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Ending Black America's Permanent Economic Recession: Direct and Indirect Job Creation and Affirmative Action Are Necessary

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Abstract

Among the economic demands of the 1963 March on Washington for Jobs and Freedom was a demand for a federal jobs program that would eliminate unemployment for African Americans. From the 1960s to today, Black Americans have been about twice as likely as White Americans to be unemployed. Consequently, Black people never achieve low unemployment. They can be said to be living in a permanent economic recession. This Article presents a suite of policies to end high unemployment in African American communities. The policies include those that work indirectly by increasing the demand for goods and services, and those that directly create jobs. Since anti-Black racial discrimination in the labor market is at the root of the persistently high rate of Black joblessness, a strong affirmative action program to counteract discrimination will also be needed. Some might think that a universal basic income is an acceptable alternative to a jobs program, but a job has economic, psychological, and sociological benefits beyond an income. A society that denies many African Americans the opportunity to work denies them not just an income, but also opportunities for identity, self-esteem, service, and social relationships. Ending the permanent recession in Black America is an important step toward providing equal opportunity in America.

Introduction

Many Americans have heard excerpts of Dr. Martin Luther King Jr.'s 1963 "I Have a Dream" speech, but few Americans know the full title of the march where that speech was given. While the march is commonly referred to as the "March on Washington," the

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full title was the "March on Washington for Jobs and Freedom."[1] The latter part, "for Jobs and Freedom," is essential to a full understanding of the goals of the African American Civil Rights Movement. Half of the demands of the march were economic justice demands.[2] The leaders of the march were clear that legal rights without economic justice could not produce full equality for Black people.[3] Black people were oppressed on the basis of both race and class, and thus liberation would require both legal rights policies and economic justice policies.

In 1963, on every economic measure, African Americans were significantly worse off than White Americans. About half of all African Americans lived in poverty,[4] and African Americans were twice as likely to be unemployed.[5] In a country as strongly capitalist as the United States, one's economic resources have a significant impact on all aspects of one's well-being.

It is important to recall this history, because as successful as the African American Civil Rights Movement was, too few people realize that the Movement failed to achieve most of its goals—especially its economic goals.[6] As a result, today, we are still

1. MARCH ON WASHINGTON FOR JOBS AND FREEDOM, LINCOLN MEMORIAL PROGRAM (1963), http://okra.stanford.edu/transcription/document_images/undecided/630828-042.pdf [perma.cc/7MBE-VLRZ].

2. There was a bit of overlap and redundancy to the formal listing of the demands. *See id*. I re-organize them into six economic demands and three more typical civil rights demands. The economic demands are for (1) decent housing, (2) integrated education, (3) a federal jobs program, (4) a federal minimum living wage, (5) a broadened Fair Labor Standards Act, and (6) a law barring discrimination in employment. The civil rights demands are for (1) access to public accommodations, (2) voting rights, and (3) a broad anti-discrimination policy for all federal programs. The demand for integrated education could be placed in either category.

3. ALGERNON AUSTIN, THE UNFINISHED MARCH: AN OVERVIEW 2 (2013), https://files.epi.org/2013/EPI-The-Unfinished-March-An-Overview.pdf [perma.cc/NCB8-BSHQ] [hereinafter AUSTIN, THE UNFINISHED MARCH].

4. The U.S. Census Bureau does not provide the Black poverty rate for 1963, but it does provide Black poverty rates for 1959, when the rate was 55.1 percent, and for 1966, when the rate was 41.8 percent. In 1959, the White poverty rate was 18.1 percent. In 1963, it was 15.3 percent, and in 1966, it was 11.3 percent. JESSICA SEMEGA, MELISSA KOLLAR, EMILY A. SHRIDER & JOHN F. CREAMER, INCOME AND POVERTY IN THE UNITED STATES: 2019, at 61–66 tbl.B-5 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-270.pdf [perma.cc/B3JD-5E3G].

5. AUSTIN, THE UNFINISHED MARCH, *supra* note 3, at 7–8.

6. Note 2, *supra*, outlined the civil rights goals. Today, civil rights activists view the voting rights gains as being eroded and the legal victory for integrated education as largely circumvented. *See* Press Release, NAACP Legal Def. & Educ. Fund, Inc., LDF Attorneys to Testify Before Congress in Support of Voting Rights Protections (Oct. 17, 2019), https://naacpldf.org/wp-content/uploads/Janai-Nelson-and-Deuel-Ross-Oct.-17-Testimonies-Press-Statement.pdf?_ga=2.207257555.1933672218.16

struggling with a myriad of racial inequality issues concerning African Americans. Among them are issues of Black-White economic inequality. African Americans are still significantly worse off than White Americans on every economic measure. Black people are more than twice as likely as White people to live in poverty,[7] and they are twice as likely to be unemployed.[8] In 2019, the median White family had eight times the net worth of the median Black family.[9]

This Article focuses on one of the economic demands of the March on Washington for Jobs and Freedom—the demand for jobs. The march called for "[a] massive federal program to train and place all unemployed workers—Negro and white—on meaningful and dignified jobs at decent wages."[10] The first section of this Article explains why this was a demand in 1963 and why it is still an important demand for those working to achieve Black-White racial equality today. From 1963 to today, the Black unemployment rate has consistently been twice the White rate.[11] This means that Black America is always experiencing high unemployment and always in a labor market that White Americans would consider to be a recession. The second section of this Article addresses policies that could end persistent high unemployment in Black America. The policies include those that work indirectly by increasing the demand for goods and services and those that directly create jobs. In addition to creating jobs, it will be necessary that African Americans obtain their fair share of the jobs created. Following the policy section, there is a discussion of what exactly affirmative action in employment is—it is not what most Americans think it is—and why there is a need for a strong affirmative action program

15941715-271256527.1615941715 [perma.cc/5TJF-BDBP]; *see also* AUSTIN, *supra* note 3, at 2–3, 5.

7. In 2019, the poverty rate for non-Hispanic White people was 7.3 percent, while it was 18.8 for the Black population. SEMEGA ET AL., *supra* note 4.

8. Olugbenga Ajilore, *The Persistent Black-White Unemployment Gap Is Built into the Labor Market*, CTR. FOR AM. PROGRESS (Sept. 28, 2020), https://www.americanprogress.org/issues/economy/news/2020/09/28/490702/persistent-black-white-unemployment-gap-built-labor-market/ [perma.cc/3KWK-KN5G].

9. *See* Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYS.: FEDS NOTES (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm [perma.cc/4YZG-FCSG].

10. MARCH ON WASHINGTON FOR JOBS AND FREEDOM, *supra* note 1.

11. AUSTIN, THE UNFINISHED MARCH, *supra* note 3, at 3, 7; *see also* Ajilore, *supra* note 8 (noting Black Americans "have consistently shown an unemployment rate double that of whites" since 1972).

to accompany any jobs program. The final section of this Article addresses why a universal basic income should not be substituted for a jobs program.

I. The Permanent Recession in Black America

In 1963, the Black unemployment rate was 2.2 times the White rate.[12] In 2019, the Black unemployment rate was 1.85 times the White rate.[13] For all of the years in between these two dates, the Black unemployment rate has been about twice the White unemployment rate.[14]

Having an unemployment rate twice the White unemployment rate puts African Americans at a level of unemployment typical for economic recessions. To get a sense of what we should consider a low and a high unemployment rate, we can note that in the wake of the 1969 recession, the national quarterly[15] unemployment rate peaked at 6.0 percent.[16] In the wake of the 2001 recession, the quarterly unemployment rate peaked at 6.2 percent.[17] An unemployment rate of 6.0 percent or higher is not a desirable rate.

12. AUSTIN, THE UNFINISHED MARCH, *supra* note 3, at 7, 11 n.5.

13. Author's analysis of Current Population Survey data. *Employment Status of the Civilian Noninstitutional Population by Sex, Age, and Race*, U.S. BUREAU OF LAB. STAT.: LAB. FORCE STAT. FROM CURRENT POPULATION SURV. (Jan. 22, 2021), https://www.bls.gov/cps/cpsaat05.htm [perma.cc/H3DP-YLDJ].

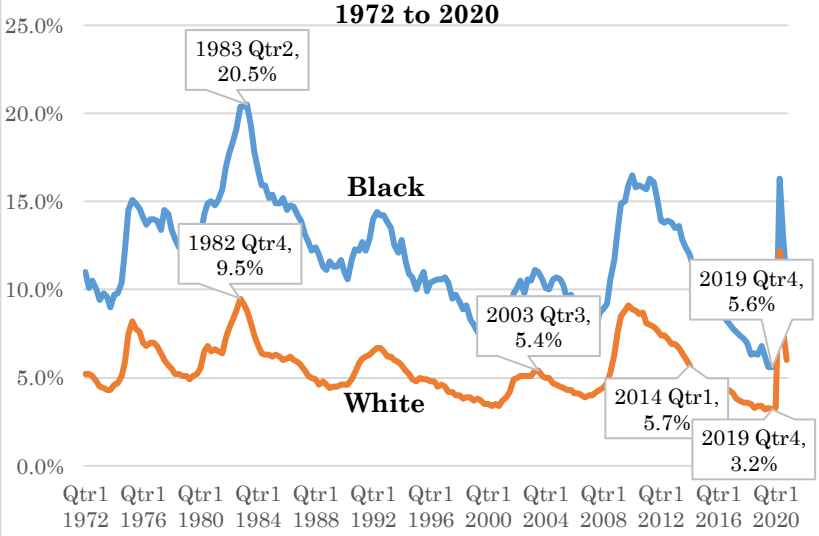
14. AUSTIN, THE UNFINISHED MARCH, *supra* note 3, at 7–8; *see also* Ajilore, *supra* note 8.

15. This Article uses quarterly unemployment rates to avoid the statistical noise in the monthly estimate of the Black unemployment rate.

16. Author's analysis of Current Population Survey data and recession dating information. *Databases*, U.S. BUREAU OF LAB. STAT.: LAB. FORCE STAT. FROM CURRENT POPULATION SURV., https://www.bls.gov/cps/data.htm (select "One Screen" under the "Labor Force Statistics" category, then select data parameters) [hereinafter Current Population Survey data); *US Business Cycle Expansions and Contractions*, NAT'L BUREAU OF ECON. RSCH. (June 8, 2020), https://www.nber.org/research/data/us-business-cycle-expansions-and-contractions [perma.cc/2JAV-CTLZ].

17. *Id.*

Figure 1. Black and White Quarterly Unemployment Rates, 1972 to 2020



Source: *Databases*, U.S. BUREAU LAB. STATS.: LAB. FORCE STATS. FROM CURRENT POPULATION SURV., https://www.bls.gov/cps/data.htm (select "One Screen" under the "Labor Force Statistics" category, then select data parameters).

While I see a 6.0 percent unemployment rate as a good place to mark the beginning of a high unemployment rate, the country has experienced much higher rates recently. The national quarterly unemployment rate after the Great Recession peaked at 9.9 percent.[18] The Great Recession was called "Great" because, at the time, it was the worst economic downturn that the country had experienced since the Great Depression.[19] An unemployment rate around 10.0 percent therefore should be considered a very high unemployment rate. With the COVID-19 recession, the national quarterly unemployment rate peaked at 13.0 percent.[20] Of course, this rate is worse still.

The quarterly unemployment data for African Americans from the U.S. Bureau of Labor Statistics begins in 1972. From 1972 to the third quarter of 2020, the median quarterly unemployment rate

18. *Id.*

19. *The Great Recession*, INVESTOPEDIA (Oct. 23, 2020), https://www.investopedia.com/terms/g/great-recession.asp [perma.cc/WQ4N-3DW5].

20. Author's analysis of Current Population Survey data and recession dating information, *supra* note 16; *US Business Cycle Expansions and Contractions*, *supra* note 16.

for African Americans was 11.3 percent.[21] This is not merely a high unemployment rate; it is very high. It is significantly higher than the post-Great Recession national peak rate of 9.9 percent. Because it is the median rate, we know that half of the time, African Americans experience rates of unemployment *above 11.3 percent*. The Black unemployment rate peaked in the 1980s at around 20 percent.[22]

That is the upper half of the Black unemployment rate distribution, but what about the lower half? How low does the Black unemployment rate typically go? The lowest Black unemployment rate from 1972 to 2020 was 5.6 percent (Figure 1)—close to the peak national rate of 6.0 percent after the 1969 recession. In other words, the lowest Black unemployment rate on record is still a rate that one might associate with a recession. It is for this reason that one can say African Americans live in a permanent recession. In terms of unemployment, Black Americans live in a labor market that feels like it is swinging from mild recessions to severe ones and never reaching a truly healthy low rate of unemployment.

Let us contrast the range of Black unemployment rates with the range for White workers. After the 1969 recession, the White unemployment rate *peaked* at 5.5 percent.[23] After the 2001 recession, the White unemployment rate *peaked* at 5.4 percent (Figure 1). These peaks are below the lowest Black unemployment rate since 1972.

The median White quarterly unemployment rate from 1972 to 2020 is 5.1 percent.[24] Half of the time, the White rate was lower than 5.1 percent, even dropping as low as 3.2 percent (Figure 1). Excluding the COVID-19 recession of 2020, the highest White quarterly unemployment rate since 1963 was 9.5 percent in 1982 (Figure 1).[25] Recall that the median Black unemployment rate is 11.3 percent. This means that the *worst* labor market conditions that White Americans typically experience is still better than the *average* labor market conditions Black Americans experience.

President Donald Trump repeatedly celebrated the historically low African American unemployment rate during his

21. Author's analysis of Current Population Survey data, *supra* note 16.

22. *Id.*

23. Author's analysis of Current Population Survey data and recession dating information, *supra* note 16; *US Business Cycle Expansions and Contractions*, *supra* note 16.

24. Author's analysis of Current Population Survey data, *supra* note 16.

25. *Id.* (including data from 1963–2020 to capture major recessions; Figure 1 includes only data from 1972–2020 because 1972 is the first year in which quarterly unemployment data for Black Americans is available).

presidency.[26] In 2019, the Black quarterly unemployment rate reached a historic low of 5.6 percent in the third and fourth quarters of that year (Figure 1). This was truly a good development—but it was not a development worth celebrating as if it were a great achievement.

Trump would never celebrate a mild recession among White Americans. Recall that the White unemployment rate sometimes has a post-recession peak at about 5.6 percent.[27] Why was Trump celebrating an African American unemployment rate one should associate with a mild recession? It is important that we do not accept separate and unequal standards for what is a desirable White unemployment rate and what is a desirable Black one. When the Black unemployment rate was 5.6 percent in the fourth quarter of 2019, White Americans had a truly good unemployment rate of 3.2 percent (Figure 1). Further, at that time, White Americans had experienced an unemployment rate lower than 5.6 percent *for almost six years* (Figure 1).

A. Rejecting the "Natural Rate of Unemployment"

In looking at the historical data on unemployment rate peaks and troughs, I am taking an empirical, as opposed to theoretical, approach to defining high and low unemployment. The theoretical approach would use the non-accelerating inflation rate of unemployment (NAIRU) which is similar to the "natural rate of unemployment."[28] Economic theory predicts that if the unemployment rate falls below the NAIRU rate, inflation will accelerate and harm the economy.[29] The Federal Reserve has used NAIRU to determine when the unemployment rate is too low. When the unemployment rate falls below the NAIRU level, the Federal

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26. *See, e.g.*, Louis Jacobson, *Donald Trump Said He's Done More for African Americans than Any President. Historians Disagree*, POLITIFACT (Aug. 1, 2019), https://www.politifact.com/article/2019/aug/01/donald-trump-said-hes-done-more-african-americans-/ [perma.cc/YX65-MFJE]; Danielle Kurtzleben, *Trump Touts Low Unemployment Rates for African-Americans, Hispanics*, NPR: FACT CHECK (Jan. 8, 2018), https://www.npr.org/2018/01/08/576552028/fact-check-trump-touts-low-unemployment-rates-for-african-americans-hispanics [perma.cc/BZ5Z-UAGJ]; Calvin Woodward, Hope Yen & Arijeta Lajka, *AP Fact Check: Trump Exaggerations on Blacks' Economic Gains*, U.S. NEWS & WORLD REP. (June 8, 2020), https://www.usnews.com/news/politics/articles/2020-06-07/ap-fact-check-trump-exaggerations-on-blacks-economic-gains [perma.cc/UL5J-4HFH].

27. Author's analysis of Current Population Survey data, *supra* note 16.

28. John Judd, *NAIRU: Is It Useful for Monetary Policy?*, FED. RSRV. BANK OF S.F.: ECON. LETTER (Nov. 21, 1997), https://www.frbsf.org/economic-research/publications/economic-letter/1997/november/nairu-is-it-useful-for-monetary-policy/ [perma.cc/6KP7-GPTX].

29. *Id.*

Reserve has felt pressure to increase interest rates to slow the economy and *increase unemployment*.[30]

In recent decades, estimates of NAIRU have included unemployment rates at and above 6 percent,[31] my starting point for "high" unemployment. Thus, in the past, at a 6 percent unemployment rate, the Federal Reserve would be considering *increasing the unemployment rate* to prevent a predicted rise in inflation. When the national unemployment rate has been around 6 percent, the Black unemployment rate has been around 10 percent.[32] Thus, where the Federal Reserve defines "low" unemployment is very important for the economic condition of Black communities.

Although NAIRU is supposed to identify when inflation will accelerate, at least in recent decades, accelerating inflation has failed to appear. The economists Dean Baker and Jared Bernstein observed that "[d]uring much of the 1990s the unemployment rate was below the [Congressional Budget Office]'s NAIRU . . . . Yet, inflation actually grew more slowly."[33] This failure of accelerating inflation to appear has occurred again recently. As the economist John Komlos notes:

> Inexplicably, the official unemployment rate has been below the natural rate since March 2017. In May 2018 the official unemployment rate (3.8%) was 0.9% below the supposed natural rate of unemployment of 4.7%. And yet, accelerating inflation was nowhere in sight.[34]

Komlos' book was completed before the period of below-NAIRU unemployment ended. This period spanned from the second quarter of 2017 to the fourth quarter of 2019—over two years—without accelerating inflation.[35]

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30. *See id.* (responding to a tight labor market, "[t]he federal funds rate was raised from 3% in early 1994 to 6% in early 1995 without actual increases in broad measures of inflation").

31. *Id.*

32. Author's analysis of Current Population Survey data, *supra* note 16.

33. DEAN BAKER & JARED BERNSTEIN, GETTING BACK TO FULL EMPLOYMENT: A BETTER BARGAIN FOR WORKING PEOPLE 3 (2013).

34. JOHN KOMLOS, FOUNDATIONS OF REAL-WORLD ECONOMICS: WHAT EVERY ECONOMICS STUDENT NEEDS TO KNOW 194 (2d ed. 2019).

35. Author's analysis of Current Population Survey data, *supra* note 16, and Natural Rate of Unemployment (NROU) data, U.S. Cong., Budget Off., *Natural Rate of Unemployment (Long-Term)*, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/NROU [perma.cc/PHQ2-A7MW].

As Baker and Bernstein point out, low unemployment rates—below NAIRU—are beneficial to low-wage workers.[36] During the 1990s, they report that "low-wage workers made particularly strong [employment] gains, [and] poverty rates fell sharply."[37] These low-wage workers are disproportionately African American.[38] It would be a grave mistake to use NAIRU as a target for low unemployment if one wishes to help African Americans.

B. Discrimination, Not Education, Explains the Unemployment Rate Gap

Some may wonder to what degree the Black-White disparity in unemployment is the result of educational attainment differences between the two groups.[39] The answer is that educational attainment differences explain little of the unemployment rate gap. We can see this by looking at the annual unemployment rates for Black and White workers by educational attainment level in 2019 (Figure 2).

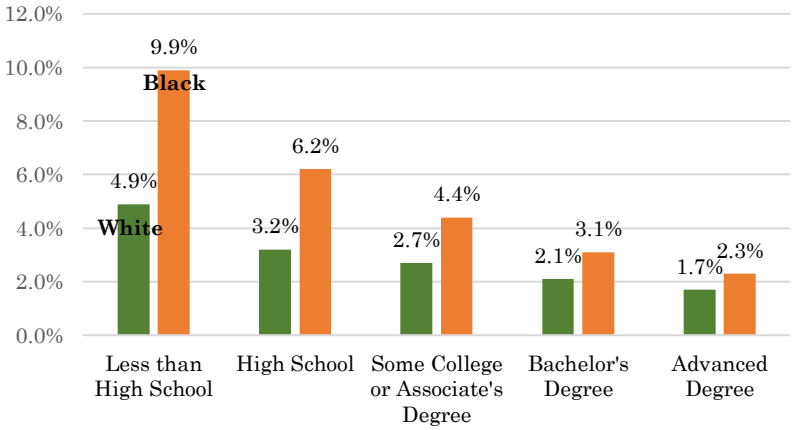
36. BAKER & BERNSTEIN, *supra* note 33.

37. *Id.* at 3.

38. In 2019, 14.7 percent of Black workers were paid hourly rates, but 17.9 percent were paid at or below the minimum wage. U.S. BUREAU OF LAB. STAT., CHARACTERISTICS OF MINIMUM WAGE WORKERS, 2019, at 3 (Apr. 2020), https://www.bls.gov/opub/reports/minimum-wage/2019/pdf/home.pdf [perma.cc/RAR8-J2CV]. *See also* David Cooper, *Workers of Color Are Far More Likely to be Paid Poverty-level Wages than White Workers*, ECON. POL'Y INST.: WORKING ECON. BLOG (June 21, 2018), https://www.epi.org/blog/workers-of-color-are-far-more-likely-to-be-paid-poverty-level-wages-than-white-workers/ [perma.cc/Q6FB-C8L5].

39. *See, e.g.*, David Andolfatto & Andrew Spewak, *Why Do Unemployment Rates Vary by Race and Ethnicity?*, FED. RSRV. BANK OF ST. LOUIS: ON ECON. BLOG (Feb. 6, 2017), https://www.stlouisfed.org/on-the-economy/2017/february/why-unemployment-rates-vary-races-ethnicity [perma.cc/C9H6-AG8G] (reviewing possible factors—educational attainment among them—that are thought to contribute to the racial disparities in unemployment rates).

Figure 2. 2019 Black and White Annual Unemployment Rates by Educational Attainment



Note: Data for individuals 25 years old and over.
Source: *Employment Status of the Civilian Noninstitutional Population 25 Years and Over by Educational Attainment, Sex, Race, and Hispanic or Latino Ethnicity*, U.S. BUREAU LAB. STATS.: LAB. FORCE STATS. FROM CURRENT POPULATION SURV., https://www.bls.gov/cps/aa2019/cpsaat07.htm.

The unemployment rate for Black workers without a high school diploma was 9.9 percent, but it was only 4.9 percent for their White peers (Figure 2). For Black workers who have a high school diploma, the unemployment rate was 6.2 percent—higher than the rate for White high school dropouts (Figure 2). For Black workers with a bachelor's degree, the rate was 3.1 percent, which was about the same as the 3.2 percent rate for Whites who only had a high school diploma (Figure 2). At every educational attainment level, the Black unemployment rate is significantly higher than the White unemployment rate (Figure 2). Because of this situation, even if Black workers had the same educational attainment as White workers, we would still see 91 percent of the Black-White unemployment rate disparity.[40] Education cannot solve this problem.

40. In 2019, if we were to give the Black labor force the educational distribution of the White labor force, the Black unemployment rate would be reduced 0.2 percentage points, which is to say that 91 percent of the Black-White unemployment rate gap would remain. This estimate is based on the author's analysis of Current Population Survey data. *Employment Status of the Civilian Noninstitutional Population 25 Years and Over by Educational Attainment, Sex, Race, and Hispanic or Latino Ethnicity*, U.S. BUREAU OF LAB. STAT.: LAB. FORCE STAT. FROM CURRENT POPULATION SURV., https://www.bls.gov/cps/aa2019/cpsaat07.htm [perma.cc/G7TV-Q42M].

While education does not explain much of the unemployment disparity, there is considerable reason to believe that racial discrimination plays a significant role. Anyone conducting a serious examination of American society would expect this to be so. The economic subjugation of Black people is a deep part of the American political economy. As the sociologist Orlando Patterson summarizes:

> For two and a half centuries America enslaved its black population, whose labor was a critical source of the country's capitalist modernization and prosperity. Upon the abolition of legal, interpersonal slavery, the exploitation and degradation of blacks continued in the neoslavery system of Jim Crow, a domestic terrorist regime fully sanctioned by the state and courts of the nation, and including Nazi-like instruments of ritualized human slaughter.[41]

Therefore, for over three centuries, anti-Blackness was sustained in American culture and social structure.

Since the passage of anti-discrimination laws in the 1960s, people with anti-Black bias and people who discriminate against Black people have become more covert and subtle in their expression of anti-Black attitudes and behavior.[42] It is not reasonable to think that the anti-Blackness that persisted for over three centuries, and that incited anti-Black riots and lynchings, disappeared overnight with the passage of anti-discrimination legislation. This belief would be equivalent to arguing that opposition to abortion ended because of *Roe v. Wade*.[43]

While it has become harder to document anti-Black bias and discrimination in the post–Civil Rights era, it is still being done. Because individuals want to present themselves as unbiased, people often try to hide their bias when completing surveys.[44] But

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41. Orlando Patterson, *Affirmative Action: The Uniquely American Experiment*, N.Y. TIMES: BOOK REV. (Jan. 30, 2020), https://www.nytimes.com/2020/01/30/books/review/the-affirmative-action-puzzle-melvin-i-urofsky.html [perma.cc/M6A3-FTKL].

42. *See* MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 178, 184 (2013).

43. Roe v. Wade, 410 U.S. 113 (1973); *see, e.g.*, Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade: *New Questions About Backlash*, 120 YALE L.J. 2028 (2011) (highlighting the polarization of attitudes towards abortion post-*Roe*).

44. Social scientists recognize that survey data can be inaccurate because of this social-desirability effect. FLOYD J. FOWLER, JR., SURVEY RESEARCH METHODS 94 (5th ed. 2014). They also find that when people aren't aware that they are being studied, their measures of racial prejudice and discrimination reveal higher levels of anti-Black bias than in survey data. *See* BANAJI & GREENWALD, *supra* note 42, at 181–84.

with some creative data analysis techniques and some new measures of anti-Blackness, it is still possible to find evidence of anti-Blackness in survey data. I have found that about 30 percent of Americans rate Black people as significantly lazier than White people, and about 30 percent of Americans register a high level of anti-Blackness on a measure of racial resentment.[45] Note that these percentages represent Americans scoring at a high level of anti-Black bias, not those who show any evidence of bias at all.[46] When researchers average racial resentment scores for all Americans, they find that the country on average exhibits anti-Black bias.[47]

Social media offers a way to analyze racial views surreptitiously. By using social media, analysts can, to a degree, circumvent people's inclinations to hide their racial prejudice. The data scientist Seth Stephens-Davidowitz has found that Americans use the word "nigger" or "niggers" (excluding "nigga(s)" found in rap songs) in Google searches as frequently as they search for "migraine(s)," "economist," and "Lakers."[48] Many of these searches are for "nigger jokes" or for information related to "stupid niggers" or "I hate niggers."[49] Amnesty International analyzed tweets sent to journalists and politicians and found that Black women were 84 percent more likely to be abused on Twitter than White women.[50] Social media analysis allows us to see numerous examples of unvarnished hate, but its weakness is that it does not allow us to obtain a good estimate of the prevalence of anti-Black racial attitudes.

It is reasonable to expect that if anti-Black prejudice is fairly common in American society, it would also be present among people making hiring decisions regarding African Americans. Scholars have been able to find evidence of explicit anti-Black bias by employers. In a telephone survey, researchers asked a sample of over 2,000 employers in four major cities whether they thought that

45. ALGERNON AUSTIN, AMERICA IS NOT POST-RACIAL: XENOPHOBIA, ISLAMOPHOBIA, RACISM, AND THE 44TH PRESIDENT 74, 121 (2015).

46. *Id.*

47. *See* MICHAEL TESLER & DAVID O. SEARS, OBAMA'S RACE: THE 2008 ELECTION AND THE DREAM OF A POST-RACIAL AMERICA 19–20 (2010).

48. SETH STEPHENS-DAVIDOWITZ, EVERYBODY LIES: BIG DATA, NEW DATA, AND WHAT THE INTERNET CAN TELL US ABOUT WHO WE REALLY ARE 6 (2017).

49. *Id.*

50. Tom Fogden, *Amnesty International Study Highlights Misogyny and Racism on Twitter*, TECH.CO (Dec. 20, 2018), https://tech.co/news/amnesty-study-misogyny-racism-twitter-2018-12 [perma.cc/KW9K-YRND].

other employers[51] in their industry showed a preference for employees of their own race. A fifth of employers agreed that there was a same-race preference.[52] A fifth of employers is an amount large enough to have a substantial negative impact on Black employment opportunities. But given the strong desire to hide anti-Black biases, it is fair to assume that a fifth is an underestimate. Face-to-face interviews of a representative sample of Chicago employers found that three-quarters expressed negative views of Black workers.[53] A qualitative study of the manufacturing industry in Silicon Valley documented explicit anti-Black sentiments among managers.[54] Another qualitative study of Los Angeles electronics firms found that anti-Black views were fairly common among individuals making hiring decisions.[55] The presence of anti-Black bias among employers leads to qualified Black workers being denied opportunities.

The strongest evidence of anti-Black discrimination in the labor market comes from audit studies. In audit studies, Black and White applicants with equivalent qualifications are presented to employers with job openings. The rate of positive responses from employers by race is then compared. These studies consistently find a preference for White workers over Black ones; a review of twenty-four audit studies found no decline in anti-Black discrimination in the labor market since 1989.[56]

C. The Methods of Discrimination

Anti-Black discrimination in the labor market can take at least three forms: (1) opportunity hoarding by hiring through

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51. Since individuals are reluctant to admit that they are racially biased, asking about other individuals—not the respondent—is a way to try to assess the prevalence of bias indirectly. The researchers found that "[a] much higher fraction of employers report a negative perception of other races or ethnicities on the part of *others* than they do a negative assessment of other races or ethnicities *themselves*." PHILIP MOSS & CHRIS TILLY, STORIES EMPLOYERS TELL: RACE, SKILL, AND HIRING IN AMERICA 95 (2001).

52. *Id.* at 92.

53. WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 111–12 (1996).

54. Edward J. W. Park, *Racial Ideology and Hiring Decisions in Silicon Valley*, 22 QUALITATIVE SOCIO. 223, 229–31 (1999).

55. Ward Thomas, *Mitigating Barriers to Black Employment Through Affirmative Action Regulations: A Case Study*, 27 REV. BLACK POL. ECON. 81, 93–94 (2000).

56. Lincoln Quillian, Devah Pager, Ole Hexel & Arnfinn H. Midtbøen, *Meta-analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring over Time*, 114 PROC. NAT'L ACAD. SCI. 10870, 10870 (2017).

segregated social networks, (2) overt anti-Black racial discrimination, and (3) implicit biases against African Americans.

There is an old saying that captures the significance of networks to finding a job: it is not what you know, but who you know. Many jobs are not widely advertised; therefore, if you are not socially connected to the employer, you may not even be able to find out that the job is available.[57] Additionally, employers often do not have a reliable way of telling who will truly be good for a job, so having someone they know and trust vouch for an individual is persuasive. As one career coach explains:

> "Hiring managers would prefer to hire someone they know, like, and trust," notes psychologist and career coach Janet Civitelli, Ph.D., of VocationVillage.com. "If they cannot identify a known candidate to hire, they will settle for a referral from someone they know, like, and trust. Their absolute last choice is to advertise the job, sort through hundreds of resumes, and hire someone with no connection to anyone in the hiring manager's network."[58]

Furthermore, employers may feel a need to do favors for friends and family, and therefore they may hire individuals that friends and family recommend. For all of these reasons, being connected via personal relationships to individuals doing the hiring is a powerful means of getting a job.[59]

Because White Americans make up a larger share of the population, and because they are advantaged in the American

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57. There is a popular saying that 80 percent of jobs are not advertised, but that appears to be based on errors and exaggerations. *See* Jennifer Parris, *The Biggest Job Search Myth, Debunked*, FLEXJOBS (May 13, 2016), https://www.flexjobs.com/blog/post/biggest-job-search-myth-debunked/ [perma.cc/CD4N-7474]. It may be impossible to determine the percent of jobs that are hidden or not widely publicized since they are hidden or not widely publicized. But there is reason to believe the "hidden" job market is a real thing. *See Is the Hidden Job Market a Myth? An Investigative Report*, LIVECAREER, https://www.livecareer.com/resources/jobs/search/hidden-job-market-myth [perma.cc/VT4A-BDLU] (providing nine reasons why an employer may not fully advertise an opening). A 2017 survey suggests that about a third of hires come from referrals (15.83 percent) and internal hires (15.25 percent) combined. RONEN SHETELBOIM, WEIJEN HSU & AMANDA VAN NUYS, 2017 RECRUITING FUNNEL BENCHMARK REPORT 12 (2017), https://www.jobvite.com/wp-content/uploads/2017/05/Jobvite_2017_Recruiting_Funnel_Benchmark_Report.pdf [perma.cc/G8Q7-NQEY]. These positions, therefore, need not have been advertised to be filled, and the individuals hired had a social connection to the employer.

58. *Is the Hidden Job Market a Myth?*, *supra* note 57.

59. Internal candidates and referrals "have a much higher percentage of hires when compared to the average percentage hired across all sources." SHETELBOIM ET AL., *supra* note 57, at 13.

economy, they are more likely to be the ones who are making hiring decisions. Although White Americans were 62 percent of everyone working in 2018, they were 72 percent of CEOs and managers.[60] In contrast, Black people were 12 percent of the employed, but only 7 percent of CEOs and managers.[61] White Americans are also likely to have social networks that have few or no Black people. A recent survey found that "75 percent of whites have 'entirely white social networks without any minority presence.'"[62] Thus, when White employers rely on their White social networks for hiring, they exclude Black people from jobs.[63]

In addition to the somewhat covert and passive exclusion of Black workers from job opportunities via social networks, employers also actively discriminate against Black job applicants. For example, in his study of the manufacturing industry of Silicon Valley, the sociologist Edward J. W. Park concludes:

> In their *strategic use* of race, high technology employers rely both on [the] crudest forms of racism *and* more nuanced racial explanations that nonetheless unequally structure the labor market opportunities for different racial groups. Whether a personnel manager believes that African Americans, by nature, lack patience, or lost their work ethic due to the welfare state, or are politically too empowered, all of these factors undermine African American employment opportunities in the high technology industry with devastating consequences.[64]

Negative racial stereotypes in American culture block African Americans from job opportunities.

The subtlest and most covert form of anti-Black bias is implicit bias. Implicit bias is a subconscious bias that can exist even among people who are committed to being anti-racist. Anyone raised in

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60. Author's analysis of 2014–2018 American Community Survey data from Steven Ruggles, Sarah Flood, Ronald Goeken, Josiah Grover, Erin Meyer, Jose Pacas & Matthew Sobek, IPUMS USA: VERSION 10.0 [dataset] (2020), https://doi.org/10.18128/D010.V10.0 (follow "Get Data" hyperlink; then follow "Analyze Data Online" hyperlink; then follow "2018 ACS" hyperlink).

61. *Id.*

62. Christopher Ingraham, *Three Quarters of Whites Don't Have Any Non-White Friends*, WASH. POST (Aug. 25, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/25/three-quarters-of-whites-dont-have-any-non-white-friends/ [perma.cc/8GML-EF86].

63. For full analyses and discussions of this method of labor market discrimination, see DEIRDRE A. ROYSTER, RACE AND THE INVISIBLE HAND: HOW WHITE NETWORKS EXCLUDE BLACK MEN FROM BLUE-COLLAR JOBS (2003), and NANCY DITOMASO, THE AMERICAN NON-DILEMMA: RACIAL INEQUALITY WITHOUT RACISM (2013).

64. Park, *supra* note 54, at 231.

American culture with its many negative associations linked to Black people is at risk of having an implicit anti-Black bias.[65] Implicit bias can make employers conclude that a White job candidate is more qualified, more likeable, and a better fit for their workplace than an *equally qualified* Black candidate. Nearly three quarters of Americans who take the Implicit Association Test—an empirical tool widely used to measure implicit stereotypical cognition—register this subconscious bias against African Americans.[66] This means that Black job applicants are constantly confronting this bias when they apply for jobs. It also explains why Black workers have to rely so much on tight labor markets where the availability of White workers is relatively low or on being *significantly better qualified* than White candidates to find work.

It may be difficult to measure precisely the contribution of anti-Black bias and discrimination in producing the Black-White gap in unemployment, but it would be unreasonable to assume that anti-Blackness plays no significant role. All of the evidence indicates that anti-Blackness continues to be a significant part of American culture and social structure.

D. What Is the Size of the Black Jobs Gap?

Although the unemployment rate is the most popularly discussed measure to assess joblessness, it is not the best measure for assessing joblessness among African Americans. Individuals who face significant challenges in finding work can become discouraged and stop looking for work. For example, the COVID-19 recession has caused many people to leave the labor force, which means that they are jobless but have stopped looking for work.[67] To be counted as unemployed by the U.S. Bureau of Labor Statistics, one has to be actively looking for work.[68] Individuals who have stopped looking for work because they don't see any suitable job openings or because they have been repeatedly rejected by

65. BANAJI & GREENWALD, *supra* note 42, at 46–47.

66. *Id.* at 47 ("[A]lmost 75 percent of those who take the Race [Implicit Association Test] on the Internet or in laboratory studies reveal automatic White preference.").

67. Lauren Bauer, Kristen E. Broady, Wendy Edelberg & Jimmy O'Donnell, *Ten Facts About COVID-19 and the U.S. Economy*, BROOKINGS INST. (Sept. 17, 2020), https://www.brookings.edu/research/ten-facts-about-covid-19-and-the-u-s-economy/ [perma.cc/FH5E-53JX].

68. *How the Government Measures Unemployment*, U.S. BUREAU OF LAB. STAT. (Oct. 8, 2015), https://www.bls.gov/cps/cps_htgm.htm#unemployed [perma.cc/9C2U-T4MN].

employers are not counted as unemployed even though they are jobless.

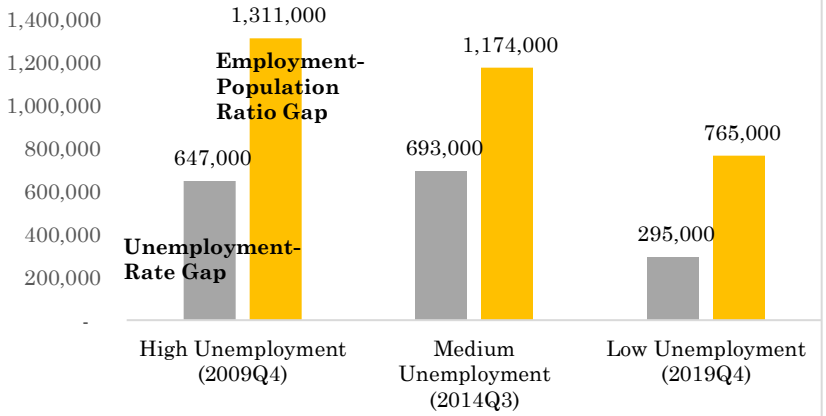
As discussed above, African Americans live under conditions that feel like a permanent recession. This situation leads to a large number of discouraged[69] Black workers and fewer Black people in the labor force than there should be.

A better measure of joblessness for African Americans is the employment-population ratio. As the name suggests, this measure is a ratio the number of people employed relative to the number of people in the population. It can be converted into a percent to indicate the percent of the population that is employed. Because some people are full-time students, retired, disabled and cannot work, or do only unpaid work in the home, the employment-population-ratio is never 100 percent.

To illustrate the importance of using the employment-population ratio to assess the Black-White jobs gap, we can compare the number of jobs needed to close the Black-White unemployment rate gap and the Black-White employment-population ratio gap. We will first look at the statistics from the third quarter of 2014 because that was when African Americans were at their median unemployment rate (Figure 3).

69. When I use the word "discouraged" here and elsewhere, I am referring more to something like the group that the Bureau of Labor Statistics (BLS) refers to as "not in the labor force who currently want a job" rather than the much narrower technical BLS category of a "discouraged worker." *See id.*; News Release, Bureau of Lab. Stat., U.S. Dep't of Lab., The Employment Situation – December 2020 (Jan. 8, 2021), https://www.bls.gov/news.release/archives/empsit_01082021.pdf [perma.cc/N5Z4-UM86].

Figure 3. Black-White Unemployment-Rate and Employment-Population Ratio Jobs Gaps During High, Medium, and Low Unemployment



Note: Calculations are based on 25- to 54-year olds.
Source: Author's analysis of 2014–2018 American Community Survey data from Steven Ruggles, Sarah Flood, Ronald Goeken, Josiah Grover, Erin Meyer, Jose Pacas & Matthew Sobek, IPUMS USA: VERSION 10.0 [dataset] (2020), https://doi.org/10.18128/D010.V10.0 (follow "Get Data" hyperlink; then follow "Analyze Data Online" hyperlink; then follow "2018 ACS" hyperlink).

It is useful to focus on prime-age workers, those who are 25 to 54 years old. The age distribution of the Black and White populations is different. Older individuals are more likely to be out of the labor force because of retirement or disability. Younger individuals may not be ready to enter the labor force or may be dedicating themselves to being full-time students. Since the employment-population ratio is calculated based on the population, differences in the age distribution can affect the jobs-gap estimates. By focusing on prime-age workers, we eliminate these differences and have more of an apples-to-apples comparison. However, by doing this, we are also likely to underestimate the true size of the jobs gap.

In the third quarter of 2014, the Black unemployment rate was 11.3 percent, and the White unemployment rate was 5.2 percent.[70] The *prime-age* unemployment rate, however, was 9.7 percent for

70. Author's analysis of Current Population Survey data, *supra* note 16.

Black workers and 4.3 percent for White workers.[71] By focusing on the prime-age unemployment rate, we have trimmed off the high-unemployment youth segments of the populations. The employment-population-ratio for Black prime-age workers was 71.0 percent, and it was 78.2 percent for White prime-age workers.[72] If one wished to lower the Black prime-age unemployment rate to the White rate, one would have needed 693,000 jobs for Black workers (Figure 3). If one wished to raise the Black prime-age employment-population ratio to the level of the White ratio, one would have needed 1,174,000 jobs for Black workers.

The jobs gap measured by the employment-population ratio is larger by 481,000 (1,174,000 minus 693,000) workers. This means we can estimate that there were about 481,000 "missing" Black workers from the labor force who were not being counted as unemployed. If there were a history of equal opportunity in the American labor market, we would expect the Black prime-age employment-population ratio to be very similar to the White ratio.

It is important to be aware that this estimate is not counting individuals who are incarcerated. Those who are incarcerated are excluded from the population used to calculate the employment-population ratio. If we were to include jobs needed for the incarcerated population, the Black-White jobs gap estimate would be larger still.

Our estimate for the Black-White employment-population ratio jobs gap is for when the overall Black unemployment rate was at its median—11.3 percent. It is informative to examine how this jobs gap changes during periods when the country as a whole experiences high unemployment and low unemployment (Figure 3). The post-Great Recession peak quarterly unemployment rate was 9.9 percent in the fourth quarter of 2009. Comparing the Black and White prime-age employment-population ratios at that time would yield an employment-population ratio jobs gap of 1,311,000 jobs. In the fourth quarter of 2019—the time of the historic low for the Black unemployment rate—the Black-White prime-age employment-population ratio jobs gap was 765,000 jobs. Thus, we see that the Black-White jobs gap tends to increase as the overall unemployment rate increases and shrink when the overall unemployment rate decreases. But even at the end of 2019, in what

71. Author's analysis of 2014–2018 American Community Survey data from Ruggles et al., *supra* note 60.

72. *Id.*

most Americans would regard as a good economy, there was still a need for 765,000 more jobs for African Americans.

II. How to Create a Million Black Jobs to End the Black Permanent Recession

In the third quarter of 2014, when the Black unemployment rate was at its median of 11.3 percent, the Black-White prime-age employment-population ratio jobs gap was 1,174,000 jobs. Therefore, creating roughly one million additional jobs for Black workers is a good target for ending the permanent recession in Black America.

A. Creating a Low National Unemployment Rate

We have seen that having a strong American economy overall with a low unemployment rate does help Black workers, even if it is not enough to close the jobs gap.[73] Our employment-population ratio jobs gap estimate above, for when the overall unemployment rate was high, was 1,311,000 jobs (Figure 3). When the overall unemployment rate was at a historic low, it was 765,000 jobs, 546,000 fewer. Reducing the number of jobs needed to be created by over half a million is substantial.

There are a number of policies that our leaders can pursue to help keep the American economy strong and the overall unemployment rate low. One policy has already been enacted: the Federal Reserve will no longer rush to slow the economy.[74] Because of NAIRU-based fears of runaway inflation, the Federal Reserve historically has slowed the economy as the national unemployment rate began to reach lower levels.[75] Since the Black unemployment rate is nearly double the national rate, this policy kept the Black rate very high.

The leaders of the Federal Reserve are finally realizing that it is not necessary to put the brakes on the economy as soon in an economic expansion as they have done historically. Federal Reserve Chair Jerome H. Powell stated that their new approach "reflects our appreciation for the benefits of a strong labor market, particularly for many in low- and moderate-income communities, and that a robust job market can be sustained without causing an unwelcome

73. *See supra* Figure 3.

74. Rachel Siegel, *Fed Changes Its Approach to Inflation, As Leaders Aim to Navigate Future Crises and Reach Full Employment*, WASH. POST (Aug. 27, 2020), https://www.washingtonpost.com/business/2020/08/27/powell-jackson-hole-inflation/ [perma.cc/CWU2-MN5T].

75. Judd, *supra* note 28.

increase in inflation."[76] The Black unemployment rate would not have reached its historic low in 2019 if the Federal Reserve had been as fearful as it had been in prior decades of the risk of inflation.

Lowering the U.S. trade deficit is another way to create more jobs for African Americans.[77] The economist Robert E. Scott estimated that African American workers lost 230,000 good jobs between 2001 and 2007 because of bad trade policy.[78] If we reduce the trade deficit, we can create more jobs in the United States. This can be done by lowering the value of the U.S. dollar. When the U.S. dollar is lower, U.S. goods are cheaper in foreign markets, and foreign goods are more expensive in the United States. This change in the value of the dollar would reduce the amount of foreign goods Americans purchase and at the same time increase the amount of American goods that both Americans and foreigners purchase. The American economy would have to produce more to meet this increased demand for goods, which should increase the employment level in the United States.[79]

Another way to increase employment is to reduce the number of hours Americans work. Imagine a company that requires its total workforce to complete 4,000 hours of work a week. If each worker works 40 hours per week, then the company only needs 100 workers. But if the company employs workers at 35 hours per week, it would need to hire about 114 workers—14 more. This dynamic also occurs at the national level. Policies that reduce work hours can increase employment. A small reduction in work hours economy-wide could lead to a demand for millions of additional workers.[80]

The best way to reduce work hours in the United States is to have stronger vacation, paid sick days, and paid family leave policies. Compared to other rich countries, the United States does poorly in terms of these types of paid leave policies.[81] As a result, the average number of hours worked per year is greater in the United States than in other rich countries.[82] If the United States reduced its work year to Canada's, there would be a need for 5

76. Siegel, *supra* note 74.

77. BAKER & BERNSTEIN, *supra* note 33, at 63–71.

78. ROBERT E. SCOTT, ECON. POL'Y INST., THE CHINA TRADE TOLL: WIDESPREAD WAGE SUPPRESSION, 2 MILLION JOBS LOST IN THE U.S. (2008), https://www.epi.org/publication/bp219/ [perma.cc/2XQ4-FLF2].

79. BAKER & BERNSTEIN, *supra* note 33, at 66.

80. This example adapted from BAKER & BERNSTEIN, *supra* note 33, at 81.

81. *Id.* at 86–87 (showing how the U.S. does not mandate any paid leave, while many comparable countries mandate between ten and thirty paid vacation days and and holidays per year).

82. *Id.* at 81–84, 86.

million additional workers.[83] If the United States reduced its work year to France's, there would be a need for 29 million additional workers.[84] Using Germany as the standard, there would be a need for an additional 37 million workers.[85]

Being able to take vacations, sick days, and time off to care for family members is extremely important to one's health, the health of loved ones, and to one's well-being. Enacting these policies has benefits beyond the pressure they can create for increasing employment. It is still the case that women are primarily responsible for caregiving. These policies would be very helpful for workers who need to take care of loved ones.[86] There is a relatively high rate of Black female single parenthood among African Americans.[87] These policies would make it slightly easier for Black female single parents to manage work and childcare. We should also note that increasing the employment rates for Black men should increase the marriage rates for Black women.[88]

During recessions, it is also possible for employers to reduce work hours rather than lay off workers. This practice is called work sharing.[89] To illustrate with a simplified example of how this works, let us return to our hypothetical firm with 100 employees working 40 hours per week. In a healthy economy, the firm has 4,000 hours of work a week. During a recession though, with fewer sales, the firm only has 3,600 hours of work a week. The firm could lay off 10 employees and have the remaining 90 work 40 hours per week. These 10 laid off employees would have to rely on unemployment insurance, but they would still lose much of their income. When the

83. *Id.* at 88 ("According to these [Organisation for Economic Co-operation and Development (OECD)] data, the average work year in the United States is 3.6 percent longer than the average work year in Canada; reducing the work year in the United States by this amount would imply the need for 5 million additional workers.").

84. *Id.* (using the same OECD data but substituting France's average work year for Canada's).

85. *Id.*

86. *Id.*

87. Terry-Ann L. Craigie, Samuel L. Myers, Jr. & William A. Darity, Jr., *Racial Differences in the Effect of Marriageable Males on Female Family Headship*, 84 J. DEMOGRAPHIC ECON. 231, 233 (2018).

88. *Id.* at 231–56 (arguing that because women "will only marry if the economic benefits gained from marriage exceed those gained outside of marriage," increasing men's earning ability, and thus their potential to add economic benefit to a household, will result in more marriages).

89. *See Work Sharing: An Alternative to Layoffs*, NAT'L EMP. L. PROJECT (July 6, 2016), https://www.nelp.org/publication/work-sharing-an-alternative-to-layoffs/ [perma.cc/ZE3K-92V2].

economy recovers, however, the firm may have to spend time finding and training 10 new employees.[90]

An alternative is for the firm to use work-sharing policies. In this scenario, rather than lay off 10 workers, the firm reduces the hours of the 100 employees to 36 hours a week. *It reduces work hours without laying anyone off*. The employees receive unemployment insurance for the 4 hours lost in their work week. When the economy recovers, the employer increases the work hours of the employees without needing to find and train any new workers.[91]

This work-sharing approach is used well in Germany. In the 2001 recession, the Great Recession, and the COVID-19 recession, the unemployment rate in Germany increased much less than in the United States.[92] For example, during the COVID-19 recession, the U.S. monthly unemployment rate peaked at nearly 15 percent in April of 2020, but it only reached 4.4 percent in Germany.[93] Some U.S. states have adopted work-sharing polices, but they are not fully utilized.[94]

Widespread use of work sharing would significantly benefit Black workers. Black workers are hit very hard by recessions. They typically see their unemployment rates rise faster than other racial groups.[95] Work sharing, if used to its maximum, would reduce the spike in unemployment that Black workers typically experience during downturns in the economy. As a relatively low-income and low-wealth population, staying employed with a somewhat lower income is much preferable to unemployment for Black workers.

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90. This example is adapted from BAKER & BERNSTEIN, *supra* note 33, at 82.

91. *Id.*

92. *See* Heather Long & Andrew Van Dam, *As U.S. Unemployment Soared, Germany's Barely Budged. Is America's Safety Net Enough?*, WASH. POST (Oct. 13, 2020) https://www.washingtonpost.com/business/2020/10/13/germany-unemployment/ [perma.cc/A8VM-BQSC] ("Germany expanded its Kurzarbeit program before the Great Recession. Since then, its unemployment rate has remained far lower than the U.S. rate during downturns."); *see also* BAKER & BERNSTEIN, *supra* note 33, at 824 ("A big part of Germany's success has been its policy of *Kurzarbeit*, or short-work, under which the government makes up a portion of the wages that workers lose as a result of the shortening of the workweek.").

93. Long & Van Dam, *supra* note 92.

94. *See* BAKER & BERNSTEIN, *supra* note 33, at 83.

95. *E.g.*, Christopher Famighetti & Darrick Hamilton, *The Great Recession, Education, Race, and Homeownership*, ECON. POL'Y INST. (May 15, 2019), https://www.epi.org/blog/the-great-recession-education-race-and-homeownership/ [perma.cc/JM8E-BXVS] ("Relative to white wealth, black wealth was hit especially hard by the Great Recession. Black [people] saw their median net worth fall precipitously compared with white [people] (that is, in percentage terms, not in absolute terms). Between 2005 and 2009, the median net worth of black households dropped by 53 percent, while white household net worth dropped by 17 percent.").

B. Job Creation Programs

The policies discussed above would create jobs indirectly or prevent the loss of jobs. It is also possible to enact policies that would create jobs directly. These policies include infrastructure investments, a federal jobs guarantee, and targeted job creation.

i. Infrastructure Investments and Mitigating Climate Change

America's infrastructure is facing a crisis. The American Society of Civil Engineers gave America's infrastructure a D+ grade on its last infrastructure report card.[96] Additionally, climate change will result in more extreme weather conditions that will put extra stress on our already weak infrastructure. If we don't repair, renew, and adapt our infrastructure, we will be faced with a variety of catastrophes as our systems fail.[97]

Ideally, we should not simply repair and adapt our infrastructure for climate change; we should try to prevent the worst climate change outcomes from occurring. One way to do this is by creating a net-zero greenhouse-gas economy as soon as possible. Moving our energy systems away from fossil fuels as fast as possible would require very large investments in clean energy production and distribution systems.[98]

These problems are also opportunities for job creation. If we make the necessary investments in our infrastructure, we can create millions of jobs. Addressing America's general overall infrastructure needs is estimated to create 3 million jobs.[99] Making

96. AM. SOC'Y OF CIVIL ENG'RS & ECON. DEV. RSCH. GROUP, FAILURE TO ACT: ECONOMIC IMPACTS OF STATUS QUO INVESTMENT ACROSS INFRASTRUCTURE SYSTEMS 2 (2021), https://www.infrastructurereportcard.org/wp-content/uploads/2021/02/FTA_Econ_Impacts_Status_Quo-1.pdf [perma.cc/F5S2-PHPP] ("In 2017, the U.S. infrastructure earned a D+ average.").

97. Jonathan Woetzel, Mekala Krishnan, Dickon Pinner, Hamid Samandari, Hauke Engel, Brodie Boland, Peter Cooper & Byron Ruby, *Will Infrastructure Bend or Break Under Climate Stress?*, MCKINSEY & CO. (Aug. 19, 2020), https://www.mckinsey.com/business-functions/sustainability/our-insights/will-infrastructure-bend-or-break-under-climate-stress [perma.cc/6LY7-CKZR].

98. *Cf.* SAUL GRIFFITH, SAM CALISCH & ALEX LASKEY, REWIRING AMERICA, MOBILIZING FOR A ZERO CARBON AMERICA: JOBS, JOBS, JOBS, AND MORE JOBS: A JOBS AND EMPLOYMENT STUDY REPORT (2020), https://www.rewiringamerica.org/jobs-report [perma.cc/JP4U-ET8B] (follow "Download the Report" hyperlink) (recommending rapid decarbonization across all U.S. industries as a way to combat climate change and create more employment opportunities).

99. JOSH BIVENS, ECON. POL'Y INST., THE SHORT- AND LONG-TERM IMPACT OF INFRASTRUCTURE INVESTMENTS ON EMPLOYMENT AND ECONOMIC ACTIVITY IN THE U.S. ECONOMY (2014), https://www.epi.org/publication/impact-of-infrastructure-investments/ [perma.cc/EV2B-BW9N].

the investments necessary to address climate change by transitioning rapidly to a net-zero carbon economy could create 25 million jobs in the shorter term.[100] This estimate includes direct jobs, indirect jobs, and jobs from the re-spending of workers who have gained direct and indirect jobs. In the long-term, the net-zero greenhouse-gas transition is predicted to add 5 million permanent jobs to the economy.[101] Roughly 10 percent of the jobs created from both of these infrastructure proposals are expected to go to African Americans.[102]

ii. A Federal Jobs Guarantee

One of the demands of the 1963 March on Washington for Jobs and Freedom was for "[a] massive federal program to train and place all unemployed workers—Negro and white—on meaningful and dignified jobs at decent wages."[103] Today's call for a federal jobs guarantee is most in line with this demand.

A federally guaranteed jobs program has significant strengths. It would certainly solve the problem of high Black joblessness. It is a universal program, and universal programs tend to receive more public support than targeted programs, especially programs that can be thought of—whether accurate or not—as targeting African Americans.[104] There is public support for the idea. In 2018, about half of Americans supported a jobs guarantee with the remaining half divided between those who are opposed and those who are neutral or undecided.[105]

While there is significant support for a federal jobs guarantee,[106] it is not likely that the general public fully appreciates how a jobs guarantee would re-order the American economy. First,

100. GRIFFITH ET AL., *supra* note 98, at 2.

101. *Id.* at 2, 7.

102. ALGERNON AUSTIN, ECON. POL'Y INST., INFRASTRUCTURE INVESTMENTS AND LATINO AND AFRICAN AMERICAN JOB CREATION (2013), https://www.epi.org/publication/infrastructure-investments-latino-african/ [perma.cc/K3PT-N7L4].

103. MARCH ON WASHINGTON FOR JOBS AND FREEDOM, *supra* note 1.

104. Lawrence Bobo & James R. Kluegel, *Opposition to Race-Targeting: Self-Interest, Stratification Ideology, or Racial Attitudes?*, 58 AM. SOC. REV. 443 (1993); MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 42–45 (1999) (explaining that public support is generally higher for universal welfare programs versus means-tested programs).

105. DATA FOR PROGRESS, POLLING THE LEFT AGENDA (2018), https://www.dataforprogress.org/polling-the-left-agenda/ [perma.cc/6LL8-5W3J]. *See also* John Bowden, *46 Percent of Americans Support Government Jobs Guarantee: Poll*, THE HILL (May 2, 2018), https://thehill.com/blogs/blog-briefing-room/news/385840-46-percent-of-americans-support-government-jobs-guarantee-poll [perma.cc/7CGC-G9RY].

106. *Id.*

we should note that this policy is not like the idea of universal health coverage where we know that several other countries have been able to do it successfully for decades. No Western capitalist country—and I include the Nordic social democracies here—has done this.[107]

A federal jobs guarantee like the one envisioned by Mark Paul, William Darity, Jr., and Darrick Hamilton would be very attractive to many low-wage workers and probably also to some middle-wage workers. The Paul, Darity, and Hamilton (PDH) proposal calls for a wage higher than the federal minimum wage, one that is high enough to lift a family of four out of poverty.[108] Additionally, it would provide health insurance, retirement plans, paid family and sick leave, and paid vacation.[109] Many American workers lack these benefits.

The PDH estimate for the uptake for their jobs guarantee is about 11 million workers.[110] This estimate is from a period of low unemployment. It is based on an alternative measure of the unemployed and underemployed, specifically the U-6 unemployment measure, in January 2018.[111] In October of 2020, a period of high unemployment, the equivalent estimate would be about 17 million workers.[112] As illustrated here, the program would expand substantially during economic downturns.

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107. This conclusion is based on the fact that Mark Paul, William Darity, Jr. & Darrick Hamilton only discuss much more modest programs in India and Argentina in support of their federal jobs guarantee proposal. MARK PAUL, WILLIAM DARITY, JR. & DARRICK HAMILTON, CTR. ON BUDGET & POL'Y PRIORITIES, THE FEDERAL JOB GUARANTEE: A POLICY TO ACHIEVE PERMANENT FULL EMPLOYMENT 7 (2018), https://www.cbpp.org/sites/default/files/atoms/files/3-9-18fe.pdf [perma.cc/SC66-L2XY].

108. *Id.* at 3.

109. *Id.* at 4.

110. *Id.* at 12 ("This would result in the employment of 10.7 million workers, or 9.7 million full-time equivalent positions.").

111. *Id.* at 11 n.40 ("U3 is the International Labour Organization official unemployment rate that includes individuals that are unemployed and have actively looked for work within the past four weeks. U6 is a broader unemployment, or 'underemployment' rate, which, in addition to U3, includes 'discouraged workers,' or those who have stopped looking for work due to current economic conditions; other marginally attached workers who are willing and able to work but have not actively sought employment in the past four weeks; part-time workers who seek but cannot attain full-time employment.").

112. Author's calculations based on Current Population Survey data. *See BLS Data Viewer*, U.S. BUREAU OF LAB. STAT.: LAB. FORCE STAT. FROM CURRENT POPULATION SURV., https://beta.bls.gov/dataViewer/view/cef3bbaf735a435388c4af64c2397638 [perma.cc/3U8P-3E3D] (displaying the civilian labor force level) [hereinafter *CPS Labor Force Data*]; *BLS Data Viewer*, U.S. BUREAU OF LAB. STAT.: LAB. FORCE STAT. FROM CURRENT POPULATION SURV., https://beta.bls.gov/

The PDH estimate of the jobs needed is likely too low. About a quarter of the labor force earns wages lower than what would be offered by the PDH proposal.[113] It seems reasonable to expect these workers to leave their jobs for a guaranteed job that pays higher wages and that probably also has better benefits. If one adds these workers to the U-6 workers, then the program could end up with around 50 million workers.[114] It seems possible that some workers who earn a higher wage than what is offered in the PDH proposal might still want a PDH job for the benefits offered. If this is the case, then the size of the program would be larger still.

In 2019, the federal workforce had 2.8 million workers—1.7 percent of the employed.[115] At its peak, the Depression-era Works Progress Administration provided jobs for about 3.3 million Americans[116]—about 6 percent of the labor force at the time.[117] The PDH proposal would have the federal government provide jobs for about 30 percent of the labor force.[118] A federal jobs guarantee like the PDH plan would require a significant re-shaping of the American economy.

iii. Targeting Job Creation Programs to High-Unemployment Communities

An alternative to offering a federally sponsored job to everyone who might want one is to do a program that is more limited and

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dataViewer/view/a46a5d0c288c448a987a35ca5e81ba95 [perma.cc/LMB4-P3H7] (displaying the U-6 measure).

113. The PDH proposal is designed to start at the poverty-level wage—the minimum wage needed to keep a family of four out of poverty. In 2016, 23.7 percent of workers earned less than this wage. *State of Working America: Data Library*, ECON. POL'Y INST. (2019), https://www.epi.org/data/#?subject=povwage [perma.cc/G3K9-2XJZ].

114. Author's calculations based on Economic Policy Institute data and Current Population Survey data. *See id.*; *CPS Labor Force Data*, *supra* note 112.

115. *Employment by Major Industry Sector*, U.S. BUREAU OF LAB. STAT.: LAB. FORCE STAT. FROM CURRENT POPULATION SURV., https://www.bls.gov/emp/tables/employment-by-major-industry-sector.htm [perma.cc/ZRR9-Y5BH].

116. *Works Progress Administration (WPA)*, HISTORY (June 10, 2019), https://www.history.com/topics/great-depression/works-progress-administration [perma.cc/F3PL-9V7X].

117. Author's calculations based on WPA data and historical labor force data. *See id.*; *Labor Force, Employment, and Unemployment, 1929-39: Estimating Methods*, U.S. BUREAU OF LAB. STAT. (July 1948), https://www.bls.gov/opub/mlr/1948/article/pdf/labor-force-employment-and-unemployment-1929-39-estimating-methods.pdf [perma.cc/SAZ7-5NQT].

118. Author's calculations based on Economic Policy Institute data, Current Population Survey data, and industry sector data. *See State of Working America: Data Library*, *supra* note 113; *CPS Labor Force Data*, *supra* note 112; *Employment by Major Industry Sector*, *supra* note 115.

targeted. One way to do this is to target communities with persistently high unemployment. These communities could receive federal subsidies for local employers to hire net new local workers. After the unemployment rate is lowered in a community, the program can be gradually phased out.[119]

It would be important to design the program so that it does not produce a windfall for individuals and organizations who do not need help. The geography covered by the specific local programs needs to be carefully selected so that a sufficiently large local program can be administered, but not one so large that resources are expended on individuals and organizations who do not need assistance. The employers would be required to use the subsidies for net new hires of long-term local residents.

Because this program would be targeted to high-unemployment communities, it would bring benefits to people of all races. It would bring disproportionate benefit to African American communities because they are more likely to be high-unemployment communities. Thus, this program too is universal as far as the race of the recipients, although it is targeted geographically to high-unemployment communities.

If our leaders and the Federal Reserve were strongly committed to maximizing employment in the U.S. economy, they could easily create a sufficient number of jobs to end the permanent recession in Black America. To accomplish this goal, the Federal Reserve would hold off on slowing down the economy until there are clear signs of high inflation.[120] Our political leaders would lower the value of the dollar to eliminate the trade deficit and create more U.S. jobs. They would also require stronger vacation, family, and sick leave policies. Additionally, they would encourage shorter work weeks and work-sharing during recessions. These policies would significantly increase the demand for workers. Addressing our

119. *See* ALGERNON AUSTIN, ECON. POL'Y INST., A JOBS-CENTERED APPROACH TO AFRICAN AMERICAN COMMUNITY DEVELOPMENT 7–8 (2011), https://files.epi.org/2011/bp328.pdf [perma.cc/ZTA7-7WTV] ("The program could be phased out in communities over a five-year period after the annual unemployment rate fell below 6 percent.").

120. JOSH BIVENS, ECON. POL'Y INST., WHAT SHOULD WE KNOW ABOUT THE NEXT RECESSION? (Apr. 18, 2019), https://www.epi.org/publication/next-recession-bivens/ [perma.cc/4ZSY-ARBW] ("Excessively contractionary monetary policy is likely the single most common cause of recessions in the post–World War II period. When the Federal Reserve thinks that growth in aggregate demand threatens to run ahead of growth in the economy's productive capacity and spark accelerating inflation, it raises interest rates to keep the economy from 'overheating.' These interest rate hikes slow debt-financed spending . . . . Too often, however, the Fed has raised rates too far and too fast, and the result has been a recession.").

infrastructure needs and climate change would also create millions of jobs.

The policies listed already are likely sufficient to close the jobs gap. If they are not, federally subsidized jobs targeted to high-unemployment communities should be enough to provide the additional needed jobs.

While the motivation for this plan is to end the African American permanent recession, people of all races would see tremendous benefits if our leaders were to commit to these policies. Adding millions of jobs to the economy will lower *all* racial groups' rates of joblessness, put upward pressure on wages, and lead to increased benefits for workers.

III. Affirmative Action

While the jobs policies listed above are guaranteed to provide a large benefit for non-Blacks, there is reason to worry that Black workers may not receive their fair share. The same racial discrimination that causes the jobs gap would also be present in the hiring for the jobs created by the policies above.[121] Strong affirmative action policies and enforcement would be necessary to see that Black workers are provided equal opportunity.

Affirmative action programs are highly controversial in no small part due to misunderstanding and misinformation. One reason affirmative action is misunderstood is because it is somewhat complex. To start with, there are two different programs: one in higher education and one in employment.[122] Each program has a somewhat different logic and is complex on its own. The American public generally does not understand what affirmative action in employment is or how it works.[123] For this reason, it is necessary to explain what it is and how it works.

The discussion below will focus on affirmative action in employment relating to African Americans. But it is important to remember that the target groups for affirmative action include the Latino, Asian American, and American Indian populations, as well as women and veterans. White Americans are more opposed to affirmative action for Black people than to affirmative action per se. Researchers have found that White people are more opposed to the

121. *See* discussion of Ward Thomas study, *infra* notes 126–145 and accompanying text.

122. *See* FAYE CROSBY, AFFIRMATIVE ACTION IS DEAD; LONG LIVE AFFIRMATIVE ACTION 6–10 (2004).

123. *Id.* at 64–73.

idea of affirmative action when told that it is for Black people than when told it is for women.[124] Although admissions policies in elite higher education that benefit White students and particularly children of alumni, who are disproportionately White, are far more substantial, the program constantly being attacked in court is the admission policy—affirmative action—which benefits Black students.[125] These findings are what one would expect in a society with significant anti-Black attitudes—precisely the type of society in which affirmative action programs for Black people would be necessary.

To explain affirmative action in employment, we will take a quick look at Ward Thomas' study of affirmative action in electronics firms in Los Angeles in the late 1990s.[126] We will begin by looking at the actual application of affirmative action. After reviewing some key aspects of affirmative action in practice, we will discuss the ideals of the program. First, one must be aware that affirmative action in employment only applies to firms with at least fifty employees and $50,000 worth of federal government contracts.[127] About 20 percent of American workers are in a workplace covered by mandatory affirmative action.[128]

Thomas' study is based on a random sample of fifty firms.[129] Twenty-two of the firms were subject to affirmative action and twenty-eight firms were not.[130] Thomas compared the recruiting and screening of job applicants in the affirmative action firms with the non–affirmative action firms.[131] There were no radical differences between the recruiting practices of affirmative action

124. BANAJI & GREENWALD, *supra* note 42, at 179.

125. *See, e.g.*, Camille G. Caldera, *Legacy, Athlete, and Donor Preferences Disproportionately Benefit White Applicants, per Analysis*, HARV. CRIMSON (Oct. 23, 2019), https://www.thecrimson.com/article/2019/10/23/nber-admissions-data/ [perma.cc/7YTR-QD56]; Jordan Weissman, *43 Percent of White Students Harvard Admits Are Legacies, Jocks, or the Kids of Donors and Faculty*, SLATE (Sept. 23, 2019), https://slate.com/business/2019/09/harvard-admissions-affirmative-action-white-students-legacy-athletes-donors.html [perma.cc/9EUC-Q29M].

126. Thomas, *supra* note 55, at 86–88.

127. *Affirmative Action Plans*, FINDLAW (Feb. 16, 2018), https://www.findlaw.com/smallbusiness/employment-law-and-human-resources/are-employers-required-to-have-affirmative-action-plans.html [perma.cc/8BQL-GMTP]. For veterans, the requirement is a federal contract of $100,000. 38 U.S.C. § 4212 (2018).

128. CROSBY, *supra* note 122, at 9.

129. Thomas, *supra* note 55, at 86.

130. *Id.* at 86–87.

131. *Id.* at 88.

firms and non–affirmative action firms.[132] The difference was in degree, not in kind.[133]

One way that Black job-seekers are disadvantaged is that some firms advertise and recruit for jobs in ways that made it difficult for Black workers to learn of openings. In Thomas' study, the affirmative action firms were more likely to use recruiting methods accessible to African Americans.[134] For example, for higher-skilled positions, 34 percent of affirmative action firms publicized their openings at colleges while only 10 percent of non–affirmative action firms did.[135] Non–affirmative action firms were more likely to rely on employee referrals (24 percent) than affirmative action firms (8 percent).[136] Employee referrals tend to reproduce the existing racial makeup of the firm.[137] Affirmative action firms do more outreach to build a racially diverse applicant pool.

The affirmative action firms in Thomas' study relied more on more objective screening methods than the non–affirmative action firms, but again the difference was of degree, not of kind. For example, for lower-skilled positions, 95 percent of the affirmative action firms looked at prior work experience in evaluating candidates, but 77 percent of the non–affirmative action firms did.[138] The non–affirmative action firms were more likely to evaluate the attitude of the worker (42 percent versus 14 percent for affirmative action firms).[139] An evaluation of attitude is likely to be fairly subjective, and it may be open to implicit anti-Black biases and sub-cultural misunderstanding.

Thomas found that hiring officials at non–affirmative action firms were more likely to share negative stereotypes about African Americans in his interviews (for lower-skilled workers: 56 percent versus 33 percent for affirmative action firms).[140] Affirmative action firms are more conscious and committed to eliminating anti-Black bias from their hiring decisions.

In Thomas' analysis, 3.7 percent of the employees in the affirmative action firms were Black compared to 2.4 percent in the

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132. *Id.* at 91.
133. *Id.* at 99.
134. *Id.* at 89–90.
135. *Id.* at 89.
136. *Id.* at 90.
137. *Id.* at 83.
138. *Id.* at 92.
139. *Id.*
140. *Id.* at 94.

non–affirmative action firms.[141] In other words, affirmative action appears to have increased the representation of Black workers by 1.3 percentage points.[142] This small impact is in line with other research. In Los Angeles at the time of the study, the labor force was 9 percent Black.[143] Affirmative action employers do not willy-nilly hire individuals from targeted groups. Affirmative action hiring goals are based on the share of the targeted population *with the necessary qualifications* for the position.[144]

Affirmative action can be defined as "both voluntary and mandatory efforts undertaken by federal, state, and local governments; private employers; and schools to combat discrimination and to promote equal opportunity in education and employment for all."[145] As Thomas's study illustrates, affirmative action firms put more effort into finding a diverse applicant pool, and they rely more on explicitly work-related and objective means of evaluating applicants. Firms have a tremendous degree of flexibility in how they pursue affirmative action.

The affirmative action information above is likely very different from what most Americans imagine when they think of affirmative action in employment. Even supporters of the program are sometimes unclear about the program and are poor at describing it.[146]

More importantly, opponents of affirmative action have been very effective at spreading misinformation about the program. Opponents of the program regularly describe it as a quota system when hiring quotas are illegal.[147] Affirmative action expert Faye Crosby reports that "a study commissioned by Sen. Robert Dole . . . proved that no affirmative action measure involved quotas. Not a single one."[148] These facts will not stop opponents from repeating the falsehood.

We can see the effectiveness of the anti-affirmative action activists in this "affirmative action" survey question from the National Opinion Research Center:

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141. *Id.* at 96.

142. *Id.*

143. *Id.* at 97.

144. CROSBY, *supra* note 122, at 7.

145. *Id.* at 5 (quoting AM. PSYCH. ASS'N, AFFIRMATIVE ACTION: WHO BENEFITS? (1996)).

146. *Id.* at 64 ("A substantial proportion of the people I've encountered at events focusing on affirmative action have only a vague idea of what the policy entails.").

147. *Id.* at 70–71.

148. *Id.* at 6.

> Some people say that because of past discrimination, blacks should be given preference in hiring and promotion. Others say that such preference in hiring and promotion of blacks is wrong because it discriminates against whites. What about your opinion—are you for or against preferential hiring and promotion of blacks?[149]

This "affirmative action" question is not precisely asking about affirmative action. Affirmative action is a policy to counteract discrimination *in the present*, not the past.[150] It is described by many as a system of "preference," but this is not truly accurate. It is a system to undo White preference. As a human resource official told Thomas,

> If they [a minority applicant] are qualified and a manager or supervisor says I don't want to hire that person, you have to point out, very diplomatically, what the reasons are to hire a certain person, not by look or by gender, but by qualifications, and that's it.[151]

Black job candidates should not be passed over because of the conscious or unconscious biases of managers or supervisors. Prior to affirmative action, most employers have hiring processes that consciously and unconsciously advantage White applicants. Affirmative action works to undo that White preference.

If we wish to ensure that Black workers receive their fair share of jobs from the jobs policies, we will need affirmative action. We should look for ways to expand and strengthen affirmative action programs so that they are more effective at increasing the hiring of Black workers. For example, firms have tremendous flexibility in pursuing affirmative action goals. It may be better to develop a set of best practices and to encourage firms to use them.

IV. A Universal Basic Income Is Not a Substitute for a Job

Some people may propose that we stop worrying about jobs and focus on providing the jobless with a universal basic income.[152] This perspective misses the full meaning and benefits of

149. Frank Newport, *Affirmative Action and Public Opinion*, GALLUP NEWS (Aug. 7, 2020), https://news.gallup.com/opinion/polling-matters/317006/affirmative-action-public-opinion.aspx [perma.cc/ZX4K-W325].

150. CROSBY, *supra* note 122, at 4–5.

151. Thomas, *supra* note 55, at 95.

152. MICHAEL TANNER, CATO INST., THE PROS AND CONS OF A GUARANTEED NATIONAL INCOME 2 (2015).

employment in U.S. society. Work has economic, psychological, and sociological benefits beyond an income.[153] Thus, it would be a mistake and a grave disservice to the African American jobless to try to fill their need for jobs with just a basic income. Before we examine these other dimensions of work, we should first examine the problems that universal basic income proposals have in providing a basic income.

For people who aren't poor or jobless, the thought of an additional $1,000 a month as Andrew Yang's universal basic income (UBI) proposal[154] calls for is very seductive. Many Americans are struggling, even if they aren't officially poor. For the poor, UBI proposals can sound like liberation from a paternalistic and punitive safety net bureaucracy with its many requirements for receiving benefits. But UBI won't truly be helping the poor if it leaves them poorer. It is important to examine UBI proposals very carefully.

Yang's proposal called for a $1,000 per month basic income to all American citizens over 18.[155] It is important to be aware that this amount, $12,000 per year, is lower that the Census Bureau's 2019 poverty threshold for a single adult under 65.[156] While Yang's UBI can lift households with multiple adults out of poverty, it cannot lift single individuals out of poverty—and certainly not if that individual has one or more dependent children.

Yang's UBI proposal also asks people to choose between a basic income and safety net programs. It states, "[c]urrent welfare and social program beneficiaries would be given a choice between their current benefits or $1,000 cash unconditionally—most would prefer cash with no restriction."[157] While at one point in an individual's life, Yang's UBI might be worth more than the benefits an individual receives, in the future—during a recession or during retirement or when the individual develops a disability or has children or becomes homeless—it might not. If there is a significant decline in the uptake of a particular safety net program because

153. Alice Boyes, *What Psychological Benefits Do You Get from Work?*, PSYCH. TODAY (Aug. 22, 2019), https://www.psychologytoday.com/us/blog/in-practice/201908/what-psychological-benefits-do-you-get-work [perma.cc/BRW3-BGQB].

154. *The Freedom Dividend, Defined*, YANG2020 (2020), https://2020.yang2020.com/what-is-freedom-dividend-faq/ [perma.cc/93GY-M2X4].

155. *Id.*

156. The 2019 poverty threshold for a single adult under sixty-five years old was $13,300. U.S. CENSUS BUREAU, POVERTY THRESHOLDS (2020), https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html [perma.cc/M2WM-THKG].

157. *The Freedom Dividend*, *Defined*, *supra* note 154.

people have chosen the UBI, will there not be increased pressure from conservatives to end the program completely?

Conservatives support a UBI precisely because they see it as a means to eliminate safety net programs.[158] For example, in 2006 the conservative Charles Murray argued for eliminating all welfare transfer programs—including Social Security and Medicare—for an annual grant of $10,000.[159] Adjusting that amount for inflation would make it about $12,700 in 2020.[160] The average Social Security benefit in 2020 was worth $18,000—$5,300 more.[161] For some people, before retiring, Murray's UBI would add to their income, but once they retire it would significantly reduce their income. The medical bills covered by Medicare can easily be worth much more than $12,700. In retirement, Murray's UBI would dramatically increase poverty and extreme economic hardship among the elderly. Only if a UBI is added on top of our existing safety net would the poor be guaranteed to be better off.

Yang's proposal lifts households with multiple adults out of poverty if one uses the Census Bureau's poverty threshold.[162] But that threshold has been criticized for being too low.[163] If one uses a "family-budget" standard which would provide "a modest yet adequate standard of living,"[164] Yang's UBI is not enough. For example, for a family of two working adults and one child in Birmingham, Alabama, the family-budget income that family needs is estimated to be $66,000 a year.[165] Yang's UBI would provide only $24,000 to two jobless adults with a child.[166] Thus, if the goal is to

158. Noah J. Gordon, *The Conservative Case for a Guaranteed Basic Income*, THE ATLANTIC (Aug. 6, 2014), https://www.theatlantic.com/politics/archive/2014/08/why-arent-reformicons-pushing-a-guaranteed-basic-income/375600/ [perma.cc/2RQB-YEP4].

159. *Id.*

160. Inflation calculation based on June 2006 to June 2020. U.S. BUREAU OF LAB. STAT., CPI INFLATION CALCULATOR, https://www.bls.gov/data/inflation_calculator.htm.

161. Sean Williams estimates the average 2020 Social Security benefit to be $1,503 per month. Sean Williams, *The Average Social Security Retirement Benefit in 2020*, MOTLEY FOOL (Dec. 22, 2019), https://www.fool.com/retirement/2019/12/22/the-average-social-security-retirement-benefit-in.aspx [perma.cc/3TYV-MTPU].

162. *See* U.S. CENSUS BUREAU, *supra* note 156.

163. Sean Fremstad, *The Federal Poverty Line Is Too Damn Low*, THE NATION (Sept. 14, 2016), https://www.thenation.com/article/archive/the-federal-poverty-line-is-too-damn-low/ [perma.cc/3QHX-BU8H].

164. ECON. POL'Y INST., FAMILY BUDGET CALCULATOR (Mar. 2018), https://www.epi.org/resources/budget/ [perma.cc/J46S-EUNN].

165. *Id.*

166. *The Freedom Dividend, Defined*, *supra* note 154.

allow people to have a decent standard of living without a job, the UBI would have to be significantly more than what Yang proposes.

The public policy professors Hilary W. Hoynes and Jesse Rothstein calculate that Yang's $1,000-per-month UBI proposal would require doubling federal tax revenue to pay for it.[167] Of course, if we wished the UBI to meet the higher family-budget standard, it would be much, much more costly. Since a UBI is universal, most of this increased federal expenditure would go to non-poor, non-jobless households[168] while possibly putting at risk safety net programs for the needy.

We have seen that there are several problems in UBI proposals' provision of a "basic income." But the challenges for UBI as a substitute for jobs do not end there. Economically, a job is more than an income. At work, people gain work experience, learn skills, and build social networks that can lead them to higher pay and better jobs.[169] If an income is used to replace a job, then these opportunities for upward economic mobility are cut off. We do not want a policy that will work to further block Black upward economic mobility.

In American society, a job is an important part of individual's identity and self-esteem. When people are asked to describe themselves to strangers, they often begin with a discussion of their work.[170] In Alford A. Young, Jr.'s study of the Black working class, he documents how these individuals think about the non-economic value of work. Young observes, "[t]he women's ideas of good work had a lot to do with feeling good about themselves as a consequence of what they believed they were offering to others in the course of their work."[171] While the women felt pride in their ability to help others, the men focused more on jobs as an opportunity to build their social status and to achieve respect in the eyes of others. Young reports, "men often talked about what the good job would do for their sense of personal identity in ways that would not de-

167. Hilary W. Hoynes & Jesse Rothstein, *Universal Basic Income in the U.S. and Advanced Countries* 2, 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25538, 2019), https://www.nber.org/system/files/working_papers/w25538/w25538.pdf [perma.cc/8R7S-N23H].

168. *Id.* at 14.

169. *See* Boyes, *supra* note 153.

170. Work is one of the more common topics for small talk. *See* Arlin Cuncic, *Preparing for Small Talk: A List of the Best and Worst Topics*, VERYWELL MIND (June 28, 2020), https://www.verywellmind.com/small-talk-topics-3024421 [perma.cc/ZDL3-RP4Z].

171. ALFORD A. YOUNG, JR., FROM THE EDGE OF THE GHETTO: AFRICAN AMERICANS AND THE WORLD OF WORK 112 (2020).

emphasize service to others, but rather provide elevated attention to social status and individual accomplishments made at work."[172] Substituting income for a job would cut individuals off from an important source of identity and self-esteem in American society. As a policy to help unemployed Black people, UBI as a substitute for employment has the potential to further marginalize these individuals and keep them outside of the American mainstream.

The former U.S. Surgeon General Vivek Murthy has argued that there is a loneliness epidemic in America.[173] In 2019, 61 percent of Americans reported some degree of loneliness.[174] Loneliness has been shown to be associated with a greater risk of heart disease, depression, anxiety, and dementia.[175] Loneliness may be as harmful to one's health as smoking 15 cigarettes a day.[176] There is research suggesting that African Americans suffer from loneliness to a greater degree than White Americans.[177] Lower-income individuals report higher rates of loneliness than higher-income individuals.[178]

While a job does not guarantee an escape from loneliness, it does have the potential to be a positive site for social interaction. At work, people can have regular meaningful contact with others, they can form friendships, and they can even develop romantic relationships. If we were to try to solve the problem of African American joblessness with a UBI, we may be exacerbating the problem of loneliness for African Americans.

A job is a lot more than an income. But it is important to note that there are UBI proposals that could lead to lowering some people's income and increasing poverty and economic hardship.[179] Beyond the risk of lowering income, a UBI fails as a substitute for

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172. *Id.* at 118.

173. Jena McGregor, *This Former Surgeon General Says There's a 'Loneliness Epidemic' and Work Is Partly to Blame*, WASH. POST (Oct. 4, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/10/04/this-former-surgeon-general-says-theres-a-loneliness-epidemic-and-work-is-partly-to-blame/ [perma.cc/KUA4-J4V8].

174. CIGNA, LONELINESS AND THE WORKPLACE 1 (2020), https://www.cigna.com/static/www-cigna-com/docs/about-us/newsroom/studies-and-reports/combatting-loneliness/cigna-2020-loneliness-factsheet.pdf [perma.cc/7KJ9-3NYG].

175. McGregor, *supra* note 173.

176. *Id.*

177. *See* Kristen Monaco, *Social Isolation, Loneliness Real for Midlife Minority Women*, MEDPAGE TODAY (May 22, 2019), https://www.medpagetoday.com/meetingcoverage/apa/79987 [perma.cc/2KGL-J6CN] (describing a study finding that Black and Hispanic middle-aged women reported high levels of loneliness).

178. CIGNA, *supra* note 174.

179. *See supra* text accompanying notes 160 and 161.

a job. UBIs do not provide individuals with opportunities for upward mobility that can come with working. UBIs do not provide individuals with opportunities to feel like they are helping others, contributing to society, or doing a job well. A UBI also does not provide individuals with opportunities for positive, meaningful social interactions to combat loneliness like work does. Of course, there are too many bad jobs that fail to achieve all of the positive potential of work. But even the best UBI would fail in achieving these broader benefits of work beyond an income.

When we recognize the non-income value of work, we can also gain a deeper appreciation of the harms caused by a society that produces a permanently high rate of joblessness among African Americans. The damage from the loss of income is severe and serious, but that is not all of the damage. Joblessness also makes it more difficult for unemployed African Americans to build a good, meaningful, and purposeful life.

Conclusion

The 1963 March on Washington for Jobs and Freedom called for "[a] massive federal program to train and place all unemployed workers—Negro and white—on meaningful and dignified jobs at decent wages."[180] At that time Black workers were twice as likely to be unemployed as White workers.[181] Today, Black workers are still twice as likely to be unemployed.[182] While Black educational attainment has increased since the 1960s,[183] the Black-White unemployment rate ratio has remained the same.[184] This ratio has consigned Black America to live under conditions that feel like a permanent economic recession.

More than half a century has passed since the 1963 demand for jobs—more than half a century of continued racial inequality in the labor market. We should delay no further in creating federal policies to employ all workers. As the Jobs and Freedom activists envisioned, addressing the problem of high Black unemployment would create jobs for people of all races. If the Federal Reserve refrains from prematurely reversing economic growth, the number

180. MARCH ON WASHINGTON FOR JOBS AND FREEDOM, *supra* note 1.

181. AUSTIN, THE UNFINISHED MARCH, *supra* note 3, at 3.

182. Ajilore, *supra* note 8.

183. JENNIFER CHEESEMAN DAY, U.S. CENSUS BUREAU, BLACK HIGH SCHOOL ATTAINMENT NEARLY ON PAR WITH NATIONAL AVERAGE (2020), https://www.census.gov/library/stories/2020/06/black-high-school-attainment-nearly-on-par-with-national-average.html [perma.cc/LR7G-AY8R].

184. AUSTIN, THE UNFINISHED MARCH, *supra* note 3, at 8.

of available jobs would increase for all. If we eliminate the trade deficit, that would increase the number of jobs available for all. If we shorten work weeks and increase vacation and paid leave for workers, that would create jobs for all. If we make the needed investments in infrastructure and in fighting climate change, that would produce jobs for all. If we invest through employment subsidies in high-unemployment communities, that would create jobs for all.

Although these jobs policies would create jobs for all Americans, there is reason to worry about whether African Americans would receive their fair share. The Black-White jobs gap is the product of racial discrimination in the labor market.[185] Direct and indirect job-creation policies do not address this problem. Affirmative action is a small and modest intervention to counteract the overt and covert forms of anti-Black discrimination in the labor market. We will need a strong commitment to affirmative action to break the half-century pattern of Black people being twice as likely to be unemployed as White people.

We know the policies necessary to end the permanent recession in Black America. We just need to create the political will.

185. *See supra* Section I.C.

Improving Board Decisions: The Promise of Diversity

Cindy A. Schipani†

The board of directors plays an important role in United States corporate governance.[1] Corporate law requires board members, particularly independent directors, to both outline corporate strategy and monitor the performance of management.[2] Many boards have failed to meet this important duty. Time after time, we see corporate scandals escape a board's attention. Examples of recent corporate scandals include: the financial crisis of 2008,[3] sales practice abuses at Wells Fargo,[4] sexual harassment at NBC involving *Today* host Matt Lauer,[5] sexual misconduct by Harvey Weinstein of the Weinstein Company,[6] cheating on auto emissions

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1. S. Burcu Avci, Cindy A. Schipani & H. Nejat Seyhun, *Do Independent Directors Curb Financial Fraud? The Evidence and Proposals for Further Reform*, 93 IND. L.J. 757, 780 (2018) [hereinafter Avci et al., *Independent Directors*] (noting that "[b]oards of directors have always been a traditional element of American corporate governance"); *see also* John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 303 (2004) (noting that board independence has increased in recent years).

2. Kelli A. Alces, *Beyond the Board of Directors*, 46 WAKE FOREST L. REV. 783, 789 (2011); Franklin A. Gevurtz, *The Function of "Dysfunctional" Boards*, 77 U. CIN. L. REV. 391, 396 (2008) (both articles noting the board's traditional function of monitoring management).

3. Shivaram Rajgopal, Suraj Srinivasan & Yu Ting Forester Wong, *Bank Boards: What Has Changed Since the Financial Crisis*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 19, 2019), https://corpgov.law.harvard.edu/2019/02/19/bank-boards-what-has-changed-since-the-financial-crisis/ [https://perma.cc/DJ7R-NSEU].

4. *See* Eleanor Bloxham, *Here's How Wells Fargo's Board of Directors Just Failed Customers*, FORTUNE (Apr. 14, 2017), https://fortune.com/2017/04/14/wells-fargo-fake-accounts-2/ [perma.cc/E3KM-3ACY]; Matt Egan, *Wells Fargo Scandal: Where Was the Board?*, CNN BUS. (Apr. 24, 2017), https://money.cnn.com/2017/04/24/investing/wells-fargo-scandal-board-annual-meeting/index.html [perma.cc/L6YZ-YQLR].

5. Caitlin Flanagan, *Matt Lauer's Woman Problem*, THE ATLANTIC (Nov. 5, 2019), https://www.theatlantic.com/ideas/archive/2019/11/lauer-had-a-problem-with-women/601405/ [perma.cc/M2MU-46MC].

6. *Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC NEWS (May 29, 2020), https://www.bbc.com/news/entertainment-arts-41594672 [perma.cc/

tests at Volkswagen (VW),[7] the ignition switch scandal at General Motors (GM),[8] the explosion in the Massey Energy coal mine,[9] and the Deep Water Horizon oil rig blowup.[10] Presumably, all these scandals were the result of either outright fraud or reckless and wanton disregard for safety.

Some of the warning signs for these scandals appear to have been dismissed by boards. For example, the Weinstein Company's board did not take corrective action when it became aware of Harvey Weinstein's settlements for multiple claims of sexual misconduct.[11] And NBCUniversal allegedly ignored sexual harassment at the company for years before Matt Lauer was fired.[12] The warning signs for other scandals, such as GM's ignition switch scandal[13] or the cheating on emissions tests at VW,[14] may not have risen to the level of the boards. Whether the boards' failures were disregarding facts, or willfully failing to seek them out, all these scandals demonstrate that the board was unable to fulfill its gatekeeping function—a function vital to corporate governance.[15]

A3RK-9VDP].

7. Russell Hotten, *Volkswagen: The Scandal Explained*, BBC NEWS (Dec. 10, 2015), https://www.bbc.com/news/business-34324772 [perma.cc/E72P-WR25].

8. Tanya Basu, *Timeline: A History of GM's Ignition Switch Defect*, NPR (Mar. 31, 2014), https://www.npr.org/2014/03/31/297158876/timeline-a-history-of-gms-ignition-switch-defect [perma.cc/K8DW-AEA2].

9. Sabrina Tavernise, *Report Faults Mine Owner for Explosion that Killed 29*, N.Y. TIMES (May 19, 2011), https://www.nytimes.com/2011/05/20/us/20mine.html [perma.cc/2H3B-AXAX].

10. Jie Jenny Zou, *8 Years After Deepwater Horizon Explosion, Is Another Disaster Waiting to Happen?*, NPR (Apr. 20, 2018), https://www.npr.org/2018/04/20/603669896/8-years-after-deepwater-horizon-explosion-is-another-disaster-waiting-to-happen [perma.cc/XC9W-6557].

11. *See* Dacher Keltner, *Sex, Power, and the Systems that Enable Men Like Harvey Weinstein*, HARV. BUS. REV. (Oct. 13, 2017), https://hbr.org/2017/10/sex-power-and-the-systems-that-enable-men-like-harvey-weinstein [perma.cc/8ZRK-6EZM].

12. *See* Patrick Ryan, *Ronan Farrow Says NBC's Alleged Cover-up of Sexual Misconduct Is 'Bigger' than Matt Lauer*, USA TODAY (Oct. 14, 2019), https://www.usatoday.com/story/entertainment/books/2019/10/14/ronan-farrow-new-book-catch-and-kill-alleged-cover-up-harvey-weinstein-matt-lauer/3948761002/ [perma.cc/KUQ3-56UN] (citing RONAN FARROW, CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS (2019)) ("NBC brokered nondisclosure agreements and seven-figure payouts with at least seven women who alleged sexual harassment or discrimination at the company.").

13. *See* Basu, *supra* note 8.

14. *See* Hotten, *supra* note 7.

15. *See* S. Burcu Avci, Cindy A. Schipani & H. Nejat Seyhun, *The Elusive Monitoring Function of Independent Directors*, 21 U. PA. J. BUS. L. 235, 285 (2018) [hereinafter Avci et al., *Elusive Monitoring Function*] (critiquing the independent directors' role of "gatekeepers" in corporate law); *see also* Coffee, *supra* note 1, at 302 (defining "gatekeepers" as "independent professionals who pledge their reputational capital" and describing their traditional role in securities markets as "protect[ing]

Board diversity may help mitigate this problem. Although progress is being made, corporate gatekeepers are still not diverse. For example, women are struggling to reach business leadership positions in the United States. The U.S. ranks fifty-third in the World Economic Forum's Global Gender Gap Index, with 21.7% female board members.[16] Though this percentage is low relative to the female population, women are increasingly filling open board seats.[17] In 2019, women filled 45% of open board seats at Russell 3000 companies compared to only 12% in 2008.[18] And in July 2019, the last all-male board in the S&P 500 added a female representative.[19] Lawmakers[20] and investors[21] are pressuring companies to increase gender diversity on boards. Women of color, however, only held 4.6% of Fortune 500 board seats in 2018,[22] and ethnic minorities only filled 15% of open board seats in 2019 (and held 10% of total board seats). This disparity indicates there has been less progress with ethnic diversity.[23]

To address these deficiencies in corporate governance and board diversity, this paper is organized as follows. Part I explains three limitations on the effectiveness of independent board

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the interests of dispersed investors who cannot easily take collective action").

16. WORLD ECON. F., GLOBAL GENDER GAP REPORT 2020 11, 32–33 (2020), http://www3.weforum.org/docs/WEF_GGGR_2020.pdf [https://perma.cc/7Y27-WL9A] (noting that the wage gap, rather than workforce participation, was the main reason the U.S. was not ranked higher).

17. *See* Subodh Mishra, *U.S. Board Diversity Trends in 2019*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 18, 2019), https://corpgov.law.harvard.edu/2019/06/18/u-s-board-diversity-trends-in-2019/ [https://perma.cc/AMZ5-6RGW] (summarizing the results of Institutional Shareholder Services' diversity profile of Russell 3000 companies from 2008 to 2019).

18. *Id.*

19. Vanessa Fuhrmans, *The Last All-Male Board on the S&P 500 Is No Longer*, WALL ST. J. (July 24, 2019), https://www.wsj.com/articles/the-last-all-male-board-on-the-s-p-500-is-no-longer-11564003203 [https://perma.cc/4ZC5-NDPB].

20. CAL. CORP. CODE § 301.3 (requiring public companies headquartered in California to have one or more female directors, depending on the size of their board).

21. *E.g.*, Joann S. Lublin & Sarah Krouse, *State Street to Start Voting Against Companies that Don't Have Women Directors*, WALL ST. J. (Mar. 7, 2017), https://www.wsj.com/articles/state-street-says-it-will-start-voting-against-companies-that-dont-have-women-directors-1488862863 [https://perma.cc/DMV8-CRL5] ("[State Street Global Advisors] says it will vote against board members charged with nominating new directors if they don't soon make strides at adding women.").

22. DELOITTE, MISSING PIECES REPORT: THE 2018 BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS 17 (2018), https://www.catalyst.org/wp-content/uploads/2019/01/missing_pieces_report_01152019_final.pdf [https://perma.cc/ZK2J-PTHE] (analyzing diversity trends of Fortune 500 companies from 2010 to 2018). Women and minorities held 22.5% and 16.1% of total Fortune 500 board seats in 2018, respectively. *Id.*

23. *See* Mishra, *supra* note 17.

members in monitoring management. Part II proposes that board diversity may mitigate these problems with outside directors and uses research on gender diversity to argue this point, while acknowledging cultural barriers. Part III introduces proposals from corporate law lecturer, Professor Akshaya Kamalnath, for improving the board's access to information and diversity. This Part further argues that once women are hired, companies need programs to support their development to maximize the benefits of diversity. Concluding remarks follow.

I. The Difficult Role of Outside Directors

Corporate law relies upon outside directors to monitor management.[24] Relying on outside directors, however, may not be as robust a solution as was once thought.[25] The following sections explain how outside directors are sometimes (A) not fully informed, (B) not fully independent, or (C) potentially complicit in some fraudulent schemes.

A. Outside Directors: Not Fully Informed

Currently, the corporate community expects independent board members to monitor management.[26] But in reality, this expectation may not be fair. Although U.S. corporate law values the independence of outside directors,[27] independence, almost by

24. James Chen, *Outside Director*, INVESTOPEDIA (Nov. 18, 2020), https://www.investopedia.com/terms/o/outsidedirector.asp [https://perma.cc/N7AK-LSHQ] ("An outside director is a member of a company's board of directors who is not an employee or stakeholder in the company.").

25. James D. Cox, *Managing and Monitoring Conflicts of Interest: Empowering the Outside Directors with Independent Counsel*, 48 VILL. L. REV. 1077, 1078 (2003) ("[I]s the independent director up to the challenges that our expectations have placed before the director?"); *see also* Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 IOWA L. REV. 127, 130–32 (2010) (arguing that the value of independent directors "has been vastly overstated" and perhaps the solution lies with inside directors, instead).

26. Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise Is the Received Wisdom?*, 95 GEO. L.J. 1843, 1864 (2007) (commenting that a "near consensus" has risen in the global community that increased independence of directors more effectively monitors management); s*ee also* Avci et al., *Illusive Monitoring Function*, *supra* note 15, at 285 (noting corporate law requires independent directors to protect the company from executive fraud); Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. L. 921, 921 (1999) (observing the trend toward board independence back in 1999).

27. *See* Lucian Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1280–81 (2017) (observing that "[i]ndependent directors are an important feature of U.S. boardrooms" and have been encouraged by both the judiciary and by federal law); *see also* A.C. Pritchard,

definition, means that board members are not fully informed. Outside directors are not involved in the day-to-day operations of the firm.[28] The best they can do is gather reasonably available information.[29] Yet it is the C-Suite,[30] comprised of the same individuals whom directors are tasked with monitoring, that decides which information to disclose.[31] This conflict complicates independent board members' quests to gather information. If C-Suite executives are planning a get-rich-quick scheme, they can easily hide it from outside directors. Even the most diligent, hard-working board may not receive the information necessary to uncover intentional wrongdoing. Additionally, boards typically meet only a few times per year and outside directors are normally busy running other companies.[32] Therefore, even the most well-intentioned board member may not have the bandwidth to effectively monitor management.

Monitoring of Corporate Groups by Independent Directors, 9 J. KOREAN L. 1, 1–2 (2009) (noting that U.S. corporate law has long-valued director independence).

28. Cox, *supra* note 25, at 1082–83 (arguing that because of their lack of involvement in the company's regular activities, they often have inadequate information); Fairfax, *supra* note 25, at 161 (citing Cox's reasoning that independent directors lack access to adequate information as a reason why outsiders may fail to adequately monitor management).

29. *See* Fairfax, *supra* note 25, at 161–62 (commenting that outsiders often turn to "advisors, attorneys, and accountants" for gathering information, but, even so, these advisors are unlikely to be purely objective).

30. The term "C-Suite" describes the top level of executive corporate managers, often with titles starting with C, such as the CEO (Chief Executive Officer), CFO (Chief Financial Officer), or COO (Chief Operating Officer). *See* Andrew Blumenthal, *C-Suite*, INVESTOPEDIA (Feb. 24, 2021), https://www.investopedia.com/terms/c/c-suite.asp [https://perma.cc/NBF4-ZJU5].

31. *See* Fairfax, *supra* note 25, at 161 (noting that because independent directors rely on insiders for information, it is difficult for them to assess whether the information they receive is accurate); s*ee also* Renée B. Adams, Benjamin E. Hermalin & Michael S. Weisbach, *The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey*, 48 J. ECON. LITERATURE 58, 65 (2010) (observing that boards have become reliant on auditors and regulators to discover managerial misconduct).

32. Michal Barzuza & Quinn Curtis, *Board Interlocks and Corporate Governance*, 39 DEL. J. CORP. L. 669, 691 (2015) ("Sitting on many boards could also result in directors who are so busy that they cannot give sufficient attention to any given firm. At a certain point, board members might be too busy to conduct their monitoring role diligently and effectively."); Jeremy C. Kress, *Board to Death: How Busy Directors Could Cause the Next Financial Crisis*, 59 B.C. L. REV. 877, 880 (2018) ("America's boardrooms are filled with directors who . . . serve as board members or executives of other firms . . . . [O]ther board seats and outside employment limit a director's availability, contribute to cognitive overload, and thereby diminish the director's effectiveness."); *see also* SPENCER STUART, 2017 SPENCER STUART U.S. BOARD INDEX 18 (2017), https://www.spencerstuart.com/~/media/ssbi2017/ssbi_2017_final.pdf [https://perma.cc/S376-53GC] (finding that on average, S&P 500 independent board members sit on the board of two public companies).

B. Outside Directors: Not Fully Independent

Not only are outside directors likely not fully informed, they may also not be fully independent. That is, even outside board members may be "captured" by the CEO and other executives.[33] This capture may occur when board members and executives inhabit the same social circles, operate in the same professional networks, or are otherwise friends.[34] These relationships suggest a lack of objectivity and may prevent board members from questioning managements' strategies and decisions. For instance, in the options backdating scandal at Comverse Technology, Inc. in 2006, the board unwittingly approved stock options for fictitious employees at management's direction.[35] The board even granted an option to an employee named "I. M. Fanton."[36] That was hardly an inconspicuous moniker for a phantom employee, but not one board member apparently saw any grounds for suspicion.[37]

C. Outside Directors and Complicity

In addition to lacking the full independence necessary for genuine oversight of executive decisions, outside directors may become complicit in wrongdoing. Complicity is especially tempting when there is significant money on the table and no real fear of getting caught. Empirical studies have shown that not only do some

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33. JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 57 (2008) ("The problem with boards is their unique susceptibility to capture by the managers they are supposed to monitor."); Kobi Kastiel & Yaron Nili, *"Captured Boards": The Rise of "Super Directors" and the Case for a Board Suite*, 19 WIS. L. REV. 19, 27–30 (observing that the reliance of outside directors on management for information and their limited firm-specific knowledge reduces the chance they are independent); Kress, *supra* note 32, at 883–84 (observing that boards form close relationships to management and become emotionally invested in management's success, making them ineffective monitors).

34. *See* Vikramaditya Khanna, E. Han Kim & Yao Lu, *CEO Connectedness and Corporate Fraud*, 70 J. FIN. 1203, 1242–43 (2015) (explaining that board members can be connected to CEOs through "common network ties").

35. Litigation Release No. 21090, SEC, SEC Sues Comverse Technology, Inc. for Fraudulent Options Backdating and Earnings Management Schemes (June 18, 2009), https://www.sec.gov/litigation/litreleases/2009/lr21090.htm [https://perma.cc/BF47-LC9K]; M. P. Narayanan, Cindy A. Schipani & H. Nejat Seyhun, *The Economic Impact of Backdating of Executive Stock Options*, 105 MICH. L. REV. 1597, 1610–11 (2007) ("The executives purportedly went so far as to create a so-called 'slush fund' of backdated options in the names of fictitious employees, hidden from the company's auditors.").

36. *See* Tim Annett, *Ghost Story*, WALL ST. J. (Aug. 9, 2006), https://www.wsj.com/articles/SB115514263305431169 [https://perma.cc/SNB5-4ZST].

37. *See* Litigation Release No. 21090, *supra* note 35; *see also* Annett, *supra* note 36 (explaining that the fake names were gradually intermingled with actual employees to snooker the directors into approving them).

outside directors fail to exercise sufficient checks on the behavior of executives, they may also succumb to the temptation to join in malfeasance. For example, a study examining manipulation of the timing of granting stock options to outside directors analyzed the profits made by outside directors who controlled that timing.[38] The study found that the profits made were strongly suggestive of the directors' complicity in the manipulation of stock options to assure that the options were in the money.[39] Another study similarly found directors were "lucky" in their receipt of stock option grants.[40] Lucky directors are those who receive "lucky grants," which are grants given at the lowest price in a given grant month.[41] The researchers found that lucky grants were not given to executives or independent directors as a result of routine corporate activity.[42] Instead, they found that these lucky grants were likely deliberately given to executives and directors to increase their profits.[43] That is, grants were awarded to directors at the lowest price of the month apparently due to backdating or the knowledge of future stock appreciation.[44] Therefore, so-called "lucky directors" may have profited from illicit behavior rather than luck.[45] Perhaps even worse, there is evidence that boards may have been complicit in manipulating the disclosure of information to the market.[46] This

38. *See* Avci et al., *Independent Directors*, *supra* note 1.

39. *Id.* The term "in the money" means "an option that possesses intrinsic value" where that value is more favorable compared "to the prevailing market price of the underlying asset." Cory Mitchell, *In the Money (ITM)*, INVESTOPEDIA (Nov. 7, 2020), https://www.investopedia.com/terms/i/inthemoney.asp [https://perma.cc/C48B-XRGA].

40. *See* Lucian A. Bebchuk, Yaniv Grinstein & Urs Peyer, *Lucky CEOs and Lucky Directors*, 65 J. FIN. 2363 (2010) (observing the opportunistically timed stock option grants given to executives and outside directors).

41. *Id.* at 2368.

42. *Id.* at 2364–65.

43. *Id.* at 2364.

44. *See id.* at 2382 ("Although we do not know for certain which lucky grants were produced by backdating, we identify a pool of grants—those awarded at the lowest price of the month—in which a large fraction was likely produced by opportunistic timing.").

45. *Id.* at 2399 ("We show that the grants awarded to independent directors, who are charged with overseeing the company's executives, were themselves affected by opportunistic timing. The timing of director grants was not merely a byproduct of the directors being simultaneously awarded grants with executives or of firms routinely timing grants to all recipients.").

46. *See* S. Burcu Avci, Cindy A. Schipani & H. Nejat Seyhun, *Ending Executive Manipulations of Incentive Compensation*, 42 J. CORP. L. 277, 285–88 (2016) [hereinafter Avci et al., *Executive Manipulations*] (citing Robert M. Daines et al., *Right on Schedule: CEO Option Grants and Opportunism* 2 (Stan. U. & BYU, Working Paper No. 3314, 2015)) ("To reduce the risk of this type of distortion, scholars have suggested that boards and analysts stay aware of the incentives

manipulation occurs by either "spring-loading" (delaying disclosure of positive news until after the option grant date, so that the option will be in the money), or "bullet-dodging" (expediting disclosure of negative news before the option grant date, lowering the strike price of the option).[47] Unfortunately, as these and other studies[48] suggest, not all directors are immune from the temptation to make easy money.

Thus, not only may some outside board members fail at the monitoring function, they may be tempted to engage in illegal behavior themselves. At the same time, simply changing the law to strengthen the board's monitoring function is not without its downsides. For example, as board members monitor more, executives may reveal less to them.[49] That is, improving board monitoring may sow distrust between the board and executives.[50] Any solution aimed at improving board monitoring must therefore also improve the trust between the board and company executives. In other words, a solution must focus on the functions of board members as well as the culture of the company they are monitoring.

II. The Potential of Diversity to Improve Board Functioning

Increasing the diversity of board membership may help address the aforementioned problems created by uninformed, not fully independent, or complicit outside directors on boards who fail to properly monitor executives. Akshaya Kamalnath's research and

established by scheduled options and closely monitor disclosures.").

47. Avci et al., *Executive Manipulations*, *supra* note 46, at 286.

48. *See, e.g.*, Daniel W. Collins, Guojin Gong & Haidan Li, *Corporate Governance and Backdating of Executive Stock Options*, 26 CONTEMP. ACCT. RSCH. 403, 404 (2009) ("[I]nterlocking boards are at least partially responsible for spreading the backdating practice across firms."); *see also* Narayanan et al., *supra* note 35 at 1614–15 (noting that directors may violate federal securities law if they recklessly disregard "red flags" in executives' representations regarding stock option grants).

49. *See* Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 813 (2001) (noting that CEOs may trust outside directors less and thus reveal less information to them); *see also* Bebchuk, *supra* note 27, at 1312 ("Having [independent directors] . . . would interfere with board cohesiveness and undermine the trust between the board and corporate insiders . . . .").

50. Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1310 (2003) ("[C]orporate governance scholars have cautioned that too many independent directors on a board may weaken the trust needed among the CEO and board members . . . ."); *see also* Joan MacLeod Heminway, *Sex, Trust, and Corporate Boards*, 18 HASTINGS WOMEN'S L.J. 173, 174–75 (2007) (commenting on how independent directors may distrust C-Suite executives even if the CEO helped choose them).

the studies on gender diversity discussed below support this proposition.

A. Kamalnath's Proposal

Kamalnath suggests improving the monitoring function of the board through diversity. Proposing a way to achieve that diversity,[51] she hypothesizes that improving the diversity of each board's membership will increase the expression of nonconforming opinions, which will improve the board's monitoring of management.[52]

Turning to the example of gender to evaluate Kamalnath's proposal, there are numerous studies supporting the theory that gender diversity improves firm performance.[53] For example, the National Center for Women and Technology found that companies with women on their boards outperformed companies with all-male boards in a variety of industries.[54] This trend was first observed after the 2008 global economic crash, suggesting that gender diversity might matter even more in a struggling economy and that gender diversity on a board may decrease the company's volatility.[55] Research like this has led Christine Lagarde of the International

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51. Akshaya Kamalnath, *Strengthening Boards through Diversity: A Two-Sided Market that Can Be Effectively Serviced by Intermediaries*, 40 LAW & INEQ. (forthcoming 2022) (manuscript at 1) (on file with Minnesota Journal Law & Inequality).

52. *See id.* (manuscript at 11) ("[D]iverse candidates are likely to come from different social circles and hence will not hesitate to question management."); AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY 15 (2015).

53. *E.g.*, LOIS JOY, NANCY M. CARTER, HARVEY M. WAGNER & SRIRAM NARAYANAN, CATALYST, THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN'S REPRESENTATION ON BOARDS (2007), https://www.catalyst.org/wp-content/uploads/2019/01/The_Bottom_Line_Corporate_Performance_and_Womens_Representation_on_Boards.pdf [perma.cc/EPJ2-WKRT] (finding that Fortune 500 boards with more women enjoy better returns on equity, sales, and invested capital); *see also* FRANCESCA LAGERBERG, GRANT THORNTON, WOMEN IN BUSINESS: THE VALUE OF DIVERSITY 3 (2015), https://www.grantthornton.global/globalassets/wib_value_of_diversity.pdf [perma.cc/M3DM-BP4N] (discovering that in the U.S., boards with both genders represented have an almost 2% greater return on assets than male-only boards); *see also* Tim Smedley, *Diversity at the Top Pays Dividends,* FIN. TIMES (Mar. 7, 2016) (quoting Marcus Noland, Peterson Inst. for Int'l Econ.), https://www.ft.com/content/82a3aee2-d97d-11e5-a72f-1e7744c66818 [perma.cc/JT4Z-QGQW] ("[F]irms with more women can expect a 6 percentage point increase in net profit.").

54. LECIA BARKER, CYNTHIA MANCHA & CATHERINE ASHCRAFT, NAT'L CTR. FOR WOMEN & INFO. TECH., WHAT IS THE IMPACT OF GENDER DIVERSITY ON TECHNOLOGY BUSINESS PERFORMANCE? RESEARCH SUMMARY 3 (2014), https://www.ncwit.org/sites/default/files/resources/impactgenderdiversitytechbusinessperformance_print.pdf [perma.cc/N66C-CYBD] ("Gender-diverse management teams showed superior return on equity, debt/equity ratios, price/equity ratios, and average growth.").

55. *Id.*

Monetary Fund, then the organization's managing director, to comment: "[I]f it had been the Lehman Sisters rather than the Lehman Brothers, the world might well look a lot different today."[56] Additionally, research has suggested that companies with more female board members may be more proactive about corporate social responsibility issues.[57] Indeed, diverse inputs may lead to innovation as more perspectives bring more to the table.[58] Yet increasing board member diversity can be challenging: diverse members may be unsure when to speak up, and they may be less likely to be heard when they do.[59]

B. Difficulties for Women on Boards

The hypothesis that diverse boards may lead to better monitoring is supported by a study conducted by Michael McDonald and James Westphal.[60] This study focused on the diversity of incoming board members and their access to mentoring.[61] The researchers suggest that the board benefits from diversity on the board, but also found that women were not being mentored, which inhibited their advancement.[62] That is, according to the study, newly appointed male board members received informal mentoring

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56. *See* Christine Lagarde, *Ten Years After Lehman – Lessons Learned and Challenges Ahead*, IMFBLOG (Sept. 5, 2018), https://blogs.imf.org/2018/09/05/ten-years-after-lehman-lessons-learned-and-challenges-ahead/ [perma.cc/7VAY-NG4A].

57. Eunjung Hyun, Daegyu Yang, Hojin Jung & Kihoon Hong, *Women on Boards and Corporate Social Responsibility*, SUSTAINABILITY, Apr. 2016, at 1, 2 (2016) (noting that women are more likely to speak up about corporate social responsibility issues for reputational reasons, or because they may be more morally oriented towards social responsibility).

58. *See* Stephen Turban, Dan Wu & Letian Zhang, *Research: When Gender Diversity Makes Firms More Productive*, HARV. BUS. REV. (Feb. 11, 2019), https://hbr.org/2019/02/research-when-gender-diversity-makes-firms-more-productive [perma.cc/2WEJ-K4QC] ("Significant research has shown that diverse teams can develop more innovative ideas.").

59. *See* Michael McDonald & James Westphal, *Access Denied: Low Mentoring of Women and Minority First-Time Directors and Its Negative Effects on Appointments to Additional Boards*, 56 ACAD. MGMT. J. 1169, 1173–74 (2013) (arguing that because women do not receive the mentoring opportunities that men do, they are not as aware of when to speak up or not in the professional setting); *see also* Susan Chira, *The Universal Phenomenon of Men Interrupting Women*, N.Y. TIMES (June 14, 2017), https://www.nytimes.com/2017/06/14/business/women-sexism-work-huffington-kamala-harris.html [perma.cc/QD87-VPSX] (observing that women are often interrupted or decide not to speak when outnumbered by men).

60. *See* McDonald & Westphal, *supra* note 59.

61. *Id.* at 1169.

62. *See id.* (citing Renee B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291 (2009)) ("[D]emographic minority directors may be, at least in some respects, more conscientious in executing their director roles and may be more independent from management.").

about board culture, such as raising issues to management before formal board meetings rather than during meetings,[63] whereas newly appointed women did not. This mentorship inequity in turn resulted in women speaking up more often than men in meetings[64] and consequently, not being selected for other board positions because they were perceived as less savvy in navigating their roles, thus hurting women's future career opportunities.[65]

The findings from McDonald and Westphal's study raise several questions: First, why are women not receiving the informal mentoring that men receive? Second, why are women's careers harmed for speaking up and doing their job? And third, why are men, who typically receive more mentoring, not being mentored to ask more questions and to take their monitoring role more seriously? These concerns demonstrate the need to change the prevailing culture of boards. Board members should be applauded, not penalized, for speaking up, asking questions, and seeking information. A board's culture should allow questions to be openly asked and answered, regardless of who is asking the questions.

When corporate culture punishes women for speaking up, it follows that women may be reluctant to speak up in the future. This reluctance not only hurts the company, as potential company improvements are ignored,[66] but also harms the silenced individuals.[67] Employees who feel their voices are not heard may

63. *Id.* at 1173–76 (finding that mentoring for first-time directors is important for them to win support in the boardroom).

64. *Id.* at 1182 ("[F]irst-time directors who are racial minorities or women receive significantly lower levels of participation process mentoring than first-time directors who are white males.").

65. *See id.* at 1174, 1197 (stating that a first-time director's failure to understand board norms, including the appropriate venues to raise concerns and questions about strategy and policy issues, will ultimately hinder their ability to receive further board appointments).

66. *See* Cindy A. Schipani, Frances J. Milliken & Terry M. Dworkin, *The Impact of Employment Law and Practices on Business and Society: The Significance of Worker Voice*, 19 PA. J. BUS. L. 979, 985 (2017) [hereinafter Schipani et al., *Significance of Worker Voice*] ("An employee is therefore more likely to engage in voice behaviors to the extent that she has a strong desire or sense of obligation to help the organization operate more effectively . . . ."); *see also* Linn Van Dyne & Jeffrey LePine, *Helping and Voice Extra-role Behaviors: Evidence of Construct and Predictive Validity*, 41 ACAD. MGMT. J. 108, 109 (1998) ("[V]oice [is] promotive behavior that emphasizes expression of constructive challenge intended to improve rather than merely criticize.").

67. *See* RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 113 (1999) (noting that employees themselves believe their work would improve if they had a greater voice in the company); *see also* Matthew T. Bodie, Miriam A. Cherry, Marcia L. McCormick & Jintong Tang, *The Law and Policy of People Analytics*, 88 U. COLO. L. REV. 961, 1019 (2017) ("Diverse employees often feel pressure to mute some aspect of their identity to fit into their workplace culture."); *see also* Stephen Befort, *A New*

face more stress because they feel less in control of their work environment.[68] Research has shown that workplace stress has many negative effects. For example, higher stress is correlated with employees skipping work more often.[69] Stress can also lead to physical ailments or aggravate pre-existing health conditions.[70]

Put more positively, speaking up may help at both an individual and an organizational level. When able to speak up and feel heard, employees are more likely to have better attitudes toward their duties.[71] They are also likely to think more highly of the company for which they work.[72] On an organizational level, happier employees may be more committed to improving their company.[73] Although these studies demonstrate the positive effects that speaking up has on employees, board members may also experience these same effects.

Voice for the Workplace: A Proposal for an American Works Councils Act, 69 MO. L. REV. 607, 611–12 (2004) (discussing how employees with stronger voices in the company are more likely to be satisfied, loyal, and stay with the company longer).

68. *See* E.W. Morrison & F.J. Milliken, *Organizational Silence: A Barrier to Change and Development in a Pluralistic World*, 25 ACAD. MGMT. REV. 706, 721 (2000) (stating that employees might use destructive means to establish control if constructive means are unavailable); *see also* Schipani et al., *Significance of Worker Voice*, *supra* note 66, at 986 ("[T]he suppression of voice behaviors and the perceived lack of voice opportunities can create feelings of stress . . . .").

69. Thomas W. Colligan & Eileen M. Higgins, *Workplace Stress: Etiology & Consequences*, 21 J. WORKPLACE BEHAV. HEALTH 89, 93 (2006) ("Workplace stress has been shown to . . . increase absenteeism . . . ."); Schipani et al., *Significance of Worker Voice*, *supra* note 66, at 990–91 (observing the psychological and physical health effects of when employees' voices are not heard in their companies).

70. *See* Colligan & Higgins, *supra* note 69, at 91–92 (describing a typical physical response to chronic stress); Schipani et al., *Significance of Worker Voice*, *supra* note 66 ("Stress-induced medical conditions include bodily pains, dizziness, headaches, heart disease, asthma, and hypertension.").

71. *See* Michael Bashshur & Burak Oc, *When Voice Matters: A Multilevel Review of the Impact of Voice in Organizations*, 41 J. MGMT. 1530, 1535–36 (2015) (noting a positive relationship between employee voice and job satisfaction in multiple studies); *see also* Schipani et al., *Significance of Worker Voice*, *supra* note 66, at 988 ("[E]mployees who perceive that they have input into procedures and outcomes are likely to view such procedures and outcomes as fairer.").

72. *See* Bashshur & Oc, *supra* note 71, at 1536 (observing a positive relationship between employee voice opportunities and trust in authority); *see also* Schipani et al., *Significance of Worker Voice*, *supra* note 66, at 988 ("[Employees] may also feel more like valued members of the organization if they perceive that they are treated fairly at the workplace.").

73. *See* Schipani et al., *Significance of Worker Voice*, *supra* note 66, at 989–90 (observing that when employees have the opportunity to speak, they feel more committed to their companies); *see also* Naz Beheshti, *10 Timely Statistics About the Connection Between Employee Engagement and Wellness*, FORBES (Jan. 16, 2019), https://www.forbes.com/sites/nazbeheshti/2019/01/16/10-timely-statistics-about-the-connection-between-employee-engagement-and-wellness/?sh=5d7bd35a22a0 [perma.cc/EPJ2-WKRT] ("Employees who feel their voice is heard are 4.6 times more likely to feel empowered to perform their best work.").

Not only is it important for board members to raise their voices, but if their voices are diverse (as Kamalnath proposes),[74] boards may be more likely to find innovative solutions to problems. Studies have shown that diversity in multiple characteristics, such as "age, nationality, gender, [and] racial diversity" can all help increase innovation,[75] encouraging the company to consider doing things differently.[76] Therefore, companies with more diverse boards may be less likely to get stuck in practices that do not improve company performance.[77] In addition to making companies more adaptable, board diversity may also increase innovation through widening a company's "knowledge base."[78] Furthermore, a diverse board may help executives understand the market from a more holistic perspective as the board members would represent a broader range of constituents.[79]

III. Potential Solutions to Improve Board Monitoring

This Part discusses Kamalnath's proposal to improve the board's monitoring of management, which includes (1) inviting board members to attend management meetings and (2) empowering third parties to recruit diverse board candidates.[80] It also argues that mentorship and sponsorship programs are important to the advancement of new, diverse employees and board members.

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74. Kamalnath, *supra* note 51 (manuscript at 3) (suggesting that increasing board diversity will improve its monitoring of management).

75. Fabrice Galia & Emmanuel Zenou, Board Composition and Forms of Innovation: Does Diversity Make a Difference? (June 27, 2016) (manuscript at 1, 3) (published in 6 EUR. J. INT'L MGMT. 630 (2012)); *see also* Donald C. Hambrick & Phyllis A. Mason, *Upper Echelons: The Organization as a Reflection of Its Top Managers*, 9 ACAD. MGMT. REV. 193, 202 (1984) ("[N]ovel problem solving is best handled by a heterogenous group in which diversity of opinion, knowledge, and background allows a thorough airing of alternatives.").

76. *See* Christian R. Østergaard, Bram Timmermans & Kari Kristinsson, *Does a Different View Create Something New? The Effect of Employee Diversity on Innovation*, 40 RSCH. POL'Y 500, 500 (2011) ("Employee diversity . . . make[s] the firm more open towards new ideas and more creative.").

77. *See id.*

78. *Id.* (noting that more diversity increases a firm's knowledge base, which in turn creates more opportunities for innovation).

79. *See* Galia & Zenou, *supra* note 75 (manuscript at 2) ("According to many studies . . . diversity provides the firm with several advantages such as greater creativity, better understanding of the market, effective problem solving and enhanced capability.").

80. *See* Kamalnath, *supra* note 51 (manuscript at 6, 15).

A. Kamalnath's Proposals

Kamalnath suggests there are several ways to create more diverse boards that can effectively monitor management.

i. Include Board Members in Executive Meetings

In addition to diversity increasing a board's access to information at a company, Kamalnath discusses other potential solutions to ensure information is readily available to the board.[81] One such example is the so-called "Netflix model."[82] At Netflix, the executives ensure information is accessible to the board by asking directors to regularly listen in on management meetings.[83] Netflix also requires executives to provide the board with detailed memos on the corporation's activities and allows the board to question the executives about these memos.[84] A board with information on the company's activities readily available—and the ability to question it—can create a culture of openness and free thinking between the board and management.

ii. Empower Third Party Intermediaries

Kamalnath also proposes that third party intermediaries may be able to assist in recruiting diverse members to the firm, as well as mediate a shift in culture.[85] She suggests the market for intermediaries is two-sided.[86] On one side, third parties can help companies find diverse board candidates.[87] On the other side, third parties can help potential board members assess a company's

81. *See id.* (manuscript at 6–10) (discussing proposals to outsource the board's functions, empower well informed board members, and follow the "Netflix model").

82. *Id.* (manuscript at 6–7) (describing the "Netflix model" as requiring directors to "regularly attend monthly and quarterly senior management meetings" as observers and to adopt a "memo-based culture[,]" as opposed to a presentation culture).

83. *See id.* (manuscript at 6).

84. *See id.* ("[B]oard communications are 'structured as approximately 30-page online memos in narrative form that not only include links to supporting analysis but also allow open access to all data and information on the company's internal shared systems, including the ability to ask clarifying questions of the subject authors.'" (quoting David F. Larcker & Brian Tayan, *Netflix Approach to Governance: Genuine Transparency with the Board*, (Rock Ctr. for Corp. Governance, Stanford Closer Look Ser. No. CGRP71, 2018)).

85. *See id.* (manuscript at 15–17).

86. *See id.* (manuscript at 14) ("[E]xecutive search firms . . . facilitate transactions between companies and potential executives." (internal citations omitted)).

87. *See id.* (manuscript at 14–15) (suggesting that third parties find and vet diverse candidates for companies to improve their boards or to minimally signal they are socially responsible).

culture.[88] Because they see both sides of the market, Kamalnath notes that third parties can "fill information gaps" between boards and potential candidates.[89] In turn, she observes that the work of third parties shapes "corporate culture generally" through advising how to create a more inclusive corporate culture and attracting a more diverse pool of individuals for board seats.[90]

To further the work of third-party intermediaries, it is necessary for executives and board members to fully invest in the approach. Otherwise, they could easily shop for an outside opinion that blindly praises the board's functioning. This approach could lead to "tick-the-box compliance" instead of critically evaluating the board to improve its effectiveness.[91] Yet when properly utilized, these third parties can help improve a board's diversity and performance.

B. Mentoring, Sponsoring, and Networking

Once more diverse candidates are hired into companies—which, in turn, feed the pipeline for corporate boards—they need proper mentoring to succeed. Gender discrimination has been illegal for some time,[92] so presumably, overt discrimination is not the reason why boards have few women members.[93] Instead,

88. *See id.* (manuscript at 14) ("[D]iverse candidates want to be able to accurately assess boards before joining them.").

89. *Id.* (manuscript at 14–15) (noting that the benefits of using executive search firms outweigh the costs).

90. *Id.* (manuscript at 15–16) ("[Executive search firms] work to manage unconscious bias . . . ." (internal citations omitted)).

91. *Id.* (manuscript at 17) (citing Luca Enriques & Dirk Zerzsche, *Quack Corporate Governance, Round III: Bank Board Regulation Under the New European Capital Requirement Directive*, 16 THEORETICAL INQUIRIES L. 211 (2015)) (observing that the European Union's board evaluation requirements do not lead to meaningful board engagement).

92. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Cindy A. Schipani & Terry M. Dworkin, *The Need for Mentors in Promoting Gender Diverse Leadership in the #MeToo Era*, 87 GEO. WASH. L. REV. 1272, 1275–80 (2019) [hereinafter Schipani & Dworkin, *Mentors in the #MeToo Era*] (detailing Title VII's protections and other laws that prohibit sexual harassment in the workplace).

93. *See* Cindy A. Schipani, Terry M. Dworkin, Angel Kwolek-Folland & Virginia G. Maurer, *Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking*, 16 DUKE J. GENDER L. & POL'Y 89, 97–98 (2009) (internal citations omitted) ("The more usual forms of discrimination, however, are the subtle but clear cultural biases and gender stereotypes in corporate decision-making, behavior, and job assignment."); *see also* Karen S. Lyness & Donna E. Thompson, *Above the Glass Ceiling? A Comparison of Matched Samples of Female and Male Executives*, 82 J. APPLIED PSYCHOL. 359, 372 (1997) ("[W]omen are more likely to be found in jobs that are not comparable to men's jobs in status, power, or advancement potential."). Subtle discrimination has persisted for decades. *See* O.C. Brenner, Joseph Tomkiewicz & Virginia Ellen Schein, *The Relationship Between Sex*

unconscious biases may be at play as humans tend to value people who are similar to them.[94] Because men are more often the leaders of a company, this norm may result in women often being considered outsiders by company leadership.[95] Mentoring programs may help counter these unconscious biases.[96]

Furthermore, mentoring provides many benefits that can turn women into insiders. Mentoring, for instance, exposes "both parties to the values, beliefs, and assumptions of the other."[97] Mentoring may also further the careers of those mentored.[98] It helps mentees adapt more quickly to the corporate culture and introduces them to influential figures within the corporation who could help advance their careers.[99] Furthermore, employees with informal mentors are

Role Stereotypes and Requisite Management Characteristics Revisited, 32 ACAD. MGMT. J. 662, 668 (1989) (noting that although there is an increase in women in lower and middle management positions, the attitudes of male managers have not changed and impede women from obtaining positions in upper management); *see also* Belle Rose Ragins & Eric Sundstrom, *Gender and Power in Organizations: A Longitudinal Perspective*, 105 PSYCH. BULL. 51, 63 (1989) (noting gender stereotyping is one obstacle to female success in the corporate world).

94. *See* Georgia T. Chao & Henry Moon, *The Cultural Mosaic: A Metatheory for Understanding the Complexity of Culture*, 90 J. APPLIED PSYCHOL. 1128, 1135 (2005) (describing research on why people prefer to interact with those who are similar to them); *see also* DONN BYRNE, THE ATTRACTION PARADIGM 211 (1971) (discussing the similarity-attraction theory, which claims humans gravitate to those with whom we are similar); Terry M. Dworkin, Cindy A. Schipani, Frances J. Milliken & Madeline K. Kneeland, *Assessing the Progress of Women in Corporate America: The More Things Change, the More They Stay the Same*, 55 AM. BUS. L.J. 721, 725 (2018) [hereinafter Dworkin et al., *Progress of Women in Corporate America*] ("Social-identity theory . . . posits that individuals attach differing value to various social categories and assign more value to those categories with which they personally identify.").

95. *See* Dworkin et al., *Progress of Women in Corporate America*, *supra* note 94, at 755 (discussing how the perception of women as outsiders makes mentoring programs important in elevating women up the corporate ladder).

96. *See* Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1288 (arguing that mentoring women may help connect them to career opportunities they may not otherwise have if male management subconsciously "views them as less capable"); *see also* Terry M. Dworkin, Aarti Ramaswami & Cindy A. Schipani, *The Role of Networks, Mentors, and the Law in Overcoming Barriers to Organizational Leadership for Women with Children*, 20 MICH. J. GENDER & L. 83, 115–16 (2013) (observing that mentoring may improve the networks of women with dependents).

97. Dworkin et al., *Progress of Women in Corporate America*, *supra* note 94, at 755 (continuing on to suggest mentoring will help women "be seen as part of the same club as men").

98. *See* Tammy D. Allen, Lillian T. Eby, Mark L. Poteet & Elizabeth Lentz, *Career Benefits Associated with Mentoring for Protégés: A Meta-analysis*, 89 J. APPLIED PSYCHOL. 127 (2004); *see also* Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1287 (stating that mentors support the career development of their mentees).

99. *See* Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1287 (citing Allen et al., *supra* note 98, at 128) (noting how mentoring teaches mentees about how an organization functions and helps communicate mentees' value to

more likely to be noticed within a company, as mentors can draw the attention of decision makers to their mentees.[100]

Not only does mentoring help boost a mentee's career, it can also improve their mental health.[101] A mentor can provide their mentee with emotional support during stressful moments at work.[102] Mentees may also turn to their mentors for advice when feeling stuck on a project.[103] These professional relationships may become personal friendships as well.[104] On a macro-level, mentorship helps the mentee feel connected to and accepted by the corporation and that the company believes the mentee is worth its investment.[105] Mentors also receive positive psychological benefits from mentorship, such as feeling appreciated by their coworkers.[106]

Sponsorship programs (whether formal or informal) are another tool that may help increase the diversity of the workforce—and thus future diversity on boards. Sponsorship differs from mentorship because a mentor shares their institutional knowledge with the mentee, while a sponsor uses their influence to help the protege rise within a corporation.[107] The corporate community often prefers mentoring over sponsoring.[108] Some companies have stopped their formal sponsorship programs because executives felt uncomfortable advocating for junior colleagues whom they felt were unprepared for promotion.[109] Indeed, sponsorship creates higher risks for executives as it asks them to put their reputation on the

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decision-makers).

100. *See id.*

101. *See id.* at 1289 ("Studies have indicated that informal relationships tend to be more beneficial both psychosocially and for career development . . . .").

102. *See id.* at 1287 (quoting Allen et al., *supra* note 98, at 128) (stating that a mentor's psychosocial function includes "counseling[] and friendship").

103. *See id.*

104. *Id.* at 1287 (quoting Allen et al., *supra* note 98, at 128).

105. *See id.* at 1288 (stating that mentoring will help women feel less like outsiders in organizations); *see also* Allen et al., *supra* note 98, at 128 (stating that mentoring includes "psychosocial functions," one of which is "acceptance").

106. Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1287 (quoting Kathy E. Kram, *Phases of the Mentor Relationship*, 26 ACAD. MGMT. J. 608, 613–14 (1983)) ("[M]entors, in turn, are benefitted through 'recognition and respect from peers and superiors' for developing the talent.").

107. Herminia Ibarra, *A Lack of Sponsorship is Keeping Women from Advancing into Leadership*, HARV. BUS. REV. (Aug. 19, 2019), https://hbr.org/2019/08/a-lack-of-sponsorship-is-keeping-women-from-advancing-into-leadership [https://perma.cc/T6YG-MRQB] (describing the difference between a sponsor and a mentor).

108. *See id.* ("Typically, [organizations] abandon sponsorship because . . . you cannot mandate that [senior executives] spend their personal capital advocating for people they don't know well . . . .").

109. *Id.*

line for junior colleagues.[110] On the other hand, sponsorship provides higher rewards for junior colleagues than mentorship does.[111] Thus, companies should provide opportunities that facilitate informal sponsorship as well as mentorship programs.

In addition to mentorship and sponsorship, professional networking also helps women feel more accepted at work.[112] Women are often not given control over the most valuable client projects.[113] This exclusion could be because management sees women as less competent than their male counterparts or holds women to a higher standard when proving their competence.[114] Networking may help women bring valuable clients to the firm and thus gain ownership of important projects.[115] Networking may also help debunk stereotypes of women being too burdened by marital or familial life to fully participate in the organization.[116] Furthermore, studies have shown that networking can result in a better salary, improved career development, and even better job performance evaluations.[117]

In their above-mentioned study, McDonald and Westphal concluded that women were not receiving the same mentoring opportunities that men were, and thus, women were offered fewer

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110. *Id.*

111. *See id.* ("[H]aving a mentor increased the likelihood of promotion two years later for men, but had no effect on promotion for women.").

112. Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1292–94 (observing the ways networking can benefit women in the workplace); *see also* Kristen Hicks, *Why Professional Networking Groups for Women Remain Valuable*, FAST COMPANY (Jan. 7, 2020), https://www.fastcompany.com/90448654/the-benefits-of-womens-networking-groups [https://perma.cc/8ACP-WUVN] ("[I]nner [female] networks help not just with finding opportunities, but also by exchanging advice specific to the unique challenges women face.").

113. Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1287–88 (citing Paula Santonocito, *Women Pipeline*, 27 EMP. ALERT 3, 3 (2010)).

114. DEBORAH L. RHODE, ABA COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 6 (2001) (stating that female attorneys are not presumed to be competent, as men are, and citing studies where a majority of women feel they are held to a higher standard); *see* Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1288 (stating that gender stereotypes can lead to women not being assigned to the company's most valuable clients).

115. Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1287–88 (citing Santonocito, *supra* note 113, at 3) (commenting that not getting more "valuable clients" is one obstacle women face in climbing the corporate ladder).

116. Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1288; *see also* Dworkin et al., *Progress of Women in Corporate America*, *supra* note 94.

117. Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1289 (citing Hans-Georg Wolff & Klaus Moser, *Effects of Networking on Career Success: A Longitudinal Study*, 94 J. APPLIED PSYCHOL. 196, 196–97, 202 (2009)) (observing the benefits networking can have on one's professional life).

opportunities to serve on additional boards.[118] Mentoring opportunities may help more women attain board positions, with the direct effect of creating more gender-diverse boards.[119] And, as Kamalnath argues, greater board diversity may, in turn, help improve the board's monitoring of management.[120]

C. Integrity

It is also critically important to look for individuals of high integrity when appointing C-Suite executives as well as board members, and to have internal controls in place so that good people are not tempted to do bad things. As previously mentioned, we have seen executives perpetrate elaborate and not-so-elaborate schemes to hide fraud.[121] And in some cases, we have even seen likely complicity between management and the directors.[122] Integrity in both the C-Suite and the boardroom is thus critical.

D. Applying Equal Standards Across the Board

Finally, in addition to increasing board diversity, it is also important to hold all board members to the same standards. This application of equal standards is not necessarily the case today. For example, during the ongoing Black Lives Matter movement, reporters have observed that, following allegations of gaslighting, emotional abuse, or underpaying or ignoring the opinions of people of color, female business founders were stepping down from their leadership positions more quickly than their male counterparts.[123]

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118. McDonald & Westphal, *supra* note 59, at 1174.

119. *See id.* at 1190 ("[D]isadvantages in mentoring might contribute to the difficulties that women and minorities have in attaining other kinds of high-influence positions in the corporate world.").

120. Kamalnath, *supra* note 51.

121. *See, e.g.*, Annett, *supra* note 36 (describing how Comverse Technology, Inc.'s executives tricked the board into approving stock grants for fictitious employees and how "[t]he Enron scandal had accounting vehicles named after 'Star Wars' characters").

122. *See, e.g.*, Avci et al., *Executive Manipulations*, *supra* note 46, at 285–88 (citing Robert M. Daines, Grant R. McQueen & Robert J. Schonlau, *Right on Schedule: CEO Option Grants and Opportunism*, 53 J. FIN. & QUANTITATIVE ANALYSIS 1025, 1055 (2018)).

123. Leah Chernikoff, *Are All These Female-Founder Takedowns Fair?*, THE HELM (May 14, 2020), https://thehelm.co/female-founder-takedowns-outdoor-voices-away-the-wing/ [perma.cc/JH9J-KWYV] (observing that three female business founders stepped down after allegations of mismanagement, while the press was slow to report more incriminating behavior by male founders); *see also* Katie Robertson, *Refinery29 Editor Resigns After Former Employees Describe 'Toxic Culture'*, N.Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/06/08/business/media/refinery-29-christene-barberich.html [perma.cc/4TT6-N6VT] (stating that Refinery29 co-founder Christene Barberich resigned after allegations of racial

After employees called out companies for creating toxic environments for people of color, the female founders of The Wing,[124] Man Repeller,[125] and Refinery29[126] (to name a few) all stepped down. These quick departures starkly contrast with how long it took the male founders of Uber (Travis Kalanick) and WeWork (Adam Neumann) to step down.[127] Kalanick allegedly created a sexist work culture at Uber, which involved "sexual harassment, discrimination and retaliation."[128] Similarly, Neumann allegedly smoked marijuana around a pregnant WeWork employee, who was demoted after both her pregnancies.[129] It took years for Kalanick and Neumann's alleged discriminatory behaviors to catch the public's eye.[130] Top management, whether male or female, should be held accountable by their board of directors. They should not exist in responsibility-free vacuums. Instead, the business community should ensure that both male and female founders are held to the same standards.

Conclusion

We rely on outside directors to play an important monitoring role in corporate law.[131] Yet their presence on the board is not a

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discrimination).

124. Amanda Hess, *The Wing Is a Woman's Utopia, Unless You Work There*, N.Y. TIMES (Mar. 17, 2020), https://www.nytimes.com/2020/03/17/magazine/the-wing.html [perma.cc/MU8Z-NV5T] ("Members and their guests could be casually racist.").

125. Frida Garza, *With Its Founder Gone, Can Man Repeller Ever Be Relevant Again?*, THE GUARDIAN (June 13, 2020), https://www.theguardian.com/lifeandstyle/2020/jun/13/man-repeller-leandra-medine-cohen-fashion-relevance [perma.cc/HPL6-CRJM] ("[Founder Leandra Medine Cohen] was responding to claims that the fashion blog . . . had failed its former staffers of color.").

126. Robertson, *supra* note 123.

127. *See* Chernikoff, *supra* note 123 ("[E]gregious stories of [their] misbehavior . . . were so slow to come out in the press, and far more incriminating.").

128. Randall Stross, *Why Companies Like Uber Get Away with Bad Behavior*, N.Y. TIMES (June 13, 2017), https://www.nytimes.com/2017/06/13/opinion/travis-kalanick-uber-bad-behavior.html [perma.cc/CH68-TJQH]; *see also* Chernikoff, *supra* note 121.

129. Chernikoff, *supra* note 123; Taylor Telford, *WeWork and Ex-CEO Neumann Accused of Pregnancy Discrimination by Former Employee*, WASH. POST (Nov. 1, 2019), https://www.washingtonpost.com/business/2019/11/01/wework-ex-ceo-neumann-accused-pregnancy-discrimination-by-former-employee/ [perma.cc/9PNH-FPCH].

130. Chernikoff, *supra* note 123.

131. Prentice & Spence, *supra* note 26, at 1864 (noting the board's role in monitoring management and that director independence is a best practice for corporate governance); *see* Avci et al., *Independent Directors*, *supra* note 1 (noting that "[b]oards of directors have always been a traditional element of American corporate governance").

panacea.[132] Due to their status as outsiders, independent board members lack the information necessary to fully understand the company's operations.[133] Furthermore, outside directors often are not completely independent from management: they move in similar social and professional networks, sometimes developing personal friendships.[134] Without complete information and full independence, it is not surprising that the monitoring function of the board sometimes fails.[135] Kamalnath proposes two solutions to this dilemma. First, she suggests that increasing the diversity of board members will help improve the board's monitoring of management.[136] Second, she recommends both companies and potential board candidates interact with third party intermediaries to help reduce information gaps between these two sides of the labor market.[137]

Kamalnath's proposals are insightful and important steps in the right direction. In addition, to maximize the benefits of board diversity, corporations must ensure diverse voices are heard and valued. Corporations can do this through investing in mentorship and sponsorship programs that promote diversity, as well as increasing networking opportunities.[138] Finally, the board should appoint members of high integrity and hold all executives to the same standards of behavior. With these changes, future boards may be better able to prevent—or at least better positioned to take corrective action against—another major corporate scandal.

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132. *See* Cox, *supra* note 25, at 1082–83 (arguing that because of their lack of involvement in the company's regular activities, independent directors often rely on management for information); *see also* Khanna et al., *supra* note 34, at 1242 (noting that directors may run in the same social circles as the CEO and thus not be fully independent).

133. *See* Cox, *supra* note 25, at 1082–83.

134. *See* Khanna et al., *supra* note 34, at 1242–43 (explaining that board members can be connected to CEOs through "common network ties").

135. Annett, *supra* note 36 (recalling the board approval of stock options granted to fictitious employees at Comverse Technology); *see* Avci et al., *Elusive Monitoring Function*, *supra* note 15, at 285 ("[N]ot only may independent directors be ill-equipped to engage in serious oversight of the activities of management, they may also be easily co-opted when they have the opportunity to personally participate in self-interested transactions to the detriment of shareholders.").

136. Kamalnath, *supra* note 51 (manuscript at 1).

137. *Id.* (manuscript at 15).

138. Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1287 ("One tool that is crucial for women in dealing with the issues of voice and climbing the corporate ladder is access to networks and mentors."); *see also* Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV., July–Aug. 2016, at 52 (observing that mentoring programs increase the diversity of a company's management).

The Shackled Sexual Assault Victim: Trauma, Resistance, and Criminal Justice Violations of an Indigenous Woman†

Melanie Randall††

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†. Thanks to Sheila Wahsquonaikezhik for her sustained and thoughtful attention to this text, and for her many important, challenging comments and political insights about this story of Angela Cardinal, my analysis of it, and her views on its broader implications and meaning for Indigenous women and peoples. Thanks to Dr. Philip Hebert and Dr. Victoria Lee for taking the time to provide very helpful critical feedback on this paper (i.e. for the latter's "scorched earth" approach to editing). Thanks also to Emma Owens, J.D., Victoria McCorkindale, J.D., Victoria Ostrovsky, and in particular, Claire Sweeny, for their comments and research assistance on this text while they were law students at Western. Finally, thanks, as always, to Dr. Lori Haskell for her insights and collaboration. Thanks also to the *JLI* editors for their careful attention to the manuscript.

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Introduction

> *THE ORDINARY RESPONSE TO ATROCITIES is to banish them from consciousness. Certain violations of the social compact are too terrible to utter aloud: this is the meaning of the word unspeakable.*
>
> *Atrocities, however, refuse to be buried. Equally as powerful as the desire to deny atrocities is the conviction that denial does not work. . . . Remembering and telling the truth about terrible events are prerequisites both for the restoration of the social order and for the healing of individual victims.*[1]

In a Canadian courtroom in 2015, during a preliminary inquiry for a sexual assault trial, the resources of the criminal justice system were used to forcibly confine and systematically violate the rights of a woman who was not the accused perpetrator

1. JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE - FROM DOMESTIC ABUSE TO POLITICAL TERROR, at 1 (1992).

of the crime but—astonishingly—the victim.[2] Instead of being supported throughout the grueling process of cooperating with the legal system about the violent sexual assault she had endured, she was shackled.[3] Instead of getting the help she needed in order to cope with testifying about the trauma of the vicious attack she had suffered, she was literally imprisoned throughout the proceedings.[4] How could this have happened in a country holding itself up as a champion of human rights and equality? Even posing this question reveals a perspective outside of Indigenous experience.[5] From the viewpoint of Indigenous women, the callous disregard and degradations shown to them by the criminal justice system are not "astonishing" but, unfortunately, routine.

It is no coincidence that the woman who suffered this degradation was an Indigenous woman.[6] It is no coincidence that she was homeless. It is no coincidence that her relatively short life had been marked by the multiple challenges of drug addictions and poverty. These are the very conditions of socially produced marginalization and disempowerment in which colonialism and the genocidal disregard for Indigenous peoples have been writ large in shaping Canada's history and present.[7] An appreciation of these very same conditions should have made those in positions of power in that courtroom—particularly the Judge and the Crown prosecuting the case—acutely sensitive to her circumstances and needs. They should have been able to utilize their considerable power, skills, and abilities to marshal the many resources at their disposal to assist her. This is not what happened. Instead, they chose to exercise their legal authority to confine her and strip her of her basic human rights and liberties, all while she was performing

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2. *See* Dean Bennett, *Alberta Launches Investigation After Sexual Assault Victim Jailed During Hearing*, GLOBAL NEWS (June 5, 2017), https://globalnews.ca/news/3503303/alberta-launches-investigation-after-sexual-assault-victim-held-in-remand-during-hearing/ [perma.cc/YGG6-T72A].

3. *Id.*

4. *Id.*

5. As Sheila Wahsquonaikezhik (patiently) pointed out to me, the degradation and dehumanization of Angela Cardinal in a Canadian courtroom is not "astonishing." As she wrote to me, "it is not 'astonishing' that resources are used to systemically violate the rights of a woman, especially if she is an indigenous woman."

6. In fact, although the intersectionality of the multiple aspects of her identity and the difficult circumstances of her life were all no doubt relevant to the way she was mistreated, it is her status as an Indigenous woman that seems to have been determinative and defining.

7. I refer to Angela Cardinal in the past tense because she was tragically killed in an unrelated incident less than a year after the preliminary inquiry at which she was subjected to the appalling rights violations which are the subject of this analysis. R. v. Blanchard, 2016 ABQB 706, para. 2 (Can.).

her civic duty by giving evidence in a legal proceeding about traumatic harms she had suffered.[8] She was the victim of the crime, not the offender.[9]

Canada prides itself as a nation defined by its commitment to human rights protections and equality rights guarantees.[10] Canada has a robust legal rights regime of constitutional, Charter,[11] and human rights law[12] that guarantees any sexual assault complainant, in theory at least, equal protection under the law. There is even a Canadian Victims' Bill of Rights[13] adding, in theory at least, an additional layer of legal protections for victims of crime. And there is a great deal of rhetoric from the Canadian government and the Supreme Court of Canada about "reconciliation" with Indigenous peoples, the original occupants of the country.[14] As well, the government has made numerous pledges to address the causes of violence against Indigenous women and the multiple inequalities they face.[15] These promises remain largely abstract, more honored in their breach than in their observance.

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8. Bennett, *supra* note 2.

9. *Id.*

10. *See, e.g.*, Dep't of Just., *Rights and Freedoms in Canada*, GOV'T OF CAN. (Mar. 10, 2017), https://www.justice.gc.ca/eng/rp-pr/cp-pm/just/06.html [perma.cc/4PBV-3ADU].

11. INST. FOR THE ADVANCEMENT OF ABORIGINAL WOMEN (IAAW) & THE WOMEN'S LEGAL EDUC. & ACTION FUND (LEAF), SUBMISSION, INDEPENDENT REVIEW OF CIRCUMSTANCES SURROUNDING THE TREATMENT OF "ANGELA CARDINAL" IN R. V. BLANCHARD 2 (Oct. 15, 2017), www.leaf.ca/wp-content/uploads/2017/11/Cardinal-Inquiry-IAAW-and-LEAF-Final-Submission-Oct-15.pdf [perma.cc/FP8A-Q49J] [hereinafter IAAW/LEAF Submission].

12. Canadian Human Rights Act, R.S.C. 1985, c H-6 s. 2.

13. Canadian Victims Bill of Rights, S.C. 2015, c 13 s. 2.

14. *See, e.g.*, Calder v. British Columbia, [1973] S.C.R. 313 (recognizing Aboriginal title); Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (outlining the test for "proof" of Aboriginal title); Tsilhqot'in Nation v. British Columbia, [2014] 2 S.C.R. 257 (clarifying the Court's view on the "requirements" for Aboriginal title); Mikisew Cree First Nation v. Canada, [2018] 2 S.C.R. 765 (addressing the Duty to Consult); R. v. Sparrow, [1990] 1 S.C.R. 1075 (recognizing and affirming that the rights of Indigenous peoples predate the beginning of Canada as a nation); Ktunaxa Nation v. British Columbia, [2017] 2 S.C.R. 386 (affirming the duty to consult). Of course, the Supreme Court of Canada's right to rule on these issues, and its appropriateness as a forum for establishing or recognizing Indigenous rights in the first place, is contested, though this is not questioned or interrogated by the Court itself.

15. *See, e.g.*, WOMEN & GENDER EQUALITY CANADA, BACKGROUNDER - NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS (June 24, 2019), www.canada.ca/en/status-women/news/2019/06/backgrounder--national-inquiry-into-missing-and-murdered-indigenous-women-and-girls.html [perma.cc/3US9-DLEV] ("Eliminating violence against Indigenous women and girls is an urgent issue in Canada. The Government of Canada is committed to addressing the systemic causes of violence and increasing the safety of Indigenous women, girls and LGBTQ and Two Spirit people.").

Was it callous indifference, or was it willful blindness over many days, on the part of the legal players in that courtroom? Regardless, the record is clear on what happened to the woman who chose to be a "cooperative"[16] victim-witness in this case. This record is a devastating indictment of the legal system as a whole. It is this legal story, and especially its broader context and significance, that I recount and analyze here.

I organize the analysis of what happened to this woman at the preliminary inquiry around themes which I describe as layers of violation, layers which are intersecting and compounding. These themes highlight distinct dimensions of the wrongful conduct, stereotypes, and ignorance underpinning the inhumane treatment of Angela Cardinal. The themes, or layers of violation, revolve around the violation of Angela Cardinal's most fundamental rights and liberties, her retraumatization at the hands of the criminal justice system, and the failure to hold any of those responsible for this to account.

I also examine the story, and its many dimensions, through three lenses. First, the story of the shackling of Angela Cardinal at the preliminary inquiry and her subsequent incarceration has to be situated in wider context. As the Institute for the Advancement of Aboriginal Women (IAAW) and the Women's Legal Education and Action Fund (LEAF) so effectively emphasized:

> [T]he social context of racism, colonialism, and sexism produce conditions of systemic and targeted forms of violence and abuse against Indigenous women. This context also increases Indigenous people's overrepresentation and unequal treatment in the criminal justice system, with particular implications for Indigenous women.[17]

It is only in the larger social, political, and economic contexts of both pervasive gender inequality and colonial forms of inequality shaping the lives of Indigenous women that the significance of the

16. I use this term critically as it denotes assumptions about "ideal victims," and expectations that women who have endured sexual violence, or domestic violence, should report to the police and then follow through with all the demands and requirements of the criminal justice system, even when these demands are onerous, unreasonable, trauma-inducing and can even, in some cases, imperil a woman's safety. For analyses of these dynamics, *see* Melanie Randall, *Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming*, 22 C.J.W.L. 397 (2010); Melanie Randall, *Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law*, 23 ST. LOUIS. U. PUB. L. REV. 107 (2004).

17. IAAW/LEAF Submission, *supra* note 11, at 1–2.

story of Angela Cardinal's abuse at the hands of the Canadian legal system can be fully grasped. The documentation of her story and its wider significance can hopefully contribute to the ongoing conversations, actions, and institutional changes needed to address and remedy the structural harms and inequalities Indigenous women in Canada systematically continue to suffer.

Second, I elucidate the narrative in terms of what it tells us about how the criminal justice system's response to sexual assault victims—and in particular to women not seen as "ideal victims"18—can go very badly wrong; the themes are expressed here in the worst possible way. The epidemic levels of sexual violence marking the lives of Indigenous women in Canada have been well documented, as have the state failures in delivering equal protection of the law.[19] Too often, Indigenous women are viewed with such a degree of disdain and contempt that they end up being treated, as Sherene Razack has powerfully expressed it, as if disposable.[20]

The third lens through which I explore this story is through that of Angela Cardinal's amazing resistance in the face of the degrading and dehumanizing treatment to which she was subjected by the Canadian criminal justice system. As one scholar of resistance explains:

> stories of women's successful resistance have both individual and social impact; they challenge beliefs about women's vulnerability and men's physical superiority, about women's inherent "rapeability," and about male protection or firearms as women's best and only options for safety. In doing so, they not only remind individual women of their own capacity for resistance, they deconstruct social and cultural assumptions about sex, gender and violence.[21]

This theme of women's resistance to sexual violence is an important corrective to dominant and totalizing narratives of

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18. *See* discussion *supra* note 16.

19. *See* Shana Conroy, *Police-Reported Violence Against Girls and Young Women in Canada, 2017*, STAT. CAN. (Dec. 17, 2018), www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54981-eng.htm [perma.cc/CQW5-WS39]; *see also* Shana Conroy & Adam Cotter, *Self-Reported Sexual Assault in Canada, 2014*, STAT. CAN. (July 11, 2017), www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm [perma.cc/42GV-SVC3].

20. The idea of "disposability" is discussed at length by Sherene H. Razack in her article, *Gendering Disposability* 28 C.J.W.L. 285 (2016) [hereinafter Razack, *Gendering Disposability*], in which she analyses the story of the searing dehumanization of Cindy Gladue in the trial of first instance.

21. Jill Cermele, *Telling Our Stories: The Importance of Women's Narratives of Resistance*, 16 VIOLENCE AGAINST WOMEN 1162, 1166 (2010).

victimization which obliterate their agency—an agency[22] which often survives even in the face of the most extreme forms of violence and abuse. Indigenous women, often individually and as a collectivity (diverse as this collectivity is), have displayed fierce agency and resistance in response to the historical harms and contemporary wrongs they have endured and continue to endure.[23]

Angela Cardinal's resistance was, in the words of Sheila Wahsquonaikezhik, "a willful, determined resistance, spirited and dynamic, directive and powerful."[24] Drawing attention to Angela Cardinal's resistance highlights her demand for respect, her consistent centering of her own dignity, and her refusal to accept the dehumanizing treatment meted out to her. Moreover, it is a lens that allows her personality to shine through, providing us with a fuller sense of who she was as a person, her psychological astuteness, intelligence, and her humanity.

I. Widening the Lens: State Failures and Violence Against Indigenous Peoples and Women in Canada, the US, Australia, and New Zealand

In almost every category of social harm or inequality, Indigenous women in Canada are the most affected and over-

22. For a range of discussions of the ideas of "agency," "burdened agency," "partial agency," and "constrained autonomy," see generally, for example, MARTHA A. FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004); RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF (Catriona Mackenzie & Natalie Stoljar eds., 2000); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 351 (1995); Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 832 (1999); Caroline Joan Picart, *Rhetorically Reconfiguring Victimhood and Agency: The Violence Against Women Act's Civil Rights Clause*, 6 RHETORIC & PUB. AFF. 97 (2003); Shelley Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 IND. L.J. 1409 (2011); Diana T. Meyers, *Two Victim Paradigms and the Problem of 'Impure' Victims*, 2 HUMAN.: AN INT'L J. OF HUM. RTS., HUMANITARIANISM, & DEV. 255 (2011).

23. *See, e.g.*, litigation undertaken by Sharon D. McIvor, McIvor v. Canada, 2009 B.C.C.A. 153 (Can.). For just one organizational example among many, see the work and many projects of the Native Women's Association of Canada, https://www.nwac.ca/ [perma.cc/P2KW-XKZK]. *See also* Rep. of the Hum. Rts. Comm. at 166, *Views Adopted by the Human Rights Committee Under Article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, Concerning Communication No. R.6/24*, U.N. Doc. A/36/40, annex XVII (1977); Hum. Rts. Comm.,Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2020/2010, U.N. Doc. CCPR/C/124/D/2020/2010 (2019); Samantha Nock, *Anchored by Love, Fuelled by Anger: Indigenous Women's Resistance*, RABBLE (Aug. 20, 2014), https://rabble.ca/blogs/bloggers/samantha-nock/2014/08/anchored-love-fuelled-anger-indigenous-womens-resistance [perma.cc/P2C4-RH9M].

24. Personal correspondence, on file with author.

represented. This is true for the incidence and rates of poverty,[25] homelessness,[26] incarceration,[27] HIV infection,[28] sex trafficking,[29] and violent victimization, including domestic violence and sexual assault.[30]

The crisis of Missing and Murdered Indigenous and Aboriginal women is a North-America-wide-phenomenon that has been extensively documented.[31] After much public pressure, as well as in response to Call to Action #41 of the Truth and Reconciliation Commission, a national inquiry into the crisis was struck by the

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25. *See* Jordan Press, *Nearly 50 per Cent of Indigenous Children in Canada Live in Poverty, Study Says*, THE GLOBE & MAIL (July 9, 2019), www.theglobeandmail.com/canada/article-half-of-indigenous-children-live-in-poverty-highest-rate-of-child/ [perma.cc/9SV7-3428].

26. Nicholas Keung, *Report Says Indigenous People in Toronto Are Far More Likely to Be Homeless, Unemployed and Hungry*, TORONTO STAR (Feb. 28, 2018), www.thestar.com/news/gta/2018/02/28/report-says-indigenous-people-in-toronto-are-far-more-likely-to-be-homeless-unemployed-and-hungry.html [perma.cc/5WU9-GQQL].

27. *See* Dep't of Just., *Just Facts: Indigenous Overrepresentation in the Criminal Justice System*, GOV'T OF CAN. (May 2019), www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2019/may01.html [perma.cc/J7AC-C4XX].

28. Pub. Health Agency of Can., *Chapter 8: HIV/AIDS Epi Updates, July 2010 – HIV/AIDS Among Aboriginal People in Canada*, GOV'T OF CAN. (July 2010), www.canada.ca/en/public-health/services/hiv-aids/publications/epi-updates/chapter-8-hiv-aids-among-aboriginal-people-canada.html [perma.cc/ZVG5-7FPY].

29. *Local Safety Audit Guide: To Prevent Trafficking in Persons and Related Exploitation* at 6, PUB. SAFETY CAN. (2013), https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/lcl-sfty-dtgd/index-en.aspx [perma.cc/4XC8-244H].

30. Dep't of Just., *supra* note 27.

31. NAT'L INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, RECLAIMING POWER AND PLACE: THE FINAL REPORT OF THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS (2019), www.mmiwg-ffada.ca/final-report/ [perma.cc/P9LN-NAWW] [hereinafter MMIW Final Report]; The Inter-Am. Comm'n H.R., *Missing and Murdered Indigenous Women in British Columbia, Canada*, Doc. No. 30/14, OEA/Ser.L/V/II. (Dec. 21, 2014), www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf [perma.cc/V6FT-NK58] [hereinafter IACHR Report]; Rep. of the Special Comm. on Violence Against Indigenous Women, *Invisible Women: A Call to Action, A Report on Missing and Murdered Indigenous Women in Canada*, HOUSE OF COMMONS CHAMBRE DES COMMUNES CAN. (2014), www.ourcommons.ca/Content/Committee/412/IWFA/Reports/RP6469851/IWFArp01/IWFArp01-e.pdf [perma.cc/5D8Y-9RW4]; HUM. RTS. WATCH, THOSE WHO TAKE US AWAY: ABUSIVE POLICING AND FAILURES IN PROTECTION OF INDIGENOUS WOMEN AND GIRLS IN NORTHERN BRITISH COLUMBIA CANADA (2013), www.hrw.org/sites/default/files/reports/canada0213webwcover_0.pdf [perma.cc/X79N-TXXD]; AMNESTY INT'L, CANADA: STOLEN SISTERS: A HUMAN RIGHTS RESPONSE TO DISCRIMINATION AND VIOLENCE AGAINST INDIGENOUS WOMEN IN CANADA (2004), www.amnesty.ca/sites/amnesty/files/amr200032004enstolensisters.pdf [perma.cc/F7WC-QUJA]; Elaine Craig, *Person(s) of Interest and Missing Women: Legal Abandonment in the Downtown Eastside*, 60 MCGILL L.J. 1 (2014) [hereinafter Craig, *Person(s) of Interest and Missing Women*].

federal government of Canada in 2016.[32] After extensive and lengthy hearings, a substantial final report was tendered, documenting and analyzing the many dimensions of the problem and issuing a comprehensive and wide-ranging set of recommendations.[33]

The findings and analysis of the MMIW Inquiry indicate that:

> violence against Indigenous women and girls is a crisis centuries in the making. The process of colonization has, in fact, created the conditions for the ongoing crisis of missing and murdered Indigenous women, girls, and 2SLGBTQQIA[34] people that we are confronting today.[35]

According to Statistics Canada, indigenous women experience violent victimization at a rate 2.7 times that of non-Indigenous women.[36] Indigenous women are severely over-represented amongst murder victims.[37] Indigenous women are sexually assaulted at three times the rate of non-Indigenous women and suffer domestic violence at triple the rate.[38]

Indigenous women in Canada, as in other nations, are disproportionately killed, often in the context of sexual violence, as occurred in the harrowing case of Cindy Gladue, an Indigenous woman who was left to bleed to death in a bathtub after suffering lacerations to her vaginal wall after Bradley Barton violently penetrated her with his hand or an object (this aspect of the case was unproven at trial).[39] As Sherene Razack has observed of the

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32. WOMEN AND GENDER EQUALITY CANADA, *supra* note 15.

33. MMIW Final Report, *supra* note 31.

34. MMIW Final Report, *supra* note 31. "The National Inquiry has chosen to use the term '2SLGBTQ' (representing Two-Spirit, lesbian, gay, bisexual, transgender, queer and questioning people)[.] By putting '2S' at the front, we are remembering that Two-Spirit people have existed in many Indigenous Nations and communities long before other understandings of gender and orientation came to us through colonization. This also puts Two-Spirit people right at the front of our conversations, rather than at the end." National Inquiry into Missing and Murdered Indigenous Women and Girls, *Lexicon of Terminology*, MMIWG-GGADA (Nov. 1, 2018), https://www.mmiwg-ffada.ca/wp-content/uploads/2018/02/NIMMIWG_Lexicon_ENFR-1.pdf [perma.cc/2VGW-XRZU].

35. MMIW Final Report, *supra* note 31, at 88.

36. TINA HOTTON MAHONEY, JOANNA JACOB & HEATHER HOBSON, STAT. CAN., CATALOGUE NO. 89-503-X, WOMEN IN CANADA: A GENDER-BASED STATISTICAL REPORT: WOMEN AND THE CRIMINAL JUSTICE SYSTEM 8 (2017), www.statcan.gc.ca/pub/89-503-x/2015001/article/14785-eng.pdf [perma.cc/HAE9-MU56].

37. *Id.* at 7–8.

38. *Id*.

39. R. v. Barton, 2019 SCC 33.

patterned nature of violence against Indigenous women and their treatment as disposable objects:

> When Indigenous women's bodies are destroyed in the extreme way that we see in murdered Indigenous women, the value of their bodies in the social order is made clear . . . [T]he scopic regime of sexualized violence is key to disposability. The violence that is written on the flesh tells the colonial story of whose bodies have value.[40]

Writing specifically about the experiences of Indigenous women in Canada the MMIW Inquiry found that their "right to justice is compromised."[41] This profoundly compromised right to justice for Indigenous women in relation to the legal system leads to dual arrests (where the police arrest both the batterer and the victim), over-incarceration, institutional reprisals, and a reluctance to report interpersonal violence due to mistrust of police, stereotyping, and the presumption of criminality.[42]

The criminal justice system in Canada remains a site of intense discrimination and injustice for Indigenous peoples in Canada generally. After an in-depth investigation of Policing and Indigenous women, Human Rights Watch observed the broader context as follows:

> The legacy of settler colonialism and racist assimilation policies—particularly the residential school system—still overshadow the present-day dynamics between police and Indigenous communities. Residential schools, which the Canadian government operated up until 1994, along with the Catholic Church, forcibly removed Indigenous children and youth from their communities, severing connections to their kinship networks and family, language, and culture. Many Indigenous children and youth in residential schools were also subjected to severe psychological and sexual abuse while in these facilities. The [Royal Canadian Mounted Police] was actively involved and complicit in ensuring that Indigenous children attended these schools. This historical context fuels the strong mistrust, suspicion, and resentment many Indigenous people continue to feel towards law enforcement.[43]

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40. Razack, *Gendering Disposability*, *supra* note 20, at 291.

41. MMIW Final Report, *supra* note 31, at 625.

42. MMIW Final Report, *supra* note 31, at 621–717. These themes are documented and discussed at greater length in Chapter 8 of the Final Report, *Confronting Oppression – Right to Justice*.

43. *See* HUM. RTS. WATCH, SUBMISSION TO THE GOVERNMENT OF CANADA ON

The members of the Canadian government's "National Inquiry into Missing and Murdered Indigenous Women and Girls" find that:

> In Canada, the history of the justice system within Indigenous communities and its effectiveness and fairness in pursuing justice have been under discussion and debate. From Saskatchewan's "starlight tours," involving the Saskatoon Police Department in the 1990s and 2000s, to the more recent acquittal of the Saskatchewan farmer charged with the death of Colten Boushie, Indigenous Peoples have had little reason to be confident that the justice system is working for them.[44]

Despite some progressive legal decisions from Canada's Supreme Court attempting to recognize and remedy this systemic inequality,[45] the problem is entrenched, pervasive, and persistent. As well-known legal scholar Patricia Monture-Angus wrote:

> Enough has been said and written about the devastating effects of the Canadian criminal justice system on both Aboriginal citizens and our nations. Despite this fact, little has been accomplished to do more than accommodate Aboriginal persons in the mainstream system. There has been no systematic change of Canadian justice institutions.[46]

A widely publicized and harrowing example in Canada of the kind of vicious racism and blatant contempt and disregard Indigenous women can experience in a variety of institutional contexts came to light in the fall of 2020, when Joyce Echaquan live-streamed her experiences in a hospital in Quebec while she called out in pain to a hospital staff indifferent to her pleas for help as she lay dying.[47]

POLICE ABUSE OF INDIGENOUS WOMEN IN SASKATCHEWAN AND FAILURES TO PROTECT INDIGENOUS WOMEN FROM VIOLENCE 3 (June 19, 2017), https://www.hrw.org/sites/default/files/supporting_resources/canada_saskatchewan_submission_june_2017.pdf [perma.cc/Y94F-MJ5U].

44. MMIW Final Report, *supra* note 31, at 625.

45. *See, e.g.*, R. v. Ipeelee, [2012] S.C.R. 13; R. v. Gladue, [1999] 1 S.C.R. 688, R. v. Desautel, 2021 SCC, 17.

46. Patricia Monture-Angus, *Women and Risk: Aboriginal Women, Colonialism and Correctional Practice*, 19 CAN. WOM. STUDIES 24, 27 (1999). This powerful passage is also cited in IAAW/LEAF Submission, *supra* note 11, at 3.

47. Kristy Kirkup & Tu Thanh Ha, *Indigenous Woman Records Slurs, Taunts of Quebec Hospital Staff Before Her Death*, THE GLOBE & MAIL (Sept. 29, 2020), https://www.theglobeandmail.com/canada/article-indigenous-woman-records-slurs-taunts-of-quebec-hospital-staff-before/ [perma.cc/LQ4F-AQC6].

Joyce Echaquan was a thirty-seven-year-old Atikamekw woman who arrived at the hospital reporting stomach pain. The mother of seven had previously experienced similar health problems and reported to hospital staff that she had a heart condition. As she grimaced and moaned in pain, members of the hospital staff verbally abused her, one calling her "stupid as hell."[48] The video shows a nurse addressing her in French, saying:

"Are you done acting stupid? Are you done?"[49]

The recording then shows another nurse saying: "You made some bad choices, my dear," and, "What are your children going to think, seeing you like this . . . ?"

"She's good at screwing, more than anything else," the first nurse says.[50]

Shortly after this exchange, Echaquan died in the same hospital.[51]

At a news conference a few days after her death, Carol Dubé, Echaquan's partner, stated "I'm convinced that my partner is dead because systemic racism contaminated the Joliette hospital."[52] He announced that his family would be filing a lawsuit against the hospital, saying "[s]he spent her final days in agony, surrounded by people who held her in contempt, people who were supposed to protect her."[53] While condemning the comments made to her as "totally unacceptable," the Premier of Quebec, François Legault denied that the mistreatment of Joyce Echaquan was indicative of systemic racism.[54]

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48. *Id.*

49. *Id.*

50. *Id. See also* Leyland Cecco, *Canada: Outcry After Video Shows Hospital Staff Taunting Dying Indigenous Woman*, THE GUARDIAN (Sept. 30, 2020), https://www.theguardian.com/world/2020/sep/30/joyce-echaquan-canada-indigenous-woman-hospital [perma.cc/P6PN-NL7X].

51. Cecco, *supra* note 50. On the day she died, she was administered morphine, despite warning doctors that she could not handle the drug due to a heart condition and pacemaker. *Id.*

52. Jillian Kestler-D'Amours, *Systemic Racism in Canada Killed Joyce Echaquan, Family Says*, ALJAZEERA (Oct. 2, 2020), https://www.aljazeera.com/news/2020/10/2/systemic-racism-killed-my-partner-joyce-echaquans-family-says [perma.cc/53P9-TGLZ].

53. Mélissa Goden, *She Was Racially Abused by Hospital Staff as She Lay Dying. Now a Canadian Indigenous Woman's Death Is Forcing a Reckoning on Racism*, TIME (Oct. 9, 2020), https://time.com/5898422/joyce-echaquan-indigenous-protests-canada/ [perma.cc/Z5V4-A7VQ].

54. Kristy Kirkup & Tu Thanh Ha, *supra* note 47. The nurse and orderly heard abusing Echaquan in the video, were fired shortly after it went viral; a few months after the incident, the head of the regional health agency overseeing the hospital

Mistreatment of and discrimination against Indigenous women is hardly unique to Canada. In the United States, the levels of violence and failures of state action and protection have also been described as a "crisis,"[55] and certainly experienced as such by Indigenous women.

Research from the National Institute of Justice indicates that 84 percent of Indigenous women have experienced physical, sexual, or psychological violence in their lifetimes.[56] According to the Justice Department, one in three Native American women experience rape or attempted rape, a rate more than twice the national average.[57] While rates of processing crimes of sexual violence through the criminal justice system are low for all women in general, they are unsurprisingly lower still for Indigenous women. Specifically, only 13 percent of sexual assaults reported by Native American women result in the arrest of perpetrators, compared with 35 percent for Black women and 32 percent for White women.[58]

Inadequate criminal justice system responses to Indigenous women in the U.S. are also a systemic problem.[59] For example, Alaska has four times the national rates of sexual assault and a documented history of failing to investigate and prosecute this gendered crime.[60] Detailed journalistic investigations have

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was quietly removed from his post. *Top Stories of 2020: Joyce Echaquan's Hospital Video Shocked Quebec*, MONTREAL GAZETTE (Dec. 23, 2020), https://montrealgazette.com/news/local-news/top-stories-of-2020-joyce-echaquans-hospital-video-shocked-quebec [perma.cc/W4E7-PP75].

55. Maya Salam, *Native American Women Are Facing a Crisis*, N.Y. TIMES (April 12, 2019), www.nytimes.com/2019/04/12/us/native-american-women-violence.html [perma.cc/96PF-WHRD].

56. ANDRÉ B. ROSAY, NAT'L INST. OF JUST., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN (June 1, 2016), nij.ojp.gov/topics/articles/violence-against-american-indian-and-alaska-native-women-and-men [perma.cc/NY4F-TGF6].

57. Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, N.Y. TIMES (May 22, 2012), www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html [perma.cc/GQ62-ZHGZ].

58. Salam, *supra* note 55.

59. Marie Quasius, *Native American Rape Victims: Desperately Seeking an Oliphant-Fix*, 93 MINN. L. REV. 1902 (2012).

60. *See* Complaint, Hardy v. City of Nome, 2020 WL 5048363 (D. Alaska Aug. 26, 2020) (No. 2:20-CV-0001-HRH), https://www.acluak.org/sites/default/files/field_documents/clarice_hardy_complaint.pdf [perma.cc/B2MD-73JW]. *See also* John D. Sutter, *The Rapist Next Door*, CNN (2014), https://www.cnn.com/interactive/2014/02/opinion/sutter-change-alaska-rape/ [perma.cc/LY7E-ETUY] (exploring why Alaska's rape rate is the highest in the U.S.); Sara Bernard, *Rape Culture in the Alaskan Wilderness*, THE ATLANTIC (Sept. 11, 2014), https://www.theatlantic.com/health/archive/2014/09/rape-culture-in-the-alaskan-

uncovered a pattern of inaction and institutional resistance on the part of the police towards Alaskan Native women's reports of rape and sexual violence, demonstrating "systemic, decades long indifference."[61] In an effort to seek justice, the American Civil Liberties Union of Alaska, the ACLU's Racial Justice Program, and Sonosky, Chambers, Sachse, Miller & Monkman, LLP filed suit against the City of Nome, Alaska, along with the former law enforcement officials "who, in a display of systemic bias against Alaska Native women, failed to investigate hundreds of sexual assaults reported to the Nome Police Department, including Clarice 'Bun' Hardy's."[62]

The tragedy of and state failures regarding the disproportionate number of Missing and Murdered Women in the United States also echoes the situation in Canada. For example, "in 2016, 5,712 [I]ndigenous women and girls were reported missing, but only 116 were logged by the US Department of Justice's federal missing persons database."[63]

The situation facing Indigenous and Māori women in New Zealand and Indigenous women in Australia, while distinct, also bears striking parallels to the inequalities shaping the lives of Indigenous peoples generally, and Indigenous women specifically, in North America. In New Zealand, Māori peoples are over-represented in rates of economic deprivation and poverty,[64] unemployment,[65] and homelessness.[66] For Māori women these

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wilderness/379976/ [perma.cc/5S38-48A5]; Victoria McKenzie & Wong Maye-E, *In Nome, Alaska, Review of Rape 'Cold Cases' Hits a Wall*, ASSOCIATED PRESS (Dec. 20, 2019), https://apnews.com/article/b6d9f5f6fd71d2b75e3b77ad9a5c0e76 [perma.cc/8MEE-KCN3]; Adriana Gallardo, Nadia Sussman & Agnes Chang, ProPublica, and Kyle Hopkins & Michelle Theriault Boots, Anchorage Daily News, *Unheard*, ANCHORAGE DAILY NEWS (June 1, 2020), https://features.propublica.org/alaska-sexual-assault/unheard-survivor-stories/ [perma.cc/R32C-6P77].

61. *See* McKenzie & Maye-E, *supra* note 60.

62. *Justice for Clarice Hardy*, ACLU ALASKA, https://www.acluak.org/en/cases/justice-clarice-hardy [perma.cc/AQD8-AFU3].

63. Salam, *supra* note 55.

64. *See, e.g.*, Statistics New Zealand, *Latest Child Poverty Statistics Released*, STATS NZ (Feb. 24, 2020), www.stats.govt.nz/news/latest-child-poverty-statistics-released [perma.cc/UL7C-53JP] (discussing how after housing costs have been deducted, the number of Māori children living in New Zealand in relative poverty is 25% while the rate for children in European households is 17%).

65. *Māori in the Labour Market*, N.Z. MINISTRY OF BUS. INNOVATION & EMP. (2017), www.mbie.govt.nz/assets/c71b557b32/2017-monitoring-report-Maori -in-the-labour-market.pdf [perma.cc/V5VR-4W33].

66. HOUSING FIRST AUKLAND, IRA MATA, IRA TANGATA: AUCKLAND'S HOMELESS COUNT REPORT (2018), https://www.aucklandshomelesscount.org.nz/wp-content/uploads/2019/10/PiT-FinalReport-Final.pdf [perma.cc/X8AB-H3NF] (finding

inequalities are sharper still. For example, according to a 2017 report, the Māori unemployment rate, at 10.8 percent, was more than double the national unemployment rate of 4.9 percent. For Māori women, this was even higher, at 12 percent.[67]

Health and wellbeing are also adversely affected for Māori peoples in New Zealand relative to the general population. Life expectancy is, on average, seven years less for Māori than for non-Māori people.[68] Another indicator of poorer health outcomes situated in a social context of colonialism and inequality is that:

> Māori are demonstrably less likely than non-Māori to survive nearly every cancer, and nearly twice as likely to die from their cancer overall. Ethnic differences in cancer survival such as these can be seen as an indirect marker of the quality of a country's cancer services and the equity of service delivery.[69]

Māori people are similarly over-represented as victims of crime and subjects of incarceration. According to the New Zealand Department of Corrections, as of March 2020, Māori account for 52.8 percent of the prison population[70] while making up only about 16.5 percent of the total population.[71]

The 2014 New Zealand Crime and Safety Survey indicated that 33 percent of Māori were victims of one or more crimes in 2013.[72] Māori women experienced higher than average victimization rates at 36 percent.[73] 2013 statistics suggest that Māori women are "more than 6.5 times more likely to be hospitalized for serious assault and attempted homicide, and almost three times more likely to die by homicide than non-Maori

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that Māori, at 11% of the general Auckland population, were over-represented among those surveyed at 42.7% (53 people)).

67. *Māori in the Labor Market*, *supra* note 65.

68. Health Quality & Safety N.Z., A WINDOW ON THE QUALITY OF AOTEAROA NEW ZEALAND'S HEALTH CARE 2019 14 (2019), https://www.hqsc.govt.nz/assets/Health-Quality-Evaluation/PR/Window_2019_web_final.pdf [perma.cc/LLW2-JGJP].

69. *Id.* at 31.

70. *Prison Facts and Statistics – March 2020*, N.Z. DEP'T OF CORR. (2020), www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/prison_stats_march_2020#ethnicity [perma.cc/7PWV-37EG].

71. *New Zealand's Population Reflects Growing Diversity*, STATS NZ (Sept. 22, 2019), www.stats.govt.nz/news/new-zealands-population-reflects-growing-diversity [perma.cc/7VBK-MT5V].

72. MINISTRY OF JUST., 2014 NEW ZEALAND CRIME AND SAFETY SURVEY: MAIN FINDINGS 73 (2015), www.justice.govt.nz/assets/Documents/Publications/NZCASS-201602-Main-Findings-Report-Updated.pdf [perma.cc/NU56-RRRE].

73. *Id.*

women resident in New Zealand."[74] Māori women are also, in comparison to non-Māori women, "almost six times more likely to be hospitalised because of assault and attempted homicide, and 1.6 times more likely to die of assault and homicide."[75]

In Australia, the same themes of colonialism and its harms are evident in data on indicia of inequalities such as homelessness,[76] unemployment rates, poorer health outcomes, and over-incarceration. In 2018, the Indigenous employment rate was around 49 percent, compared to around 75 percent for non-Indigenous Australians.[77] Data from the same year revealed that 45 percent of Indigenous Australians aged fifteen and over were receiving some form of income support payment, compared to 23 percent of non-Indigenous Australians.[78]

Inequality and negative health outcomes are also correlated for Indigenous peoples in Australia. The Australian Government reported in 2020 that for the period of 2015–2017, life expectancy at birth was 71.6 years for Indigenous males (8.6 years less than non-Indigenous males) and 75.6 years for Indigenous females (7.8 years less than non-Indigenous females).[79] Furthermore, in 2018, the Indigenous child mortality rate was 141 per 100,000—twice that for non-Indigenous children (67 per 100,000).[80] This is significant because:

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74. Denise Wilson, Debra Jackson & Ruth Herd, *Confidence and Connectedness: Indigenous Māori Women's Views on Personal Safety in the Context of Intimate Partner Violence*, 37 HEALTH CARE FOR WOMEN INT'L 707, 708–09 (2016) (citing FAMILY VIOLENCE DEATH REVIEW COMM., FOURTH ANNUAL REPORT: JANUARY 2013 TO DECEMBER 2013, (Health Quality & Safety Comm'n N.Z., 2013), https://www.hqsc.govt.nz/assets/FVDRC/Publications/FVDRC-4th-report-June-2014.pdf [perma.cc/V8AG-2HEN]; MINISTRY OF HEALTH, TATAU KAHUKURA: MĀORI HEALTH CHART BOOK 2010 (2nd ed.)).

75. FAMILY VIOLENCE DEATH REV. COMM., FIFTH ANNUAL REPORT: JANUARY 2014 TO DECEMBER 2015, (Health Quality & Safety Comm'n N.Z., 2016), 42–43, https://www.hqsc.govt.nz/assets/FVDRC/Publications/FVDRC-5th-report-Feb-2016-2.pdf [perma.cc/QH5J-DB2E].

76. In 2017–2018, Specialist Homelessness Services provided support for 1% of Australia's total population. Of these individuals, 25% were Indigenous and 60% were women. AUSTL. INST. OF HEALTH & WELFARE, AUSTL. GOV., AUSTRALIA'S WELFARE 2019: IN BRIEF 19 (2019), www.aihw.gov.au/getmedia/795385cc-6493-45c9-b341-7ddf6006d518/aihw-aus-227.pdf.aspx?inline=true [perma.cc/ZKG8-UG7G].

77. AUSTL. GOV., CLOSING THE GAP REPORT 65 (2020), ctgreport.niaa.gov.au/sites/default/files/pdf/closing-the-gap-report-2020.pdf [perma.cc/8HUU-SNAQ] [hereinafter CLOSING THE GAP REPORT].

78. Austl. Inst. of Health & Welfare, *Indigenous Income and Finance*, AUSTL. GOV. (Sept. 11, 2019), www.aihw.gov.au/reports/australias-welfare/indigenous-income-and-finance [perma.cc/LY2G-22VE].

79. CLOSING THE GAP REPORT, *supra* note 77, at 78.

80. *Id.* at 15.

> child mortality is associated with a variety of health and social determinants. Although a complex set of factors are involved, maternal health (such as hypertension, obesity, and diabetes) and risk factors during pregnancy (such as smoking and alcohol use) are key drivers of birth outcomes and deaths among Indigenous children. However, access to quality medical care, public health initiatives and safe living conditions serve as protective factors and can improve the chances of having a healthy baby.[81]

Indigenous women in Australia, like their counterparts in other countries, also suffer disproportionately higher rates of interpersonal violence. The Australian Bureau of Statistics, for example, reports that during 2004–2005, "[a]fter adjusting for age differences between the two populations, Indigenous women were more than two-and-a-half times as likely as non-Indigenous women to have been a victim of physical or threatened violence."[82] A 2016 governmental report revealed that Aboriginal and Torres Strait Islander women experienced physical assault at 4.9 (NSW), 9.1 (SA) and 11.4 (NT) times the rates for non-Indigenous women for the year 2015, according to police records.[83] The same report found that 2014–2015 hospitalization rates for Aboriginal and Torres Strait Islander family violence-related assaults were 32 times the rate for non-Indigenous females.[84] Finally, the 2017 report from the U.N. Special Rapporteur on the Rights of Indigenous Peoples indicated that Indigenous women in Australia "are 10 times more likely to die of violent assault and 32 times more likely to be hospitalized as a result of violence-related assault compared with non-Indigenous women."[85]

Being Indigenous in contemporary society, then, is typically a marker for various kinds of systemic inequality. As one researcher notes:

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81. *Id.* at 20.

82. *The Health and Wellbeing of Aboriginal and Torres Strait Islander Women: A Snapshot, 2004–05*, AUSTL. BUREAU OF STAT. (July 8, 2009), https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4722.0.55.001Main+Features12004-05 [perma.cc/2MH9-YCHR].

83. STEERING COMM. FOR THE REV. OF GOV'T SERV. PROVISION, OVERCOMING INDIGENOUS DISADVANTAGE: KEY INDICATORS 2016 4.98 (2016), www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016/report-documents/oid-2016-overcoming-indigenous-disadvantage-key-indicators-2016-report.pdf [perma.cc/VY72-EZB9].

84. *Id.*

85. Victoria Tauli Corpuz, *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, U.N. Doc. A/HRC/36/46/ at 16 (2017).

> It is no coincidence that the 370 million Indigenous people worldwide rank consistently toward the bottom of their national income levels. Whether in colonial Asia, Africa, Australia or the Americas, Indigenous peoples have been treated with enormous inhumanity.[86]

The World Bank reports that:

> Although they make up over 6 percent of the global population, [Indigenous People] account for about 15 percent of the extreme poor. Indigenous Peoples' life expectancy is up to 20 years lower than the life expectancy of non-indigenous people worldwide.[87]

More specifically still, Indigenous women bear the burden of discrimination and dehumanization faced by Indigenous peoples generally, but compounded by sexism and misogyny.

The travesty of what happened to Angela Cardinal in a Canadian courtroom, therefore, is one more piece in an elaborate, multi-layered, and still unfolding story (or sets of stories) of the many types of discrimination perpetrated against Indigenous women in Canada and beyond. What happened to her is one example of "a history of the sexual brutalization and attempted annihilation of Indigenous women"[88] of state neglect, and of state perpetrated harms.

A. The Sexual and Physical Assault Perpetrated Against Angela Cardinal

Twenty-seven years old when she suffered the sexual attack on June 16th of 2014, Angela Cardinal was a petite Cree woman who grew up in Maskwacis.[89] She moved to Edmonton when she was fourteen years old and was a high school graduate.[90] At the time of the sexual assault, she had been homeless and living on and off the street for some time.[91]

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86. Daniel Wilson, *Income Inequality and Indigenous Peoples in Canada*, BROADBENT INST., https://www.broadbentinstitute.ca/daniel_wilson_income_inequality_and_indigenous_peoples_in_canada [perma.cc/T9LH-NLQF].

87. *Indigenous Peoples*, WORLD BANK (Sept. 24, 2019), https://www.worldbank.org/en/topic/indigenouspeoples [perma.cc/VRF8-45JG].

88. Razack, *Gendering Disposability*, *supra* note 20, at 290.

89. R. v. Blanchard, 2016 ABQB 706, para. 7.

90. *Id.*

91. *Id.*

The horrendous sexual attack Angela Cardinal suffered took place in the Edmonton, Alberta apartment of the assailant, Lance Blanchard, a known sexual offender released from prison the previous year.[92] He had spent thirty-seven of the previous forty years in custody for a string of violent offences.[93] In 1975, he was found guilty of raping a girl with intellectual disabilities[94] and "[t]hree years later, he forced a 13-year old girl into a car at knifepoint, threatening to sexually assault her."[95] That same year, he abducted an eleven-year-old boy, again at knifepoint, and tried to sexually assault him.[96] While in prison in 1978, Blanchard killed a fellow inmate.[97] Blanchard was clearly not unfamiliar with perpetrating violence, and often extreme violence.

The day of the assault, Angela Cardinal attempted to enter an apartment building near 106 Avenue and 111th Street, where Blanchard "happened to be a resident."[98] Discovering the back door of the building locked, "[s]he laid down and fell asleep on some nearby grass."[99]

At some point later that day, while walking his dog, Blanchard spied Angela Cardinal on the grass.[100] He approached her to ask if she wanted anything or needed medical assistance and agreed to heat up some soup she had in her bag.[101] At a later point, Blanchard returned. In a brief conversation, he asked if she wanted to come inside and warm up.[102] "In no uncertain terms," she rejected his offer.[103]

Later that same day, Angela Cardinal noticed another tenant entering the apartment building.[104] To gain access, she lied that she was going to visit a friend.[105] Once inside, she remained near the

92. *Id.* at paras. 20, 32.
93. *Id.* at para. 254.
94. Janice Johnston, *Doubts About Sex Assault Victim Angela Cardinal Raised in Sworn Affidavit*, CBC NEWS (June 19, 2017), www.cbc.ca/news/canada/edmonton/edmonton-angela-cardinal-sexual-assault-lance-blanchard-affidavit-1.4168302 [perma.cc/Q2YP-E4EP] [hereinafter Johnston, *Doubts About Sex Assault Victim*].
95. *Id.*
96. *Id.*
97. *Id.*
98. R. v. Blanchard, 2016 ABQB 706, para. 14.
99. *Id.*
100. *Id.* at para. 15.
101. *Id.*
102. *Id.* at para. 16.
103. *Id.*
104. *Id.* at para. 17.
105. *Id.*

bottom of the stairs.[106] She began singing to herself ("This Little Light of Mine") and then fell asleep.[107]

Blanchard, coming down the stairs intending to go outside to force Angela Cardinal into his apartment, discovered her in the stairwell.[108] Waking her up, he threatened her with a knife and dragged her to his apartment.[109] There he sexually assaulted her, but a significant physical struggle ensued when she fought back.[110] Angela Cardinal was able to call the police who then arrested Blanchard and took her to the hospital to receive medical attention for her injuries.[111]

In an unrelated shooting which took place in the interval between the preliminary inquiry and the trial itself, Angela Cardinal was killed.[112] She did not, therefore, live to witness the conviction of Blanchard, or to speak publicly about her experiences once they received national media attention.[113]

B. The Preliminary Inquiry

A preliminary inquiry is a pre-trial hearing for a legal determination of the sufficiency of the evidence requiring an accused to stand trial for the offence(s) charged.[114] At the preliminary inquiry for *R. v. Blanchard*, Angela Cardinal was both a cooperative witness and the key witness in the Crown's case.[115] Her testimony ultimately led to Blanchard's conviction in December of 2016 for aggravated sexual assault, kidnapping, unlawful confinement, possession of a weapon, and uttering threats to cause death or bodily harm.[116] In later legal proceedings he was subsequently designated a dangerous offender.[117]

It was during her testimony at the preliminary inquiry that Angela Cardinal's situation seriously unraveled, with the power of the state brought down against her in the most oppressive way imaginable. Despite behaving as a cooperative witness, she was

106. *Id.*
107. *Id.*
108. *Id.* at para. 246.
109. *Id.* at paras. 18–20, 246.
110. *Id.* at paras. 21–27.
111. *Id.* at paras. 26–28.
112. *Id.* at paras. 2, 5.
113. Johnston, *Doubts About Sex Assault Victim*, *supra* note 94.
114. William Poulos, *The Preliminary Inquiry: Staying Within the Zone of Protection*, 62 CRIM. L.Q. 365, 366 (2015).
115. R. v. Blanchard, 2016 ABQB 706, paras. 183, 241.
116. *Id.* at para. 343.
117. R. v. Blanchard, 2018 ABQB 205, para. 167.

incarcerated for five nights during the course of her testimony.[118] During the proceedings, to add insult to injury, she was often handcuffed and shackled.[119] Angela Cardinal was stigmatized, mislabeled, and depersonalized, ultimately transformed from the cooperative victim-witness she actually was, to being treated as if she were an out-of-control offender needing containment and imprisoning.

i. The First Layer of Violation: Stigmatizing Ms. Cardinal as a "Flight Risk"

At the time of the preliminary inquiry, Angela Cardinal was still living on the street.[120] Apparently labouring under the mistaken belief she was a "flight risk", the authorities had a subpoena for her appearance issued.[121] However, no effort had ever been made to track her whereabouts.[122] Nor had any effort apparently been made to assist her with finding secure or permanent housing after she had been subjected to the traumatic criminal attack.[123] As someone living a precarious life on the streets, she could not receive mail as she did not have the benefit of a permanent address.[124] The uncontested fact is that Angela Cardinal had no knowledge she was required to testify on the dates set for the preliminary inquiry.[125]

As it turned out, on June 3, 2015, two days before she was required to testify at the preliminary inquiry, Angela Cardinal happened to see two police officers she knew.[126] She approached them on the street, they advised her of the proceedings, and she voluntarily accompanied them to police headquarters.[127] The police found her a hotel room so she could testify the next day.[128] She was there the next morning when they came to pick her up.[129]

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118. R. v. Blanchard, 2016 ABQB 706, paras. 228–35.
119. *Id.* at paras. 221, 231–35.
120. *Id.* at para. 228.
121. *Id.* at paras. 228–30.
122. *Id.* at para. 228 ("While a subpoena was issued for her to attend the Preliminary Inquiry, there was no attempt to serve it on her though there appears to have been a general lookout for her.").
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at paras. 228–29.
128. *Id.* at para. 229.
129. *Id.*

The issuing of the subpoena appears to have been based on the belief she was unreliable and would need to be compelled to attend court. Nothing about her actual conduct supported this mistaken assumption. Indeed, as Justice Macklin observed in the decision of the trial itself, "[t]o that point, there had not been any incident of her failing to attend when required to do so, as it is clear that she was never served with a [s]ubpoena to attend in the first place."[130] The gratuitousness of the subpoena was therefore made evident by the fact that it never had to be served.

At the time of the preliminary inquiry, Angela Cardinal was exactly where she said she would be. Quite reliably. This truth, the factual record, and the demonstration of her reliability did not prohibit the legal professionals in this proceeding from relying on faulty and racist assumptions about her. Who she was and the precarious circumstances of her life at the time seem to have unleashed victim blaming, rape myths, and stereotypical and racist ideas—that she was unreliable, untrustworthy, and not credible. Sadly, these legal professionals then proceeded with even more harmful and rights-infringing conduct against Angela Cardinal.

ii. The Second Layer of Violation: Judicial Confusing of Victim and Accused

Feminists have long pointed out that women who are victims of sexual assault experience themselves as being put on trial in the criminal justice system by virtue of the many ritualized hostilities of the court processes.[131] The behaviour of some judges suggests that they actually labour under the mistaken belief that sexual assault victim-witnesses are, in some fundamental sense, *the ones actually on trial.* This has extended to judicial episodes in which *the victims of sexual assault have been confused with the accused.* This is precisely the indignity to which Angela Cardinal was subjected in the preliminary inquiry.[132] Specifically, at one point during the

130. *Id.* at para. 229.

131. *See generally* CAROL SMART, *Rape, Law and the Disqualification of Women's Sexuality*, *in* FEMINISM AND THE POWER OF LAW (1989) (providing an early analysis); Elaine Craig, *The Inhospitable Court*, 66 U. TORONTO L.J. 197 (2016) [hereinafter Craig, *The Inhospitable Court*]; ELAINE CRAIG, PUTTING TRIALS ON TRIAL: SEXUAL ASSAULT AND THE FAILURE OF THE LEGAL PROFESSION (2018) [hereinafter CRAIG, PUTTING TRIALS ON TRIAL]; Craig, *Person(s) of Interest and Missing Women*, *supra* note 31.

132. Letter from Alice Woolley, Professor of Law, Univ. of Calgary, to Alberta Justice Minister Kathleen Ganley, Chief Judge Terence Matchett of the Alberta Provincial Court, and to the Law Society of Alberta, at 4 (June 14, 2017) (available

proceeding Judge Bodnarek mistakenly referred to her as "Ms. Blanchard," the last name of her assailant.[133] Understandably offended and insulted, she responded with an angry outburst.[134]

It is interesting to note that this is the identical so-called 'slip of the tongue' former judge Robin Camp exhibited in the infamous *R. v. Wagar* trial.[135] The judge was ultimately removed from the bench after a highly publicized hearing widely noted in the Canadian press, in part because of his bluntly victim-blaming question: "couldn't you just keep your knees together?"[136] At the trial, the sexual assault victim—also a very young Indigenous woman—was notoriously referred to by the judge as "the accused."[137]

This judicial confusion was noted in the excellent report submitted by the Institute for the Advancement of Aboriginal Women (IAAW) and the Women's Legal Education and Action Fund (LEAF) to the independent review of the treatment of Angela Cardinal, a review prompted when journalists broke the story about her court room shackling.[138] The authors draw parallels between Judges Bodnarek's and Camp's confusion of the accused with the woman who was the victim-witness. As they astutely observed, "[t]he treatment of Ms. Cardinal during the Preliminary Inquiry appeared to be informed by discriminatory assumptions about Indigenous women's inherent dangerousness, their criminality, immorality, and drunkenness."[139] To this extent, then, these sexual assault victims were themselves perceived to be on trial.

These examples of judicial errors cannot simply be accidental slips of the tongue—nor does it seem plausible that they expose random, or unconscious bias. Rather, they more likely reflect the barely repressed suspicions of women victim-witnesses in sexual

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at *The Incarcerated Complainant: Submissions to the Minister of Justice*, ABLAWG (June 15, 2017), https://ablawg.ca/wp-content/uploads/2017/06/Blog_AW_Blanchard.pdf [perma.cc/A3MW-WU5F]) [hereinafter Woolley Letter].

133. R. v. Blanchard, 2016 ABQB 706, para. 231.

134. Woolley Letter, *supra* note 132 (citing Preliminary Inquiry Transcript at 369 line 19, R. v. Blanchard, 2016 ABQB (E-File No. ECP17BLANCHARDL) [hereinafter Preliminary Inquiry Transcript]); IAAW/LEAF Submission, *supra* note 11, at 10 (citing Preliminary Inquiry Transcript at 473 line 19).

135. R. v. Wagar, 2014 CarswellAlta 2756, para. 92 (Can. Alta. Prov. Ct.) (WL).

136. Transcript of Trial Proceedings at 119 line 15, R. v. Wagar, 2014 Can. Alta. Prov. Ct. (E-File No. CCP14WAGARALEX3).

137. *Id.* at 348 line 28, 432 lines 5 and 16, 433 line 20, 437 line 9, 442 line 41, 443 line 6, 446 line 41, 450 line 34.

138. IAAW/LEAF Submission, *supra* note 11.

139. *Id.* at 11.

assault proceedings held in the minds of some members of the judiciary.

Such judicial errors support the frequent assertion that the objects of the legal inquiry in a sexual assault trial are often the women who have been violated, not the accused. Mixing up the names of the sexual assault victims with the accused reflects the judicial preoccupation with—quite literally—*putting the victim on trial.*[140] On this view, the question shifts onto the credibility of the victims' accounts of sexual violence: Are they liars? Are they to be believed? This, of course, ties in with that most pernicious of all rape myths—that women routinely lie about being raped. These judicial confusions actually reveal the skeptical judicial imagination explicitly expressed.

Judge Bodnarek's misnaming of Angela Cardinal by calling her by the name of her sexual attacker was one of the early insults heaped upon the multiple legal injuries she endured. And yet, so dignified and polite was she, that after this affront to her dignity, she even apologized to the court for having expressed anger about it.[141]

iii. The Third Layer of Violation: The Failure to Understand the Context of Ms. Cardinal's Life Circumstances and her Trauma Responses

At the point in the preliminary inquiry when she was required to recount some of the more harrowing aspects of the attack committed against her, Angela Cardinal had some difficulty in testifying.[142] At this point, in fact, her difficulties testifying became particularly acute.

This is extremely common. Indeed, it is more typical than it is exceptional in a criminal sexual assault proceeding, especially one involving a physically violent attack such as Angela Cardinal had suffered.[143] As Justice Macklin described in the subsequent trial, in the process of testifying, "[s]he was clearly distraught and, using

140. *See* CAROL SMART, FEMINISM AND THE POWER OF LAW (1989); CAROL SMART, *Law's Power, the Sexed Body, and Feminist Discourse*, *in* LAW, CRIME AND SEXUALITY: ESSAYS IN FEMINISM, 70–86 (1995) (providing an early analysis); Craig, *The Inhospitable Court*, *supra* note 131 (providing a more recent analysis).

141. IAAW/LEAF Submission, *supra* note 11, at 12–13.

142. Woolley Letter, *supra* note 132, at 4.

143. *See generally* JUDITH DAYLEN, WENDY VAN TONGEREN HARVEY & DENNIS O'TOOLE, TRAUMA, TRIALS, AND TRANSFORMATION: GUIDING SEXUAL ASSAULT VICTIMS THROUGH THE LEGAL SYSTEM AND BEYOND (2006); CRAIG, PUTTING TRIALS ON TRIAL, *supra* note 131 (describing the difficult experiences of women testifying in sexual assault cases in Canada).

her word, 'panicking'. She was somewhat belligerent."[144] The use of the latter term, in these circumstances, is particularly problematic.[145] Describing Angela Cardinal as "belligerent" is pathologizing and fails to understand the various ways in which women process trauma responses.[146] It also stigmatizes what are very often healthy expressions of anger.

Women's anger is barely tolerated in our society. Too often it is contained, ignored, or punished.[147] The rightful anger and outrage that Angela Cardinal experienced throughout the extraordinarily emotionally taxing task of testifying about her violent sexual assault, within the confines of the adversarial criminal trial process, should not be mischaracterized or dismissed as "belligerence."

Instead of being offered whatever resources might have assisted and *supported her* through the adversarial legal process—as should take place in any trauma-informed approach—Angela Cardinal was punished and treated as if she were a criminal living in a dystopian era. It strains belief that such events could take place in 2015, in a Canadian court room. Instead of being provided with care, respect, and appropriate resources, she was pathologized, stigmatized, and abandoned for her reactions to traumatic events.

The trial judge described Angela Cardinal as coming "across as an intelligent woman during her testimony. While there were times when she was clearly distraught, much of her testimony was given in a clear, cogent, coherent and articulate manner."[148] But in her distress she became listless. At one point during a break, she took to lying down on a bench outside the courtroom, behaviour the

144. R. v. Blanchard, 2016 ABQB 706, para. 229.

145. It is also sharply at odds with the rest of the tone of Justice Macklin's decision in which he displayed significant sensitivity to the degrading situation Angela Cardinal was put in, as is elaborated more fully in the text below.

146. *See* Lori Haskell & Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims: What the Criminal Justice System Needs to Know*, JUST. CAN. (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3417763 [perma.cc/L247-7249] [hereinafter Haskell & Randall, *Impact of Trauma*] (detailing the psychological and physiological effects of trauma and advocating for a trauma-informed justice system).

147. *See, e.g.*, Rachel Flowers, *Refusal to Forgive: Indigenous Women's Love and Rage*, 4 DECOLONIZATION, INDIGENEITY, EDUC. & SOC'Y 32, 42–43 (2015) (analyzing recent social responses to women's anger); SORAYA CHEMALY, RAGE BECOMES HER: THE POWER OF WOMEN'S ANGER (2018); REBECCA TRAISTER, GOOD AND MAD: THE REVOLUTIONARY POWER OF WOMEN'S ANGER (2018); JAMELIAH YOUNG-MITCHELL, THE DEATH OF THE ANGRY BLACK WOMAN (2018); Casey Cep, *The Perils and Possibilities of Anger*, NEW YORKER (Oct. 8, 2018), www.newyorker.com/magazine/2018/10/15/the-perils-and-possibilities-of-anger [perma.cc/AQH2-VBWB].

148. R. v. Blanchard, 2016 ABQB 706, para. 348.

Crown then used against her to argue for her imprisonment.[149] According to Crown Prosecutor Patricia Innes, she was "curled up on the benches outside, literally *unwilling* to interact."[150] It was at this point that the Crown sought to take more drastic action against Angela Cardinal, and the Judge appeared not to hesitate in facilitating her incarceration.[151]

Psychological shut down or collapse is a common trauma response,[152] especially likely during or after the traumatic recalling of the experience of a life-threatening sexual and physical attack.[153] During a break in the proceedings, it was no surprise Angela Cardinal had to lie down after being questioned and testifying about the violent assault she suffered. Reliving the horrifying details of the violent physical attack and the sexual violation of her body would have been retraumatizing and exhausting. Her need for a rest—both psychological and physical—taken on the bench is something the legal professionals in the court room should have understood. In addition, it is highly probable her discomfort and distress may not have only been emotionally based. She was apparently also hungry as she had not eaten well or sufficiently during this entire ordeal.[154]

The Crown did seek some limited support for Angela Cardinal but clearly for instrumental purposes only in order to allow the hearing to proceed. Ms. Innes' words to Judge Bodnarek make this abundantly evident. As she explained, " . . . witnesses [are] required to present themselves in a manner that they are fit to testify[.] [S]he has not done that."[155] For this Crown, support for the victim-witness was exclusively for the purpose of getting her in shape to testify, not

149. Steven Penney, *Unlawful Remand: The Wrongful Jailing of a Sexual Assault Victim*, FAC. OF L., UNIV. OF ALBERTA: FACULTY BLOG (June 16, 2017), ualbertalaw.typepad.com/faculty/2017/06/unlawful-remand-the-wrongful-jailing-of-a-sexual-assault-victim-.html [perma.cc/S7MX-SUXC].

150. IAAW/LEAF Submission, *supra* note 11, at 11 (emphasis added).

151. *Id.* ("Despite the fact that Ms. Cardinal was compliant and never refused to testify, she was ordered remanded under s. 545(1)(b) of the *Criminal Code*, a provision that allows for a Preliminary Inquiry judge to order the detention of a witness who, 'having been sworn, refuses to answer the questions that are put to him, without offering a reasonable excuse for his failure or refusal.'").

152. This has been noted in the psychological and trauma literature for many years. It is more recently explained and applied to victim responses in the criminal justice system in Haskell and Randall, *Impact of Trauma*, *supra* note 146.

153. I owe this point to Dr. Lori Haskell.

154. R. v. Blanchard, 2016 ABQB 706, para. 176 ("[S]he lived a lifestyle where she would often stay awake all night long for safety reasons and look for shelter during the daytime to sleep and keep warm. She was also cold, hungry and looking for food.").

155. Woolley Letter, *supra* note 132, at 6.

to provide her with the needed psychological support. Ms. Innes therefore advised the Judge that, ". . . it occurred to me that perhaps somebody from the Native community **like a medicine person** [sic] **or something** could assist."[156]

The problematic language used by the Crown here reflects ignorance of the kinds of culturally appropriate resources she could have drawn upon—from the Cree community specifically, and from other Indigenous communities more broadly. Calling for a "medicine person" [sic] in particular demonstrates limited knowledge of Indigenous cultures and their diversity. Angela Cardinal was already abandoned before the proceedings had even begun when no one thought to connect her with victim supports, members of her own community, and a range of other appropriate services. Adequate supports from the outset would have helped her be more physically and emotionally grounded. This, in turn, would have helped her better manage the inherently stressful legal proceedings before and during the preliminary inquiry.

Instead, it appears the Court laboured under the mistaken belief that she lacked the capacity or the "will" to participate in Court proceedings, as if it were simply a matter of strength of character rather than being a procedure requiring resources and supports for traumatized victims. In relying upon highly derogatory, patronizing, racist and colonial assumptions about Angela Cardinal, the Crown seriously misjudged her. It appeared she departed too much from what the Crown and Judge expected as the demeanour of an "ideal victim,"[157] one who could recount her experience in a calm, collected and linear manner, perhaps exhibiting outward feminine distress at appropriate moments, but ultimately rational and in control of the narrative required by the court. Instead, she was stigmatized as a homeless Indigenous woman, believed to be "out of control," and perceived as someone needing to be contained in the most degrading way possible.

As the authors of the IAAW/LEAF submission to the independent review powerfully observe:

> In sum, rather than being treated as a rights-bearing legal subject entitled to dignity and respect, Ms. Cardinal was subjected to harshly punitive treatment. In fact, it appears as though she was objectified and reduced to a mere instrument of the prosecution. The Crown aggressively pursued the

156. *Id.* (emphasis added).

157. *See* Randall, *Sexual Assault Law, Credibility, and 'Ideal Victims'*, *supra* note 16.

> prosecution of an accused with a long history of violence and Ms. Cardinal became a casualty of this process.[158]

At the point the media spotlight was turned on this case[159] and attention focused on how so-called vulnerable witnesses are treated in the criminal justice system,[160] many well-meaning recommendations were offered for improved treatment of victims.[161] Excellent as many of these recommendations are, and imperative as it is that they be implemented, none are expressly trauma-informed as they necessarily should be to reflect the fullest extent of knowledge and best practices in the area.[162]

But more fundamentally, the whole concept of "vulnerable witness" is itself in many cases, especially like this one, deeply problematic and in need of some analysis. Why? Because this construct slips too often into locating the idea of "vulnerability" within the woman herself, as if vulnerability were some sort of personal characteristic, stigma or deficiency carried within her. Even when meant well, the term is too often a backward or upside-down formulation of the problem. It looks inwards instead of outwards, to the social conditions producing and structuring "vulnerability."[163]

More fundamentally, this traditional formulation of vulnerability as a personal and individual problem is one which relieves us, *particularly those working within the criminal justice system and those working within law,* from looking systemically and structurally at the social conditions producing the so-called vulnerability in the first place.

Is it ultimately really about "personal vulnerability" in a situation such as Angela Cardinal's? Instead, it is more fundamentally about structural inequalities, trauma histories, and

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158. IAAW/LEAF Submission, *supra* note 11, at 15.

159. *See generally* Janice Johnston, *Sex Assault Victim Jailed After Crown, Police Refused to Pick Up Hotel Bill*, CBC NEWS (June 15, 2017), www.cbc.ca/news/canada/edmonton/angela-cardinal-sexual-assault-victim-jailed-hotel-remand-1.4161035 [perma.cc/XX7J-XMTP] [hereinafter Johnston, *Sex Assault Victim Jailed*].

160. ROBERTA CAMPBELL, INDEPENDENT REPORT ON THE INCARCERATION OF ANGELA CARDINAL, ALBERTA GOV. 15 (2018), open.alberta.ca/dataset/8cd7c0a6-b8ea-4c33-ae01-f42177558fa1/resource/4867cd3d-9b2d-4ce1-9412-38d017d42b29/download/independentreportincarceration-angelacardinal.pdf [perma.cc/FQN9-HDWY] [hereinafter Campbell, *Independent Report*].

161. *See* Haskell & Randall, *Impact of Trauma*, *supra* note 146.

162. *Id.*

163. Surely the problem has mutually reinforcing elements. I do not deny the personal and psychological elements of vulnerability. Here, I am making a different and larger political point.

how these layers get interconnected and lived in individual histories. It's about addictions and their ravages in people's lives. It's about poverty and/or homelessness. It's about misogyny and sexism. It's about oppression, marginalization, and disempowerment. It's about colonialism, and the multiple ways in which colonialism gets expressed, lived, and structured in Indigenous people's lives.[164] Most importantly, this notion of "vulnerable victims" too easily lets the institution of the criminal justice system itself off the hook from examining its own role in exacerbating the very harms of sexual violence.

Here, the issue was not so much that Angela Cardinal was a "vulnerable witness," as if this were her unique personal affliction. To the contrary, she was, as Justice Macklin noted, clearly a highly intelligent woman struggling with difficult life circumstances, circumstances that were socially constructed and hardly unique, but shared by many other women with similar life histories.[165] She struggled with a total lack of stability and support in these difficult circumstances. Not only was she radically disempowered in the legal proceeding in which she acted as a dutiful citizen by testifying as a victim of a crime against the state, but she was dehumanized by powerful people within a powerful legal system.

Angela Cardinal was, therefore, rendered even more vulnerable than she already was, every aspect of her "vulnerability" exacerbated by the indignities foisted upon her by the Crown and the judge. During her entire testimony, which—let's remember—actually led to the perpetrator's conviction, this woman was in shackles; at night she was sent to sleep in a prison. This is the astounding part of the story I analyze next.

iv. The Fourth Layer of Violation: The Shackling and Imprisonment of Ms. Cardinal as If She Were a Criminal (and Not a Sexual Assault Victim)

"[P]unishment is confused with care."[166]

Misinterpreting Angela Cardinal's listlessness as evidence of uncooperativeness, the Crown asked Judge Bodnarek to issue an

164. *See* MMIW Final Report, *supra* note 31; *see also* Lori Haskell & Melanie Randall, *Disrupted Attachments: A Social Context Complex Trauma Framework and the Lives of Aboriginal Peoples in Canada*, 5 J. ABORIGINAL HEALTH 48 (2009) [hereinafter Haskell & Randall, *Disrupted Attachments*].

165. R. v. Blanchard, 2016 ABQB 1323, para. 348.

166. IAAW/LEAF Submission, *supra* note 11, at 13.

order to allow for her detention.[167] This request was made pursuant to Section 545(1)(b) of the *Criminal Code*. This provision provides:

> 545 (1) Where a person, being present at a preliminary inquiry and being required by the justice to give evidence . . .
>
> (b) having been sworn, refuses to answer the questions that are put to him . . . without offering a reasonable excuse for his failure or refusal, the justice may adjourn the inquiry and may, by warrant in Form 20, commit the person to prison for a period not exceeding eight clear days or for the period during which the inquiry is adjourned, whichever is the lesser period.[168]

The Crown claimed, then, that Angela Cardinal's detention would be justified on the basis that she was refusing to answer questions put to her, a situation which was, to put it mildly, factually inaccurate.[169]

Because this was such an astonishing and degrading move to make against a victim-witness in a sexual assault proceeding, the justification provided by the Crown bears repeating at some length. In addition, because the judge allowed this highly unusual order, examining the record in some detail allows the inherently problematic assertions and assumptions to be exposed.

The Crown, Patricia Innes, narrated the following into the court record:

> Sir, since we adjourned and of course the Court was privy to the complainant making the attempt to testify that she did make. It was not helpful I don't think being in the state that she's in for her to attempt to testify. She was — just to give you a little bit of background. A subpoena was issued for her, I'm not exactly sure of the date, but it was in April. It took until approximately a week ago when she wasn't served to have the Downtown police resources looking out for her. Luckily somebody located her in the downtown area on Wednesday morning and brought her into the police station in an attempt to have her sit down and watch her, in this case the videotape CD of her interview as is normal in preparation for witnesses. She was not willing to do that. She was very agitated and upset about the idea of doing that to the point where the attempt to have her do that did not continue.[170]

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167. Woolley Letter, *supra* note 132, at 5.
168. Criminal Code, R.S.C. 1985, c C-46, s. 545(1)(b).
169. Woolley Letter, *supra* note 132, at 5.
170. *Id.* at 6 (citing Preliminary Inquiry Transcript at paras. 387–90).

Innes explained that arrangements had been made for Angela Cardinal to have a hotel room.[171] She proceeded to narrate a story making it appear as if Ms. Cardinal had not been available, when in fact she had been fully cooperative with the police and had appeared when required.[172] While the Crown continued to paint a picture of an uncooperative victim-witness, a more accurate and compassionate depiction would have highlighted a woman in distress. Innes told the judge:

> [The police] [b]rought her here and she essentially (INDISCERNIBLE) that's been around outside can attest to the fact that she curled up in a corner of the witness room out there or the ante room and just laid on the floor and closed her eyes and is non-communicative.[173]

The Crown continued:

> Efforts were made to get her to understand the importance of standing up and becoming vocal and giving her evidence. And the best shot that we took at that was when she came in here this morning and was essentially unable to participate in the process in a way that we need for a witness to participate. In speaking with the person from the Bissell Rayann (phonetic), I don't know her last name I'm sorry, she's outside and certainly can be asked questions about this, but she indicated that in her experience the presentation of [Ms. Cardinal] is consistent with somebody who's coming down off of methamphetamine which is why potentially why she's so incredibly unable to be alert and wake up. It's a possibility and obviously she's not diagnosed and it could be other things. Additionally, she made reference here when she was on the witness stand about wanting to commit suicide. She also, according to the one detective who was one of the two detectives that was looking after her hotel and transportation to court this morning told them that some days back and I do not have a specific date that she hung herself in an alley and one of her friends saved her.[174]

In this statement we see the Crown's acknowledgment of the psychological distress suffered by Angela Cardinal as evidenced by the statement she had wanted, at some point, to commit suicide.

171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*

How, then, would locking her up in a prison, ever be the appropriate response?[175]

The Crown continued to explain to the Judge that:

> . . . the complainant simply wishes to go to sleep. I don't like having to ask this, but I feel I have no option and that is I ask, Sir, that as this witness has presented in a fashion that is not consistent with being able to give her evidence and given the difficulty in getting her here in the first place and maintaining enough idea of where she's located to ensure she attends for court I'm asking *that she be detained in custody and brought back to court the next day that we sit in an attempt to have her give her evidence.*[176]

The Crown went on to say:

> Now, my friend brought up the idea that she might want to speak with duty counsel. I have no problem with that of course. I'm not sure that anyone is going to be in a position to speak with her as she is not communicated with really anyone outside other than I think she took a couple of Tylenol a little bit ago. I can certainly have the worker come in Rayann. The lady from the Ambrose House the Elder who's here Ms. Goulay to speak to whether or not they think someone could communicate with her, but I haven't [sic] really run out of options, Sir, other than to suggest that.[177]

This entire narrative advanced by the Crown pathologizes Angela Cardinal, miscasting her as unreliable and uncooperative when she had, in fact, been at the hotel as promised and had voluntarily attended court. Moreover, she had answered questions to the best of her ability until she became so emotionally distressed that she needed to lie down.[178] This occurred at about the same point in the proceedings that the judge mistakenly called her by the name of the man who had assaulted her.[179] However, the Crown persisted in the pathologizing narrative to the Judge:

> I know witnesses [are] required to present themselves in a manner that they are fit to testify **she has not done that**. I don't know whether this is her own doing or some other thing

175. I owe this point to Sheila Wahsquonaikezhik.

176. Woolley Letter, *supra* note 132, at 6 (emphasis added) (citing Preliminary Inquiry Transcript at paras. 387–90).

177. *Id.*

178. Penney, *supra* note 149.

179. Woolley Letter, *supra* note 132, at 4.

> is at play or it's a combination of factors, but if we turn her back after today to her own devices I can probably guarantee, short of having an officer essentially handcuff himself to her she won't be here unless the officers are lucky enough to find her again.[180]

This claim is not only unfounded, but racist, based on stereotypes about Indigenous people as unreliable and untrustworthy.[181] This latter claim was also a particularly egregious misrepresentation to the Court since Angela Cardinal had fully cooperated with the prosecution, attended court voluntarily, and answered questions up until the point she became distressed and apparently collapsed in exhaustion on the bench outside the court room. Undaunted, the Crown pressed on, further pathologizing her distress and omitting the crucial fact that the subpoena was never served, having been entirely unnecessary given her voluntary attendance.[182] In Ms. Innes' words:

> It's in the public interest that she be here to testify. So these are the things that I'm putting before you, Sir . . . And we also have the overriding concern that she be here in a state to testify at some reasonable date in the future if that is ever going to occur . . . . I think with the additional factor that we are in a court of law, she's under subpoena. We had this history trying to locate her although I don't have the details of what efforts were made to locate her in the first place. I do know that as of Friday of last week two sergeants from Downtown Division had spread out a bulletin to all members to keep their eye out for this young lady and to try to bring her in to to—for the—to serve her with the subpoena which was in their—in their custody.[183]

On the basis of the Crown's assertions, and without requesting any supporting evidence, let alone any further submissions from counsel, Judge Bodnarek ordered that Angela Cardinal be imprisoned for the weekend at the Edmonton Remand Centre.[184] As Professor Alice Woolley, a leading academic legal ethicist before her appointment to the bench, points out, Judge Bodnarek "did not flag

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180. *Id.* at 6 (emphasis added) (citing Preliminary Inquiry Transcript at paras. 387–90).

181. Sheila Wahsquonaikezhik pointed out this aspect of the Crown's submission to the Court.

182. Woolley Letter, *supra* note 132, at 6 ("A subpoena was issued for her, I'm not exactly sure of the date, but it was in April.").

183. *Id.* at 7 (citing Preliminary Inquiry Transcript at paras. 387–90).

184. IAAW/LEAF Submission, *supra* note 11, at 12.

the issue with the factual basis for the order . . . and did not ask the Crown to provide additional information . . . ."[185]

Crown Prosecutor Innes had made the request without any evidentiary basis, and worse still, on the basis of serious misrepresentations to the court about Angela Cardinal. As one legal commentator observed:

> These statements [from the Crown] were pure assertions. No evidence was adduced to support them, and the court did not direct Ms. Cardinal back to the stand to continue her testimony. Nor did the prosecutor provide any legal argument or case law supporting her claim that section 545(1)(b) authorized the detention.[186]

Both the Crown Attorney and the Judge were ostensibly "concerned" about Angela Cardinal's physical and mental state.[187] The Crown suggested she had "presented in a condition unsuitable for testifying and we don't know what the reason is."[188]

Yet their concern did not extend to providing the necessary care and supports needed by Angela Cardinal, a woman performing a public duty by cooperating with a sexual assault trial in which she was the centerpiece by virtue of her crucial evidence. Instead, the so-called "concern" of the Crown and the Judge was manifested by entrapping and incarcerating this woman in the same place where offenders are held, including the very offender who had physically and sexually assaulted her.

Even the duty counsel, the court appointed defence lawyer appointed for the sole purpose of protecting the security and liberty interests of a person in the position of Angela Cardinal, failed to rise to the occasion to argue vigorously against her detention. Thus, the indignity of the situation was further compounded by the duty counsel's failure to challenge and resist the judicial order to imprison her. This is the bare minimum one should expect from legal representation when such fundamental rights as personal liberty are at stake, as Woolley so ably points out.[189] Since incarceration is among the most extreme examples of the state's power to infringe a person's fundamental rights and liberties, this breach of a defence lawyer's duty to an incarcerated witness like

185. Woolley Letter, *supra* note 132, at 13.
186. Penney, *supra* note 149.
187. Woolley Letter, *supra* note 132, at 9.
188. *Id.* at 7.
189. *Id.* at 12.

Angela Cardinal is, to say the least, extremely surprising, if not a dereliction of professional duty.

Professor Woolley has done a superb job of explicating the many potential ethical issues and breaches on the part of the lawyers and judges involved in incarcerating Angela Cardinal. Based on her thorough review of the transcript of the preliminary inquiry, the trial judgment, and various other proceedings, Woolley wrote and publicly posted a letter to then Alberta Minister of Justice, Kathleen Ganley, carefully substantiating her claim that both the lawyers and the judge bear responsibility for an order which "subjugated Ms. Cardinal" and violated her rights.[190]

The incarceration of Ms. Cardinal was such an egregious breach of human rights and other legal norms, involving so many rights violations, that it is difficult to know where to begin disentangling them. Moreover, the flimsy basis for her incarceration was based on a series of misrepresentations to the Court by the Crown and legal errors by the Judge, for which there has still been no professional accountability.[191]

At the end of Angela Cardinal's testimony on June 8, 2015, the Court again remanded her.[192] Contrary to the information presented to the Court by the Crown, Angela Cardinal had returned to the hotel the evening of June 4 before she was to testify.[193] She was then taken by the police to her mother's home where she was found the next morning.[194] She was never missing and had never failed to appear.

At this level of state failure, then, we see a total system breakdown by three different legal levels in the court system—the Crown, the Judge, and the duty counsel. The detention of this sexual assault victim also represents the use and abuse of state resources—in all, Angela Cardinal was incarcerated for five nights, from June 5 to June 10.

Here it is also incumbent on us to note the terrible irony that this period of incarceration is *a longer period of imprisonment* than most sexual offenders in Canada ever receive, given that most cases of sexual assault are never touched by the criminal justice system and, of those that are processed, the conviction rate is extremely

190. Woolley Letter, *supra* note 132, at 13.
191. *Id.*
192. *Id.* at 9.
193. *Id.* at 8.
194. *Id.*

low.[195] That the overwhelming majority of sexual assault cases are never even reported to the police has been well and thoroughly documented by decades of research.[196] This means the vast majority of those who sexually assault and violate others do so with impunity. This low rate of reporting has not, unfortunately, significantly changed in recent years.[197]

As the authors of the IAAW/LEAF Submission observe, "[a]ssumptions were made by the Crown, defence and court about [Angela Cardinal's] state of sobriety, whether she was using drugs, her willingness to appear in court without being incarcerated, and her ability to testify, resulting in a deprivation of her liberty and equality rights."[198] In the detention of Angela Cardinal, we see the paradox of a sexual assault victim "punished" for the "crime" of cooperating with the very system that is supposed to be there to deliver justice to her.

v. The Fifth Layer of Violation: Multiple Rights Violations, Legal Obfuscation, and the Absence of a Legal Foundation for Imprisoning Ms. Cardinal

Judge Bodnarek appears to have accepted that he had authority to imprison the victim-witness Angela Cardinal under Section 545(1)(b) of the Canadian *Criminal Code*. But this provision

195. Data from the Canadian Government indicates that around 5% of sexual assaults are reported to police. SAMUEL PERREAULT, STAT. CAN., CATALOGUE 85-002-X, JURISTAT: CRIMINAL VICTIMIZATION IN CANADA IN 2014, at 26 chart 15 (2015); ADAM COTTER & LAURA SAVAGE, STAT. CAN., CATALOGUE 85-002-X, GENDER-BASED VIOLENCE AND UNWANTED SEXUAL BEHAVIOUR IN CANADA, 2018: INITIAL FINDINGS FROM THE SURVEY OF SAFETY IN PUBLIC AND PRIVATE SPACES 20 (2019), https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.pdf [perma.cc/DYM9-6HBB]. As of the 2016–2017 fiscal year, only 42% of all sexual assault cases resulted in a finding of guilt, and only 22% of those resulted in an incarceral sentence. STAT. CAN., TABLE 35-10-0031-01, ADULT CRIMINAL COURTS, GUILTY CASES BY MOST SERIOUS SENTENCE, ANNUAL, https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510003101&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=2.8&pickMembers%5B2%5D=3.1&pickMembers%5B3%5D=4.1&pickMembers%5B4%5D=5.1&cubeTimeFrame.startYear=2016+%2F+2017&cubeTimeFrame.endYear=2016+%2F+2017&referencePeriods=20160101%2C20160101 [perma.cc/DLT9-8Y5T]; STAT. CAN., TABLE 35-10-0027-01, ADULT CRIMINAL COURTS, NUMBER OF CASES AND CHARGES BY TYPE OF DECISION, https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510002701&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=2.8&pickMembers%5B2%5D=3.1&pickMembers%5B3%5D=4.1&pickMembers%5B4%5D=5.2&cubeTimeFrame.startYear=2016+%2F+2017&cubeTimeFrame.endYear=2016+%2F+2017&referencePeriods=20160101%2C20160101 [perma.cc/32AS-TYRY].

196. PERRAULT, *supra* note 195; COTTER & SAVAGE, *supra* note 195.

197. *Compare* PERRAULT, *supra* note 195, at 3, *and* COTTER & SAVAGE, *supra* note 195, at 21.

198. IAAW/LEAF Submission, *supra* note 11, at 9.

of the *Code* pertains to witnesses who refuse to answer questions.[199] Angela Cardinal did not refuse to answer questions put to her.

An independent legal report on the issue of her detention completed by Steven Penney elaborates:

> But even if she did constitute a genuine flight risk, it wouldn't matter. The provision does not authorize detention to prevent absconding. Of course, witnesses may be jailed for contempt if they refuse to comply with a properly-served subpoena or other court order, but they cannot be detained prospectively because of a concern that they may not come to court.[200]

Roberta Campbell, a criminal lawyer who was commissioned to conduct an independent review of the mistreatment of Angela Cardinal, made this same finding in her external report. Campbell concluded that the Crown should not have sought an order to incarcerate Ms. Cardinal and concluded her incarceration was not justified by any section of the *Criminal Code*.[201]

Similarly, the authors of the IAAW/LEAF Submission express strong concern about "the serious violations of Ms. Cardinal's Section 7 and Section 11(d) *Charter* rights throughout the Preliminary Inquiry."[202] In their view, "[t]he remanding of the complainant was not done according to law and violated basic norms of due process."[203]

It seems incontrovertible, then, that Angela Cardinal's detention should never have been sought and was legally unjustified under the *Criminal Code* or at common law. It was both legally impermissible as well as morally noxious to incarcerate the victim of the crime of sexual assault. Yet this is exactly what happened. Clearly there should have been some accountability for these egregious legal errors.

vi. The Sixth Layer of Violation: Retraumatizing a Sexual Assault Survivor - Violating Ms. Cardinal's Psychological Safety by Confining Her in Close Proximity with Her Violent Sexual Attacker

As if this story could get no worse, during her days and nights of imprisonment, Angela Cardinal was for periods of time actually

199. IAAW/LEAF Submission, *supra* note 11, at 11.
200. Penney, *supra* note 149 (emphasis added).
201. CAMPBELL, *supra* note 160, at 8–9.
202. IAAW/LEAF Submission, *supra* note 11, at 13.
203. *Id.*

physically trapped in close proximity with the very man who had violently attacked her. During normal court adjournments, she was often housed in a cell next to or near that of the Accused.[204]

Even more appallingly, she was episodically put into confined spaces with Blanchard. "[I]t is clear that on many occasions, she was required to walk right past the Accused in order to exit the courtroom."[205] Furthermore, "[o]n at least two occasions, she was transported between the Remand Centre and the Courthouse *in the same transport van . . . .*"[206] This was a form of forcible confinement of Angela Cardinal which traumatically exposed her on multiple occasions to the very source of her injuries—her violent attacker. This kind of entrapment could only have retraumatized an already traumatized sexual assault victim.

In its report after the fact, the judicial council noted that "[Judge] Bodnarek took steps to keep Cardinal and Blanchard apart *when he heard* they were being transported in the same van."[207] The judicial council noted that the Judge also took other measures to "keep the two as far away from each other as possible in court."[208] But this hardly attenuates the wrongfulness or the inconceivable insensitivity of confining Ms. Cardinal in spaces close to the man who would be proven to have violently assaulted her. This is the extreme antithesis of a trauma-informed institutional response, let alone one guided by principles of common sense and decency.

vii. The Seventh Layer of Violation: The Court's Denial of Its Rights Contraventions and Self Congratulation in the Face of Its Degradation of Angela Cardinal

Judge Bodnarek revealed himself to be strikingly disconnected from the suffering he inflicted upon Angela Cardinal when he ordered her to be shackled and imprisoned. Comments Judge Bodnarek made about the proceedings appear to betray how blithely inured he was to the travesty of justice he perpetrated.

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204. *Id.* at 14.

205. R. v. Blanchard, 2016 ABQB 706, para. 235.

206. *Id.* (emphasis added).

207. Dean Bennett, *Alberta Judge Cleared in Case Where Sexual Assault Victim Was Shackled, Jailed in Court*, THE TORONTO STAR (Feb. 23, 2018), www.thestar.com/news/canada/2018/02/23/alberta-judge-cleared-in-case-where-sexual-assault-victim-was-shackled-jailed-in-court.html [perma.cc/VNB9-P39K] (emphasis added). However, why this action was only taken after the fact remains unanswered.

208. *Id.*

There appears to be a self-congratulatory tone to some of the remarks he directed at Angela Cardinal during her ordeal.

For example, at multiple points during the proceedings, Angela Cardinal complained that she did not want to be sent back to the prison where the food was bad and "someone pooped in all . . . [the] showers."[209] Judge Bodnarek's disregard of her concerns are evident by how he kept her incarcerated, but also made patronizing comments directing her to be patient because, in his view, the Court was "*making really good progress*."[210]

This is among the most astonishing and revealing of the small moments to be gleaned from the transcript of this horrifying episode. That the Judge was apparently sufficiently detached from the indignities and discomfort he imposed on the victim-witness must underlie his sense of entitlement in commenting favourably on the pace of the legal proceedings. Perhaps from his vantage point from the bench, the progress of the legal proceeding was "good." For Angela Cardinal, however, it was anything but.

It is as if Judge Bodnarek laboured under the misapprehension that this judicial observation—which reflects the self-referential vantage point of the legal system and his position of power and comfort issuing orders from the bench—would be appeasing or was relevant to the frightening circumstances into which Angela Cardinal had been remanded. This judicial remark that the Court was *"making really good progress"* was made while the judge elected to ignore Ms. Cardinal's repeated pleas to be freed, choosing instead to keep her shackled, in handcuffs, and incarcerated, night after night.

viii. The Eighth Layer of Violation: Institutional Betrayal - The Failure to Take Responsibility for and Fully Acknowledge the Levels of Harm and Wrongdoing

The story of what happened to Angela Cardinal in the criminal justice system is a story of institutional failure and betrayal. Indeed, the horrendous treatment meted out against her is, in microcosm, an expression and example of the multiple and ongoing ways the criminal justice system, including the police, so often and spectacularly fails at the macro level, to adequately or appropriately respond to the specific needs of Indigenous women harmed by

209. R. v. Blanchard, 2016 ABQB 706, para. 231.
210. *Id.* at para. 233 (emphasis added).

violence.[211] In fact the criminal justice system itself can be a site of violence and often perpetrates serious harms against Indigenous women.[212] This is a stark example of institutional betrayal.

The term "institutional betrayal" refers to wrongdoings perpetrated by an institution upon individuals who depend on that very institution.[213] Developed by Jennifer Freyd, and since elaborated upon and applied in a range of contexts, this concept captures the additional and compounding harms experienced by those betrayed by institutions mandated to protect, serve, assist, respect and acknowledge them in some fundamental capacity.[214] It can apply to failing to prevent or respond supportively to wrongdoings by individuals (e.g. sexual assault) committed outside of or within the context of the institution.[215]

There has been an explosion of important research, largely from the disciplines of psychology and psychiatry, on the nature and impact of traumatic events and traumatic responses, as experienced at an individual level.[216] As Jennifer Freyd explains, however:

> [N]ew research has begun to focus on events that are clearly traumatic and yet historically have not fit neatly within the individually focused model that has dominated the field of traumatic stress. . . . What does it mean to find danger in a place where one instead expected to find safety? These questions mark a notable departure from descriptions of traumatic experiences as flashpoints of danger in an otherwise safe world.[217]

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211. *See, e.g.*, Sherene H. Razack, *Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George*, 15 CAN. J.L. & SOC. 91 (2000) [hereinafter Razack, *Gendered Racial Violence*]; Sherene Razack, *Sexualized Violence and Colonialism: Thoughts Related to the Investigation of Missing and Murdered Aboriginal Women*, 28 C.J.W.L. 285 (2016); Razack, *Gendering Disposability*, *supra* note 20; MMIW Final Report, *supra* note 31.

212. *See generally* HUM. RTS. WATCH, POLICE ABUSE OF INDIGENOUS WOMEN IN SASKATCHEWAN, *supra* note 43.

213. *See* Jennifer J. Freyd & Carly Parnitzke Smith, *Institutional Betrayal*, 69 AM. PSYCH. 575 (2014) [hereinafter Freyd & Smith, *Institutional Betrayal*].

214. *Id.*

215. Melissa Platt, Jocelyn Barton & Jennifer J. Freyd, *A Betrayal Trauma Perspective on Domestic Violence*, *in* VIOLENCE AGAINST WOMEN IN FAMILY RELATIONSHIPS 185 (Evan Stark & Eve Buzawa eds., 2009); *see also* Jennifer J. Freyd, *When Sexual Assault Victims Speak Out, Their Institutions Often Betray Them*, THE CONVERSATION (Jan. 11, 2018), theconversation.com/when-sexual-assault-victims-speak-out-their-institutions-often-betray-them-87050 [perma.cc/79PZ-3DXU].

216. For some of the seminal works in the field, see, for example, BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (2014); HERMAN, *supra* note 1.

217. Freyd & Smith, *Institutional Betrayal*, *supra* note 213, at 577.

Freyd developed the concept of "institutional betrayal"[218] to analyse systemic level harms. With colleagues, she has further explored and developed the concept in a variety of contexts in order to "examine institutional action and inaction that exacerbate the impact of traumatic experiences."[219] This concept effectively illustrates the fundamental ways in which the criminal justice system, which is organized around principles of due process and fairness, not only failed to treat a citizen victim-witness such as Angela Cardinal with the dignity and respect she deserved, but then actively and profoundly harmed her by transgressing her most basic of human rights. Not only was there institutional betrayal through a violation of her fundamental rights, but this was then significantly compounded by the failure of any oversight bodies to hold any of the legal players accountable for their wrongdoing.

After media reports brought to public attention Angela Cardinal's terrible situation and mistreatment in this preliminary proceeding of a sexual assault trial, significant media scrutiny was focused on the case.[220] One important outcome was the search for accountability from those within the legal system responsible for her shackling and detention as if she were the criminal, not the victim.[221] Unfortunately, despite a number of commentators and organizations recognizing and speaking out against this wrongdoing, not a single one of the responsible parties was ever held to account. Worse still, the institution responsible for overseeing judicial conduct and ethics absolved all key figures, including the Judge, of any responsibility for violating Angela Cardinal.[222]

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218. *Id.* ("Institutional betrayal is a description of individual experiences of violations of trust and dependency perpetrated against any member of an institution in a way that does not necessarily arise from an individual's less-privileged identity.").

219. *Id.*; *see also* Jennifer J. Freyd & Carly Parnitzke Smith, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. OF TRAUMATIC STRESS 119 (2013).

220. *See, e.g.*, *'Extreme Failings': Justice Minister Outlines Scope of 'Angela Cardinal' Case Review,* CBC NEWS (June 15, 2017), www.cbc.ca/news/canada/edmonton/extreme-failings-justice-minister-outlines-scope-of-angela-cardinal-case-review-1.4163029 [perma.cc/CU9K-FLZC].

221. *See, e.g.*, Johnston, *Sex Assault Victim Jailed*, *supra* note 159; Janice Johnston, *'I'm the Victim and I'm in Shackles': Edmonton Woman Jailed While Testifying Against Her Attacker*, CBC NEWS (June 5, 2017), https://www.cbc.ca/news/canada/edmonton/sex-assault-victim-jailed-judge-edmonton-1.4140533 [perma.cc/B3E2-RY9Y] [hereinafter Johnston, *'I'm the Victim'*].

222. The Alberta Judicial Council cleared Judge Bodnarek as is elaborated below. For public reports of this, see Bennett, *supra* note 207.

It should be pointed out, however, that not all members of the legal profession failed to see the obvious and glaring problems. Justice Macklin, in the trial decision itself, recognizing the appalling treatment meted out to Angela Cardinal at the preliminary inquiry, said so explicitly and clearly in his reasons for judgment.

Then Alberta Provincial Justice Minister Kathleen Ganley also strongly condemned the court's conduct, condemning it as "unacceptable."[223] As she explained, "[t]he way this woman was treated in our justice system is absolutely unacceptable, and we cannot lose sight of the extreme failings in this case."[224] Minister Ganley went on to state, "[i]t is not easy on any of us to admit that the system did not meet the public's legitimate expectations."[225] She then asserted, "if we do not admit that this was a bad outcome, we lose the opportunity to improve the system."[226]

Minister Ganley also made the connection between the appalling treatment endured by Angela Cardinal and her status as an Indigenous woman struggling with homelessness and addictions in a racist society. Ganley explained, "one of the questions that keeps me up at night is whether this would have been the case if this woman was Caucasian and housed and not addicted, whether this would have happened to her."[227] It seems patently obvious that it would not have. Finally, Ganley acknowledged that Ms. Cardinal was owed an apology she can now never receive.[228]

Minister Ganley then took action to mandate a committee to recommend policy changes on the treatment of victims in Alberta and sought a public report on what happened.[229] Rebecca Campbell, the external reviewer appointed by Ganley, concluded that she had difficulty summarizing "all that went wrong in a case such as this,"

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223. *'Extreme Failings'*, CBC NEWS, *supra* note 220.

224. *Id.*

225. Janice Johnston, *'Incredibly Damning Allegation': Angela Cardinal Case Ignites Feud Between Prosecutors, Justice Minister*, CBC NEWS (June 21, 2017), http://www.cbc.ca/news/canada/edmonton/angela-cardinal-kathleen-ganley-crown-prosecutors-1.4169582 [perma.cc/YZS5-HXAV] [hereinafter Johnston, *Incredibly Damning Allegation*].

226. *Id.*

227. Michelle Bellafontaine, *Question of Race in Sex Assault Victim's Jailing 'Keeps Me Up at Night,' Alberta Justice Minister Says*, CBC NEWS (June 5, 2017), www.cbc.ca/news/canada/edmonton/sex-assault-victim-jailed-ganley-1.4146682 [perma.cc/J35K-UVC4].

228. *Id.*

229. *Changes to Further Support Victims of Crime*, GOV'T OF ALBERTA (Feb. 23, 2018), www.alberta.ca/release.cfm?xID=52457A2F9131F-DC13-5220-03AF07EC8913968D [perma.cc/GFZ6-XUJW].

which she described as revealing "systemic problems" in "a complete breakdown of legal protections."[230]

A powerful and thoroughly researched joint submission to the independent review was made by the Institute for the Advancement of Aboriginal Women (IAAW) and the Women's Legal Education and Action Fund (LEAF).[231] The authors condemned the many mistakes made, recognizing that Angela Cardinal's voice and rights were systematically ignored.[232]

Moreover, these organizations crucially took note of the broader context by observing that "the treatment of Ms. Cardinal occurred in a context in which relations between Indigenous women and the criminal justice system are in crisis."[233] The report authors explain that:

> Overall, the contextual factors outlined here show the deeply flawed relationship between the criminal justice system in Alberta and Indigenous women. Indigenous women are under-protected and over-criminalized. Indigenous women are disproportionately victimized by violent crime, yet rather than protecting them, the criminal justice system disproportionately targets them as "criminals." It is incumbent on actors in the criminal justice system to consider this context in their engagement with Indigenous women and to take proactive decisions to break this cycle.[234]

Even in the face of the media outcry,[235] the strong and resounding condemnation from national organizations such as the IAAW and the LEAF, the condemnation expressed in the independent review of the case, as well as that of the Alberta Minister of Justice, none of the legal oversight bodies saw fit to raise a concern, let alone impose accountability on the Judge, Crown, or duty counsel defence lawyer who together facilitated Angela Cardinal's shackling and imprisonment.

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230. *Jailing of Edmonton Sex Assault Victim 'A Call to Action'*, CBC NEWS (Feb. 23, 2018), https://www.cbc.ca/news/canada/edmonton/angela-cardinal-justice-alberta-jailed-victim-1.4547990 [perma.cc/WR8R-H3RB].

231. IAAW/LEAF Submission, *supra* note 11.

232. *Id.*

233. *Id.* at 20.

234. *Id.*

235. *See* Don Braid, *Sexual Assault Victim Who Was Shackled and Jailed Yet Another Example of Failure of Justice*, NAT'L POST (June 6, 2017), https://nationalpost.com/news/don-braid-sex-assault-victim-who-was-shackled-and-jailed-yet-another-example-of-failure-of-justice [perma.cc/F5DJ-5D5E] ("[T]he case of Angela Cardinal, who was jailed during her testimony—is so offensive to natural justice that it can literally make you gasp, or gag.").

Instead, in 2017, the President of the Crown Association vigorously defended the Crown's request for Angela Cardinal's remand.[236] When a CBC news reporter asked Crown prosecutor Innes if she would have done anything differently in the case, knowing what she knows now, she categorically replied: "No."[237] Innes apparently remained unperturbed by her shameful treatment of this victim-witness in this sexual assault prosecution.

Furthermore, James Pickard, President of the Alberta Crown Attorneys' Association, defended the actions of the Crown prosecutor in a blistering four-page letter to then-Justice Minister Ganley.[238] Just as disconcertingly, "50 fellow prosecutors" in Alberta chose to make a visible display of their enthusiastic support.[239]

In the same defensive vein, contrary to the finding of other legal experts such as Professor Alice Woolley, the Alberta Judicial Council (AJC) declined to make any finding of judicial misconduct against Judge Bodnarek. Adding insult to injury, the Judicial council claimed—*without citing any substantiation*—that there was a legal basis for Angela Cardinal's imprisonment.[240] This kind of assertion, without detailed reasoning and substantiation to support it, would barely muster a passing grade on a first-year law exam. Reason and justification are central and defining aspects of legal analysis, yet the AJC seemed content to relieve itself of this obligation.

This closing of legal ranks occurred in the same criminal justice system ostensibly dedicated to the rule of law and victims' rights.[241] The idea of the significance of victims' rights—which long

236. Johnston, *Sex Assault Victim Jailed*, *supra* note 159.

237. Janice Johnston, *Alberta's Chief Judge Will Examine Case of Jailed Sexual Assault Victim*, CBC NEWS (June 5, 2017), https://www.cbc.ca/news/canada/edmonton/lance-blanchard-angela-cardinal-diana-goldie-patricia-innes-1.4147276 [perma.cc/D8EG-L2M4].

238. Johnston, *Incredibly Damning Allegation*, *supra* note 225.

239. *Id*.

240. *No Judicial Misconduct in Case of Jailed Sex Assault Victim, Council Finds*, CBC NEWS (Feb. 23, 2018), www.cbc.ca/news/canada/edmonton/no-judicial-misconduct-in-case-of-jailed-sex-assault-victim-council-finds-1.4549004 [perma.cc/2NYL-CUYF].

241. *See, e.g.*, Canadian Victims Bill of Rights, S.C. 2015, c 13 (Can.) ("Whereas it is important that victims' rights be considered throughout the criminal justice system; Whereas victims of crime have rights that are guaranteed by the *Canadian Charter of Rights and Freedoms* . . . [e]very victim has the right to have their security considered by the appropriate authorities in the criminal justice system . . . . Every victim has the right to have reasonable and necessary measures taken by the appropriate authorities in the criminal justice system to protect the victim from intimidation and retaliation.").

predate legislation enacted to recognize them—is articulated in the express language of the preamble to the Canadian Victims Bill of Rights:

> Whereas it is important that victims' rights be considered throughout the criminal justice system;
> Whereas victims of crime have rights that are guaranteed by the *Canadian Charter of Rights and Freedoms*; . . . .[242]

Not only do we see institutional betrayal in the degrading treatment of Angela Cardinal during the preliminary inquiry, but we also see another and compounding layer in the unconscionable responses of the professional oversight bodies of the legal profession, which defended the actions of the Judge and Crown and refused to impose any censures for violating Angela Cardinal's rights many times over.

Even worse, the AJC took pains to deny the presence or relevance of any social factors in the Judge's response to this victim-witness, such as the fact that Angela Cardinal was an Indigenous woman. Nor did the Council acknowledge the presence of sexism, racism, and colonialism in society at large as well as in the criminal justice system, or the antipathy towards vulnerable and marginalized people struggling with addictions and homelessness, and how these factors necessarily shaped Angela Cardinal's treatment. Instead, in a complete and totalizing erasure of the context and impact of multiple layers of discrimination at play in this case, the AJC wrote, "*There is no evidence that the gender or aboriginal status of the complainant* influenced any of Judge Bodnarek's rulings in this case."[243]

The finding that Angela Cardinal's gender or aboriginal status had no impact on the judgment, in addition to being untenable, is at odds with judges' ethical duties issued by the Canadian Judicial Council, as Emma Cunliffe points out in an incisive blog post.[244] The Canadian Judicial Council directs judges, in the *CJC Ethical Principles for Judges*, and in relation to the principle of equality, to "strive to be aware of and understand differences arising from, for

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

243. *No Judicial Misconduct in Case of Jailed Sex Assault Victim*, *supra* note 240.

244. Emma Cunliffe, *Incarcerating the Victim: Indigeneity, Gender and the Canadian Legal System's Treatment of 'Angela Cardinal'*, RECONCILIATIONSYLLABUS (March 1, 2018), https://reconciliationsyllabus.wordpress.com/2018/03/ [perma.cc/LA57-WG7U].

example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability."[245]

Even in the otherwise sensitive and progressive external report commissioned by the Alberta Justice Minister, Roberta Campbell wrote that the authors of the report "do not believe that the anyone [sic] *deliberately engaged in racist or discriminatory action* towards Ms. Cardinal, as that is not borne out by the court record, but instead believe that systemic bias played a role in the unfolding of the narrative."[246] Roberta Campbell's opinion represents a retreat from holding key legal professionals responsible, and instead avers to free-floating "systemic bias" not rooted in any individual person's beliefs or actions.

While we have seen a few public examples of institutions taking responsibility for errors and wrong-doing and moving forward to make positive changes, this case is emphatically not an example. Instead, we have an erasure of responsibility and whitewashing—pun intended—by some of the most powerful players and oversight bodies in the legal system, denying the obvious significance of Ms. Cardinal's Indigeneity and the contexts, legitimating beliefs and practices of racism, sexism and colonialism which situated her life and the responses to her within the criminal justice system.

A final example of institutional betrayal can be found in the erasure of Angela Cardinal's true identity. The woman who is the subject of this story is publicly identified by the pseudonym Angela Cardinal because her real name remains covered by a publication ban.[247] However, her family has protested this, wanting her true identity revealed.[248] During an interview with CBC Radio, when asked about the publication ban and the reasons for its persistence after Cardinal's death, her sister-in-law replied:

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245. CANADIAN JUDICIAL COUNCIL, ETHICAL PRINCIPLES FOR JUDGES 23 (2004), https://cjc-ccm.ca/sites/default/files/documents/2019/news_pub_judicialconduct_Principles_en.pdf [perma.cc/V4CC-VUJ4]. These principles are being redrafted and updated, with a new Draft posted November 20, 2019, while the final and updated version is being completed. CANADIAN JUDICIAL COUNCIL, Draft, ETHICAL PRINCIPLES FOR JUDGES (Nov. 20, 2019), https://cjc-ccm.ca/sites/default/files/documents/2019/EPJ%20-%20PDJ%202019-11-20.pdf [perma.cc/M3QN-YEUG].

246. CAMPBELL, *supra* note 160, at 16 (emphasis added).

247. *Id.* at 3.

248. *'People Need to Know Who She Is,' Says Family of Sex Assault Victim Shackled During Her Attacker's Trial*, CBC RADIO (June 7, 2017), http://www.cbc.ca/radio/asithappens/as-it-happens-wednesday-edition-1.4149694/people-need-to-know-who-she-is-says-family-of-sex-assault-victim-shackled-during-her-attacker-s-trial-1.4149697 [perma.cc/VW4K-GJTE].

> We don't know, the whole family wants it gone. Because she's a human being. There are so many Angela Cardinals. People could mistake one for the other. Giving her a fake name doesn't make her who she is. Her name makes her who she is. I think that people need to know who she is.[249]

Angela Cardinal's sister-in-law continued to describe the woman she wanted people to know. In her sister-in-law's words, Angela Cardinal was "[a] loving, caring mother. She was my best friend. She was homeless, and she had nothing, but if me and her brother needed something, she would take the shirt off her back to help us. She loved everybody, she loved society. She never hated anybody."[250]

Obscuring Angela Cardinal's real identity and name under a publication ban has the effect of depersonalizing her and erasing her. The fact that Angela Cardinal's real name has not been revealed is yet another violation occurring even after her death, and one still experienced by her surviving family.

None of the institutions which should have assisted Angela Cardinal while she was alive—indeed which were obligated to assist her—did so. Instead, those institutions betrayed her.

C. Widening the Lens on Institutional Betrayal: The Shameful Practices of Shackling and Imprisoning Indigenous Women

The shackling and imprisoning of Angela Cardinal was not an isolated incident. There are numerous examples, within Canada and elsewhere, of the institutional betrayal of Indigenous women—themselves the victims of sexual violence and/or physical assault—in jailing them at various stages in the criminal justice process.[251] Despite having lived through harrowing experiences of violence, these women were treated as criminals, not as victims.

In a case eerily similar to some of the aspects of Angela Cardinal's, another Indigenous woman, Kitty Nowdlok-Reynolds, who was Inuk, was violently raped by another Inuk man and then

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249. *Id.*

250. *Id.*

251. *See* R v. A(M), 2020 NUCJ 4, 6; SHERENE RAZACK, LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE AND CULTURE IN COURTROOMS AND CLASSROOMS 80–81 (1998); Shannon Sampert, *Justice System Re-victimizes Indigenous Women*, WINNIPEG FREE PRESS (June 8, 2017), https://www.winnipegfreepress.com/opinion/analysis/justice-system-re-victimizes-indigenous-women-427155601.html [perma.cc/ZS5B-JL2P].

later brutalized by the criminal justice system.[252] In 1990, she was violently sexually assaulted while living in Iqaluit.[253] Nowdlok-Reynolds then moved from her home in the North to Vancouver after her attacker was arrested.[254] Police had neglected to obtain a statement from Nowdlok-Reynolds prior to her move, and so, after a "series of inept police bureaucratic manoeuvres," Crown counsel sought and obtained a warrant for her arrest to compel her attendance in court in the Northwest Territories.[255]

Nowdlok-Reynolds was "arrested and put in handcuffs, dragged through the airports in Edmonton and Vancouver, Ottawa and Toronto, in part because the security guard responsible for her travel had slept in and missed one of her flights north."[256] Nowdlok-Reynolds was also jailed for five days while she was escorted by police back to Iqaluit.[257] Similar to Angela Cardinal's ordeal, Nowdlok-Reynolds was transported to the courtroom while confined in the same vehicle as her attacker.[258] The RCMP Public Complaints Commission appointed to oversee her complaint pointedly noted: "[We] may be pardoned for wondering which victimizing incident had the greater effect, the sexual attack on June 7, 1990 or the treatment accorded to her by the criminal justice system."[259] Nowdlok-Reynolds said it was as if "she had been raped twice."[260] About twenty-five years later Angela Cardinal suffered virtually identical treatment.

In 2018, an Inuk woman, identified by the initial K, was being assaulted by her boyfriend.[261] Called by K's sister for help, the RCMP arrived and determined that K was intoxicated.[262] At the time of the attack, K was on bail conditions forbidding her to drink alcohol.[263] Although it was evident that K had been violently assaulted, the kind of "assistance" the RCMP elected to offer at the

252. RAZACK, LOOKING WHITE PEOPLE IN THE EYE, *supra* note 251, at 80–81 (citing ALLAN WILLIAMS, S. JANE EVANS & LAZARUS ARREAK, ROYAL CANADIAN MOUNTED POLICE PUB. COMPLAINTS COMM'N, PUBLIC HEARING INTO THE COMPLAINT OF KITTY NOWDLOK-REYNOLDS: COMMISSION REPORT (1992) [hereinafter RCMP Commission Report]).

253. *Id.*

254. *Id.*

255. *Id.*

256. Sampert, *supra* note 251.

257. *Id.*

258. RAZACK, LOOKING WHITE PEOPLE IN THE EYE, *supra* note 251, at 81.

259. *Id.* (citing RCMP Commission Report, *supra* note 252, at 47).

260. Sampert, *supra* note 251.

261. R v. A(M), 2020 NUCJ 4, 6.

262. *Id.* at 12.

263. *Id.*

scene of the crime where K was being beaten, was to charge K with breaching her bail conditions.[264]

When she appeared before him, Justice of the Peace Joseph Paul Murdoch-Flowers, addressed her as follows:

> You're sitting here with your face black and blue, beaten. And I'm sorry that I have to say that, but I see that. And I have to say that, because this is being recorded and I want whoever hears this in the future to be able to see in their minds what I see from this seat.[265]

K was given an absolute discharge.[266]

In 2020, the same Justice of the Peace faced a disturbingly similar case. In 2018, A(M), also an Inuk woman, called the police for assistance because she was being assaulted by her stepfather.[267] A(M), too, was on bail conditions prohibiting her from drinking alcohol.[268] Again, exercising the same wisdom, the RCMP elected at the scene of her violent assault to arrest A(M) and charge her for breaching her bail condition.[269] The Justice of the Peace stated:

> Such decision making by the police and Crown is a failure to properly exercise the discretion which the law grants them to charge or not to charge. More importantly, it is a disservice to some of the most vulnerable people in our society—namely Inuit women who suffer from domestic violence.[270]

He continued on, emphasizing that "the police and Crown must cease this practice."[271] A(M) was also granted an absolute discharge.[272]

These situations are not unique to Canada. In Western Australia there have been several similar cases where women, particularly Indigenous women, call police to report abuse, and are themselves arrested, for "crimes" such as unpaid fines.[273] The case

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264. *Id.*
265. *Id.* at 14.
266. *Id.* at 15.
267. *Id.* at 11.
268. *Id.*
269. *Id.*
270. *Id.* at 27.
271. *Id.* at 28.
272. *Id.* at 29.
273. *See* Livia Albeck-Ripka, *The Police Were Called for Help. They Arrested Her Instead*, N.Y. TIMES (Feb. 24, 2019), https://www.nytimes.com/2019/02/24/world/australia/police-arrest-aboriginal-woman-fines.html [perma.cc/FMX5-XT8U].

of Ms. Dhu is one especially tragic example.[274] After receiving an anonymous tip that Ms. Dhu had been the victim of domestic violence, police arrived at her home and arrested not only her violent spouse but Ms. Dhu as well.[275] What was Ms. Dhu's crime? She owed more than 3,600 Australian dollars from an initial smaller fine for not having provided police with personal details after they stopped her on the street.[276]

While in custody Ms. Dhu complained of feeling unwell, but "the majority of the persons responsible for [her] care formed the view that she was exaggerating or feigning symptoms of being unwell."[277] Ms. Dhu died in custody as a result of complications from injuries sustained in an earlier domestic assault incident.[278] Not only is it grossly inappropriate for a victim of domestic violence to be arrested at the scene of the crime, but the shocking negligence and blatant disregard for Ms. Dhu's wellbeing shown by the criminal justice system's authorities clearly make them complicit in her death.

In another incident in Australia, Kearah Ronan, a twenty-six-year-old Indigenous woman, six months pregnant at the time, was arrested and jailed when she did not attend court to give evidence against her former partner in a domestic violence case.[279] Although Ronan informed the court registry in advance that she was sick and unable to attend court, the Magistrate ordered an arrest warrant at the request of the police prosecutor.[280] As a result of this seriously inappropriate arrest, the pregnant and terrified Ms. Ronan was

274. Although her full name is available, the media referred to her as Ms. Dhu. *See, e.g*, *id.*; *Ms Dhu Death in Custody: CCTV Footage Shows 'Inhumane' Police Treatment – Video*, THE GUARDIAN (Dec. 16, 2016), https://www.theguardian.com/australia-news/video/2016/dec/16/ms-dhu-death-in-custody-cctv-footage-shows-inhumane-police-treatment-video [perma.cc/X6HZ-RXPC]; Sebastian Neuweiler, *Ms Dhu's Family to Sue State Over Death in Custody*, ABC NEWS (July 20, 2017), https://www.abc.net.au/news/2017-07-20/ms-dhu-family-to-sue-wa-over-death-in-custody/8728620 [perma.cc/DY76-JDY5]; Belinda Jepsen, *Ms Dhu Died in Prison After Failing to Pay Fines. A Six-Year Fight Means No One Else Will*, MAMAMIA (June 17, 2020), https://www.mamamia.com.au/ms-dhu/ [perma.cc/G7EY-3BKK].

275. Albeck-Ripka, *supra* note 273.

276. *Id.*

277. Rosalinda Vincenza Fogliani, State Coroner, *Inquest into the Death of Julieka Ivanna Dhu*, at 4, 11020-14, Ref. No. 47/15, W. AUSTL. CORONER'S COURT, (Dec. 16, 2016), www.coronerscourt.wa.gov.au/_files/dhu%20finding.pdf [perma.cc/YA9T-P7GM].

278. *Id.* at 27.

279. Annabel Hennessy, *How Did It Come to This? Kearah Ronan Was Locked Up For Being Sick*, W. AUSTRALIAN (May 31, 2019), https://thewest.com.au/news/wa/how-did-it-come-to-this-kearah-ronan-was-locked-up-for-being-sick-ng-b881217063z [perma.cc/8RN5-TMC7].

280. *Id.*

forced to spend the night in a police lock-up.[281] Worse still, when this egregious conduct came to light, a police spokesperson defended the arrest. By tragic coincidence, Ms. Ronan was the cousin of Ms. Dhu.[282]

The following examples involve the arrest of victims of sexual assault. In these cases, although not specifically identified as such, there is a high probability that the victims were Indigenous, given that the attacks took place in Canada's Northwest Territories, home to many Indigenous peoples.[283]

In 2018, police arrived at an alleyway in response to a service call that a woman was being raped.[284] Instead of taking the woman to the hospital for a medical examination and using the rape kit to collect evidence, the police arrested her for public intoxication and held her locked up overnight.[285] The trial judge in that case stated, "I am unable to imagine circumstances which would justify this type of treatment of a victim of sexual assault."[286]

In 2016, J.S., a thirteen-year-old girl, was sexually assaulted while on probation.[287] The police had been looking for her because she had breached her curfew.[288] Located at the house of the accused, "extremely intoxicated,"[289] J.S. was put in a jail cell overnight for intoxication and for breaching curfew, instead of being taken to the hospital to be examined.[290] At trial, J.S. left the courtroom partway through her cross-examination and failed to return, undoubtedly a reaction to the traumatizing experience of the trial and her desire

281. *Id.*

282. *Id.*

283. STATISTICS CANADA, FOCUS ON GEOGRAPHY SERIES, 2016 CENSUS (2017), https://www12.statcan.gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-PR-Eng.cfm?TOPIC=9&LANG=Eng&GK=PR&GC=61& [perma.cc/QN4M-HGZR] (detailing census data that 50.7% of the Northwest Territories population is Aboriginal).

284. R. v. Kapakatoak, 2018 NWTTC 10, para. 6.

285. *Id.* at para. 36.

286. *Id.* at para. 44; *see also* Richard Gleeson, *Yellowknife RCMP Jail Woman After She Was Sexually Assaulted*, CBC NEWS (Aug. 27, 2018), www.cbc.ca/news/canada/north/rcmp-jail-sexual-assault-victim-1.4798644 [perma.cc/HDH8-QFJS] (describing the judge's disapproval of the victim's treatment by police).

287. R. v. Durocher, 2016 NWTSC 17, para. 1.

288. *Id.* at para. 19.

289. *Id.* at para. 22; *see also* Richard Gleeson, *N.W.T. Judge Questions RCMP's Treatment of 13-Year-Old Sexual Assault Victim*, CBC NEWS (Mar. 29, 2016), www.cbc.ca/news/canada/north/hay-river-sexual-assault-victim-13-years-old-1.3510347 [perma.cc/P8JZ-A9RU] (describing how the case raises questions about police treatment of sexual assault victims).

290. R. v. Durocher, 2016 NWTSC 17, para. 23.

for self-preservation.[291] The trial judge stated that he "would not have been inclined to issue a warrant for the arrest of J.S. even if an application for a warrant had been made."[292] The trial judge specifically referenced J.S.'s treatment by the police upon arrest as a circumstance that must be taken into consideration when addressing her decision to leave the courtroom.[293] While laudable that the trial judge recognized, however tentatively ("not have been inclined"), the police's wrongful conduct in jailing a sexual assault victim only thirteen years of age, his mild condemnation is insufficient.

These examples highlight one of the particularly appalling ways in which the criminal justice system continues to fail Indigenous women in Canada, Australia, and beyond. After being sexually and physically assaulted, these women should have been offered support and compassion. Instead, they were treated like criminals—arrested, incarcerated, and shackled.[294]

The brutal and degrading treatment of Indigenous women at the hands of professionals within the criminal justice system cannot be understood without reference to the defining context and reverberations of colonialism, racism and misogyny. It can only be because of entrenched racism and sexism—such that Indigenous women are viewed as unworthy of basic respect and rights and therefore disposable—that these practices have taken place.

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291. *Id.* at para. 17.

292. *Id.* at para. 39.

293. *Id.*

294. When I delivered a much shorter version of this analysis as a keynote address at a conference in British Columbia (Melanie Randall, Keynote Address at Beyond #MeToo: Supporting Survivors | Changing Culture (Nov. 14, 2018)), I was taken aback by how many Indigenous women approached me afterwards to tell me that this story was far from unique, that there are many more like Angela Cardinal across Canada whose stories of mistreatment have not been revealed, let alone remedied. While already aware of the horrifying scale of violence against Indigenous women in Canada, I had naively hoped that the egregiousness of Angela Cardinal's story at the hands of the criminal justice system was at least somewhat extreme and anomalous. However, this is far from the truth as Indigenous women working on the front lines already know. In fact, once the story of Angela Cardinal's incarceration was exposed by the media, a CBC journalist investigated and uncovered two additional cases in which sexual assault victims, each of whom was extremely vulnerable and impoverished, were imprisoned, one only sixteen years old, the other, eight months pregnant. *See* Janice Johnston, *'Great Unfairness': 2 More Sex Assault Cases Where Victims Were Jailed to Ensure Their Court Testimony*, CBC NEWS (July 28, 2017), www.cbc.ca/news/canada/edmonton/edmonton-victims-sexual-assault-custody-alberta-1.4226601 [perma.cc/8VC8-R92F].

Police and state failures in relation to women who are victims of gendered violence are well documented.295 It is difficult to imagine, however, that affluent, Caucasian women who are victims of gendered violence would be arrested for extraneous matters when they call police during a domestic violence incident, or would be imprisoned while they testify about their own sexual assaults in criminal proceedings. These examples of dehumanizing conduct in shackling and imprisoning Indigenous women who are victims of gendered violence themselves, also demonstrate the profound failure to recognize or understand the harms of such violence. This dehumanizing conduct highlights a systematic prioritizing of the imperatives of the criminal justice system over the needs of the women whose experiences of violence should have led them to expect assistance, respect, and rights protections from that very system.

II. Resistance and Resilience in the Face of Indignities, Degradation, and Violence

One powerful and striking theme, both in the story of Angela Cardinal's sexual assault and the mistreatment she suffered while cooperating with the prosecution, is the strength of her spirit, her resilience, and the resistance she demonstrated throughout. Too often in accounts of what is done to women, and in documenting victimization and the forms of violence perpetrated against women, we fail to pay sufficient attention to, or even recognize, women's multiple ways of coping with, and, more importantly, vigorously and creatively resisting, this violence. In fact, the many ways in which women respond to, cope with, struggle against, and try to end the violence in their lives has not always, or even often, been framed in terms of *resistance*.

Resistance is a refusal, a way of engaging in, contesting, and opposing a relationship, often of unequal power. Highlighting resistance points to how women try to stop or contain violence perpetrated against them, or diminish circumstances of domination and oppression. More fundamentally, resistance is also a challenge to the power expressed through the infliction of this violence and/or domination in the first place. Seen this way, resistance is an important corrective to totalizing narratives of victimization which

295. *See, e.g.*, HUM. RTS. WATCH, THOSE WHO TAKE US AWAY, *supra* note 31; HUM. RTS. WATCH, POLICE ABUSE OF INDIGENOUS WOMEN IN SASKATCHEWAN, *supra* note 43.

fail to grasp agency and resistance in the face of often crushing circumstances of domination and victimization.

Angela Cardinal's fierce resistance is a remarkable, defining, and crucial part of her story that must be foregrounded if there is to be a more complete and adequate narrative of her experience. Angela Cardinal resisted both at the time she was being sexually and physically assaulted by a massively larger and stronger man, and she resisted throughout the time she was cooperating with the preliminary inquiry. Despite her resistance, Angela Cardinal was shackled and imprisoned by an overwhelmingly powerful arm of the state—the criminal justice system. This is the very system that was supposed to protect her.

A. Angela Cardinal's Incredible and Courageous Resistance Throughout Two Assaults

At the time of her violent assault by Blanchard, Angela Cardinal's fierce resistance undoubtedly minimized the extent of the physical injuries she suffered, and stopped the attack, thereby saving her life.

At just over five feet tall and weighing only 109 pounds, Angela Cardinal was a very petite woman.[296] In contrast, Blanchard, her attacker, was an extraordinarily large man; he was 6-foot-7¾ inches tall and weighed 260 pounds.[297] Although Blanchard's body was huge in comparison to hers, Angela Cardinal amazingly fought off the massively physically larger Blanchard.[298]

Even more details reveal the nature of what she faced during the sexual assault.[299] At trial, the judge found as fact that the accused:

> grabbed her, forced her onto the couch face down and took off her shoes and socks. He attempted to take off her pants but she resisted. Still holding the knife to her, he touched her breasts underneath her clothing and touched her vagina and buttocks over her clothing. He then threw her on the floor.[300]

296. R v. Blanchard, 2016 ABQB 706, para. 7.

297. *Id.* at para. 32.

298. *Id.*

299. Ms. Cardinal's account of what happened was found to be credible by the trial judge and was bolstered by corroborating evidence of her injuries and of the crime scene. *Id.* at para. 241.

300. *Id.* at para. 248.

Angela Cardinal was also stabbed and slashed during the horrific sexual attack, and had her head slammed against the floor. She required more than twenty-seven stiches to repair the lacerations Blanchard inflicted.[301] Her attempts to escape her assailant's apartment were thwarted because the blood from her own wounds made the doorknob too slippery to turn.[302]

The judge further found as facts these details about the accused's attack on Angela Cardinal:

> While on top and behind the Complainant with a knife in his hand, the Accused touched her breasts underneath her tank top. He also rubbed her vagina and her buttocks over top of her clothes. After throwing her to the floor, he exposed his penis and placed it close to the Complainant's face. He did all of this forcefully and violently. The Accused committed these acts intentionally and clearly against the Complainant's will. He was holding a knife to her for most of the time.[303]

Outlining the gravity of the offence, the trial judge continued:

> The force intentionally applied by the Accused wounded the Complainant and endangered her life. At one point, the Accused stabbed the Complainant in the hand as she tried to protect herself. She was cut numerous times, including once on her face. He hit her head against the floor. I have no doubt that the use of the knife by the Accused and the injuries inflicted upon the Complainant caused wounding and severe bleeding and endangered her life. She could have died.[304]

At some point during the attack, Angela Cardinal was able to grab a phone and dial 911 by throwing it across the room before her assailant could get it.[305] She shouted to the operator for help, all the while terrified that she would be killed, as Blanchard continued to attack her.[306] Throughout the terrifying assault, she displayed an

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301. *Id.* at para. 28.

302. *Id.* at para. 272 ("The blood on the door and doorknob was seen by police officers who attended the scene a few minutes after the 911 call was made and photos were taken. The only person bleeding was the Complainant. There was blood on the doorknob and blood spattered on the door downwards from the area of the doorknob. There is nothing credible to suggest that it got on the door in any way other than from the Complainant attempting to turn the doorknob and open the door.").

303. *Id.* at para. 317.

304. *Id.* at para. 318.

305. *Id.* at para. 26.

306. *Id.* at para. 249.

amazing fighting spirit—what the trial judge Justice Eric Macklin later described as a "feisty resistance."[307]

Allowing ourselves to acknowledge some of the horrible aspects of the violence perpetrated against Angela Cardinal, it is not difficult to imagine, then, that requiring her to recount this traumatic attack in the courtroom would itself be deeply traumatizing. It is also not difficult to predict that any close contact with the assailant would be severely distressing and traumatizing. Yet our criminal justice system required both of these from Angela Cardinal, in the most offensive and degrading of ways.

To reiterate:

- She was forced to testify in shackles.
- She was forced at times to wear handcuffs.
- She was forced to be trapped in a van in close proximity to her violent attacker on the way to court.
- She was forced to sleep in a prison for five nights, all while fully cooperating (the "cooperative victim-witness") in a criminal proceeding in which she was the main source of evidence, and in which she testified as a public service to the state.[308]

And all this took place in 2015, in Canada, a country whose rhetoric prides itself on its rights protections, commitment to equality, and care of the vulnerable.

B. "This Is a Great System:"[309] *Cardinal's Resistance Strategies During the Legal Proceedings*

Throughout the preliminary trial, once again asserting her agency and her resistance, Angela Cardinal insistently protested her imprisonment as well as the shackles she was forced to wear. She gave evidence to the court on her own behalf that she had been a reliable witness, even though the Crown failed to attend to this fact.[310] She objected to being sent to sleep in jail and insisted that she not be placed back in remand with its deplorable conditions, the bad food, and the soiled and contaminated showers.[311] She was ignored. The judge continued to patronize her.[312]

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307. *Id.* at para. 249.

308. *See* discussion *supra* Section I.B.iv. ("The Fourth Layer of Violation").

309. Woolley Letter, *supra* note 132, at 12 (quoting Angela Cardinal's sarcastic preliminary inquiry testimony).

310. Woolley Letter, *supra* note 132, at 8–9; *see also* discussion *supra* Section I.B.iv.

311. *Blanchard*, 2016 ABQB 706, para. 231.

312. *Id.* at para. 232; Woolley Letter, *supra* note 132, at 9.

Almost always, she protested in a straightforward way by calling out and naming what was happening to her, describing the frankly upside-down nature of the experience. "I'm the victim and look at me. I'm in shackles," she said to Judge Bodnarek.[313] Unmoved by her plea, he ordered her back to a jail cell. "Aren't you supposed to commit a crime to go to jail?" she retorted.[314]

At one point during her imprisonment, the proceeding was delayed until mid-afternoon in order to accommodate a dental appointment for the accused.[315] This lengthy delay meant that Angela Cardinal's time in prison was protracted and also that she was kept waiting around for the entire morning and part of the afternoon. All this so the man who had sexually and physically attacked her could receive some dental work. She, of course, received none, though she pointed out, with a flourish, that she could have benefited from some, as seen in the exchange below:

> COURT: Okay. All right. So, we're back tomorrow at 2 PM[.]
> INNES: Thank you, Sir.
> COURT: Thank you.
> CARDINAL: At two?
> COURT: Two, yes.
> CARDINAL: So, I am in the gaol cells incarcerated while you sit missy pritzy on your fricking stairs—on your chair, and I get to sit in the gaol cell cool?
> INNES: Ms. [Cardinal]
> COURT: We're—we're doing 2:00 because Mr. Blanchard needs some emergency dental work done and—
> CARDINAL: Emergency?
> COURT: —and they can only do it on Tuesdays and he's—he's waited some time for this. So, he's going to be.
> CARDINAL: Emergency?
> COURT: —he's going to be seen by a dentist tomorrow. So, that—that's why he—
> CARDINAL: I need to be seen by a dentist. You don't see me crying, My Lord.[316]

At another point in the proceedings, in a Kafka-esque reframing, the Crown made the astonishing claim to Angela Cardinal that the abhorrent treatment she was receiving was akin

313. *Blanchard*, 2016 ABQB 706, para. 232.
314. Johnston, *'I'm the Victim'*, *supra* note 221.
315. Woolley Letter, *supra* note 132, at 12.
316. *Id.*

to assistance. This is evident in the exchange below when Crown Attorney Patricia Innes refers to the court as "accommodating" her. The victim-witness' frustration is palpable as she asks to be released from being essentially held in bondage:

> CARDINAL: Can we make this testimony faster? Like somehow get me out of these shackles and get me free?
> COURT: We're[. . .]
> INNES: We're going to do everything we can *to accommodate you*.[317]

The Crown's response is a gross perversion of any concept of accommodation, in either the generic or the legal sense.

When the Judge claimed that, from his perspective, the proceedings were moving well, Angela Cardinal corrected him, demanding a judicial focus on *her* experience, not his:

> CARDINAL: I'm the victim and look at me. I'm in shackles. This is fantastic. This is great fricking—this is a great system.
> COURT: We're—we're making really good progress.
> CARDINAL: Not great progress. Look at me, I'm in shackles[.]
> COURT: No, I understand.
> CARDINAL: Judge, *you wear these*. I'd like to see that[.][318]

Angela Cardinal's boldness, her challenge to his power and authority, her demand for equality, and her insistence the judge understand her experience in that moment are plainly evident in her provocative suggestion that Judge Bodnarek subject himself to the shackles into which he had forced her. This was, again, an expression of her creative and insistent resistance.

As fundamentally important, however, was the psychological astuteness and sophistication Angela Cardinal revealed when she issued this challenge to the Judge. In suggesting to the judge that she should be mentalized,[319] she was issuing a profound rebuttal to his claim to "understand" her or what she was saying. Instead, she

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317. *Id.* (emphasis added).

318. *Id.* (emphasis added).

319. Mentalization is a psychological term which describes the process of recognition of the other, involving the imaginative mental activity required to perceive and interpret human behaviour and feelings of others. *See* Peter Fonagy & Elizabeth Allison, *What Is Mentalization? The Concept and Its Foundations in Developmental Research*, *in* MINDING THE CHILD: MENTALIZATION-BASED INVERVENTIONS WITH CHIDREN, YOUNG PEOPLE AND THEIR FAMILIES 11 (Nick Midgley & Ionna Vrouva eds., 2012).

was insisting that he failed to understand, as if saying to him, "you absolutely do not get this." She insisted the only way he might begin to have a real understanding of her experience would be if he were forced down from his position on the bench and almost literally placed into her shoes. Only then could he understand the indignity he was imposing upon her by shackling her: by personally experiencing it.

Cardinal's resistance strategies and responses are truly inspiring. In the face of the indignities heaped upon her, she persistently retained her dignity. Under such circumstances of duress and radical disempowerment, how did she ever possess the bravery and presence of mind to challenge the judge so calmly and name the reality of the situation like she did? How did she not rage and swear and curse (all totally understandable and warranted responses)? Her resistance strategies are a testament to her lively fighting spirit, no doubt a product of her indomitable personality and perhaps of the many survival strategies she may have had to construct to survive the multiple challenges of her life.

Within the inescapable confines of her situation, Angela Cardinal refused to accept the indignities heaped upon her. She resisted in the ways she could, both at the time of the attack, in order to save her life, and throughout her terrible ordeal at the preliminary inquiry where she gave evidence and fully cooperated with the state. Throughout all of her spirited and creative strategies of resistance, she refused to accept as justified the many expressions of degrading and wrongful conduct against her.

C. A Police Investigation and Criminal Prosecution Not Trauma-Informed, but Trauma-Inducing

What Angela Cardinal endured at the preliminary proceeding counts as one of the most appalling examples of gendered and racialized harms that the Canadian criminal justice system has imposed on a sexual assault complainant in recent memory. This part of the story must also be understood through the lens of this complainant's strategy, in the face of the egregious institutional revictimization, of incredibly powerful, persistent, determined and dignified resistance.

Angela Cardinal's legal story throws into stark relief the pressing need for social context and trauma-informed criminal justice system responses, especially to victims of crimes like sexual

assault (though also needed more broadly).[320] Social context-aware and trauma-informed responses—within the legal system and beyond—require recognition of the racialized and gendered harms Indigenous people have suffered in colonial societies.[321] Social context-aware, trauma-informed approaches recognize systemic discrimination in its many forms and how its structures shape people's lives, including their psycho-social development, influence their psychological capacities and coping mechanisms and circumscribe their life choices and opportunities.[322]

Paralleling developments in other professions, particularly the health fields, there has been a significant shift towards trauma-informed approaches to the prosecution of sexual assault.[323] This means, in part, attention to the nature of trauma and its role in human responses and adaptations, an understanding of the neurobiology of traumatic impacts on victims, and a shifting of institutional procedures and practices to take this knowledge meaningfully into account.[324] It would be an understatement to describe this proceeding in the prosecution of Blanchard as the antithesis of a trauma-informed sexual assault prosecution.

Even before the decision to prosecute the case was reached, the little we know of the structure of the police interview of Angela Cardinal reveals that it was highly problematic. Not only did it fail to conform to trauma-informed standards for interviewing sexual assault complainants, but it also represents a prioritizing of

320. *See* Haskell & Randall, *Impact of Trauma*, *supra* note 146, at 24–35 (discussing trauma and the importance of understanding it in its relation to social contexts such as colonialism and gender); *see also* Haskell & Randall, *Disrupted Attachments*, *supra* note 164 (discussing trauma and the wellbeing of the Aboriginal peoples in Canada).

321. *See generally* Haskell & Randall, *Disrupted Attachments*, *supra* note 164; Joseph P. Gone, *Redressing First Nations Historical Trauma: Theorizing Mechanisms for Indigenous Culture as Mental Health Treatment*, 50 TRANSCULTURAL PSYCHIATRY 683 (2013); Maria Yellow Horse Brave Heart, *The Return to the Sacred Path: Healing the Historical Trauma and Historical Unresolved Grief Response Among the Lakota Through a Psychoeducational Group Intervention*, 68 SMITH COLL. STUD. SOC. WORK 287 (1998). Maria Yellow Horse Brave Heart coined the term "historical trauma." *See Dr. Maria Yellow Horse Brave Heart Speaks on Historical Trauma*, SMITH COLL. SCH. FOR SOC. WORK, https://ssw.smith.edu/about/news-events/dr-maria-yellow-horse-brave-heart-returns-smith-give-rapoport-lecture [perma.cc/SER6-D8SG].

322. Haskell & Randall, *Disrupted Attachments*, *supra* note 164; Lori Haskell & Melanie Randall, *Social Context, Trauma-Informed Approaches to Law*, (unpublished manuscript) (on file with author).

323. *See* Haskell & Randall, *Impact of Trauma*, *supra* note 146, at 5; *see, e.g.*, CANADIAN CTR. ON SUBSTANCE ABUSE, THE ESSENTIALS OF . . . SERIES, TRAUMA-INFORMED CARE (2014), www.ccsa.ca/sites/default/files/2019-04/CCSA-Trauma-informed-Care-Toolkit-2014-en.pdf [perma.cc/E2FD-HPXK].

324. *See* Haskell & Randall, *Impact of Trauma*, *supra* note 146.

outdated standardized police requirements over the needs of traumatized crime victims. It is impossible to ignore the racist and sexist disregard with which it appears the police treated her.

When the police arrived at the scene of the crime, Angela Cardinal "was found bloodied and on the floor in the hallway entrance to the apartment."[325] She was taken to the hospital about an hour and a half later, at about 8 p.m., where her injuries were treated.[326] As the trial judge also noted, "[t]here were marks around her throat where she testified she had been strangled by the Accused when he tried to quieten her after the 911 call."[327]

The emergency physician who attended to Angela Cardinal reported that:

> [Cardinal] did not appear to have a normal mental status and was fluctuating between falling asleep and crying. He thought she was carrying on strangely and was not answering his questions in a normal manner. He testified that she appeared sleep deprived, which would have affected her ability to respond.[328]

This characterization reveals the emergency physician's failure to recognize or understand typical trauma responses. As Judith Herman explains, "[t]he psychological distress symptoms of traumatized people simultaneously call attention to the existence of an unspeakable secret and deflect attention from it. This is most apparent in the way traumatized people alternate between feeling numb and reliving the event."[329]

It is not, therefore, a "strange" response to a traumatic event, such as the near death experience and sexual assault through which Ms. Cardinal had just lived, to fluctuate between "falling asleep and crying."[330] Instead, "[t]he dialectic of trauma gives rise to complicated, sometimes uncanny alterations of consciousness . . . ."[331] Nor is it abnormal to deviate from what one might consider a "normal mental status" which is to be expected in

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325. R v. Blanchard, 2016 ABQB 706, para. 144.

326. *Id.* at para. 28.

327. *Id.*

328. *Id.* at para. 146.

329. HERMAN, *supra* note 1, at 11.

330. *Compare id.* (describing the common signs of psychological distress in traumatized people), *and* R v. Blanchard, 2016 ABQB 706, para. 146 (recounting the doctor's testimony that he believed Ms. Cardinal was sleep deprived due to her fluctuations between falling sleep and crying).

331. HERMAN, *supra* note 2, at 11.

"normal" and regular life circumstances.[332] It would be strange, in fact, *not* to consider the traumatic event and its understandable psychological impacts in assessing a patient's mental and physical status (as is required for a trauma-informed medical response).

This kind of destabilized mental status is consistent with a number of the stresses Angela Cardinal experienced—a traumatic and life-threatening attack, significant physical injuries, sleep deprivation, and not having eaten in many hours—causing her to feel physically unstable and unwell.[333] In addition, along with many other medications, she was given five doses of Fentanyl, a powerful opioid prescribed for her severe pain.[334]

She was discharged from the hospital at 3:50 a.m.[335] In the middle of the night, then, having suffered severe injuries in a life-threatening attack, psychologically traumatized, heavily medicated, and sleep deprived, she was not allowed to get a full restorative night's sleep or rest. Instead, she was taken immediately to police headquarters so police could conduct an interview.[336] Why? This has been routine with sexual assault victims, based on the inaccurate belief memory is more reliable and accounts of crimes more thorough closest to the time of the attack.[337]

At 5:35 a.m., only about ninety minutes after her hospital discharge, when she had fallen asleep at the police station, she was woken up by the police to sign a consent form to obtain her medical records.[338] Was this necessary? The authorization paperwork could have waited. This urgency demonstrated an overriding concern for police procedures and needs, not a sensitivity to the profound and threatening experience Angela Cardinal had endured only hours before, or to her need for rest.

To further compound this disregard for the traumatized Angela Cardinal, she was awakened again by police, and "provided a caution"![339] About what could she possibly have needed to be

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332. *See* Haskell & Randall, *Impact of Trauma*, *supra* note 146, at 10. *Cf.* HERMAN, *supra* note 1, at 11 (describing highly emotional and contradictory storytelling, hysteria, and other abnormal emotional behaviors that might manifest in individuals who are traumatized).

333. R v. Blanchard, 2016 ABQB 706, paras. 8–15, 18–28.

334. *Id.* at para. 147.

335. *Id.*

336. *Id.* at para. 150.

337. *Cf.* Haskell & Randall, *Impact of Trauma*, *supra* note 146, at 14, 19, 23, 29 (discussing best practices for obtaining follow-up statements from victims, which requires diverging from the norm to allow memories to consolidate).

338. R v. Blanchard, 2016 ABQB 706, para. 150.

339. *Id.*

"cautioned"? The record does not reveal the specifics of this caution, but police interviews "under caution" are typically done with crime *suspects*, not crime *victims* such as Angela Cardinal.[340] The caution suggests that the police approached her with suspicion, as if she were a wrongdoer, as opposed to someone who had just been brutalized and was in need of support. Further, it suggests that systemic racism and sexism, so deeply a part of the lives of Indigenous women, shaped how the police responded to Angela Cardinal who had just been sexually assaulted and violently attacked.

Still insufficiently rested, Angela Cardinal was then immediately required by the police to provide a statement about the violent attack.[341] When she appeared too fatigued to continue, she was allowed to sleep briefly, only until 2:54 p.m., when she was reawakened to continue the interview.[342] The police interview of this injured, exhausted sexual assault victim continued for over three hours, until 6:09 p.m.[343]

Trauma-informed practices for police undertaking sexual assault investigations have been developed over a number of years, but adopted in some jurisdictions in Canada only since about 2018.[344] Trauma-informed practices were well established in many other fields well before then.[345] But even in the absence of official adoption of trauma-informed approaches in the policing context—which would require that police conduct only an initial bare bones interview and then continue a few days later once the victim has fully slept and rested—common sense and decency should have alerted attuned police officers to the heavy and unreasonable burden being placed on a traumatized crime victim who had just been viciously attacked, injured, treated at the hospital, and who was profoundly exhausted, not least because she had been kept awake all night. In other contexts, Angela Cardinal appreciated the police who were kind to her, even those who had arrested her in the

340. *See A Review of Brydges Duty Counsel Services in Canada*, CAN. DEP'T OF JUST. (Jan. 7, 2015), https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03_la4-rr03_aj4/p5.html [perma.cc/49Z7-L7XJ] (describing the rights of the accused after a caution).

341. R v. Blanchard, 2016 ABQB 706, para. 150.

342. *Id.*

343. *Id.*

344. *See* Haskell & Randall, *Impact of Trauma*, *supra* note 146, at 19.

345. *See, e.g.*, BC PROVINCIAL MENTAL HEALTH & SUBSTANCE USE PLAN. COUNCIL, CTR. FOR EXCELLENCE ON WOMEN'S HEALTH, TRAUMA-INFORMED PRACTICE GUIDE (May 2013), http://bccewh.bc.ca/wp-content/uploads/2012/05/2013_TIP-Guide.pdf [perma.cc/BS87-TYBH].

past, describing them as "awesome."[346] At this time, however, the police were hardly awesome in their treatment of Angela Cardinal, instead they failed her.

Conclusion: The Poetry of Angela Cardinal's Spirit—What We Must See

As Alice Woolley observed of the criminal justice system's response to Angela Cardinal, "it is impossible not to think that part of the problem . . . was a failure to see Ms. Cardinal in her full humanity."[347] Her full humanity, however, was much more fully grasped and appreciated by Judge Eric Macklin who presided over the trial itself. Judge Macklin was so troubled by what he learned about her treatment in the legal proceeding overseen by Judge Bodnarek, that he was moved to add a postscript to his decision convicting the accused explicating his views on Angela Cardinal's fate at the preliminary inquiry.[348]

Because she was killed before the case reached trial, Judge Macklin listened to recordings of Angela Cardinal's testimony at the preliminary inquiry.[349] Despite not ever having met her, he was able to get a sense of who she was as a person in a fuller way. In describing her as a person worthy of respect, and pointing out her strengths and achievements, he resisted and rejected the stereotyping, stigmatizing, and pathologizing that Angela Cardinal had experienced at the preliminary inquiry. As is evident in this passage, Judge Macklin took pains to flesh out some of the achievements of her life as well as to highlight her positive attributes. In Judge Macklin's words:

> In her testimony, she confirmed that she had graduated from Grade 12 and was a good student. It is not difficult to accept this would be true, as she clearly came across as an intelligent woman . . . . She spoke of having some artistic talent and displayed a sense of humor when suggesting that drawings she had taken depicting the Accused's apartment and the Accused were not of Picasso quality. When shown a particular photograph of the scene, she identified a piece of paper on the floor as a poem that she had written. She recited the poem in Court and indicated that she kept it in her sock so that in the

346. Alice Woolley, *Law and Morality: Reflections on the Angela Cardinal Case*, ABLAWG (June 24, 2017), https://ablawg.ca/2017/06/24/law-and-morality-reflections-on-the-angela-cardinal-case/ [perma.cc/ANE7-3K54] [hereinafter Woolley, *Law and Morality*] (citing Preliminary Inquiry Transcript at 745, 835).

347. *Id.*

348. R v. Blanchard, 2016 ABQB 706, paras. 346–47.

349. *Id.* at paras. 183, 347, 349.

> event it fell out, she could "make someone smile from a distance without knowing it . . . cute little things like that might make life beautiful[.]"[350]

Shown a photograph in court of where she had been attacked, Angela Cardinal's focus on and identification of her poem on the floor of the crime scene—the space in which she was sexually violated, physically assaulted, and had her body cut and injured—confirms her powerful survival and coping skills. Her poem and her attachment to it—"you look best in a smile so wear that one with pride because it's always darkest before dawn"[351]—also reveals something profoundly beautiful about her spirit and her creativity.

Angela Cardinal shared her poem with the court in the preliminary inquiry, despite this being another space where she had been violated[352]—shackled and imprisoned by legal professionals—all of whom represented institutions of the Canadian government. She shared it in the hopes that she could contribute to making "life beautiful," despite her own life having been deeply marked by pain and profound struggles.[353]

In his postscript, Judge Macklin did not shy away from noting the difficult circumstances of Angela Cardinal's life and their direct relationship to what befell her at the preliminary inquiry. In unusual and strong terms for a judge, he wrote that:

> The Complainant was a 27-year-old Indigenous woman who was homeless and living on the street. I have related the circumstances surrounding her remand to ensure attendance at the Preliminary Inquiry (paras 228 to 238 above). Her treatment by the Justice system in this respect was appalling. She is owed an apology. Unfortunately, no apology can be extended to her as she was tragically shot and killed in an unrelated incident.[354]

Judge Macklin powerfully concluded the trial decision, then, with a postscript highlighting Angela Cardinal's strengths and situating her life in its social context.[355] This is a conceptual shift—not often seen in law—which moves away from blaming

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350. *Id.* at para. 348.

351. Woolley, *Law and Morality*, *supra* note 346 (citing Preliminary Inquiry Transcript, 645–46).

352. R v. Blanchard, 2016 ABQB 706, para. 348.

353. *Id.*

354. *Id.* at para. 347.

355. *Id.* at para. 348.

marginalized people for the oppressive difficulties with which they struggle. It implicitly integrates a recognition of the broader and systemic forces at play in shaping marginalization. As Judge Macklin said of Angela Cardinal, "[u]nfortunately, her life circumstances did not allow society to see or experience her intelligence and artistic qualities."[356]

Judge Macklin, unlike Judge Bodnarek and Patricia Innes for the Crown, saw Angela Cardinal in her fuller humanity. This echoes the powerful and insistent plea—the *demand*—she made throughout the preliminary proceedings when she was imprisoned and shackled. In her repeated requests for removal of her shackles, she more than once implored of Judge Bodnarek:

> "Look at me."[357]

We must listen to this plea.

Angela Cardinal's insistence—"Look at me"—is a demand to be heard, seen, and acknowledged. It is a call for recognition. It is a demand for us to reroot ourselves in the teaching of respect[358] so central and foundational to Indigenous cultures. It is a demand for equality. And it is a demand for justice.

These demands must be met by a re-imagined and reconfigured criminal justice system if there is to be anything like actual fairness, equality, and justice.

When Angela Cardinal addressed the judge by saying "look at me," she was insisting on her rights, and asking that her experience be recognized and understood. At a very minimum she called on the judge to show her fairness, dignity, and respect, to recognize her as a full human being, and to see her as someone forced to suffer when she should have been supported. He did not oblige.

We must see the treatment of Angela Cardinal in that Canadian court room, and at the hands of the police beforehand, as revealing larger, profound, and systemic state failures against Indigenous women in Canada and beyond. These failures have been well documented for many years. They are not new. They should evoke a sense of shame and of outrage in all of us.

Outrage is insufficient, however. Mobilizing is required. Change is required. The extensive recommendations of the Missing

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356. *Id.* at para. 349.

357. *Id.* at paras. 232–33.

358. This wording was suggested to me by by Sheila Wahsquonaikezhik who also described Angela Cardinal's plea, "look at me," as a "song to be heard,".

and Murdered Indigenous Women and Girls Inquiry provide a roadmap for this change.

It is not an overstatement that we remain legally and politically in a state of emergency when talking about the lives of Indigenous women in Canada. This emergency includes the staggering extent of sexual and physical violence they endure. It also fundamentally and centrally includes criminal justice system failures and wider state responsibilities to Indigenous women, responsibilities dramatically more often evaded than fulfilled.

Angela Cardinal's story is an example not only of the scale of the system failures, legal failures, and indignities so many Indigenous women continue to endure. It is also an example of multiple institutional betrayals, and of the complicity of all of us who are not Indigenous in these betrayals.

Not only Canadian constitutional and human rights law should have secured and protected Angela Cardinal's rights in that courtroom. Article 22(2) of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[359] of which Canada is a full supporter, specifies that:

> States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.[360]

Clearly, adequate measures were not taken to ensure that Angela Cardinal enjoyed the full protection of her rights. Instead, she was endangered on many levels by being shackled, incarcerated, and forced to ride in the same vehicle as her violent attacker.[361]

Article 9 of The International Covenant on Civil and Political Rights,[362] to which Canada is a State party, stipulates that:

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359. *See* G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples art. 22(2) (Sept. 13, 2007), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.18_declaration%20rights%20indigenous%20peoples.pdf [perma.cc/5MQY-FAD4].

360. *Id.*

361. R v. Blanchard, 2016 ABQB 706, para. 221; *see also* discussion *supra* Section I.B.vi. ("The Sixth Layer of Violation") (describing the various ways in which Cardinal was forced into proximity with her attacker during and surrounding the preliminary inquiry).

362. International Covenant on Civil and Political Rights art. 9, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[363]

The judicial deprivation of one's liberty is one of the most drastic powers in Canadian law and it is subject to vigorous constitutional rights protections. The forced detention of Ms. Cardinal during the preliminary hearing and her shackling and handcuffing while she testified violated these rights. Angela Cardinal was a victim-witness in the case; she was not charged with a crime, nor was she a criminal, yet even criminals are recognized as persons with rights which were denied to her in this case. The terrible irony is that, had she been charged with a crime, she would have had the benefit not only of robust general constitutional protections, but also of Section 718.2(e) of the Canadian Criminal Code,[364] which mandates courts to consider the circumstances of Indigenous offenders, and the Supreme Court's elaborations of the issues in *Gladue*, *Ipeelee*, and *Ewart*.[365]

What happened to Angela Cardinal, while unique in its specificity, is general in its applicability to the lives of other Indigenous girls and women in Canada, the United States, and beyond, and the violence, abuse, neglect, and institutional betrayals they have endured. Some of their names in Canada are well known, others are not: Pamela George.[366] Tina Fontaine.[367] Cindy Gladue.[368] The young Indigenous woman sexual assault

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363. *Id.*

364. R.S.C. 1985, c C-46, s 718.2.

365. R v. Gladue, [1999] S.C.R. 688 (holding the trial court erred by failing to consider an offender's traumatic background in sentencing, and directing the court to seek "all available sanctions, other than imprisonment"); R. v. Ipeelee, [2012] S.C.R. 433 (reaffirming R. v. Gladue); *see also* Ewert v. Canada, [2018] S.C.R. 165 (finding that Correctional Service Canada's assessment of risk in evaluating parole applications does not approrpriately evaluate the risk posed by and against Indigenous offenders).

366. *See generally* Razack, *Gendered Racial Violence*, *supra* note 211 (describing the sexual attack on and murder of Pamela George, its cover up, and the deeply racist and sexist trial).

367. *See* Pamela Palmater, *Shining Light on the Dark Places: Addressing Police Racism and Sexualized Violence Against Indigenous Women and Girls in the National Inquiry*, 28 CAN. J. WOMEN & L. 253, 254–55 (2016); Bill Graveland, *Raymond Cormier Found Not Guilty in Death of Winnipeg Teen Tina Fontaine*, NAT'L POST (Feb. 23, 2018), nationalpost.com/news/canada/cp-newsalert-accused-in-death-of-winnipeg-teenage-girl-not-guilty-of-murder [perma.cc/RXZ8-YSDL].

368. *See* Jonny Wakefield, *Bradley Barton Trial: Wound that Killed Cindy Gladue Would Require 'Considerable' Force, Pathologist Testifies*, EDMONTON J. (Jan. 13,

complainant in *R. v. Wagar*.[369] The petite, twelve-year-old Indigenous girl serially sexually assaulted by three non-Indigenous adult men in their twenties in rural Saskatchewan.[370] The still many Missing and Murdered Indigenous women. The Highway of Tears.[371] The list goes on, and on.

Angela Cardinal's powerful and self-respecting resistance throughout her ordeals is an inspiration in an otherwise bleak and harrowing story.

During the sexual assault, she fought off her attacker and kept herself alive. During the assault on her basic rights and fundamental dignity during the preliminary inquiry, she dared to spar with the judge and vigorously and repeatedly contested being confined and jailed. She called out and named what was happening to her in a system massively more powerful and resourced than she was: the same system that degraded her.

Angela Cardinal's individual resistance serves to remind us of the need for greater and organized resistance to end systematic violence against Indigenous women, the social conditions which facilitate it, and the state failures which further construct and compound it.

2021), https://edmontonjournal.com/news/local-news/bradley-barton-trial-wound-that-killed-cindy-gladue-would-require-considerable-force-pathologist-testifies [perma.cc/6L6V-8WPG]; Kathleen Harris, *Top Court Hears Grim Details of Cindy Gladue's Last Hours as It Considers New Murder Trial*, CBC NEWS (Oct. 11, 2018), https://www.cbc.ca/news/politics/supreme-court-gladue-barton-1.4762680 [perma.cc/T3RY-8EM6].

369. R. v. Wagar, 2014 CarswellAlta 2756 (Alta. Prov. Ct.).

370. Krista Foss, *The Cree Girl and the White Men*, THE GLOBE & MAIL (Nov. 12, 2001), www.theglobeandmail.com/news/national/the-cree-girl-and-the-white-men/article1034556/ [perma.cc/7YG5-U23P]. This case is extensively and powerfully analysed by Lucinda Vandervort, *Legal Subversion of the Criminal Justice Process? Judicial, Prosecutorial and Police Discretion in Edmondson, Kindrat, and Brown*, *in* SEXUAL ASSAULT IN CANADA: LAW, LEGAL PRACTICE AND WOMEN'S ACTIVISM 111–50 (Elizabeth Sheehy ed., 2012). For the trial history see R. v. Edmondson, 2005 SKCA 51, *leave to appeal to Supreme Court of Canada denied*, 2005 SCC 273 (No. 30986). Dean Edmondson was tried for the crime by a jury in 2003 and convicted. Jeffery Lorne Brown and Jeffery Kindrat were tried together in 2003 and acquitted by the jury; a retrial was ordered in 2005. For the judgment on the appeal of Kindrat and Brown's acquittal, see R. v. Brown, 2005 SKCA 7. These original Brown and Kindrat retrial cases were severed in 2007. The Kindrat retrial by jury proceeded in 2007, leading to an acquittal that was not appealed. Brown's retrial was adjourned until May 2008. The jury failed to reach a verdict and the matter was stayed by the Crown in early July 2008. *See* Editorial, *Balancing Justice in a Difficult Case*, LEADER-POST, July 9, 2008, at B8.

371. "The Highway of Tears" describes the highway corridor of about 725 kilometers between Prince George and Prince Rupert in British Columbia, Canada, where many of the Missing and Murdered Indigenous women have "disappeared." Carrier Sekani Fam. Servs., *Highway of Tears*, HIGHWAY OF TEARS, https://www.highwayoftears.org/about-us/highway-of-tears [perma.cc/X5DW-7U5V].

It is essential to hear Angela Cardinal's plea to be seen, and to situate it more broadly within the ongoing abject institutional failures experienced by Indigenous women. We must come to grips with, and end our collective complicity in, these failures, which in turn requires sustained political will and action on multiple fronts.

The detailing of Angela Cardinal's story is a call to action. It calls us to be more courageous. It is especially important for all of us working to end violence against women, and more generally, striving for a more just society. This requires that we see and honour Angela Cardinal's ferocious and powerful resistance, as we systematically work to foreground the lives of Indigenous and First Nations women in the struggle for women's equality and a world free from sexual assault and sexual violence.

Angela Cardinal kept a poem in her sock, she tells us through her testimony at the preliminary inquiry, so that if it fell out, someone might find it and enjoy it, and she might, from a distance, make that person smile. In this way she said that she hoped to contribute to making life beautiful. It expressed a way for her to be seen and to be remembered. Throughout the many atrocities she endured in her short life, she retained her beautiful spirit and she shared it with us. We must honour her spirit. We must do whatever is necessary to make sure no Angela Cardinals are ever again subjected to what she endured in the name of so-called "justice."

Paying Unpayable Debts: Juvenile Restitution and Its Shortcomings in Hennepin County, Minnesota

Anwen Parrott†

Introduction

A few weeks before the end of his freshman year in high school, Adam[1] met up with a group of his friends at a park near his home. As a fourteen-year-old growing up in a small suburban town outside of the Twin Cities, Adam felt insulated by the rules his parents set and the lack of freedom that he had. He was antsy for the end of the school year and bored by his daily routine. Most significantly, however, he was fourteen and impulsive, so when a friend noticed that the park's groundskeeper had neglected to return a crowbar and an axe to the small groundskeeping shed where the tools were stored, Adam joined his friends in picking up and examining the forgotten tools. Adam began playfully swinging the crowbar and, before long, he and his friends were hitting a park bench and the shed with the tools, damaging both. The police promptly arrived and arrested Adam, who was later charged with criminal damage to property and ordered to pay over $10,000 to the city.[2] Adam did not have a job. His parents lived paycheck to paycheck and were unable to contribute anything beyond a few dollars to his monthly restitution payment. They shared this information with the court, hoping that the restitution order would be reduced, yet the order stood in full.

For Adam and other youth in his position, the journey towards making restitution often continues long after a court orders it.

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1. The facts of Adam's case are based upon those of *In re Welfare of I.N.A.*, 902 N.W.2d 635 (Minn. Ct. App. 2017), though a few details are embellished or changed, including the Defendant's name, to protect identity.

2. In Hennepin County, juveniles and adults alike can be held jointly and severally liable for restitution. *See* State v. Johnson, 851 N.W.2d 60, 66 (Minn. 2014). In Adam's case, as in many cases resulting in a restitution order, it did not matter how much damage he individually contributed to, for he was on the hook for the whole amount. *Id.*

Unpaid restitution orders begin accumulating interest—and, if still unpaid by the age of eighteen, transition into a civil judgment.[3] As such, restitution orders pinned upon juveniles can follow these individuals into adulthood. Unpaid restitution orders seep into choices about whether to pursue post-secondary education or to forego college to pay down an accumulating debt. When money gets tight, tense calculations about whether to pay an electric bill, rent, or restitution follow.[4] In other cases, the restitution order is simply ignored—but with this approach, too, come the consequences of debt, civil judgments, and probation violations for failure to comply with the restitution order.[5]

Adam's story is not unusual. Throughout Hennepin County and the state of Minnesota at large, courts order justice-involved youth[6] to pay restitution in amounts that, given the children's financial situations, are quite literally unpayable. A child too young to legally work was ordered to pay over $3,000 after hitting a car with his skateboard.[7] A sixteen-year-old was required to pay nearly $2,000 in restitution after participating in a fight that landed *him* in the hospital, despite the fact that both he and his mother were unemployed or underemployed.[8]

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3. *Restitution*, HENNEPIN CNTY. ATT'Y'S OFF., https://www.hennepinattorney.org/cases/adult-felonies/restitution [perma.cc/WL5P-G6YZ]. If a defendant does not begin payment within sixty days, the restitution they owe may be entered as a civil judgment and/or referred to the Minnesota Department of Revenue, where a "collection fee of up to 25%" is added to their outstanding restitution. *Id.* The Department of Revenue may "levy (take) property and assets," such as wages, tax refunds, and bank accounts to cover the unpaid debts, and can even revoke professional licenses—seemingly complicating payment even further. *Id.*

4. The impacts of restitution on individuals living in poverty is extreme. Restitution orders received while still in the juvenile system strain a family to the point of homelessness. *See* Eli Hager, *Punishing Kids with Years of Debt*, THE MARSHALL PROJECT (June 11, 2019), https://www.themarshallproject.org/2019/06/11/punishing-kids-with-years-of-debt [perma.cc/UJ35-34RJ].

5. MINN. STAT. § 260b.198(8).

6. The term "justice-involved youth" describes children accused of committing a delinquent or criminal act. *See* Precious Skinner-Osei, Laura Mangan, Mara Liggett, Michelle Kerrigan & Jill S. Levinson, *Justice-Involved Youth and Trauma-Informed Interventions*, JUST. POL'Y J., Fall 2019, at 2. Occasionally, the term is viewed more narrowly, to incorporate only the population of youth incarcerated in juvenile or adult facilities. *See Justice Involved Youth*, AM. YOUTH POL'Y F., https://www.aypf.org/youth-populations/juvenile-justice/ [perma.cc/44U5-BSBR]. This Note incorporates the broader meaning of the word.

7. *In re* Welfare of L.F.M., No. A13-0541, 2013 WL 5778221, at *3 (Minn. Ct. App. Oct. 28, 2013).

8. *In re* Welfare of N.A.B., No. A13-0270, 2013 WL 5676920, at *1–2 (Minn. Ct. App. Oct. 21, 2013) (finding the district court sufficiently considered N.A.B.'s ability to pay restitution and affirming the restitution order to pay $1,763.90 in spite of his mother's statement that she "[doesn't] make any money").

While these virtually unpayable orders are handed down in district courts, burdening children and teenagers with debts that loom larger over time (quite literally, due to the interest or collections costs that attach to unpaid court fines), without a significant increase in ability to pay even as these children transition into adulthood, restitution programs are nationally lauded for their capacity to make a victim "whole" while holding the responsible party personally accountable.[9] Scholars have focused particular attention on the positive impact that restitution might wield in the juvenile court system, theorizing that restitution aids in the rehabilitation that courts have increasingly identified[10] as the goal of juvenile court.[11] Yet this literature routinely overlooks a practical reality: restitution programs are not likely to have a positive impact on children and teenagers required to pay more money than they (or their immediate and extended families) can afford to pay. What's more, when judges set restitution without regard for an individual's ability to pay, these orders are unlikely to provide financial support to victims of a crime, thus injuring the parties restitution was intended to uplift.[12]

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9. Stacy Hoskins Haynes, Alison C. Cares & R. Barry Ruback, *Juvenile Economic Sanctions: An Analysis of Their Imposition, Payment, and Effect on Recidivism*, 13 CRIMINOLOGY & PUB. POL'Y 31, 36, 51 (2014).

10. For an overview of the United States Supreme Court's recognition of a rehabilitative framework in juvenile law (prior to *Jones v. Mississippi*, No. 18-1259, slip op. R-30 (Apr. 22, 2021)), see generally *Roper v. Simmons*, 543 U.S. 551 (2005) (finding the death penalty a violation of the Eighth and Fourteenth Amendments when given to offenders who committed their crimes when they were under 18 years old), *Miller v. Alabama*, 567 U.S. 460 (2012) (finding a sentence of lifetime incarceration without parole is a violation of the Eighth Amendment when given to juveniles), and *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (finding that offenders who committed their crimes as juveniles must be given the opportunity to demonstrate that their crime did not indicate "irreparable corruption"). The *Roper* and *Miller* line of cases rely on juvenile brain science and societal values to conclude that juveniles are "categorically less culpable than the average criminal," *Roper*, 542 U.S. at 552 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)), and that the "penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes" are thus diminished. *Miller*, 567 U.S. at 472. Punishment accorded to juveniles, the Court reasoned, must allow some meaningful opportunity for release based upon demonstrated growth and rehabilitation. *Id.* at 479. *But see* Jones v. Mississippi, no. 18-1259, slip op. R-30 (Apr. 22, 2021) (finding that a sentencer does *not* need to make any official finding of "permanent incorrigibility" before sentencing a juvenile to life without parole).

11. Haynes et al., *supra* note 9, at 35.

12. Numerous studies tracking restitution orders suggest that this type of court-ordered payment largely goes unpaid. One study tracking payments of a subsample of individuals with felony-level offenses found that nearly 77% of the restitution they had been assessed went unpaid. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary*

This Note will examine the history of juvenile restitution, focusing specifically on its historical and current practice within Hennepin County in Minnesota.[13] It will argue that Hennepin County's juvenile restitution program potentially harms, rather than rehabilitates, justice-involved youth and, in response, it advocates for a shift in statutory interpretation to take seriously the financial needs and limitations of youth. This Note also argues that despite being classified alongside "restorative justice" programs, restitution, as currently implemented, is more punitive than restorative for low-income individuals and thus does not align with the rehabilitative purpose of juvenile court. In Part I, this Note explores the historical use of restitution in criminal courts throughout the United States, the implementation of restitution programs in both adult and juvenile courts in Minnesota, and the widespread celebration of the practice that arises in scholarship about restitution (despite its inconclusive success rates). In Part II, this Note emphasizes the importance of restorative justice and rehabilitation, particularly in the lives of youth, and argues that the restitution program in Hennepin County, on the whole, fails to serve a restorative or rehabilitative purpose. Finally, Part III of this Note considers solutions. It advocates for changes to the interpretation of Minnesota Statutes Sections 260b.198 and 611A.045 to encourage courts to more fully consider a juvenile's ability to pay restitution, and urges the restitution juveniles face be "reasonable." This Note also considers creative solutions, including the enactment of a county-wide restitution fund to compensate victims when a juvenile defendant cannot afford to pay, and proposes some alternative approaches that could more successfully consider and repair the harm caused by youth adjudicated delinquent.

United States, 115 AM. J. SOCIO. 1753, 1774 (2010). Unfortunately, these unpaid restitution orders disproportionately impact poor communities. R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 269 MINN. L. REV. 1779, 1788 (2015) ("The problems usually faced by offenders are also faced by victims—they are disproportionately poor, unemployed, unskilled, and racial/ethnic minorities.").

13. Restitution programs vary remarkably from state to state. While much of what is discussed within this Note is relevant on a national scale, solutions should be tailored to individual states, counties, or even cities.

I. Background: What Is Restitution and Why Do We Use It?

A. Defining Restitution and Understanding Its Growing Popularity

Like other court fines and fees, restitution is a payment ordered upon the trial court's discretion after a defendant is convicted of a crime—or, in the case of a juvenile defendant, after they have been adjudicated delinquent by the court.[14] Unlike fines and fees that are somewhat standardized,[15] restitution is a payment from a defendant to the victim of the crime to compensate for the unique harm caused by their wrongful acts.[16] Restitution orders vary dramatically, as courts discretionarily order monetary restitution for the tangible harm sustained in a given incident[17]—which may broadly include damage to property, medical or therapy bills, or funeral costs.[18] Legal scholars and social scientists alike have opined about the transformative impact that restitution can have, theorizing that restitution orders force defendants to not only reimburse victims for the direct harm that they created, but also to reckon with the full magnitude of loss that they caused, in both monetary and philosophical terms.[19]

While the concept of restitution and the notions of accountability embedded within it (*i.e.*, that a responsible party compensates an innocent party for an injury or loss that they caused) have ancient roots,[20] court systems in the United States did

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14. MINN. STAT. § 611A.04(1); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 2 (2014); Steven H. David & Cale J. Bradford, *Crime Does Not Pay: Understanding Criminal Debt*, 50 IND. L. REV. 1051, 1075 (2017).

15. For example, many fines, fees, and court costs are established at a set amount and automatically applied upon the conclusion of a case.

16. *Restitution*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Compensation for loss; esp., full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as a part of a criminal sentence or as a condition of probation."); *see also Restitution*, NAT'L CTR. FOR VICTIMS OF CRIME, [https://web.archive.org/web/20200106012317/https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/restitution] (providing a guide for victims of crime about what restitution is and sharing strategies to ensure that it is collected).

17. Harris et al., *supra* note 12, at 1774 (tracking restitution orders in felony cases ranging from $500 to a staggering $256,257).

18. Ryan Anderson, *The System is Rigged: Restitution Is Blind to the Victim's Fault*, 43 MITCHELL HAMLINE L. REV. 140, 149 (2017).

19. David & Bradford, *supra* note 14, at 1075.

20. Scholars have traced restitution's roots to ancient indigenous and religious traditions. *See* Nancy Lucas, *Restitution, Rehabilitation, Prevention, and*

not begin to implement structured restitution programs in any widespread manner until the 1970s.[21] The rise of restitution within the justice system reflected a change in society at large. Spearheaded by the Victim's Rights Movement in the early 1970s,[22] the narrative around crime, punishment, and justice shifted from marginally considering the victim's wants and needs to centering the victim's views of what a successful resolution to their case would look like.[23] Critics and commentators declared restitution a valuable—even restorative—factor in ensuring that justice was done for the victim.[24] Currently, all states have statutory provisions permitting restitution[25] and fourteen states, including Minnesota, demonstrate their commitment to ensuring restitution is paid by levying civil judgments against individuals with outstanding restitution orders.[26]

It did not take long for courts and scholars to note that restitution seemed particularly suited to juvenile court, where traditional incarceration is often neither desired nor appropriate.[27] Resultingly, there exists a "shortage of useful sentencing options" by which justice-involved youth may be punished or held

Transformation: Victim-Offender Mediation for First-Time Non-violent Youthful Offenders, 29 HOFSTRA L. REV. 1365, 1370 (2001); Anderson, *supra* note 18, at 148–49.

21. Burt Galaway, *Is Restitution Practical?*, 41 FED. PROBATION 3, 3 (1977) ("During 1976 and 1977 the Law Enforcement Assistance Administration has systematically funded a series of pilot adult and juvenile restitution programs to further test the feasibility of using this concept in the criminal justice system.").

22. *See generally History of Victims' Rights*, NAT'L CRIME VICTIM L. INST., https://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_victims_rights/ [perma.cc/3P2S-LF5H] (discussing the history of the Modern Crime Victims' Rights Movement).

23. Ruback, *supra* note 12, at 1788.

24. *Id.*

25. Susan Jacobs & David C. Moore, *Successful Restitution as a Predictor of Juvenile Recidivism*, 45 JUV. & FAM. CT. J. 3, 3–4 (1994).

26. *See, e.g.*, RESTITUTION: COLLECTING CIVIL JUDGMENTS RESULTING FROM RESTITUTION ORDERS, CARVER CNTY., MINN., https://www.co.carver.mn.us/home/showdocument?id=12300 [perma.cc/L4JP-86NG] ("Judges can order the restitution converted into a civil judgment if the offender has not paid in full and the offender's probationary period is expiring. Crime victims can file an Affidavit of Identification of Judgment Debtor along with a copy of the Restitution Order to start the Civil file for the amount owed to them. This process can be done immediately after the Order for Restitution has been Ordered."); *see also* Ruback, *supra* note 12, at 1794.

27. *See generally* Miller v. Alabama, 567 U.S. 460, 489 (2012) (finding a sentence of lifetime incarceration without parole a violation of the Eighth Amendment when given to juveniles). *But see* Jones v. Mississippi, no. 18-1259, slip op. R-30 (Apr. 22, 2021).

accountable.[28] Today, all but one state has added an additional statute or provision directly governing juvenile restitution.[29]

B. Restitution in Minnesota: Past and Present

Likely guided by the nationwide trend,[30] Minnesota first enacted a criminal restitution statute, Section 611A.04, in 1983.[31] This original statute operated with very few procedural requirements and solely considered the financial losses that a victim self-reported: the victim would submit an itemized list of the losses they sustained to the court, and the court would issue restitution in that amount.[32] Shortly after the original statute's enactment, the Minnesota Legislature enacted Section 611A.045,[33] which widened (albeit only slightly) the factors that a court was required to consider before issuing a restitution award.[34] By 1989, the Legislature updated Section 611A.045 to include a few basic requirements that remain virtually untouched to date:[35] the trial court was mandated to weigh "the amount of economic loss sustained by the victim as a result of the offense; and the income, resources, and obligations of the defendant."[36]

Although this new addition seemed to provide an opportunity for more nuanced and complex restitution orders, case law interpreting these requirements somewhat foreclosed this possibility. Courts have since held that when "balancing" the monetary loss sustained and the defendant's ability to pay, the trial court judge can tip the scales to (heavily) favor the victim; a judge can order restitution without making any specific findings about a defendant's ability to pay, even if there is a potential financial hardship to the defendant and their family.[37] After receiving a

28. Haynes et al., *supra* note 9, at 35.

29. For a thorough compilation of juvenile restitution statutes across the United States, see *Juvenile Restitution Statutes*, NAT'L JUV. DEF. CTR. (Mar. 2015), https://njdc.info/juvenile-restitution-statutes/ [perma.cc/ZRP3-457J].

30. NAT'L CRIME VICTIM L. INST., *supra* note 22 (discussing the impetus for the Victim's Rights Movements, which led to a surge in the use of restitution).

31. Anderson, *supra* note 18, at 148–49.

32. *Id.*

33. *Id.*

34. *Id.*; MINN. STAT. § 611A.04.

35. NAT'L CRIME VICTIM L. INST., *supra* note 22.

36. MINN. STAT. § 611A.045(1)(a)(1)–(2).

37. State v. Jola, 409 N.W.2d 17, 20 (Minn. Ct. App. 1987) ("[Defendants] argue that they should not be required to pay restitution because no specific findings were made on their ability to pay and restitution should not be punitive. The purpose of restitution is to *compensate the victim* and not rehabilitate the defendant." (emphasis added)).

court-mandated restitution order, the defendant has a thirty-day window in which to challenge the order,[38] but then must make payments (typically on a payment schedule generated by the court)[39] to a court administrator, who passes the money along to the impacted individuals.[40]

The first appearance of a juvenile-specific restitution statute in Minnesota appeared in 1999, when the Legislature brought forth an act recodifying and clarifying procedures related to juvenile delinquency and child protection.[41] Though very general, the juvenile restitution practices detailed within the 1999 statute remain largely unchanged today. One study found that, both then and now, juveniles with exposure to the criminal justice system encounter a restitution process substantially similar to that functioning within the adult court.[42] Courts subject justice-involved youth to the requirements contained within the *general* restitution statutes, Minnesota Statutes Sections 611A.045 and 611A.04 (which provide an overview of what can be included in a restitution request and order), along with one statute specific to the juvenile restitution context, Section 260b.198. While only a few additional requirements are imposed by Section 260b.198, the language used to express these considerations is broad.[43] After a trial court adjudicates a child delinquent, "the court may order the child to make *reasonable* restitution for such damage,"[44] and failure to do so (by not paying or falling behind on the court-generated payment schedule) can result in a probation violation.[45] Few Minnesota cases have interpreted these statutory provisions in a manner that provides concrete guidance to judges and attorneys alike, leading to continued confusion about where the confines of restitution—particularly juvenile restitution—truly lie.[46]

38. MINN. STAT. § 611A.045(3)(b).

39. MINN. STAT. § 611A.045.

40. OFF. OF JUST. PROGRAMS, MINN. OFF. OF PUB. SAFETY, MINNESOTA RESTITUTION WORKING GROUP: REPORT TO THE LEGISLATURE, 6–7 (2015) [hereinafter MINNESOTA RESTITUTION WORKING GROUP].

41. *See* 1999 Minn. Laws 616 (enacting new language involving juvenile-specific restitution in Minnesota); MINN. STAT. § 260b.198.

42. Haynes et al., *supra* note 9, at 32 (stating that juvenile punishments should be scaled below adult punishments).

43. *See* MINN. STAT. § 260b.198(1)(5).

44. *Id.* (emphasis added).

45. MINN. STAT. § 260b.198(8).

46. *See* MINNESOTA RESTITUTION WORKING GROUP, *supra* note 40, at 6–7.

While arguably unforeseen at its inception,[47] restitution has become one of the most common dispositions given to children and teenagers in Minnesota at the conclusion of delinquency hearings.[48] In 2016, the Hennepin County Department of Community Corrections and Rehabilitation (DOCCR) identified 242 juveniles in Minnesota's Fourth Judicial District Court (Hennepin County) who were paying off restitution orders.[49] These individuals constituted just over 20% of the justice-involved youth under DOCCR jurisdiction.[50] Of the 242 kids ordered to pay restitution, the largest portion were adjudicated delinquent for misdemeanor offenses,[51] with property crimes making up the bulk of the restitution orders.[52] In Hennepin County, the average age of an adolescent ordered to pay restitution was 15.3 years,[53] and the vast majority of these adolescents were Black.[54] Notably, the average age for Native and Black youth who received restitution orders was lower than the overall average, at 14 and 14.9, respectively.[55]

Because the Legislature gave Minnesota courts the statutory authority to sentence these youth to restitution, it is surprising that the Legislature did not also consider how child labor laws may be a limiting factor in a fourteen- or fifteen-year-old's ability to pay. Although teenagers of age fourteen and older can legally work in Minnesota,[56] a number of regulations cap the number of hours and timeframes during which individuals under sixteen can work,[57] thus making it difficult for a young teenager to spend substantive

47. *See generally* Galaway, *supra* note 21, at 5–6 (arguing, in 1977, that the problem of the "indigent offender" is likely overstated, as most of the restitution programs and orders are "modest" in scope (under $200), and that with the aid of a payment plan, most offenders could cover their restitution obligations).

48. Sarah J. Batzli, Case Note, *In re* Welfare of L.K.W., *372 N.W.2d 392 (Minn. Ct. App. 1985)*, 13 WM. MITCHELL L. REV. 247, 253 (1987).

49. HENNEPIN CNTY. DEP'T OF CMTY. CORR. & REHAB., 2016 PROFILE OF JUVENILES UNDER DOCCR JURISDICTION 2 (2017).

50. *Id.*

51. *Id.* at 5 (explaining that 40% of youth charged with misdemeanors received restitution after their adjudication).

52. *Compare id.* at 9, *with* MINNESOTA RESTITUTION WORKING GROUP, *supra* note 40, at 19, 34 (indicating that in statistics on the adult side of restitution, restitution orders at both county and statewide levels were largely for felony offenses).

53. HENNEPIN CNTY. DEP'T OF CMTY. CORR. & REHAB., *supra* note 49, at 3 fig.4 (tracking age at intake).

54. *Id.* at 4 fig.5.

55. *Id.*

56. *Child Labor FAQS*, MINN. DEP'T OF LAB. & INDUSTRY, https://www.dli.mn.gov/business/employment-practices/child-labor-faqs [perma.cc/CZS9-K2YG].

57. *Id.*

time working for pay—and, in turn, more difficult for a self-supporting teenager to pay restitution. Just as in adult court, if a child or teenager is unable to meet the requirements of their restitution order, their inability to comply with the terms of their adjudication constitutes a probation violation,[58] extending the length of time they remain subject to close monitoring by the state. If their restitution remains unpaid, in part or in full, the outstanding amount becomes a civil judgment against justice-involved youth when they turn eighteen.[59]

C. Restitution's Theoretical Goals

The past fifty years have seen a growing reliance on restitution, which has been met with strong support from "both juvenile justice practitioners . . . and the general public."[60] Academics who support juvenile restitution theorize that it makes victims "whole"[61] while simultaneously holding "offenders" responsible for rectifying the damage that they caused.[62] Furthermore, these same scholars hypothesize that the process of making court-ordered payments "aids in the rehabilitation of the criminal."[63] Throughout the past few decades, researchers have predicted that restitution will reduce recidivism by teaching justice-involved youth about accountability[64] while instilling within these individuals a "sense of accomplishment" for repairing the harms they caused.[65]

Assuming this theory is correct, restitution serves two laudable and essential goals: it compensates a victim for the financial loss that they suffered while also "rehabilitating" the individual responsible by forcing them to acknowledge the harm they caused. Predicted to be a positive side effect, the hope has been that the second component will reduce recidivism among the justice-involved youth population.[66] This two-part theory about

58. MINN. STAT. § 260b.198(8).

59. *See* Ruback, *supra* note 12, at 1794.

60. Haynes et al., *supra* note 9, at 32.

61. Richard E. Laster, *Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness*, 5 U. RICH. L. REV. 71, 80 (1970); *see also* Linda F. Frank, *The Collection of Restitution: An Often Overlooked Service to Crime Victims*, 8 J.C.R. & ECON. DEV. 107, 119–20, 134 (1992).

62. Ruback, *supra* note 12, at 1790–91.

63. Laster, *supra* note 61, at 80.

64. U.S. DEP'T OF JUST., RESTITUTION BY JUVENILES: INFORMATION AND OPERATING GUIDE FOR RESTITUTION PROGRAMS 3 (1988); *see also* Jacobs & Moore, *supra* note 25, at 4.

65. Ruback, *supra* note 12, at 1791.

66. *Id.*

restitution has inspired scholars and practitioners to categorize restitution as a restorative justice[67] program.[68] In that vein, many practitioners, guided by the view that restitution employs restorative rather than punitive justice, have advocated for an *increased* reliance on restitution in the juvenile justice system to better prioritize rehabilitation over punishment.[69] Some of these same practitioners anticipate that parents will pay the (presumably manageable) restitution orders juveniles receive.[70]

But of the two idealistic goals identified by scholars, only one seems to matter in practice: making payments. In studies spanning multiple decades, scholars across the U.S. have attempted to study the effectiveness or "success" of restitution by tracking how many restitution orders were fulfilled[71] and, in a few cases, whether the justice-involved youth recidivated.[72] While these are important metrics to track, these studies leave many other measures of success unaddressed. Notably absent from these studies are meaningful qualitative measures of whether the justice-involved youth felt a sense of accomplishment after paying down their debt, or whether the restitution process taught them lessons about accountability or the wrongfulness of their acts. Also absent is any data conclusively indicating that juvenile restitution programs are successful; restitution payment rates differ dramatically from state to state[73] and, in general, a high percentage of youth fail to pay their restitution.[74] While some studies have traced a connection between paying restitution and a decrease in recidivism,[75] the practitioners of these studies admit that this connection might be more indicative of the socioeconomic status of the child's family than the

67. *Id.* at 1798 ("Restorative justice practices assume that the justice process is about repairing the harm from a crime in a way that balances the needs of the victim, the community, and the offender.").

68. Haynes et al., *supra* note 9, at 33.

69. *See supra* note 10 (discussing the United States Supreme Court's recognition of a rehabilitative framework in juvenile law).

70. Haynes et al., *supra* note 9, at 37.

71. *See* Sudipto Roy, *Two Types of Juvenile Restitution Programs in Two Midwestern Counties: A Comparative Study*, 57 FED. PROBATION, Dec. 1993 at 48; *see also* U.S. DEP'T OF JUST., RESTITUTION BY JUVENILES, *supra* note 64, at 3; Jacobs & Moore, *supra* note 25, at 3.

72. Roy, *supra* note 71, at 48.

73. Hager, *supra* note 4 (noting that 87% of orders were paid in Connecticut, while only 28% of orders were paid in Mississippi).

74. *See* Haynes et al., *supra* note 9, at 37.

75. *Id.* at 37–38.

rehabilitative effect of restitution.[76] Ultimately, the many gaps in these data suggest that the strong support juvenile restitution has received is not supported by equally strong results confirming restitution's effectiveness.

II. The Need for Restorative Justice in the Juvenile Delinquency System and Restitution's Shortcomings

The U.S. Supreme Court has held in a recent string of landmark cases[77] that children are constitutionally different than adults when it comes to sentencing and punishment.[78] As science, social science, and common sense[79] demonstrate, juveniles who commit criminal acts of even the most serious caliber possess both diminished culpability—due to many factors, including their immaturity, vulnerability to negative influences, inability to control the environment in which they are situated, and malleable character traits[80]—and a heightened capacity to change as they grow older.[81] Each of these Supreme Court decisions was rooted in the belief that the vast majority of justice-involved youth are capable of rehabilitation,[82] and that the applicable punishments must be adjusted accordingly.[83]

Courts across the country followed suit by recognizing that juveniles are inherently different than adults,[84] and that rehabilitation rather than punishment must be the focus of juvenile

76. *Id.* at 51 ("In other words, juveniles who paid a greater percentage of their economic sanctions might have come from families with greater means to pay and might have been less likely to recidivate in the first place.").

77. *See supra* note 10 (discussing cases in which the United States Supreme Court recognized a rehabilitative framework in juvenile law).

78. Miller v. Alabama, 567 U.S. 460, 460–62 (2012). See Christopher Northrop & Kristina Rothley Rozan, *Kids Will Be Kids: Time for a Reasonable Child Standard for the Proof of Objective Mens Rea Elements*, 69 ME. L. REV. 109, 111–12 (2017) for an interesting discussion inspired by this Supreme Court precedent that advocates for a different standard of reasonableness for children in criminal proceedings in recognition of the differences in brain functioning and culpability between juveniles and adults.

79. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569 (2005) (finding support for the Court's conclusions in psychology and brain science, but also in what "any parent knows" about how kids think and impulsively act).

80. *Id.* at 569–70.

81. *Miller*, 567 U.S. at 471–72.

82. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 733–34 (2016).

83. *But see* Jones v. Mississippi, no. 18-1259, slip op. R-30 at 5 (Apr. 22, 2021) (finding a sentencing judge has discretion to impose a lesser sentence than life without parole, but may institute a life-without-parole sentence without making any explicit or implicit finding of "permanent incorrigibility").

84. *See* Haynes et al., *supra* note 9, at 32.

delinquency courts.[85] This shift is visible in the implementation of restorative justice practices in juvenile courts nationwide. Unlike punitive responses to transgressions, which calculate offenses in terms of laws broken or property damaged, restorative justice focuses on the ways that wrongdoings harm people and relationships.[86] When properly implemented in a court setting, restorative justice often features a formal process administered by the state and an informal process led by the community.[87] The latter component, which typically involves practices like Victim Offender Mediation (VOM) or other face-to-face discussions between the victim and offender, attempts to balance the needs of all parties while reintegrating the offender peacefully and thoughtfully into their community.[88]

A. Juvenile Restitution Falls Short of "Restorative" in Hennepin County, Minnesota

In Minnesota (as in many other states), courts have begun to classify restitution programs as one of the "restorative justice" initiatives available to children adjudicated delinquent.[89] In some of the jurisdictions where they are used, restorative juvenile restitution initiatives require the justice-involved youth to participate in dialogues with the individuals impacted by their wrongful acts;[90] other programs see juveniles partaking in the VOM process while simultaneously working to pay down their restitution orders.[91] In Hennepin County, however, where the juvenile restitution program closely mirrors its adult equivalent, there are no mandatory VOM mediations, no meetings, and virtually no communication between the juveniles ordered to pay restitution

85. *See id.*

86. MINN. MGMT. & BUDGET, JUVENILE JUSTICE REPORT: JUVENILE JUSTICE BENEFIT-COST ANALYSIS 47 (2018) [hereinafter MINN. JUVENILE JUSTICE REPORT]. Rather than asking "what law was broken, who broke it and what punishment is deserved," restorative justice requires a legal and social community to ask who was harmed, what this person's needs might be, and how those needs can be met. Lara Bazelon, *Oakland Demonstrates Right Way to Use Restorative Justice with Teens*, JUV. JUST. INFO. EXCHANGE (Jan. 3, 2019), https://jjie.org/2019/01/03/oakland-demonstrates-right-way-to-use-restorative-justice-with-teens/ [perma.cc/77SC-DZCJ].

87. Ruback, *supra* note 12, at 1798.

88. *See id.*

89. MINN. JUVENILE JUSTICE REPORT, *supra* note 86, at 47. *But cf.* State v. Jola, 409 N.W.2d 17, 20 (Minn. Ct. App. 1987) (declaring that the goal of restitution is *not* rehabilitation but simply payment to the victim).

90. Roy, *supra* note 71, at 49.

91. *See* Lucas, *supra* note 20, at 1375.

and the individual(s) they are paying it to.[92] Rather, the restitution process is boiled down to its most basic bureaucratic components: a judge adjudicates a child delinquent, orders them to pay restitution, places them on a payment schedule, and requires the child to pay a designated amount to a court administrator on a court-mandated basis.[93] Nevertheless, the State of Minnesota lists restitution among the restorative justice programs it utilizes.[94]

At a theoretical level, restitution processes like that implemented in Hennepin County may be classified as "restorative" because some academics speculate that a nebulous, philosophical change occurs when youth are held monetarily accountable for their wrongdoings.[95] In practice, however, the theoretical effectiveness of restitution towards reducing recidivism and rehabilitating children who have committed crimes remains unproven.[96] Studies increasingly suggest that emotional accountability does not necessarily accompany monetary accountability, especially when all that is required of justice-involved youth is that they pay a bill to the court.[97] Children from affluent backgrounds may receive financial support from their families,[98] while children from families that are already in debt or struggling to pay their bills simply accumulate more debt, thereby reducing their (already limited) family income.[99] For children in this second category, the accumulation of debt—paired with the reduction in job prospects that follows a criminal record—counterintuitively *increases* the likelihood of a child's ongoing involvement with the justice system.[100]

Taken together, the lack of clarity about whether restitution produces recidivism or emotional accountability and the clear

92. *See* MINNESOTA RESTITUTION WORKING GROUP, *supra* note 40, at 6 (grouping adult and juvenile cases in the explanation of the statutory scheme guiding "ordering restitution" in Minnesota).

93. *See id.*

94. MINN. JUVENILE JUSTICE REPORT, *supra* note 86, at 47.

95. *See* Jacobs & Moore, *supra* note 25, at 4.

96. *See supra* notes 71–72 and accompanying text.

97. *See generally* Hager, *supra* note 4 (discussing both the merits and ineffectiveness of restitution).

98. *See, e.g.*, Haynes et al., *supra* note 9, at 51.

99. *See, e.g.*, Harris et al., *supra* note 17, at 1756.

100. *See id.*; *see also* Northrop & Rozan, *supra* note 78, at 112 (discussing a juvenile criminal record's potential impact on future educational, employment, and housing opportunities). For an in-depth analysis of the unexpected and counterintuitive impacts of well-meaning criminal justice reforms, see MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS (2020).

socioeconomic disparities impacting outcomes suggest that a practical process in Hennepin County that strips juvenile restitution of any mediation, dialogue, or interaction between offender and victim cannot be considered conclusively restorative. In practice, such a system imposes an uneven punitive burden and likely makes it difficult for many juvenile offenders to reach a point of restorative change. True restorative justice directly "involves offenders . . . in deciding how to make amends for their crimes, rather than relegating them to being 'the passive objects of punishment.'"[101] Thus, when court systems focus solely on ordering restitution for a justice-involved child to pay, the "emotional issues surrounding crime and victimization, including even the possibility of forgiveness and reconciliation" remain unaddressed.[102]

B. Restorative Justice Requires More than Restitution Payments Alone

Stand-alone restitution orders will not bring restorative justice to juvenile court in Hennepin County, as restorative justice requires a sense of human connection and interpersonal understanding that is unlikely to be generated by sending a check to a court administrator. Other jurisdictions have adjusted their juvenile restitution processes to embrace the principles of restorative justice—and studies hint at the positive outcomes of this approach.

In a study tracking the impact of VOM on restitution payment in Minneapolis and Albuquerque, researchers found that juvenile offenders who participated in VOM while paying down restitution were statistically more likely to pay their restitution than individuals who received a restitution order without also attending mediation.[103] The same participants in VOM programming committed fewer and less serious crimes than their counterparts who were subject to traditional programming.[104] Other studies have

101. Lucas, *supra* note 20, at 1372.

102. *Id.* at 1399 (quoting MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 157–58 (1994)).

103. *See id.* at 1375 n.58 ("'Offenders who negotiated restitution agreements with their victims through a process of mediation were considerably more likely to actually complete their restitution obligation than similar offenders who were ordered by the court to pay a set amount of restitution.' In . . . [a] Minneapolis study, 69% of offenders in a VOM program paid restitution, compared to 54% who did not go through the mediation process. In Albuquerque . . . 86% of offenders paid full restitution following VOM compared to 57% of the non-mediation offenders." (citations omitted)).

104. *Id.*

similarly indicated that programs involving face-to-face meetings are more effective than remote, court-based programs.[105] Of course, creative and restorative solutions may extend well beyond VOM and face-to-face interaction; other practitioners have called for a greater reliance upon community service for which juveniles receive an hourly stipend.[106] While the theories supporting this approach employ similar rationales to the traditional theories celebrating juvenile restitution[107]—i.e., by working many hours for an hourly wage, children are forced to reckon with the amount of harm they caused and their role in repairing it—the community service aspect aligns it more precisely with restorative justice. While working to pay back individuals harmed by their wrongful acts, justice-involved youth who volunteer are made aware of their role within a community, and hopefully begin to understand that their actions can either harm their community or strengthen it.[108]

Currently, a limited version of paid restorative justice is present in Hennepin County in its Sentence to Service (STS) programming, which allows juveniles to volunteer on weekends to pay off a restitution order.[109] An expansion of this program, paired with VOM programming or other opportunities for discussion between all impacted parties, may push Hennepin County's juvenile restitution from the punitive to the restorative realm. Importantly, the input of both victim and offender is considered essential to true restorative justice: the person who did something wrong *and* the individual(s) impacted by these actions must both show a willingness to work through hard feelings to reach an agreement.[110] These agreements should look different depending on the unique parties involved; thus, any true restorative system of

105. *See* Roy, *supra* note 71, at 48.

106. *See* Haynes et al., *supra* note 9, at 52.

107. *See id.* at 33, 52.

108. It is important to note that, like restitution, court-mandated community service could be more rehabilitative in theory than in practice. *See, e.g.*, SCHENWAR & LAW, *supra* note 100, at 51–57, 89 (arguing that many prison reform efforts, including probation and court-ordered treatment, continue to have harmful impacts on the lives of individuals). For example, probation has been identified as "one of the most significant drivers of mass incarceration" despite typically being used to avoid prison time. *Id.* at 87. While, in theory, community service enables rehabilitation and aligns with restorative justice ideals, certain implementations of this practice could result in *forced, punitive* community service (think: a chain gang). To combat this from happening, juvenile courts hoping to implement community service should allow justice-involved youth to have some autonomy over where they volunteer, and how and when they serve their communities.

109. *See Sentencing to Service*, HENNEPIN CNTY. https://www.hennepin.us/residents/public-safety/sentencing-service [perma.cc/8ZPK-AJA9].

110. *See* Ruback, *supra* note 12, at 1798.

accountability must eschew the rigidity of our current juvenile delinquency system to embrace a more flexible, open approach to justice. Though daunting, this task may see more success in addressing the emotional issues surrounding crime[111] and, surprisingly, save the court systems a substantial amount of money.[112]

III. An Overhaul of Juvenile Restitution in Hennepin County: Large (and Small) Changes Towards a More Equitable Institution

As it currently operates, Hennepin County's system of juvenile restitution fails to function in a rehabilitative or restorative manner. Despite their lessened culpability and heightened capacity to change, children and teenagers adjudicated delinquent face a restitution process functionally equivalent to that used in Hennepin County's adult court. Restitution in Minnesota, though part of the adult court system for nearly forty years and the juvenile system for over twenty,[113] has been subject to restrained judicial interpretation and few structural changes.[114] Without requiring regular analysis of the financial statuses of justice-involved youth,[115] courts continue to order restitution payments in increasingly high amounts[116] and, if the juvenile with a restitution order cannot or does not meet their payments, they both violate their probation and carry a debt with them from childhood into adulthood. As a disproportionate number of juveniles entering the criminal justice system live in poverty,[117] this debt unevenly burdens those who are already struggling financially and plunges them deeper into the cycle of poverty. This, in turn, makes it more difficult for them to increase household wealth and reach financial

111. *See* Lucas, *supra* note 20, at 1399.

112. *See id.* at 1375.

113. *See* Act of May 11, 1999, ch. 139, § 30, 1999 Minn. Laws 616–18 (codified at MINN. STAT. § 260b.198); Anderson, *supra* note 18, at 148.

114. *See* Anderson, *supra* note 18, at 148.

115. *See In re* Welfare of L.F.M., No. A13-0541, 2013 WL 5778221, at *3 (Minn. Ct. App. Oct. 28, 2013) (citing State v. Jola, 409 N.W.2d 17, 20 (Minn. Ct. App. 1987)) (stating that "[a] district court does not abuse its discretion by ordering restitution without specific findings regarding the defendant's ability to pay, even if there is a potential financial hardship to the defendant.").

116. *See* Galaway, *supra* note 21, at 5 (noting that in the early days of restitution, orders did not typically stretch beyond $200).

117. *See* Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 70–79 (2012).

stability, while simultaneously increasing the likelihood that the youth will reoffend.[118]

In addition to exploring the impacts restitution may have on justice-involved youth, the conversation on juvenile restitution must not overlook its impacts on victims harmed by the actions of justice-involved youth. Restitution was so widely implemented not just to hold youth accountable, but also to ease the financial and psychological harms experienced by victims.[119] In many cases, restitution is a service that is valuable to—and, at times, desperately needed by—victims of crime.[120] Yet, as discussed in further detail above, studies suggest that many restitution orders remain unpaid,[121] and the parties waiting for compensation fail to receive it. This statistic is particularly salient when considering the population of justice-involved youth, which is disproportionally poor[122] and, as a result of youth, less likely to have employment (not to mention well-paid employment). Restitution programs cannot make a victim whole if the person ordered to pay restitution simply cannot afford to pay it.

Like many broader aspects of the criminal justice system—and, as some argue, many broader aspects of well-intentioned, popular criminal justice reforms[123]—Hennepin County's local process of juvenile restitution falls short of its stated goals. Yet changes at the county- and state-wide levels can begin the process of fixing it, thus bettering the experience for justice-involved youth and the people harmed by their actions.

A. Statutory Interpretation of Minnesota Statutes Sections 260b.198 and 611A.045

As noted previously, the statutes most applicable to juvenile restitution, Minnesota Statutes Sections 260b.198 and 611A.045, each discuss the restitution process in broad terms. The court, Section 611A.045 explains, shall consider the economic loss sustained by the victim as well as the income, resources, and

118. *See* Harris et al., *supra* note 12, at 1761.

119. *See* Ruback, *supra* note 12, at 1783.

120. *See id.* at 1789 (explaining that, statistically, victims of crime are often demographically similar to the perpetrators of the crime: disproportionately poor).

121. *See* Hager, *supra* note 4 (noting that "[c]ourts' success in collecting juvenile restitution varies by state" and "[f]or amounts of more than $10,000, the payment rate is nearly zero in many states.").

122. *See* Birckhead, *supra* note 117, at 58 (stating that "[j]uvenile courts have traditionally been considered the courts of the poor and impoverished").

123. *See generally* SCHENWAR & LAW, *supra* note 100 (discussing the unintended negative consequences stemming from prevalent criminal justice practices).

obligations of the defendant.[124] When a child causes such economic loss, Section 260b.198 additionally requires that a court order "reasonable restitution" for the damage.[125] Both statutes are broad enough to allow for a rigorous restitution process that fully evaluates the financial obligations and limitations of a defendant before ordering restitution to be paid, or for a process devoid of such an individual analysis. In interpreting these statutes, Minnesota courts have not only adopted the second approach, but have declared that courts need not make any specific findings about an offender's ability to pay.[126]

This is a problem. While a child's ability to pay is incorporated in relevant statutes, it is too often absent from the balancing test used by judges. In a recent report requested by the Legislature,[127] the Minnesota Department of Public Safety's Restitution Working Group identified this precise issue as a major roadblock in the restitution process.[128] Quoting the adage "[y]ou can't get blood from a turnip,"[129] the Restitution Working Group acknowledged that the major reason why so many Minnesota restitution orders go unpaid is perhaps the most simple reason: people don't have the ability to pay them.[130] The Group went on to recommend the State adopt a standard, objective process to assess an individual's ability to pay restitution so that orders will be realistic rather than unpayable.[131]

Increasingly, jurisdictions outside of Minnesota are considering such an approach.[132] Notably, Maine's Legislature suggested revamping their restitution statutes to include monetary caps on juvenile restitution,[133] while other jurisdictions with statutes similar to Minnesota's *must* consider ability to pay. In Indiana, for example, the vagueness surrounding one's ability to pay is removed: rather than suggesting that courts "consider" ability to pay, as Minnesota does, Indiana law mandates that

124. MINN. STAT. § 611A.045(1).

125. MINN. STAT. § 260B.198(1)(a)(5).

126. *In re* Welfare of L.F.M., No. A13-0541, 2013 WL 5778221, at *3 (Minn. Ct. App. Oct. 28, 2013) (citing State v. Jola, 409 N.W.2d 17, 20 (Minn. Ct. App. 1987)).

127. MINNESOTA RESTITUTION WORKING GROUP, *supra* note 40.

128. *Id.* at 12.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See* Hager, *supra* note 4; *see, e.g.*, David & Bradford, *supra* note 14, at 1080 (discussing Indiana's approach).

133. *See* Hager, *supra* note 4 (tracing the Maine Legislature's attempts to limit the use of restitution and impose an $800 cap on orders given to juveniles).

restitution orders *may not exceed* a person's ability to pay.[134] To support this policy, trial courts are *required* to determine a party's financial obligations and earnings, and often consider additional factors that impact ability to pay, such as the defendant's health and employment history.[135] While critics sometimes balk at the addition of "ability to pay" to the restitution calculation due to supposed complications in determining financial ability,[136] states like Indiana demonstrate that a quick and holistic review of an individual's finances, earning capacity, financial obligations, and preexisting debt provides a solid starting point.

While a massive restitution overhaul might benefit Hennepin County (more on that below), small adjustments in statutory interpretation may also benefit all involved parties. As a state-wide measure, Minnesota courts should take seriously their obligation under Minnesota Statutes Section 611A.045 to, at the very least, *consider* each individual offender's ability to pay. In following the status quo in interpreting restitution statutes, Minnesota courts effectively overlook a specific statutory requirement and perpetuate a cycle of debt that harms justice-involved youth and deprives victims of their promised restitution. Hennepin County courts already have procedures in place to quickly evaluate an individual's financial resources in determining whether an individual is eligible for a public defender[137] or capable of paying child support at the set amount;[138] a similar process could be implemented after said individual is found guilty or adjudicated delinquent to determine how much restitution they could conceivably pay.

An additional statutory requirement in Minnesota Statutes Section 260b.198 mandates that restitution orders be reasonable.[139] As this requirement is incorporated in the juvenile—rather than the

134. IND. CODE § 35-38-2-2.3(a)(6) (2017); *see also* David & Bradford, *supra* note 14, at 1080.

135. *See* Bell v. State, 59 N.E.3d 959, 964 (Ind. 2016); Champlain v. State, 717 N.E.2d 567, 570 (Ind. 1999); Sales v. State, 464 N.E.2d 1336, 1340 (Ind. Ct. App. 1984); *see also* David & Bradford, *supra* note 14, at 1081.

136. Ruback, *supra* note 12, at 1806, 1809 ("Most courts do not have a written plan for how . . . a determination [of an individual's ability to pay] should be made" and that "in the United States, determining ability to pay is not straightforward.").

137. MINN. STAT. § 611.17.

138. For "ability to pay" assessments in calculating child support payments, see MINN. STAT. § 518A.42; LYNN AVES, MINN. HOUSE OF REPRESENTATIVES RSCH. DEP'T, MINNESOTA'S CHILD SUPPORT LAWS 1, 8 (2015), https://www.house.leg.state.mn.us/hrd/pubs/chldsupp.pdf [perma.cc/55VK-ELX3] (explaining that low-income obligors receive a "self-support adjustment," and if an obligor's income is less than 120% of the poverty line, their payment is reduced to a "minimum support order" of $50/month).

139. MINN. STAT. § 260b.198(1)(5).

general—restitution statute, it should be read to have a juvenile-specific intent and effect.[140] When financial resources and limitations are discussed, few populations are more constrained than the one that forms the bulk of the juvenile delinquency system: low-income youth. Youth from working-class and poor families are unlikely to receive significant support in paying off a restitution order, as their parents may already be stretched thin by bills and debts. Further, even if these children are old enough to work and have their own jobs, income generated from employment is often diverted to family bills or an individual's need to self-support.[141]

With these realities in mind, "reasonable" restitution for juveniles begins to take form. It must be within an offender's ability to pay, and their ability to pay *on their own* must be considered, as financial support from adults is simply not an option for many in Hennepin County and Minnesota at large. Ideally, reasonable restitution would not extend beyond a certain dollar amount; accordingly, a cap on restitution in juvenile court may be appropriate.

B. Changes at the County Level

While the Minnesota Legislature would likely need to initiate many of these proposed restitution reforms, Hennepin County has the ability to independently enact changes to strengthen its juvenile restitution process.

As discussed in Part II, one change beneficial to offenders and victims alike involves incorporating Victim Offender Mediation or expanding the paid community service program to make restitution a true vehicle of restorative justice. While these measures may initially pose up-front training or implementation costs, they have the potential to reduce expenses incurred by the juvenile delinquency system (via a decrease in reliance on traditional court

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140. Support for interpreting the word "reasonable" in a substantive and meaningful way can be found in the presumption against surplus language, a semantic canon traditionally utilized in statutory interpretation. This canon of construction argues that a statute should be interpreted to give meaning to every word and avoid redundancy or futility of language.

141. It is not uncommon for children from poor and working-class families to work a part-time job so that they can contribute to household expenses. *See* Darryl E. Owens, *More Teens Working to Pay Family Bills*, ORLANDO SENTINEL (Mar. 3, 1998), https://www.orlandosentinel.com/news/os-xpm-1998-03-03-9803020728-story.html [perma.cc/Y7DA-HDBC] (discussing a nationwide trend). As such, this is another important but often obscured factor to consider in the conversation about juvenile restitution and its impact: if already-employed youth must shift wages from family necessities to restitution programs, how does that impact their families?

proceedings).[142] Further, true restorative justice actually *can* achieve the philosophical and emotional changes scholars hoped for restitution, as lessons of accountability and community interconnectedness are instilled through the restorative process.[143]

Additionally, Hennepin County should consider supporting a program or stand-alone fund for juvenile restitution. Though a monetary fund would inevitably impose an additional expense on the county, having such a fund would ensure victims of crime receive their restitution without imposing an effectively unpayable debt upon children. This fund would not need to cover the full extent of a restitution order, but rather could be used to cover *part* of the court-mandated payment. After a court determines a justice-involved youth's ability to pay, any excess restitution outside of the child's ability to pay could be taken from the fund. Similarly, if a statutory cap on restitution was imposed, any required restitution beyond the cap could be met using the fund. In these instances, so long as VOM or other face-to-face programs are also in place, the supposed benefits of restitution are still operational: young people who break the law are held accountable and forced to reckon with the harm they caused, yet this reckoning does not set them up for a lifetime of debt and a constricted future.

Conclusion

Although it is viewed as philosophically rehabilitative, Hennepin County courts interpret and implement juvenile restitution in a manner that often feels punitive. Justice-involved youth, who disproportionately come from low-income families, are saddled with restitution orders that are impractical—if not impossible—for them to pay. This debt follows them from youth into adulthood, molding their future successes and stresses. This Note suggests that this process is flawed: the purpose of our juvenile delinquency system is not to expose kids to the punitive measures employed during adult sentencing, but to treat children in a manner that recognizes them as children and acknowledges their capacity to change.

For juvenile restitution to achieve these ends, it must weave community connections into payment orders (either through VOM, other mediation, or individualized community service projects). Perhaps more importantly, Minnesota courts must start interpreting the underlying restitution statutes (especially

142. Lucas, *supra* note 20, at 1375.
143. Ruback, *supra* note 12, at 1798.

Minnesota Statutes Section 260b.198) to give effect to *all* provisions in the statute, including the reasonableness and ability to pay requirements.

Expanding the Extraordinary: Expungements in Minnesota

Alena A. Simon†

Introduction

In 1990, when Alex was eighteen years old, they stole $6,000 from their employer in order to have the resources to leave their abusive ex-partner.[1] They were caught, charged, and convicted of a felony in Minnesota under Minnesota Statutes Section 609.52(3)(2). Alex never served time for the offense and successfully completed probation in 1999. They have no prior or subsequent criminal history. In 2010, they completed a Registered Nursing education program, but when applying for nursing positions, each employer conducted a background check and Alex's felony conviction showed up, barring them from all employment opportunities in the nursing field. The collateral consequences of Alex's conviction continue to follow them thirty years later.

Collateral consequences are "legal disabilities" that are not a part of a criminal sentence but stem from a criminal conviction.[2] While not intended to be punitive,[3] these consequences are often so severe they prohibit those with criminal convictions from ever fully reintegrating into society.[4] They range from denial of public benefits, exclusion from jobs and housing, social stigma, voter disenfranchisement, and impacts on immigration status.[5] The United States incarcerates more people than any other nation in the

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1. Alex is a hypothetical person based on real situations the Author witnessed while working at the Ramsey County Attorney's Office.

2. Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 302 (2015).

3. Mackenzie J. Yee, *Expungement Law: An Extraordinary Remedy for an Extraordinary Harm*, 25 GEO. J. ON POVERTY L. & POL'Y 169, 171 (2017).

4. Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R-C.L. L. REV. 563, 605 (2018).

5. Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota*—State v. Schultz, 31 WM. MITCHELL L. REV. 1331, 1332–33 (2005); *see also* Ristroph, *supra* note 4, at 566.

world.[6] People of color are disproportionately impacted by mass incarceration[7] and by the accompanying consequences.[8] Recently, more attention has been given to the postconviction consequences of criminal convictions and states have implemented reforms to restore voting rights, mitigate immigration consequences, and seal or expunge criminal records.[9] Expungement has emerged as a key policy tool to reintegrate individuals back into society,[10] and over the past decade 80% of states have tried to expand expungement legislation.[11] In 2014, the Minnesota legislature greatly expanded which offenses were expungement eligible under Minnesota statutory law.[12] Yet, even under Minnesota's expanded law, Alex will never be eligible to expunge their conviction because theft greater than $5,000 is ineligible, even if it is their only criminal conviction.[13] Recognizing the limitations of the statute, in February of 2020, Minnesota House Representative Jamie Long introduced legislation to amend Minnesota's expungement statute.[14] The new

6. ACLU OF MINN., BLUEPRINT FOR SMART JUSTICE MINNESOTA 4 (2019) [hereinafter ACLU SMART JUSTICE]; *see also* Yee, *supra* note 3, at 171 (noting that nearly one-third of all Americans have some type of criminal record).

7. JEREMY TRAVIS, AMY L. SOLOMON & MICHELLE WAUL, FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 12 (2001) [hereinafter FROM PRISON TO HOME]; *see also* Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821, 2832–33 (2018) (highlighting that nearly 50% of Black and Latino men will be arrested before the age of twenty-three).

8. Mayson, *supra* note 2, at 302.

9. MARGARET LOVE, JOSH GAINES & JENNY OSBORNE, COLLATERAL CONSEQUENCES RES. CTR., FORGIVING AND FORGETTING IN AMERICAN JUSTICE: A 50-STATE GUIDE TO EXPUNGEMENT AND RESTORATION OF RIGHTS 6–7 (2018) [hereinafter COLLATERAL CONSEQUENCES RES. CTR.]. *See generally* ACLU SMART JUSTICE, *supra* note 6 (analyzing changes needed to reduce prison populations).

10. *See* J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2523 (2019) [hereinafter Prescott & Starr, *Expungement Empirical Study*].

11. Murray, *supra* note 7, at 2843.

12. MINN. STAT. § 609A (2014). Prior to 2014, only arrest records not resulting in a conviction, juvenile crimes, and certain controlled substance offenses were eligible. *See* MINN. STAT. § 609A (1996). Following the legislative modification in 2014, expungement eligibility was expanded to cover misdemeanors, gross misdemeanors, and fifty enumerated felonies.

13. MINN. STAT. § 609A.02(3)(b)(20) (2014) allows for expungement of "theft of $5000 or less."

14. H.F. 3816, 91st Leg. (Minn. 2020). *See* MINN. H. RESEARCH, BILL SUMMARY: H.F. 3816 (Feb. 26, 2020). Representative Long reintroduced a slightly modified version of this same legislation called the *Clean Slate Act* in the 2021 legislative session. H.F. 1152, 92nd Leg. (Minn. 2021). This Note will focus on the 2020 version, as that was the one available during the time it was written.

provisions would allow for automatic expungement of select misdemeanors and for prosecutor-initiated expungement.[15]

This Note focuses on the extent to which Minnesota currently offers a meaningful expungement remedy to address collateral consequences of criminal convictions. It specifically focuses on the 2014 revisions to the Minnesota expungement statute and argues they did not go far enough to effectively mitigate the negative impacts associated with criminal records. Part One will define expungement and examine why it can be beneficial; Part Two will walk through key provisions of Minnesota's 2014 expungement statute; Part Three will look at various ways other states have structured their expungement remedy; and Part Four will analyze the effectiveness of Minnesota's current statute, break down the 2020 revisions in H.F. 3816, and suggest amendments to H.F. 3816 to make expungement even more accessible. This Note argues that (1) Minnesota's 2014 revisions did not go far enough to make expungement accessible; (2) Minnesota should pass Representative Long's 2020 bill to allow for automatic expungement of misdemeanors, but automatic expungement should cover all arrest records, dismissed cases, petty misdemeanors, and misdemeanors, *including those offenses that may be used to enhance future penalties*; (3) Minnesota should enact H.F. 3816 to provide for prosecutor-initiated expungement because prosecutors do not have flexibility under the current law to expunge crimes initially under their jurisdiction; and (4) Minnesota should make all felonies expungement eligible subject to the balancing test factors in Minnesota's current expungement statute.[16]

I. Background and Benefits of Expungements

In the 1940s, support for sealing criminal records advanced nationally as a remedy for juveniles.[17] It was thought juveniles were "easier to rehabilitate than adults," and that sealing their criminal

15. *Id.* The 2021 version of the bill includes the provisions regarding automatic expungement of qualifying petty misdemeanors, misdemeanors, gross misdemeanors, and limited felonies, but it no longer includes prosecutor-initiated expungement. The updated bill for automatic expungement has received support from the Minnesota County Attorney's Association and the Legal Rights Center, among others. *House Public Safety Committee Discusses Rep. Long's Bill to Provide Minnesotans with a Fresh Start*, MINN. LEGISLATURE (Feb. 23, 2021), https://www.house.leg.state.mn.us/members/Profile/News/15529/31314 [perma.cc/N3TP-CUST].

16. MINN. STAT. § 609A.03(5)(c) (walking through the twelve-factor test judges may consider in determining whether to grant an expungement).

17. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 6.

records would provide "an incentive to reform."[18] Reformers in the 1960s sought to extend these remedies to adult offenders[19] and the push for such reforms continued through the 1980s.[20] Today, expungement is more popular than ever.[21] Over the past three years, over twenty states have updated their expungement laws, recognizing the important role expungement plays in facilitating reintegration into society.[22] All states but nine allow for the closure of at least some adult convictions.[23] Expungement is governed by state law; there is no federal expungement statute.[24] Thus, the extent of the remedy, eligibility, and process for expungement varies from state to state.[25] Expungement generally seals a criminal

18. *Id.*; Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1709 (2003).

19. *See* Love, *supra* note 19, at 1708–10 (discussing the history of expungement). These remedies were initially drafted into the Penal Code and promoted by the National Council on Crime and Delinquency.

20. In the 1980s, the ABA encouraged states to adopt judicial expungement procedures. *See* Love, *supra* note 19, at 1713–14 (noting this would allow for the sealing of court records).

21. *See* Eric Westervelt, *Scrubbing the Past to Give Those with a Criminal Record a Second Chance*, NPR (Feb. 19, 2019), https://www.npr.org/2019/02/19/692322738/scrubbing-the-past-to-give-those-with-a-criminal-record-a-second-chance [perma.cc/QS6P-67EN] (discussing various expungement reform efforts in the United States).

22. *Id.*; *see also* David Schlussel & Margaret Love, *Record-Breaking Number of New Expungement Laws Enacted in 2019*, COLLATERAL CONSEQUENCES RES. CTR. (Feb. 6, 2020), https://ccresourcecenter.org/2020/02/06/new-2019-laws-authorize-expungement-other-record-relief/ [perma.cc/E8E5-JRTB] ("In 2019, 27 states and D.C. made certain classes of convictions newly eligible for expungement, sealing, or vacatur relief.").

23. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 7.

24. Murray, *supra* note 7, at n.115 (noting there is currently proposed legislation that would allow for expungement at the federal level). *See* Record Expungement Designed to Enhance Employment Act of 2019, H.R. Res. 2410, 116th Cong. (2019). The bill currently has twenty-eight co-sponsors and would allow for the expungement of non-violent federal offenses. For a list of cosponsors, see *Cosponsors: H.R. 2410 — 116th Congress (2019-2020)*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/2410/cosponsors?searchResultViewType=expanded [perma.cc/H29K-FPDJ].

25. *See* Murray, *supra* note 7, at 2842; *see also* George Blum, Annotation, *Judicial Expunction of Criminal Record of Convicted Adult in Absence of Authorizing Statute*, 68 A.L.R.6th 1, 155 (2011) (noting a state does not have the authority to expunge a federal conviction or an offense from another state, their authority only extends to records within their jurisdiction). The extent to which a criminal record is viewable after expungement also varies from state to state. Expungement eligibility generally varies depending on the state, crime, number of convictions, and time since completion of sentence. *See* J.J. Prescott and Sonja B. Starr, *The Case for Expunging Criminal Records*, N.Y. TIMES (Mar. 20, 2019), https://www.nytimes.com/2019/03/20/opinion/expunge-criminal-records.html [perma.cc/5W8Q-XFQQ] [hereinafter Prescott & Starr, *Case for Expunging*].

record.[26] While the verb "to expunge," literally means to obliterate or destroy,[27] expungement generally does not destroy a criminal record.[28]

A. Impacts of a Criminal Record Are Severe and Disproportionately Impact People of Color

Technological advances have made criminal records easily accessible and online access has made the practice of background checking ubiquitous.[29] Employers and landlords often require the disclosure of criminal records to determine who they would like to rent housing to or hire.[30] A study from 2001 concluded that two-thirds of employers would not hire someone with a criminal conviction.[31] Bias and stigma, perceptions of dishonesty,[32] or fears of future lawsuits often drive hiring and leasing practices.[33] Some licensing professions completely exclude anyone with a criminal conviction.[34]

These postconviction consequences disproportionately impact people of color.[35] Nationally, and in Minnesota, people of color are arrested, charged, and convicted at higher rates than their white

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26. MINN. STAT. § 609A.01 (stating that in Minnesota, expungement prohibits the disclosure of the existence of a record unless by court order or statute).

27. State v. CA, 304 N.W.2d 353, 357 (Minn. 1981) (quoting BLACK'S LAW DICTIONARY 552 (5th ed. 1979)).

28. MINN. STAT. § 609A.03(7)(b) (noting expunged criminal records can be reopened by law enforcement, prosecutors, and judges, for the "purposes of a criminal investigation, prosecution, or sentencing, upon an ex parte court order").

29. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 2; *see also* Geffen, *supra* note 5, at 1342 (noting that prior to online access and a central Bureau of Criminal Apprehension online database, most criminal records were stored only on county computers, microfilm, or handwritten in books).

30. Geffen, *supra* note 5, at 1343.

31. *See* Travis, *supra* note 7, at 31 ("A survey of employers in five major cities across the country revealed that two-thirds of all employers indicated they would not knowingly hire an ex-offender and at least one-third checked the criminal histories of their most recently hired employees.").

32. *See, e.g.*, FED. R. EVID. 609 (providing that evidence of a witness' criminal conviction may be used when "attacking a witness' character for truthfulness").

33. T. Markus Funk, *The Dangers of Hiding Criminal Pasts*, 66 TENN. L. REV. 287, 303–04 (1998) (noting employers may fear a negligence lawsuit if someone commits a crime while on the job). *See, e.g.*, Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2523–43 (discussing employment outcomes and criminal expungement).

34. *See* Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2470; CHIDI UMEZ & REBECCA PIRIUS, NATIONAL CONFERENCE OF STATE LEGISLATURES, BARRIERS TO WORK: IMPROVING EMPLOYMENT IN LICENSED OCCUPATIONS FOR INDIVIDUALS WITH CRIMINAL RECORDS (2018), http://www.ncsl.org/Portals/1/Documents/Labor/Licensing/criminalRecords_v06_web.pdf [perma.cc/FC26-GEFL].

35. *See* Mayson, *supra* note 2, at 302–03.

counterparts.[36] Nationally, nearly 50% of Black and Latino men will be arrested before the age of twenty-three.[37] Minnesota has some of the largest racial disparities in marijuana possession arrest rates,[38] and in 2017, Black Minnesotans made up 34% of the prison population but only 6% of the state population.[39] Thus, collateral consequences from arrests and convictions are compounded on people of color and need to be addressed through criminal justice reforms.

B. The Benefits of Expungement Are Far Reaching and Can Result in Higher Wages, Reduced Recidivism, and Increased Tax Revenue

Expungements benefit both individuals and society and can help individuals rehabilitate and reintegrate.[40] For individuals with criminal histories, the sealing of criminal records allows for increased opportunities for employment, housing, and reintegration.[41] Extensive research from Michigan shows that individuals who receive expungements have an easier time finding employment and housing, and their wages are nearly 25% higher than their pre-expungement trajectory.[42] Higher wages, access to housing, and reintegration into communities correlate to lower recidivism rates.[43] Research shows those who receive an expungement are less likely to reoffend.[44] Low recidivism rates lead

36. *See* ACLU SMART JUSTICE, *supra* note 6, at 5, 22.

37. Murray, *supra* note 7, at 2832–33.

38. *See* ACLU SMART JUSTICE, *supra* note 6, at 5 (citing *The War on Marijuana in Black and White*, ACLU (June 2013), https:// www.aclu.org/report/report-war-marijuana-black-and-white [perma.cc/AWD5-QJ6W]).

39. ACLU SMART JUSTICE, *supra* note 6, at 5 (noting in addition that Native Americans make up 10% of the prison population and 1% of the state population and Latinos make up 6% of the prison population, but only 4% of the general population).

40. *See* Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2462.

41. *Id.*

42. *Id.* at 2461 (noting that, on average, within one year of expungement, wages go up by 22%).

43. *See id.* at 2520–21; *cf.* William D. Payne, *Negative Labels: Passageways and Prisons*, 19 CRIME & DELINQ. 33 (1973) (arguing that labeling people as criminal or deviant produces negative social consequences for them, and thus secondary deviance). *But cf.* Chares R. Tittle, *Deterrents or Labeling*, 53 SOC. FORCES 399 (1975) (arguing that recidivism rates cannot establish that labeling people as deviants is what produces deviancy).

44. Only 3.4% of people are re-arrested and 1.8% are reconvicted within two years; 7.1% are re-arrested and 4.2% are reconvicted within five years. Rates for those who commit violent crimes or felonies are even lower. For example, within five years, only 2.6% are re-arrested and 0.6% are reconvicted for violent crimes; 2.7% are re-arrested and 1% are reconvicted for felonies. Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2512.

to safer communities.[45] A cost-benefit analysis of expungement in California provided data that expungements lead to increased GDP and tax revenues because unemployment rates are lower and states spend less money on government assistance programs.[46] Thus, expungements increase public safety and save states money.[47]

C. Expungements Are Hard to Obtain: Lack of Awareness and Resources Often Make Them Prohibitive

While expungements are highly beneficial to individuals and communities, the vast majority of people who qualify for an expungement never seek one.[48] In-depth research on the benefits of expungement from J.J. Prescott and Sonia B. Starr suggests that, in Michigan, only 6.5% of individuals eligible for expungement actually seek the remedy out[49] and nearly two-thirds of the people who actually receive an expungement are White.[50] Their research states:

> Most people don't know they can get an expungement, or don't know how to do it, and don't have lawyers to advise them. The process is long and complicated, requiring visits to police stations and courthouses. The fees and costs (which in Michigan usually total close to $100, not including transportation and time away from work) are a barrier for people in poverty. And people with records have often had painful experiences with the criminal justice system, making the prospect of returning to it for any reason daunting.[51]

Many people do not pursue expungement because they lack awareness that such a remedy exists or they lack resources to pursue relief.[52] Fees, long applications, and court appearances

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45. *See, e.g.*, MEYLI CHAPIN, ALON ELHANAN, MATTHEW RILLERA, AUDREY K. SOLOMON & TYLER L. WOODS, A COST-BENEFIT ANALYSIS OF CRIMINAL RECORD EXPUNGEMENT IN SANTA CLARA COUNTY 15 (2014) ("[E]xpungement can help people with criminal records not lose as much income as they would otherwise. In addition, the larger economy will prosper, as a substantial number of individuals will add worker productivity and gain increased spending power, and many families will be in much safer economic conditions.").

46. *Id.* at 15.

47. *Id.*

48. Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2466 (noting that Michigan's expungement law is broadly representative of expungement laws nationally).

49. *Id.*

50. *Id.* at 2494.

51. Prescott & Starr, *Case for Expunging*, *supra* note 25.

52. *See* CHAPIN ET AL., *supra* note 45, at 4.

discourage individuals who would benefit most from expungement from pursuing the remedy.[53]

II. Expungement in Minnesota

In Minnesota, there are three methods to remedy a criminal record, one resting with each branch of government.[54] Executive pardon, inherent judicial expungement authority, and statutory expungement all vary in remedy and in kind. Prior to 1940, an executive pardon was the primary remedy for a criminal conviction.[55] Pardons are given by the president or state governor and can restore rights lost from a criminal conviction but will not erase or expunge a conviction.[56] Inherent judicial authority allows a state court to seal all its own records.[57] However, inherent authority is limited to court records and will not seal records held in the Bureau of Criminal Apprehension or other executive agencies, thus these records may still appear on background checks.[58] Statutory expungement is a remedy offered by state legislatures.[59]

A. Limits on Expungement Under Minnesota's Statute

In 1996, Minnesota enacted a uniform expungement statute, Minnesota Statutes Chapter 609A.[60] The legislation drew on

53. *See id.*

54. *See* MINN. STAT. § 638 (outlining the role and responsibility of the pardon board); State v. M.D.T., 831 N.W.2d 276, 279 (Minn. 2013) ("There are two bases for expungement of criminal records in Minnesota: Minn.Stat. ch. 609A (2012) and the judiciary's inherent authority.").

55. *See* U.S. CONST. art. 2, § 2 (executive pardon power); MINN. STAT. § 638 (enacted in 1986).

56. *See Pardon Information and Instructions*, U.S. DEP'T OF JUST. (2018), https://www.justice.gov/pardon/pardon-information-and-instructions [perma.cc/DK6R-PYKX]. Many state constitutions also speak to the pardon remedy. *See* MINN. CONST. art. 5, § 7 (establishing a board of pardons); COLLATERAL CONSEQUENCE RES. CTR., *supra* note 9, at 4.

57. State v. M.D.T., 831 N.W.2d 276, 280 (Minn. 2013); *see also* State v. C.A., 304 N.W.2d 353, 361–62 (Minn. 1981) (noting the court could order the sealing of records held by the district court clerk, the sheriff, or the county attorney).

58. *See* Bergman v. Caulk, 938 N.W.2d 238, 252 (Minn. 2020) (holding petitioner was not able to obtain a permit to carry a firearm because, although his 2007 misdemeanor domestic assault conviction had been judicially expunged, it showed up in a background check, and finding: "expungement by inherent authority does not by itself satisfy the federal meaning of expungement, and Bergman's right to carry a firearm in Minnesota cannot be reinstated under these circumstances."); *State v. C.A.*, 304 N.W.2d at 361–62.

59. *See* Murray, *supra* note 7, at 2842.

60. Geffen, *supra* note 5, at 1344 (noting the statute was enacted to make the process more consistent across the state).

various provisions provided for in prior statutes and allowed for expungement of certain controlled substance offenses,[61] juvenile records when the juveniles were prosecuted as adults,[62] and when the proceedings were resolved in favor of the petitioner or when charges did not result in a conviction.[63] These three realms tracked what was happening nationally.[64]

Minnesota Statutes Chapter 609A went through minor revisions in 1999, 2001, 2005, 2014, and 2018.[65] The statute was revised substantially in 2014 to expand the convictions that were statutorily eligible for expungement. The 2014 changes expanded section 609A.02(3)(a) to include clauses (2), (3), (4), and (5). These clauses allowed for expungement when a petitioner successfully completed a diversion program or received a stay of adjudication. It also allowed for expungement of convictions for petty misdemeanors, misdemeanors, gross misdemeanors, and fifty enumerated felonies.[66] Before becoming eligible for expungement, a petitioner must go through waiting times—state-imposed periods of time following the completion of a sentence without any subsequent arrests. Under chapter 609A, the waiting time after completing a

61. *See* MINN. STAT. § 609A.02(1). This came from prior legislation. *See* MINN. STAT. § 152.18 (1971) (repealed 1996).

62. *See* MINN. STAT. § 609A.02(2). This came from MINN. STAT. §§ 609.166–.168 (1971) (repealed 1996). These provisions allowed a conviction to be set aside when the offense was committed before the offender was twenty-one, the offense was the only felony or gross misdemeanor the person had been convicted of, five years had passed since the person had served their sentence or been discharged from probation, and the offense was not one for which a life sentence would be imposed. Geffen, *supra* note 5, at n.65.

63. *See* MINN. STAT. § 609A.02(3). This came from MINN. STAT. § 299C.11, a statute which provides for the return of certain identification data obtained by police officers during arrest if a determination is made in favor of an arrestee. *See also* City of St. Paul v. Froysland, 246 N.W.2d 435, 439 at n.1 (Minn. 1976) (holding that section 299C.11 implicitly included arrest records although it only specified "finger or thumb prints, photographs, [or] other identification data"); *State v. C.A.*, 304 N.W.2d at 359.

64. Murray, *supra* note 7, at 2842 (stating that initially expungement remedies were largely available only if the charges were resolved in favor of the petitioner, and that while one could expunge an arrest record, one could not expunge if that arrest actually resulted in a conviction). The Minnesota statute was intended to be uniform, but did not revise much of the Minnesota law at the time. *See* Geffen, *supra* note 5, at 1344.

65. For example, in 2001, Section 609A.02(3) was modified to say that "a verdict of not guilty by reason of mental illness is not a resolution in favor of the petitioner."

66. MINN. STAT. § 609A. Some of the enumerated felonies include controlled substance in the fifth degree, certain felony theft offenses, aggravated forgery, criminal damage to property, financial transaction card fraud, altering a livestock certificate, false declaration in assistance application, willful evasion of fuel tax, and false certification for title on watercraft. *Id.*

diversion program or receiving a stay of adjudication is one year.[67] Waiting time for a petty misdemeanor or a misdemeanor is two years,[68] a gross misdemeanor is four years,[69] and a felony conviction is five years.[70]

There are fifty enumerated felonies that are expungable under the Minnesota Statutes, but many of them have extremely low conviction rates, and thus rarely result in an expungement.[71] The legislature chose to include these fifty felonies because they are a severity level one or two under the Minnesota Sentencing Guidelines and are not crimes of violence.[72] Data from the Minnesota Sentencing Commission shows that of the 18,284 offenders sentenced in Minnesota for felony offenses in 2018, only 6,418 (35%) of them will ever be eligible for statutory expungement.[73] In 2018, only 6 of the 50 expungement eligible felonies resulted in over 100 convictions.[74] The possession of a controlled substance in the fifth degree[75] accounted for the vast majority of expungement eligible convictions and represented 4,026

67. MINN. STAT. § 609A.02(3)(a)(2) ("[P]etitioner has successfully completed the terms of a diversion program or stay of adjudication and has not been charged with a new crime for at least one year since completion of the diversion program or stay of adjudication."); *see also* H.F. 2576, 2014 Leg., 88th Sess., 2014 Minn. Sess. L. Serv. 246.

68. MINN. STAT. § 609A.02(3)(a)(3) ("[T]he petitioner was convicted of or received a stayed sentence for a petty misdemeanor or misdemeanor and has not been convicted of a new crime for at least two years since discharge of the sentence for the crime.").

69. *Id.* at (3)(a)(4) ("[T]he petitioner was convicted of or received a stayed sentence for a gross misdemeanor and has not been convicted of a new crime for at least four years since discharge of the sentence for the crime.").

70. *Id.* at (3)(a)(5) ("[T]he petitioner was convicted of or received a stayed sentence for a felony violation and has not been convicted of a new crime for at least five years since discharge of the sentence for the crime."). These wait times have not been modified since 2014.

71. *See* § 609A.02(3)(b).

72. *See* MINN. SENTENCING GUIDELINES COMM'N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY 94–98 (Aug. 2020), https://mn.gov/msgc-stat/documents/Guidelines/2020/August2020MinnSentencingGuidelinesCommentary.pdf [perma.cc/8UEY-FY42] (listing all felonies of severity level one and two). Crimes that disqualify individuals from obtaining a permit to carry are enumerated in chapter 609. Crimes of violence disqualify individuals from obtaining a permit to carry a firearm.

73. Information Request, Minn. Sentencing Guidelines Comm'n, Expungement Eligible Felony Offenses, Sentenced 2018, at 3 (Jan. 29, 2020) (on file with Minnesota Journal of Law & Inequality).

74. *Id.*

75. MINN. STAT. § 152.025.

(or 62.7%) of those eligible offenders.[76] For other expungement eligible offenses, theft accounted for 764 (or 11.9%);[77] check forgery accounted for 428 (or 6.7%);[78] receiving stolen property accounted for 402 (or 6.3%);[79] financial card transaction fraud offenses accounted for 353 (or 5.5%);[80] and criminal damage to property accounted for 167 (or 2.6%).[81] Nearly half of the expungement eligible offenses resulted in no convictions in 2018.[82] For example: failure to control regulated animal, rustling and livestock theft, tampering with fire alarm, false certification for title on watercraft, willful evasion of fuel tax, altering a livestock certificate, false declaration in assistance application, and duty to render aid[83] resulted in no convictions in 2018.[84] The fifty enumerated felonies give the appearance of an expansive remedy, but in reality, the fact that only six felonies had significant conviction numbers significantly limits the remedy. If the offenses eligible for expungement are obscure and result in negligible conviction numbers, those provisions in chapter 609A provide ineffective expungement remedies.

B. Expungement Remains an "Extraordinary Remedy"

Expungement remains an "extraordinary remedy"[85] in Minnesota. Just because a conviction is eligible for expungement under the statute does not mean a court will grant the expungement.[86] The court may only grant expungement if the petitioner can meet their burden to establish by clear and convincing evidence that an expungement would yield them a benefit "commensurate with the disadvantages to the public and

76. Information Request, Minn. Sentencing Guidelines Comm'n, *supra* note 73, at 3; MINN. SENTENCING GUIDELINES COMM'N, 2018 SENTENCING PRACTICES 50 (2020), https://mn.gov/msgc-stat/documents/reports/2018/MSGC2018AnnualSummaryStatistics.pdf [perma.cc/5TFL-KCBR].

77. Information Request, Minn. Sentencing Guidelines Comm'n, *supra* note 73, at 3; *accord* MINN. STAT. § 609.52.

78. Information Request, Minn. Sentencing Guidelines Comm'n, *supra* note 73, at 3 (referencing severity level 2 check forgery).

79. *Id.* (Information Request); *accord* MINN. STAT. § 609.53.

80. *Id.* (Information Request); *accord* MINN. STAT. § 609.821.

81. *Id.* (Information Request); *accord* MINN. STAT. § 609.595.

82. Information Request, Minn. Sentencing Guidelines Comm'n, *supra* note 73, at 3. Only twenty-one offenses had convictions in the 2018 data.

83. MINN. STAT. § 609A.02(3)(b) (listing expungement eligible offenses).

84. Information Request, Minn. Sentencing Guidelines Comm'n, *supra* note 73, at 3.

85. MINN. STAT. § 609A.03(5).

86. *Id.*

public safety" of the expungement and burdens on the court in monitoring the order.[87] The statute lays out a twelve-factor balancing-test judges should use in deciding whether the benefits would be commensurate with the disadvantages, and therefore whether to grant expungement.[88] Under Minnesota Statutes Section 609A.03(5)(c), judges should consider the nature and severity of the crime; the risk the petitioner poses to society; the length of time since the offense; the steps taken by the petitioner toward rehabilitation; any aggravating or mitigating factors of the crime; the reasons petitioner is seeking expungement (including attempts to obtain housing and employment); prior and subsequent criminal record; the employment record and community involvement of the individual; the recommendation of prosecutors, law enforcement, and victims; whether victims were minors; any outstanding restitution; and any other factors deemed relevant by the court.[89] Thus, Minnesota courts have a significant amount of discretion in determining whether to expunge an offense, but only if it is enumerated in chapter 609A.[90] There are no limits on the number of offenses one may expunge, but prior and subsequent convictions is one of the twelve factors the courts may consider in determining whether to grant an expungement.[91] In order to begin the expungement process in Minnesota, one must file a petition with the court, pay a filing fee, and wait at least sixty days.[92]

87. *Id.* at (5)(a).

88. *Id.* at (5)(c).

89. *Id.*

90. *See id.*

91. *Id.* at (5)(c)(7).

92. § 609A.03(1)–(4). The process for expungement begins by the submission of a petition and filing fee. Section 609A.03(2) lays out the required contents of the petition. Petitioner must submit: their full legal name, address(es), why expungement is sought and the legal authority for expungement, details of the offense or arrest for which expungement is sought, steps petitioner has taken for rehabilitation in the case of a conviction, petitioner's entire criminal record (prior or pending), prior requests for expungements, and any past or present victim no-contact orders. When an individual is seeking expungement, the petition and proposed order must be served on the jurisdiction with prosecutorial control over the offense and all other jurisdictions whose records would be affected by the expungement. *See In re* H.A.L., 828 N.W.2d 476 (Minn. Ct. App. 2013) (holding that the district court erred when it ordered the sealing of Minnesota Department of Human Services (MDHS) records without proper service on MDHS by petitioner). The prosecutorial office with jurisdiction over the offense must notify any victims pursuant to MINN. STAT. § 611A.06. *See* § 611A.06(1)(a); *see also* § 611A.0385 (requiring the court to make good faith efforts to notify each affected victim of the petitioner's expungement).

III. Expungement in Other States

Since expungement is fully governed by state law, states vary drastically in their expungement schemes. All but three states allow for the sealing of arrest or juvenile records,[93] and forty-one states allow for expungement of at least some adult convictions.[94] Over twenty states have updated or expanded their expungement statutes within the last several years.[95] These reforms have taken different shapes. Some have increased the number and type of convictions eligible for expungement;[96] others allow for the expungement of an entire criminal record, including severe felonies, but limit the remedy to once a lifetime.[97] Some states have reduced waiting periods[98] or modified restrictions on how expunged records may be used.[99] Recently, Pennsylvania, California, and Utah have passed legislation for automatic expungement for eligible convictions.[100] Essentially no states allow for the expungement of homicide or certain sex offenses.[101] Only Puerto Rico allows for the expungement of serious violent felonies.[102]

A. Some States Have Made a Wider Range of Convictions Eligible for Expungement but Limit the Use of the Remedy

Wyoming, Illinois, New York, and Oregon are among the states that have structured their remedy to allow for expungement

93. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 11. Only Arizona, Idaho, and Wisconsin have no remedy to limit public access to arrest records where no conviction results.

94. *Id.* at 84–112.

95. Westervelt, *supra* note 21.

96. *See, e.g.*, WYO. STAT. § 7–13–1502 (2011) (allowing for the expungement of all felonies, other than those enumerated).

97. *E.g.*, 20 ILL. COMP. STAT. § 2630/5.2(c) (2018).

98. *See, e.g.*, *id.* at (b)(2).

99. Murray, *supra* note 7, at 2842–44.

100. Pennsylvania passed its bill in the summer of 2018. *See* Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2474.

101. *See, e.g.*, *id.* at 2482 (highlighting that although Michigan's expungement laws cover most violent offenses, certain sex offenses and offenses carrying potential life-imprisonment terms are not eligible). For example: Arizona, Colorado, Idaho, Illinois, Kansas, Missouri, New York, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Utah, Washington, and West Virginia all allow for expungement of most felonies but prohibit expungement of a class of the most violent offenses and sex offenses, but California, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Massachusetts, Minnesota, Nevada, North Carolina, Rhode Island, Vermont, Wisconsin, and Wyoming allow for expungement of some minor and non-violent felonies. *See* COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 84–112.

102. P.R. LAWS ANN. tit. 34, § 1725a-2.

of a broader range of felony convictions but limit the number of offenses that can be expunged. For example, Wyoming's expungement statute grants broad expungement authority by enumerating felonies which are *not* eligible for expungement.[103] Non–expungement eligible offenses include violent felonies, felonies involving a firearm, vehicular homicide, drug induced homicide, and assault.[104] Wyoming will only allow for the expungement of one felony in a person's lifetime, whereas Minnesota has no such limitation on number of expungable offenses.[105] The waiting period in Wyoming is ten years after the discharge of a sentence,[106] which is twice as long as Minnesota's five year wait period for enumerated felonies.[107]

Illinois allows for the sealing of records for all but a few serious felonies.[108] Offenses like driving under the influence, domestic battery, and sex crimes are never eligible.[109] In contrast to Wyoming, Illinois offers the remedy to multiple eligible offenses, but the remedy is limited to once in a lifetime.[110] Once a petitioner has had their entire record sealed, a subsequent felony conviction may result in the unsealing of any previously sealed convictions.[111] Illinois has a uniform waiting period of three years.[112]

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103. WYO. STAT. § 7–13–1502 (2011).

104. *Id.*

105. *Wyoming Restoration of Rights & Record Relief*, COLLATERAL CONSEQUENCES RES. CTR.: RESTORATION OF RIGHTS PROJECT (Jan. 2, 2021), https://ccresourcecenter.org/state-restoration-profiles/wyomingrestoration-of-rights-pardon-expungement-sealing/ [perma.cc/N7F3-NB3C]. Nowhere in Minnesota Statutes Chapter 609A is expungement limited by the number of offenses. However, this is a factor courts may consider in the twelve-part balancing test under § 609A.03(5)(c).

106. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 71.

107. MINN. STAT. § 609A.02(3)(a)(5).

108. Illinois differentiates expungement (destroying records) from sealing records (sealing court records from the public); only arrest records are eligible for expungement whereas convictions may be sealed. *See* Jessica Gillespie, *Expunging or Sealing Adult Criminal Records in Illinois*, CRIM. DEF. LAW., https://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-records-expungement/illinois.htm [perma.cc/D6RR-85SM].

109. *Id.* For the full list of ineligible convictions and required waiting periods, see 20 ILL. COMP. STAT. § 2630/5.2(c) (2018) .

110. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 9. Indiana has a similar provision. *Id.*

111. 20 ILL. COMP. STAT. § 2630/5.2(c)(4) (2018) ("A person may not have subsequent felony conviction records sealed as provided in this subsection (c) if [they are] convicted of any felony offense after the date of the sealing of prior felony convictions as provided in this subsection (c). The court may, upon conviction for a subsequent felony offense, order the unsealing of prior felony conviction records previously ordered sealed by the court.").

112. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 7.

New York and Oregon allow for the expungement of serious felony convictions, but only if it is an individual's only serious offense.[113] Missouri allows for the clearing of one felony and two misdemeanors within a person's lifetime.[114] The idea of rehabilitation is supported by giving individuals an opportunity to expunge one felony.[115] Alex would be eligible for expungement under these statutory schemes which allow for expungement of a broader range of felony convictions but limit the number of offenses that can be expunged.[116] However, states like New York and Oregon would provide no remedy for an individual who committed several felonies at a young age and then reformed, or, in the case of Illinois, sealed their entire record, obtained employment and housing, and later was convicted of a new felony, thus reopening the entirety of their criminal history.

B. Connecticut Actually Erases Expunged Convictions

Most states do not actually destroy expunged records.[117] Some states keep the criminal records but write "expunged" next to any convictions that have been expunged.[118] Others, like Minnesota, can re-open expunged records for the "purposes of a criminal investigation, prosecution, or sentencing, upon an ex parte court order."[119] Yet, in Connecticut, expunged records are actually erased and cannot be reopened, even by the courts.[120]

Actual destruction of a criminal record truly clears a person's name and relieves them of the lifelong collateral consequences associated with a criminal conviction.[121] It tells those with

113. *Id.* at 8; *see, e.g.*, N.Y. CODE CRIM. PROC. § 160.59(2)(a) (2020) ("A defendant who has been convicted of up to two eligible offenses but not more than one felony offense may apply . . . to have such conviction or convictions sealed.").

114. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 8.

115. In Minnesota, a habitual offender with dozens of convictions may be eligible to expunge them all, but an individual with one serious felony conviction is not. *See* MINN. STAT. § 609A. A one-time serious offender, like Alex, may recognize the gravity of their actions, reform, and never get a subsequent conviction, but they are barred from the remedy.

116. This is because Alex only has one felony conviction, their conviction for theft.

117. *See, e.g.*, 20 ILL. COMP. STAT. ANN. 2630/5.2(c)(4) (2018) (outlining the procedure for processing expunged records).

118. *Id.*

119. MINN. STAT. § 609A.03(7)(b). The statute also states that "an expunged record of a conviction may be opened for purposes of evaluating a prospective employee in a criminal justice agency without a court order." *Id.*

120. CONN. GEN. STAT. §54–142a (noting that a pardon will erase criminal records and bar their opening by prosecutors and law enforcement).

121. *See* Raj Mukherji, *In Search of Redemption: Expungement of Federal Criminal Records*, 163 SETON HALL L. SCH. STUDENT SCHOLARSHIP (May 1, 2013).

convictions that society trusts in their ability to reform and is willing to offer them a true second chance. After all, if a criminal record is still viewable by employers and landlords with the mere notation of "expunged," how effective is the remedy?[122] Yet, actual destruction of criminal records would tie the hands of judges and prosecutors in the rare event of a subsequent conviction. Allowing these convictions to be reopened with a court order allows them to be hidden from public view while still providing security for prosecutors and judges that they could be reopened if necessary.

C. Puerto Rico Has One of the Broadest Expungement Statutes in the United States and Allows for the Expungement of Some Violent Felonies

In Puerto Rico, courts have broad expungement authority that extends to nearly all offenses.[123] Puerto Rico is the only territory in the United States that allows for expungement of violent offenses.[124] Even still, certain registration offenses including violent sex crimes and abuse of children are not eligible.[125] Crimes of corruption are also not eligible.[126] In Puerto Rico, individuals must wait five years from the completion of their sentence, maintain a good reputation in the community, and provide a DNA sample in order to be considered for expungement.[127] The power to make an ultimate decision on whether to grant expungement is held by courts alone.[128] The court may consider the recommendations of the Secretary of the Department of Corrections and Rehabilitation and the Secretary of Justice.[129] They also may consider any evidence submitted, statements from the victim and their family, offender's conduct during incarceration, and their rehabilitation plan.[130]

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122. *Id.* at 40 (arguing the remedy is only effective if the record of the conviction is not disseminated).

123. P.R. LAWS ANN. tit. 34, § 1725a-2.

124. *See id.*; COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 59.

125. P.R. LAWS ANN. tit. 34, § 1725a-2 (legislating that "[a]ny person convicted of a felony who is not subject to the Register of Persons Convicted for Violent Sexual Crimes and Abuse of Minors nor to the Register of Persons Convicted for Corruption" is eligible for expungement).

126. *Id.*

127. *Id.* at § 1725a-2.

128. P.R. LAWS ANN. tit. 33, § 4732.

129. *Id.*

130. *Id.*

D. Pennsylvania, California, and Utah All Offer Automatic Expungement for Qualified Misdemeanors

Pennsylvania, California, and Utah all have enacted legislation for automatic expungement of eligible criminal convictions.[131] In 2018, Pennsylvania was the first state to adopt legislation for the automatic expungement of adult non-violent misdemeanor convictions.[132] Under the Pennsylvania law, individuals are eligible for automatic sealing of their second- and third-degree non-person misdemeanor convictions[133] after ten years crime-free and if all fines are paid.[134]

California recently passed even more expansive legislation allowing for the automatic record clearing of misdemeanors and minor felonies, without waiting periods.[135] Under California's new law, convictions are automatically expunged so long as the person was never incarcerated in state prison or required to register as a sex offender, completed their sentence, and does not have an active criminal record.[136] California's law allows probation or the

131. Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2473–74.

132. *Id.* at 2473; *see also Act 56 of 2018 (HB 1419) – Limited Access Petitions & Clean Slate Limited Access*, REP. PATTY KIM: 103RD DISTRICT / DAUPHIN COUNTY, https://www.pahouse.com/Kim/cleanslate/ [perma.cc/2V2X-63NL] (discussing in detail Pennsylvania's clean state law).

133. *See* David J. Cohen, *Pennsylvania Crime Classification*, DAVID J. COHEN LAW FIRM, LLC (2020), https://www.davidcohenlawfirm.com/pennsylvania-crime-classification [perma.cc/JDC4-VDZG]. Second- and third-degree misdemeanors in Pennsylvania are punishable by up to six months to two years in prison and includes crimes such as shoplifting, theft of property up to $200, strangulation (but strangulation is not eligible for automatic expungement because it involves danger to another person), possession of marijuana, open lewdness, and loitering at night. *Id.* Note that this is different from Minnesota, where misdemeanors carry a maximum jail sentence of ninety days. MINN. STAT. § 609.02. In Minnesota, some of these crimes are classified as misdemeanors and some are classified as felonies. *See* MINN. STAT. § 617.23. First degree misdemeanors still require the filing of a petition in Pennsylvania. Cohen, *supra*. In Pennsylvania, these include simple assault, terroristic threats, stalking, multiple DUI offenses, and theft of property of $200–$2000. *Id.*

134. Press Release, Gov. Tom Wolf, "My Clean Slate" Program Introduced to Help Navigate New Law (2019), https://www.governor.pa.gov/newsroom/governor-wolf-my-clean-slate-program-introduced-to-help-navigate-new-law/ [perma.cc/VN34-E8HM]. The law passed by the state legislature 188-2 and was signed into law by PA Governor Tom Wolf on June 28, 2018. *Id.*

135. Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2474. *See also* Assem. B. 1076, Reg. Sess. (Cal. 2019) (allowing for automatic record clearing of eligible offense after January 1, 2021); Press Release, Assembly Member Phil Tang, First-in-the-Nation Legislation Introduced to Automate Arrest and Conviction Relief (2019), https://a19.asmdc.org/press-releases/20190307-first-nation-legislation-introduced-automate-arrest-and-conviction-relief [perma.cc/HKR2-HQNK].

136. Assem. B. 1076, Reg. Sess. (Cal. 2019). Note that the prosecutor or probation

prosecuting attorney to file an opposition to automatic expungement.[137] California cut major costs by switching to an automated system.[138] Under the old system, each expungement petition filed cost $3,757; under the new system it costs four cents per record.[139]

Utah passed similar "clean-slate" legislation to automatically seal low-level criminal convictions.[140] Utah's law only covers low-level offenses and requires a waiting period of five to seven years, depending on the underlying offense.[141] DUI offenses, felonies, and violent misdemeanors such as domestic violence and sexual battery are never eligible for expungement.[142] These clean slate bills have received bi-partisan support because they save counties money and allow individuals an opportunity to move on after their criminal convictions.[143]

IV. Analysis

A study by researchers at Stanford recommends increasing awareness and accessibility in order to maximize the benefits of expungement legislation.[144] Using 2018's numbers as a proxy, only 35% of convicted felons will be eligible for expungement in Minnesota.[145] This means nearly 11,866 individuals sentenced for a felony will never be able clear their record.[146]

This section will argue (1) Minnesota's 2014 statutory revisions did not go far enough to effectively mitigate the negative impacts associated with criminal records. (2) Minnesota should

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may file a petition to prohibit automatic relief "based on a showing that granting such relief would pose a substantial threat to the public safety." *Id.*

137. If the court grants the state's petition, the individual would not be eligible for automatic expungement but would be eligible under existing procedures, including filing their own petition with the court. *See* Assem. B. 1076, Reg. Sess. (Cal. 2019).

138. *CA Bill Would Expunge Many Criminal Records*, CRIME REPORT (Sept. 11, 2019), https://thecrimereport.org/2019/09/11/ca-bill-would-expunge-many-criminal-records/ [https://perma.cc/SLW8-UTMX].

139. *Id.*

140. *See* Expungement Act Amendments, 2019 Utah Laws 3160; H.B. 431, Gen. Sess. (Utah 2019).

141. Jessica Miller, *Utah Lawmakers Pass the 'Clean Slate' Bill to Automatically Clear the Criminal Records of People Who Earn an Expungement,* SALT LAKE TRIB. (Mar. 4, 2019), https://www.sltrib.com/news/2019/03/14/utah-lawmakers-pass-clean/ [perma.cc/8DFU-ZPWK].

142. *Id.*

143. *Id.*

144. *See* CHAPIN ET AL., *supra* note 45, at 5.

145. MSGC, Expungement Eligible Felony Offenses, *supra* note 73, at 3.

146. *Id.*

make the remedy more accessible by passing Representative Long's 2020 amendments to Minnesota Statutes Chapter 609A to allow for automatic expungement of misdemeanors. However, Minnesota should not limit automatic expungement to non-enhanceable offenses. Automatic expungement should cover all arrest records, dismissed cases, petty misdemeanors, and misdemeanors, including offenses that may be used to enhance future penalties. (3) Minnesota should enact H.F. 3816 to provide for prosecutor-initiated expungement because prosecutors do not have flexibility under the current law to expunge crimes initially under their jurisdiction. (4) Minnesota should make all felonies expungement-eligible subject to the balancing test factors in Minnesota's current expungement statute.[147] Minnesota should increase awareness of the remedy by announcing at sentencing when an individual will be eligible for expungement.

A. Minnesota's 2014 Statutory Revisions Did Not Go Far Enough to Effectively Mitigate the Negative Impacts Associated with Criminal Records

The current statutory framework which allows only for the expungements of fifty enumerated felonies limits expungements to about 35% of convicted felons in Minnesota.[148] There is not a lot of flexibility within the current statute to expunge offenses not enumerated.

Jon Geffen and Stefanie Letze's research on Minnesota's expungement remedy prior to the 2014 legislative changes suggests that because chapter 609A specifically prohibited the expungement of registration offenses under section 243.166, that provision would be superfluous if courts were not able to "expunge convictions outside of the narrow provisions set forth in [section 609A.02]."[149] Geffen used this argument to show that chapter 609A did not overrule courts inherent judicial authority to expunge records not enumerated in 609A.[150] Likewise, 609A provides grounds for the sealing of records under section 609A.02(3), "or other applicable

147. MINN. STAT. § 609A.03(5)(c) (walking through the twelve-factor test judges may consider in determining whether to grant an expungement).

148. MSGC, Expungement Eligible Felony Offenses, *supra* note 73, at 3.

149. Geffen, *supra* note 5, at 1370–71 ("The provision prohibiting expungement of offenses that require registration is rendered superfluous if courts are not allowed to expunge convictions outside of the narrow provisions set forth in [Minn. Stat. 609A.02]. The only way to give effect to the prohibition on expunging such convictions is to interpret chapter 609A as acknowledging expungement of convictions not enumerated in chapter 609A.").

150. *Id.*

law."[151] Geffen argues the phrase "or other applicable law" again suggests that there are other modes of expungement beyond the bounds of the statute, namely, inherent judicial authority.[152] However, the scope of inherent judicial authority does not extend to records held in the Bureau of Criminal Apprehension and therefore is not as substantive as chapter 609A. There appears to be no statutory authority to expunge felonies not enumerated in 609A and thus the 2014 revisions to 609A did not go far enough to offer a meaningful remedy for the vast majority of convicted felons in Minnesota.

The language in section 609A(3)(b)(5) limits the expungements of some misdemeanors. The statute states that felonies are expungable if "the petitioner was convicted of or received a stayed sentence for a felony violation of an offense listed."[153] Thus, if petitioner received a stay of imposition or a stay of adjudication on a felony offense, it is only expungable if it is one of the fifty enumerated felonies.[154] A stay of imposition will turn a felony conviction to a misdemeanor and a stay of adjudication will leave the offender with no conviction record if they successfully complete probation.[155] A stay of imposition is discretionary by courts but the commissioner recommends "that convicted felons be given one stay of imposition, although for very low severity offenses, a second stay of imposition may be appropriate."[156] Yet, if an individual received a stay of imposition for what was initially a felony offense not enumerated under section 609A.02(3)(b)(5) and they successfully completed probation, turning their conviction to a misdemeanor, they are not eligible for expungement for this misdemeanor conviction.[157] An individual convicted of a felony under Minnesota Statutes Section 624.7132(15)(b), for example, transferring a pistol to a minor, could have their felony expunged, but one charged with third degree assault under section 609.222 who attacked an abusive partner in self-defense and received a stay of imposition (and therefore had a misdemeanor conviction after successfully completing probation) would never be able to expunge their misdemeanor.[158] The legislature should revisit the stay provision in

151. *See* MINN. STAT. § 609A.01.

152. Geffen, *supra* note 5, at 1370.

153. MINN. STAT. § 609A(3)(b)(5).

154. *Id.*

155. SENTENCING GUIDELINES, MINN. CT. R. 3.A.1.b.

156. *Id.*

157. *Id.* There is no authority for this under the statute because of the language "or received a stayed sentence" in section 609A.02(3)(b)(5).

158. *Id.*

section 609A(3)(b)(5) to make stays of imposition and adjudication expungable in Minnesota. The statute currently does not go far enough to remedy the collateral consequences of a criminal record and the "stay" provision in section 609A(3)(b)(5) further limits expungement eligibility for misdemeanors.

B. Minnesota Should Pass Representative Jamie Long's Revisions to 609A

Minnesota should pass legislation similar to Pennsylvania, California, and Utah to allow for the automatic expungement of certain low-level non-violent offenses. Expungement can be time consuming, complex, and expensive.[159] Some people do not know it exists and others have inadequate resources to pursue relief.[160] The application process under section 609A.03 is complex and governed by a seven-page statute.[161] It is no wonder only about 6.5% of eligible individuals apply.[162] The impacts of criminal records disproportionately impact low-income people and people of color, yet these groups are often least likely to undertake expungement on their own.[163] The in-depth study done of expungements in Michigan suggests that nearly two-thirds of people who receive expungements are White.[164] Implementing automatic expungements for eligible convictions in Minnesota would help alleviate barriers, level the playing field, and make our criminal justice system more equitable.

Opponents of automatic expungement often cite safety concerns. They argue law enforcement, employers, and landlords should be able to retain individuals' criminal records.[165] For example, when the police arrive at the scene of a crime, they want immediate access to the criminal history of those involved.[166] When hiring and renting, employers and landlords seek to ensure the honesty of their employees and renters; they may want to know

159. Rachel Looker, *Minor Crimes Get 'Clean Slate' in Utah*, NAT'L ASSOC. OF COUNTIES (2019), https://www.naco.org/articles/minor-crimes-get-clean-slate-utah [perma.cc/89G3-FHMT].

160. CHAPIN ET AL., *supra* note 45.

161. *See* MINN. STAT. § 609A.03.

162. Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2461. Michigan's expungement law is broadly representative of expungement laws nationally. This is the only study that has done an in-depth analysis of actual expungement numbers in the United States.

163. Funk, *supra* note 33, at 301 (1998) (criticizing expungement statutes because they require access and resources).

164. Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2494.

165. *See* Funk, *supra* note 33.

166. *Id.* at 302.

whether an individual has a conviction for a crime of dishonesty before leaving them alone with cash or property.[167] Employers do not want to hire someone who may re-offend on the job and expose the employer to liability.[168] Judges and prosecutors also need access to prior convictions to accurately compute criminal history scores and sentences.[169] Yet, in Minnesota, expunged records can be reopened for the "purposes of a criminal investigation, prosecution, or sentencing, upon an ex parte court order."[170] Thus, these records can be accessed in the event of a future prosecution without remaining public.[171] The hard data shows that expungements actually increase public safety by lowering recidivism rates.[172] This is because expungements allow for increased opportunities for employment, housing, reintegration, and rehabilitation.[173]

Opponents of automatic expungements also argue automatic expungement would place the burden on record management and court personnel rather than on the defendants.[174] These areas are already short staffed and lack sufficient resources to transition to an automated system.[175] The Stanford study found that the primary major cost to expungement was processing costs for probation and the courts.[176] Yet, in implementing their automatic expungement program, California cut major costs by automating the system.[177] District Attorneys across California worked with Code for America, a non-profit that created 'Clear My Record,' an automated algorithm system that allowed the government to automatically

167. *Id.*

168. Geffen, *supra* note 5, at 1341.

169. MINN. STAT. § 609.115 ("When a defendant has been convicted of a misdemeanor or gross misdemeanor, the court may, and when the defendant has been convicted of a felony, the court shall, before sentence is imposed, cause a presentence investigation and written report to be made to the court concerning the defendant's individual characteristics, circumstances, needs, potentialities, criminal record and social history, the circumstances of the offense and the harm caused by it to others and to the community.").

170. MINN. STAT. § 609A.03(7)(b). The statute also states that "an expunged record of a conviction may be opened for purposes of evaluating a prospective employee in a criminal justice agency without a court order."

171. *Id.*

172. *See* Prescott & Starr, *Expungement Empirical Study*, *supra* note 10.

173. *Id.* at 2528. Those whose records have been sealed have wages nearly 25% higher than their pre-expungement trajectory and are more likely to find housing.

174. *See* Funk, *supra* note 33.

175. *Concurrence in Senate Amendments: Hearing on AB 1076 Before the Senate* (Cal. 2019).

176. CHAPIN ET AL., *supra* note 45, at 4.

177. *CA Bill Would Expunge Many Criminal Records*, CRIME REPORT, *supra* note 138.

clear eligible convictions.[178] This cut costs by over $3,750 per record, and under the new system of automatic expungement, it costs four cents per record.[179] Minnesota could partner with Code for America to automate the process. Automating this process would increase awareness of expungement, cut costs, and make it more accessible for those who would benefit the most.

i. H.F. 3816 Allows for Automatic Expungement of Non-enhanceable Offenses Following a One-Year Wait Period

Legislation introduced by Representative Jamie Long in February of 2020 would allow for the automatic expungement of what is already expungable under Minnesota Statutes Sections 609A.02(3)(a) and (b)(1), (2), and (3). This would include arrest records, actions resolved in favor of petitioner, successful completion of a diversion program, petty misdemeanors, and misdemeanors. The automatic expungement of misdemeanors would occur after a one-year wait period and would be limited to non-enhanceable misdemeanors.[180] For example, disorderly conduct,[181] fourth degree criminal damage to property,[182] and careless driving[183] are non-enhanceable misdemeanors that would be eligible for automatic expungement under H.F. 3816. Enhanceable offenses are crimes that lead to increased severity, penalty, and sentence for subsequent convictions of the same offense.[184] They include DWIs, domestic assault, violation of a domestic abuse no contact order, violation of a harassment restraining order, fifth degree assault, prostitution, driving without insurance, indecent exposure, and in some instances, trespass.[185]

178. *Clear My Record,* CODE FOR AMERICA, https://www.codeforamerica.org/programs/clear-my-record [perma.cc/EE68-ANTS]. This pilot program was launched in five counties in California. San Francisco announced their plan to partner with Code for America in 2018, and four other joined as a pilot program. Jenni Avins, *A Simple Algorithm Could Help Clear Thousands of Cannabis Convictions*, QUARTZ (Feb. 26, 2019), https://qz.com/1560417/san-franciscos-code-for-america-program-to-expunge-8000-weed-convictions/ [perma.cc/QU6B-XEM5].

179. *Id.*

180. *See* MINN. H. RESEARCH, BILL SUMMARY: H.F. 3816 (Feb. 26, 2020).

181. MINN. STAT. § 609.72(1).

182. MINN. STAT. § 609.595(3).

183. MINN. STAT. § 169.13(2).

184. *See The Importance of Enhancements in Criminal Sentencing*, WILSON LAW GROUP (Dec. 27, 2015), https://wilsonlg.com/criminal/blog/importance-enhancements-criminal-sentencing [perma.cc/J49M-AG9Y].

185. *See* MINN. STAT. §§ 609.02(16), 609.322 (most enhancements require another

For these offenses, the first offense is typically treated as a misdemeanor, a second conviction may result in a gross misdemeanor, and a third or more may result in a felony.[186] The legislature has made these offenses enhanceable because subsequent convictions are considered more dangerous and threaten public safety.[187] Under Representative Long's proposed legislation, enhanceable offenses would remain eligible for expungement under section 609A.02(3)(3) but would not be automatically expunged.[188] Each offense that could enhance a future penalty would still be reviewed individually under Minnesota's twelve-factor test in section 609A.03(5)(c) before being expunged.[189] It is likely that automatic expungement will gain more political traction when it is focused on low-level, non-person offenses such as marijuana offenses and minor theft.[190]

ii. Suggested Amendments to H.F. 3816: Automatic Expungement Should Include All Misdemeanors– Including Enhanceable Offenses

Representative Long's bill to automate expungements would make the remedy more accessible in Minnesota. A suggested amendment to the proposed bill would be to make *all* misdemeanors eligible for automatic expungement and not limit the remedy to non-enhanceable offenses. Under Minnesota law, expunged records can be reopened for the purposes of any criminal investigation or subsequent prosecution or sentencing with a court order.[191] Therefore, prosecutors, law enforcement officers, and judges can still use previous expunged convictions to enhance future sentencing in the event that an offender were to reoffend,[192] but allowing for automatic expungement of these records would shield the information from the public and reduce stigma. Additionally, the 2020 legislative proposals limit automatic expungement to those who are not arrested, charged, or convicted of a new offense

conviction to occur within ten years, prostitution requires another conviction within six months); MINN. STAT. § 617.23 (indecent exposure charges are enhanced if a person gets another conviction in their lifetimes). *See also Enhanceable Crimes*, PROJUSTICE MN, https://www.projusticemn.org/library/attachment.157398 [perma.cc/N55D-6R44].

186. *Id.* Whether these convictions are the correct convictions to be enhanceable is beyond the scope of this Note.

187. MINN. STAT. § 609.1095.

188. *See* MINN. H. RESEARCH, BILL SUMMARY: H.F. 3816 (Feb. 26, 2020).

189. *See* MINN. STAT. § 609A.03(5)(c).

190. *See* § 609A.015(3)(2).

191. § 609A.03(7)(b).

192. *Id.*

during the waiting period.[193] If an individual continues to offend during their probationary period, they will not be eligible for automatic expungement.[194] This ensures that even automatic expungement is reserved for those who work to rehabilitate and are compliant throughout their probationary period.

iii. Reduction of Wait Times to One Year Increases Accessibility of Expungement

Representative Long's bill reduces wait periods for expungements of misdemeanors from two years to one year, which increases accessibility to expungement. In order to be eligible for automatic expungements, offenders must successfully complete probation.[195] The probationary period for a misdemeanor is generally one year and requires compliance with all court orders including fees, restitution, and treatment.[196] Under the current language of chapter 609A, individuals must complete their year of probation and then wait an additional two years before they can apply for expungement of a misdemeanor.[197] Automatic expungements under H.F. 3816 would reduce this wait to one year. Expungement offers the most rehabilitative impact in the years immediately following a conviction.[198] Those working for automatic expungement programs have noted not to "underestimate how much even the most minor of misdemeanor convictions—including marijuana or trespassing or any kind of conviction—can affect someone's ability to get a job, to get housing and to function fully in society."[199] Thus, reducing wait periods can help offenders reintegrate into society more quickly.

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193. H.F. 3816, 91st Leg. (Minn. 2020) § 609A.015(3)(2)–(3); MINN. H. RESEARCH, BILL SUMMARY: H.F. 3816 (Feb. 26, 2020). California structured their automatic expungement statute in a similar way, which limited automatic expungement to those who successfully completed their sentences and who do not have an active criminal record. *See California Restoration of Rights and Record Relief*, COLLATERAL CONSEQUENCES RES. CTR.: RESTORATION RIGHTS PROJECT, https://ccresourcecenter.org/state-restoration-profiles/california-restoration-of-rights-pardon-expungement-sealing/ [perma.cc/VWD3-BU6A]; *see also* Assem. B. 1076, Reg. Sess. (Cal. 2019) (providing for "clean slate" automated relief for convictions and non-convictions).

194. *See* MINN. H. RESEARCH, BILL SUMMARY: H.F. 3816 (Feb. 26, 2020).

195. *Id.*

196. *See Probation Length*, BRANDT CRIM. DEF., https://brandtdefense.com/probation-length.html [perma.cc/K9MG-FJ2S]. However, probationary periods vary depending on the offense.

197. MINN. STAT. § 609A.02(3)(3); *see also* Yee, *supra* note 3, at 185.

198. Yee, *supra* note 3, at 185.

199. Westervelt, *supra* note 21 (quoting Jenny Roberts, Co-director, Crim. Just. Clinic, American University, Washington, D.C.).

The benefits to the public of expunging low-level misdemeanors significantly outweigh the benefits of keeping them.[200] Because expungement is often only used by those with access, knowledge, and resources, implementing automatic expungement and eliminating waiting times in Minnesota would increase these benefits for individuals and the State. These reforms would also help level the playing field and minimize the perpetuation of marginalization and poverty.

C. Minnesota Should Enact H.F. 3816 to Implement Prosecutor-Initiated Expungement Because Prosecutors Do Not Have Flexibility Under the Current Statute to Support Expungement of Crimes Not Enumerated

Currently, prosecutors are not free to support expungement of felonies not enumerated in chapter 609A. Representative Long's modifications to 609A would give more discretion to prosecutors by allowing for prosecutors to initiate expungement. Section 609A.025 currently states that:

> [i]f the prosecutor agrees to the sealing of a criminal record, the court shall seal the criminal record for a person described in § 609A.02, subdivision 3, without the filing of a petition unless it determines that the interests of the public and public safety in keeping the record public outweigh the disadvantages to the subject of the record in not sealing it.[201]

The statute still limits expungement to crimes enumerated in section 609A.02(3).

i. Prosecutors May Have Some Discretion to Sentence for Expungement Under Section 609A.02(3)(5)(b)(20)

The felony theft provision under section 609A.02(3) contains unique language which may offer prosecutors some discretion during sentencing. Section 609A.02(3)(5)(b)(20) allows for expungement when the theft was under $5000 or when the amount was less than $1000 with risk of bodily harm, but it also allows for expungement of any other theft offense "sentenced under this provision."[202] This provision is the only one that includes this language and presumably expands expungement as a remedy for

200. CHAPIN ET AL., *supra* note 45.
201. MINN. STAT. § 609A.025(a).
202. § 609A.02(3)(5)(b)(20).

one whose charge was for a greater theft offense but was pleaded or sentenced down under section 609.52(3)(3)(a). Thus, had Alex been sentenced under this provision, which governs theft under $5000, rather than under section 609.52(3)(2), which governs theft greater than $5000, their conviction would be eligible for expungement. Judges and prosecutors concerned about collateral consequences may consider sentencing a first-time theft offender whose crime exceeds $5000 under section 609.52(3)(3)(a) so the offender may later be eligible for expungement. Beyond this, prosecutors have very limited authority to support expungement beyond what is enumerated in chapter 609A.

ii. H.F. 3816 Allows for Prosecutor-Initiated Expungement

H.F. 3816 would allow for prosecutor-initiated expungement under a new provision, section 609A.026.[203] This provision would allow a prosecutor to initiate expungement for an offense enumerated in 609A.02(3) or for any other felony conviction other than a registration offense under 243.166, after a wait period of five years.[204]

Giving this authority to prosecutors makes sense. Prosecutors brought charges in the first place and have a vested interest in justice and public safety. If they think the benefits of expungement are commensurate with the disadvantages to the public of sealing the record, they should have the authority to grant the remedy. Other states agree. In 2018, Delaware updated their expungement law, which now mandates expungement when the prosecutor files the petition.[205] In Hawaii, full expungement authority is given to the initial prosecuting office.[206] It is somewhat unique for states to hand off the entire oversight of the remedy to prosecutors, but nearly every state's expungement statute allows for at least some input by prosecutors.[207]

Opponents may be concerned that prosecutors will not be fair and impartial when criminal records are concerned;[208] others think prosecutors already have too much discretion.[209] Some fear that this

203. *See* MINN. H. RESEARCH, BILL SUMMARY: H.F. 3816 (Feb. 26, 2020).

204. H.F. 3816, 91st Leg. (Minn. 2020).

205. Murray, *supra* note 7, at 2847; DEL. CODE. ANN. tit. 11, § 4374 (c) (2018).

206. Murray, *supra* note 7, at 2847; HAW. REV. STAT. ANN. § 831–3.2 (2018).

207. Murray, *supra* note 7, at 2848.

208. *Id.* at 2859.

209. *See id.* at 2860–61 (citing Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 36 (2009)).

could actually lengthen the process and make an expungement more difficult to obtain.[210] Allowing more prosecutorial discretion in expungements may increase disparities across the state because judges and prosecutors vary in their application of the twelve-part balancing test.[211] Yet, the same is true of any charging and sentencing decision. Prosecutors have the authority to make charging and sentencing decisions and it makes sense that they also have the power to initiate an expungement. Passing this new provision in chapter 609A would give individuals like Alex a second chance while continuing to ensure that expungement is an extraordinary remedy.[212] Minnesota should implement prosecutor-initiated expungement.

D. Minnesota Should Make All Felony Convictions Eligible for Expungement Subject to the Twelve-Part Balancing Test

Minnesota's statute should be amended beyond H.F. 3816 to remove the fifty-enumerated felonies and make all felonies expungement eligible subject to the twelve-part test in section 609A.03(5)(c). Puerto Rico's statute that allows for expansive expungement eligibility[213] is a good model for how Minnesota could amend its statute to be more comprehensive. While no states give unlimited expungement discretion to courts, or allow for the expungement of the most serious violent felonies, reforming the

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210. *Id.* at 2848.

211. This Author observed a typical misdemeanor expungement calendar in Hennepin County. It appeared that at least some judges rarely grant expungements. Although all misdemeanors are statutorily eligible for expungement, many judges do not view the disadvantages to the individual as rising to surpass the benefit of maintaining those records. *See* Sarah Horner, *New Program Helps People Convicted of Low-Level Crimes Clear Their Records*, TWIN CITIES PIONEER PRESS (Oct. 3, 2019), https://www.twincities.com/2019/10/03/ramsey-washington-county-expunge-criminal-record-courts/ [perma.cc/F2YS-XXAZ] (explaining that Washington and Ramsey Counties are working with Southern Minnesota Regional Legal Services to implement an expungement program that would help those with eligible convictions obtain expungement).

212. *See* discussion *supra* note 1 and accompanying passage. Since this Note was written, the Minnesota Attorney General's office started a new tool to connect residents with prosecutors to streamline the process of sealing records in most Minnesota counties. *See AG Ellison, Partners Launch HelpSealMyRecord.org to Increase Access to Expungements*, THE OFF. OF MINN. ATT'Y GEN. KEITH ELLISON (Oct. 1, 2020), https://www.ag.state.mn.us/Office/Communications/2020/10/01_HelpSealMyRecord.asp [perma.cc/RTJ8-M9FP].

213. P.R. LAWS ANN. tit. 34, § 1725a-2 (2021) (allowing for expungement of any conviction unless it is a felony triggering listing on the Register of Persons Convicted for Violent Sexual Crimes and Abuse of Minors or the Register of Persons Convicted of Corruption).

statute in this way would make Minnesota a national leader in expungement reform. In Minnesota, expungement would remain an "extraordinary remedy," to be used to support those most deserving of a second chance.[214] Restricting expungement to fifty felonies excludes offenses where unique circumstances may warrant individual consideration for expungement.

i. The Case of Amreya Shefa Shows Why Expungement May Be Warranted, Even for Heinous Crimes

The case of Amreya Shefa paints a compelling picture for expanding the expungement remedy.[215] In 2013, Ms. Shefa was found guilty of manslaughter for stabbing her abusive husband.[216] She served time in prison and was awaiting deportation to Ethiopia, where it is likely her husband's family would have her killed.[217] She had no other criminal convictions and felt she had no other options to escape her husband.[218] In June of 2018, she made her case for a pardon before the Minnesota Board of Pardons.[219] A pardon or expungement may have halted her deportation and saved her life.[220] The Pardon Board denied her pardon.[221] Today, Ms. Shefa has no remedy under Minnesota's expungement statute.[222]

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214. *See generally* MINN. STAT. § 609A.03(5) (outlining expungement requirements).

215. *See* Brett Hoffland, *Minnesota Woman Convicted of Killing Her Husband Pleading for a Pardon*, KSTP (Jun. 25, 2019), https://kstp.com/news/minnesota-woman-convicted-of-killing-her-husband-pleading-for-a-pardon/5402752/ [perma.cc/E2C4-V7JY].

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. The Minnesota Pardon Board is composed of the Governor, Attorney General, and the Chief Justice of the Minnesota Supreme Court, and a vote must be unanimous among them to grant a pardon. The Chief Justice, Lorie Gildea, indicated she was unwilling to extend a pardon in Shefa's case before the Board officially decided it. Andy Monserud, *Minnesota Woman Who Killed Abusive Husband Seeks Change of Pardon System*, COURTHOUSE NEWS SERV. (May 10, 2020), https://www.courthousenews.com/minnesota-woman-who-killed-abusive-husband-seeks-change-of-pardon-system/ [perma.cc/X8AG-YYPF]. Thereafter, Shefa filed a complaint in Hennepin County District Court to place the pardoning power entirely in the hands of the Minnesota Governor. *Id.*

222. Hoffland, *supra* note 215. Since this Note was written, Amreya Shefa's attorneys continued to challenge Minnesota's unanimous pardon requirement; it was ruled unconstitutional by a Ramsey County judge in April, 2021. *See* Stephen Montemayor, *Minnesota's Unanimous Pardon Board Requirement Ruled Unconstitutional*, STAR TRIB. (Apr. 21, 2021), https://www.startribune.com/minnesota-s-unanimous-pardon-board-requirement-ruled-unconstitutional/600048574/ [perma.cc/CXD9-7BS5].

Ms. Shefa's case presents an "extraordinary" case. If the legislature did away with the fifty enumerated felonies and made all crimes expungement eligible subject to the section 609A.03 twelve-factor test, a court may have granted Ms. Shefa's expungement.[223] While the nature of the crime was severe[224] and the victim's family strongly opposed the pardon,[225] it is unlikely that Ms. Shefa poses a future danger to society.[226] There were serious mitigating factors.[227] Ms. Shefa became an active member of the community through her church, and during her time in prison she started a woman's support group.[228] Perhaps most importantly, the reason she sought a pardon was to stop her deportation and protect her life.[229] Yet today, Ms. Shefa is not eligible for expungement in Minnesota. If Minnesota law allowed for expungement of even the most serious felonies, the twelve-factor test would ensure expungement was only granted in the most compelling cases.[230] The burden would still remain with the petitioner to prove by clear and convincing evidence why their case warranted expungement.[231]

ii. We Should Trust Our Courts to be Just with Expungements

Many would oppose the removal of enumerated felonies and the expansion of expungable offenses because doing so would potentially allow those who have committed the most heinous offenses to apply for expungement. Even Puerto Rico prohibits expungement for certain sex offenses, child abuse, and corruption crimes.[232] Giving a single judge complete discretion to apply the twelve-part test may lead to disparate results in expungement across the state, and petitioners may 'judge shop' to seek to have their case heard before a favorable judge. Minnesota is a sentencing guideline state and sentencing guidelines function to eliminate indeterminate discretion of judges to foster more equitable outcomes.[233] Unfettered discretion of judges increases sentencing

223. MINN. STAT. § 609A.03(5)(a).
224. Hoffland, *supra* note 215; *accord* § 609A.03(5)(a)(1).
225. Hoffland, *supra* note 215; *accord* § 609A.03(5)(a)(10).
226. Hoffland; *accord* § 609A.03(5)(a)(2).
227. Hoffland; *accord* § 609A.03(5)(a)(5).
228. Hoffland; *accord* § 609A.03(5)(a)(4), (8).
229. Hoffland; *accord* § 609A.03(5)(a)(6).
230. *See* § 609A.03(5)(a).
231. *See id.*
232. P.R. LAWS ANN. tit. 34, § 1725a-2 (2021).
233. *See What Are Sentencing Guidelines?*, ROBINA INST. OF CRIM. L. & CRIM.

disparities.[234] Opponents to the elimination of enumerated felonies would argue, likewise, this will increase expungement disparities. But sentencing guidelines are still discretionary; the ability to expunge felonies not enumerated in chapter 609A is not. The twelve-factor balancing test provides guided discretion.

We should trust our courts and prosecutors, those most intimately connected to the criminal justice system, to be fair and just in managing expungements. Are there certain crimes so categorically heinous that we, as a society, are willing to say the offender never deserves a second chance, regardless of compelling mitigating circumstances? In the absence of absolute certainty, we should eliminate the fifty enumerated felonies and rely on the twelve-part balancing test. This would function to ensure expungement remains an "extraordinary remedy," reserved only for those most deserving.

Conclusion

In the past decade, many states have greatly expanded their expungement statutes, recognizing the debilitating impacts of a criminal conviction and expungement as an effective remedy. In 2014, Minnesota expanded its statute and took steps to make expungements more accessible by allowing for the expungement of misdemeanors, gross misdemeanors, and fifty enumerated felonies. While Minnesota's statute is more comprehensive than expungement statutes in other states, it still excludes most individuals from the benefits of expungement. Recognizing this, in 2020, Representative Jamie Long introduced H.F. 3816 to amend Minnesota Statutes Chapter 609A to allow for automatic expungement of misdemeanors and prosecutor-initiated expungement. Minnesota should pass this legislation but not limit automatic expungement to non-enhanceable offenses. Minnesota should make all felonies expungement eligible subject to the balancing test factors in Minnesota's current expungement statute. These additions would benefit individuals and the State by making expungements more accessible and comprehensive. These legislative changes would continue to address the collateral consequences of a criminal conviction while advancing equality and justice in Minnesota's criminal justice system.

JUST. (Mar. 21, 2018), https://sentencing.umn.edu/content/what-are-sentencing-guidelines [perma.cc/L52P-HY32].

234. *Id.*

Constructing Identities of Deservedness: Public Housing and Post-WWII Economic Planning Efforts†

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Abstract

Depending on its population, the approach and sustained support for public housing has varied over time. This Article discusses how policymakers' initial arguments rested upon constructed identities of deservedness. This Article argues that the perceived social identity of public housing residents was used as an impetus for political support and policy changes. Using a historical analysis of congressional testimony during the planning stages of post-World War II economic recovery, this Article explores the initial underpinnings of federal appropriations for the development of public housing. Political leaders and business elites feared what would become of public housing after returning veterans vacated. This Article argues that it was the general political consensuses on who was deserving as well as the role of the federal government in

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supplying housing that spurred policy changes to either support or deter long-term public housing for low-income households. As history shows us, the end result was a contested governmental housing response that contributed to contemporary forms of social and racial inequality.

Introduction

On September 30, 2020, President Donald J. Trump held a campaign rally in Minnesota at the Duluth International Airport.[1] With the upcoming 2020 presidential election being less than five weeks away, President Trump began to craft different narratives surrounding what the nation would be under the leadership of his Democratic opponent, former Vice President Joseph R. Biden, Jr. Amongst other tactics, Trump attempted to draw in more voters by bringing attention to the changing demographics of American suburbs.[2] During the rally, President Trump stated, "By the way, just so we can get this right, 30% of the people in the suburbs are low-income people. 30% of the people in the suburbs are minorities. So we're ruining this American dream for everybody."[3]

In his blaming of minorities for "ruining the suburbs,"[4] President Trump boasted about his administration's recent actions in undermining affordable housing requirements for suburban communities, based on a 2015 federal anti-segregation mandate known as "Affirmatively Furthering Fair Housing" (AFFH).[5]

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1. Maya Kling & Laura Barrón-López, *Trump Blames Low-Income People, Minorities for "Ruining" Suburbia*, POLITICO (Oct. 1, 2020), https://www.politico.com/news/2020/10/01/how-white-grievance-politics-informs-trumps-campaign-playbook-424590?fbclid=IwAR1EsK-wk9RjOve3Gh1CSyF8mhbjncImw7RYJUwXenORjEMNf8jDO_amt1o [perma.cc/SJ48-GENA].

2. Kriston Capps, *What Does Trump Think the "Suburban Lifestyle Dream" Means?*, BLOOMBERG: CITYLAB (July 30, 2020), https://www.bloomberg.com/news/articles/2020-07-30/-the-suburbs-are-not-what-trump-thinks-they-are?sref=QFCZ3YPm [perma.cc/7HNE-P5D8].

3. Donald Trump, President of the United States, Duluth, Minnesota Campaign Rally (Sept. 30, 2020), https://www.rev.com/blog/transcripts/donald-trump-duluth-minnesota-campaign-rally-transcript-september-30-night-after-first-debate [perma.cc/5CBC-JVCQ].

4. Donald Trump, President of the United States, Virtual Arizona Tele-Rally, at 22:42 (July 18, 2020), https://www.youtube.com/watch?v=9COL70_vKvo&feature=emb_logo (stating that Affirmatively Furthering Fair Housing is "ruining the suburbs" because it's "bringing down values of houses" and "bringing up crime").

5. Jeff Andrews, *How Ben Carson Tried to Destroy Fair and Affordable Housing*, CURBED (Aug. 27, 2020), https://www.curbed.com/2020/8/17/21372168/ben-carson-hud-housing-trump [perma.cc/Z8HN-YP33] (citing a Trump tweet saying the "AFFH rule was eliminating single-family zoning and causing an 'invasion' of 'low-

Alongside Department of Housing and Urban Development (HUD) Secretary Benjamin S. Carson, Sr., the Trump Administration has sought to reverse many of the recent gains made in making communities more equitable.[6] This rhetoric surrounding the suburbs was amplified over the last few months leading up to the 2020 presidential election.[7] However, the hyperbole surrounding affordable housing is just a contemporary example of historic debates surrounding the role of the government in addressing housing issues. President Trump's attempt to use the increasing number of low-income minorities as a cause of suburban decline, through the use of affordable housing, is reminiscent of past disputes of other federal housing programs, such as public housing.[8]

The history of public housing in the United States is characterized by growing tensions between political figures, business elites, and the opinion of the American public.[9] Stemming from efforts of organizations such as the National Public Housing Conference during the Depression era,[10] adequate and affordable

income people'"). On July 16, 2015, the U.S. Department of Housing & Urban Development (HUD), issued a new regulation to implement the affirmatively furthering fair housing requirements of the Fair Housing Act. The AFFH required local communities receiving HUD dollars to make concrete data and community member-driven plans to foster thriving communities. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

6. Andrews, *supra* note 5.

7. *See* Kriston Capps & Laura Bliss, *Diverse? Yes. But Are U.S. Suburbs Actually Integrated?*, BLOOMBERG: CITYLAB (Sept. 30, 2020), https://www.bloomberg.com/news/articles/2020-09-30/what-biden-and-trump-got-wrong-about-the-suburbs [perma.cc/E3VF-HRYA]; Jeff Andrews, *The Suburbs Aren't Getting Abolished, But Maybe They Should*, CURBED (Aug. 4, 2020), https://www.curbed.com/2020/8/4/21352657/trump-suburbs-housing-election-2020 [perma.cc/V7PD-VLFS].

8. *See* John Eligon, *Residents Feared Low-Income Housing Would Ruin Their Suburb. It Didn't*, N.Y. TIMES (Nov. 5, 2020), https://www.nytimes.com/2020/11/05/us/affordable-housing-suburbs.html [perma.cc/5EDN-F3V3] (discussing a Wisconsin community that faced a conservative political backlash from its constituents after approving the creation of low-income housing).

9. *See* MARGERY AUSTIN TURNER, SUSAN J. POPKIN & LYNETTE RAWLINGS, PUBLIC HOUSING AND THE LEGACY OF SEGREGATION (2009); *see also* EDWARD G. GOETZ, NEW DEAL RUINS: RACE, ECONOMIC JUSTICE, AND PUBLIC HOUSING POLICY (2013); LAWRENCE J. VALE, PURGING THE POOREST: PUBLIC HOUSING AND THE DESIGN POLITICS OF TWICE-CLEARED COMMUNITIES (2013); NICHOLAS DAGEN BLOOM, FRITZ UMBACH & LAWRENCE J. VALE, PUBLIC HOUSING MYTHS: PERCEPTION, REALITY, AND SOCIAL POLICY (2015).

10. The National Public Housing Conference was established in 1931 by Mary Kingsbury Simkhovitch, a social worker and housing reformer, as a non-partisan coalition of national housing leaders from both the public and private sectors. The organization is now known as the National Housing Conference and is based out of Washington, D.C. For more information, see https://nhc.org/ [perma.cc/MNK2-7775].

housing has long been an area of policy concern.[11] However, the debate concerning the role of the federal government and housing assistance shows how policy changes depending on the beneficiaries. Depending on the demographic group that benefits, the approach and sustained support for social welfare programs, like public housing, has varied.

This article discusses how policymakers constructed identities of deservedness for public housing tenants as an impetus for political support. Using a historical analysis of congressional testimony during the planning stages of the post-WWII recovery period, this article explores the initial underpinnings of federal appropriations for the development of public housing after the WWII era. Political leaders and business elites feared what would become of public housing after returning veterans vacated. This article argues that it was the general political consensus on *who* was deserving that spurred policy changes to either support or deter public housing.[12] Given the current housing affordability crisis in the United States,[13] we argue that while housing assistance has changed to include a number of government programs, debates surrounding housing assistance and the role of the federal government remain intact, largely undercutting efforts to curb housing insecurity.

The Article begins by discussing the role of the federal government in creating a national public housing program. In this section, we highlight some of the seminal work on the topic in an effort to distinguish the nuances of the historiography of public housing while also positioning this article within the broader

11. *See* Peter Marcuse, *Interpreting "Public Housing" History*, 12 J. ARCHITECTURAL & PLAN. RES. 240, 240–58 (1995).

12. *Id.* at 249–52. Marcuse argues that deciphering the nature of public housing history requires reckoning with different housing programs that get lumped into public housing. These programs include a reformer's program, a war program, a middle-class and veterans' program, a redevelopment program, a poverty program, a null program, and a decentralized program. Given the purview of this article and the timing of our analysis, we would fall under the "middle-class and veterans program." However, as we attempt to highlight in this article, the overall approach of the policy was not as decisive and episodic as Marcuse suggests.

13. Generally, households are considered to be "cost burdened" if they are spending more than 30 percent of their income on housing costs. Harvard University's Joint Center for Housing Studies released a 2020 State of the Nation's Housing report that showed that 30.2 percent of all households are considered cost burdened. More than 18 million households are paying more than half of their income on housing and are considered severely cost-burdened. For more information, see https://www.habitat.org/costofhome/2019-state-nations-housing-report-lack-affordable-housing#:~:text=When%20you%20spend%20more%20than,renters%20and%2017.3%20million%20homeowners [perma.cc/25XG-3R3A].

literature. The Article then outlines our theoretical framework. We employ Schneider and Ingram's thesis on the social construction of target populations to test our hypotheses against the data.[14] We then discuss how discourses surrounding the future of public housing after the WWII recovery period exemplified a bifurcated government response to providing subsidized housing. This Article reflects how historical and contemporary debates around housing assistance are predicated on the contentious role of the federal government in solving social issues and the perceived beneficiaries of these efforts.

I. Political Basis for a National Housing Program

Housing has always served as one of the largest policy areas of social concern. For those on the lower end of the socioeconomic ladder, it has largely served as a catalyst between many different stakeholders including political figures, business elites, and community activists alike.[15] However, policy changes within housing assistance programs have only garnered support when they have been brought to the forefront of the political arena. In 1935, Langdon Post, the Tenement House Commissioner of New York City and Chairman of the New York Housing Authority said, "The people of the United States will not get low-cost housing on any scale commensurate with the needs until the housing question is made a major political issue."[16] Until the mid-1930s, low-cost, federally subsidized housing was not a nationally sponsored initiative. Post told the Tamiment Economic and Social Institute, "The most important thing is to make housing a major political issue . . . . This must be applied both locally and nationally."[17] Post's outlook on the state of affordable and adequate housing for needy families serves as a prelude to the state of housing conditions in the United States during the Great Depression.

In 1937, the Wagner-Steagall Act (also known as the Housing Act of 1937) supplied low-income, federally subsidized housing to

14. *See* ANNE LARASON SCHNEIDER & HELEN M. INGRAM, POLICY DESIGN FOR DEMOCRACY (1997).

15. *See generally* TURNER ET AL., *supra* note 9; GOETZ, *supra* note 9; VALE, *supra* note 9; BLOOM ET AL., *supra* note 9.

16. Joseph Shaplen, *Post Urges Public to Demand Housing: Low-Cost Dwellings Must Be a Major Political Issue, He Says at Social Conference*, N.Y. TIMES, June 29, 1935, at 6 (citing Langdon Post, statement before Tamiment Econ. & Soc. Inst.).

17. *Id.*

needy families.[18] It was intended to expand a much smaller New Deal initiative that financed the development of low-income housing as part of a broader effort to support public works.[19] This national housing program received much opposition during its formation from private business owners and policymakers alike.[20] Nonetheless, President Roosevelt signed the bill into law in 1937 as the United States Housing Act, one of the major pieces of legislation during the New Deal era.[21] Different political interests largely pushed this piece of legislation. For instance, conservatives thought it would provide a jumpstart to the economy through massive construction contracts to private companies.[22] Alternatively, liberals in most urban areas thought it would provide housing options for their most vulnerable populations through direct federal aid.[23]

According to Gail Radford's vivid account of the federal government's entry into "directly aided housing," "[t]he purposes of the bill were defined in terms of slum clearance, providing housing for the poor, and promoting industrial recovery."[24] The establishment of the federal government as a permanent actor in real estate development for low-income families challenged the private interests struggling to rebound from the Depression era.

This contention over public housing also clouded the federal support of the commercial sector as well as middle- and upper-income families.[25] Prior to the passage of the Wagner-Steagall Act, the federal government responded to the needs of the commercial sector, as well as families of middle- and upper-income, through multiple means. The federal government passed legislation like the Federal Home Loan Bank Act, and created the Home Owners Loan Corporation as well as the Federal Housing Administration.[26] These institutions would offset the impact of massive foreclosure rates by

18. Wagner–Steagall Act (United States Housing Act of 1937), Pub. L. No. 75-412, 50 Stat. 888. *See* ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 125–26 (2nd ed., 2010).

19. SCHWARTZ, *supra* note 18, at 125.

20. *See* Gail Radford, *The Federal Government and Housing During the Great Depression*, *in* FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA 102–20 (Bauman et al. eds., 2000).

21. SCHWARTZ, *supra* note 18, at 125.

22. Radford, *supra* note 20, at 106–07.

23. *Id.*

24. *Id.* at 108.

25. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 192–96 (1987).

26. *See generally* SCHWARTZ, *supra* note 18.

guaranteeing homeownership as a federally sponsored standard.[27] A combination of financial support was now available to some homeowners who would have reduced mortgage payments and extended terms. This solidified homeownership as an impetus for housing construction and job growth.[28] As a result, middle- and upper-income families could pursue homeownership and lessen their financial burden by buying a home. Also, the commercial sector got the stimulus it needed to engage in massive homebuilding throughout the country.[29] It was the ability of community organizations, business leaders, and elected officials to make housing a national political issue that ultimately changed the scope of how the federal government acted.[30]

However, the same could not be said about those who fell under extreme economic hardships, largely consisting of a growing demographic of African Americans, or Black people, within the United States. Friedman discusses this transition from when the nation engaged in massive slum clearance and created the high-rise superstructures of public housing.[31] This was commonplace then, but more of a mirage today in modern housing policy.[32] Friedman discusses this transition, saying:

> Perhaps a radical fringe of housing reformers looked on public housing as something more fundamentally "public"; but the core of support lay in an old and conservative tradition.[33]

If this general analysis is correct, what would happen to public housing if a rising standard of living released the submerged middle class from dependence on government shelter? Public housing would be inherited by the permanent poor. The empty rooms would pass to those who had at first been disdained—the unemployed, "problem" families, those from broken homes. The program could

27. *See* JACKSON, *supra* note 25, at 205.

28. *See* Michael S. Carliner, *Development of Federal Homeownership "Policy"*, 9 HOUS. POL'Y DEBATE 299 (1998).

29. *See* JACKSON, *supra* note .

30. *See generally, e.g.*, RHONDA Y. WILLIAMS, THE POLITICS OF PUBLIC HOUSING: BLACK WOMEN'S STRUGGLES AGAINST URBAN INEQUALITY (2004).

31. Lawrence M. Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642, 642–43 (1966).

32. *See* GOETZ, *supra* note 9; VALE, *supra* note 9 (describing the changing physical development of public housing sites).

33. Friedman, *supra* note 31, at 649.

adapt only with difficulty to its new conditions, because it had been originally designed for a different clientele.[34]

This "submerged middle-class" consisted of those Americans who suffered greatly following the Depression era; however, they "had enjoyed prosperity in the twenties. They retained their middle-class culture and their outlook, their articulateness, their habit of expressing their desires at the polls."[35] They were middle-class, White American families who were accustomed to the collective perceptions of the American Dream. This population descended into poverty because of no fault of their own, but due to an unjust economic system which forced them into a temporary state of deprivation.[36] While this group received sympathetic justifications for their economic position, other groups, such as those thought of as the "problem poor," were not afforded the same opportunity. The "problem poor" consisted of lower-income Black families, who were stigmatized by some policymakers and decision-makers as having an alternative form of culture and outlook on American life.[37] Black families were argued to lack the articulateness of the "submerged middle-class,"[38] and said to be accustomed to a chronic state of poverty due to their own faults and values.[39] And while relief efforts targeting White families were often treated with empathy, Black families were strategically excluded from receiving any type of equitable policy responses.[40]

This Article discusses the proposed shift of public housing immediately after WWII, during a period when a large portion of public housing developments was to be inhabited by returning veterans. Through the veterans' flight to the suburbs, public housing became the home of the urban or "problem poor." The political response towards returning White veterans was quite different from Black families living in deprivation. This was due to White veterans' social identity as deserving of benefits because of their direct military service, as well as the common practice of racial discrimination and the exclusion of Black people from different economic resources during this pre-Civil Rights Era. We maintain that the sustained state of individuals living in the "urban crisis"—the effects of larger economic structural changes as well as local

34. Friedman, *supra* note 31, at 649.
35. *Id.* at 645–46.
36. *Id.* at 652.
37. *Id.*
38. *Id.* at 649.
39. *Id.*
40. *See* GOETZ, *supra* note 9, at 112.

political and social challenges[41]—perpetuates a lasting stereotype of Black people deemed by both politicians and policymakers as socially undeserving and, as a result, lacking the need for subsequent policy responses.

II. Federal Housing Policy and Racial Exclusion

The history of urban housing policy is vast and provides insights into the political and social barriers to equitable, affordable housing in the United States. Whether it is the operation of the dual housing market, racial discrimination, exclusionary zoning, massive social housing experiments, or disruptive planning techniques, the field of housing policy is rich.[42] It describes a development not just of housing issues, but one of social, economic, and political matters as well. In the case of public housing, we argue that policies were based on the racial and social identity of the residents. This determination of *who* was deserving of housing was largely based on two primary categories of reasoning: 1) individuals became poor by forces outside of their control and 2) individuals were steadily working to escape deprivation.[43] The social construction of target populations—the construction of the social identity of the urban poor as a deviant and dependent group versus returning veterans as an advantaged group—led to different political agendas and subsequent policy designs for solving the post-war housing crisis.

Housing policy is but one scenario in which this can be analyzed.[44] Nevertheless, it lends itself for theoretical interpretation given the rich history throughout American society as well as the strong effect it has had on shaping urban America. And while researchers have tried to analyze different facets of

41. *See generally* THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (1996) (discussing the concept of the "urban crisis" signaling a state within industrial cities of deep racialized poverty through the 1950s and 1960s).

42. *See* JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES (2018); KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019) (detailing recent academic work on the legacy of discriminatory housing policies).

43. Friedman, *supra* note 31, at 649.

44. *See* CORIE S. SHDAIMAH, JOE SOSS & RICHARD C. FORDING, DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE (2011) (discussing the role of race and the transformation of poverty governance); *see also* SCHNEIDER & INGRAM, *supra* note 14 (discussing how public policy can go beyond constructionist approaches). Other topics that can be used to elucidate this dynamic lie in the criminal justice or education systems.

urban housing policy, the complexity of the matter has forced many to concentrate on certain periods of time rather than investigating the historical roots of public housing in order to explain its current state.

For example, Arnold Hirsch discusses the creation of institutional arrangements in post-war Chicago during 1940–1960 to create and maintain the "second ghetto."[45] According to Hirsch, the development of housing policy and urban renewal strategies in post-war Chicago served as tools of racial and economic exclusion during the intensifying state of the urban crisis.[46] His selection of Chicago demonstrates how local development plans and concepts were adopted into federal legislation as a national renewal effort.[47] Hirsch says, "[s]ignificant redevelopment and renewal legislation had been placed on the books, on both local and national levels, and a massive public housing program, explicitly designed to maintain the prevailing pattern of segregation, was well under way."[48] His analysis dramatically accounts for a combination of forces that produced the second ghetto. These forces included the formation of institutional arrangements by local business and political groups who were threatened by the perceived economic despair carried by Black people and the resistance of this group facilitated by government support and public funds.[49] And while his book depicts a vivid account of racial tension and the response of White, inner-city ethnic groups to combat racial and economic integration, it does not explain different alternatives of addressing housing concerns during a period of economic growth, particularly for public housing.

Other researchers have argued that, due to the chronic state of racial tension and economic decline, urban housing policy during the post-war era failed to provide the needed safety net which could allow residents of color to leap out of urban poverty into mainstream, middle-class America. Roger Biles describes this response by the federal government saying, "[p]olicymakers in Washington opted for slum clearance with the passage of major housing bills in 1949 (urban redevelopment) and 1954 (urban renewal), while the provision of low-income housing assumed

45. *See generally* ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940–1960 (1983).

46. *Id.* at xiii.

47. *Id.* at xiv.

48. *Id.* at xiii–xiv.

49. *Id.* at xiii.

secondary importance."[50] The relief efforts for low-income individuals living in high numbers in public housing took second stage to the redevelopment efforts of the post-war era. The implications here posed a greater risk to Black communities during this time period.

Although Harry S. Truman signed the Housing Act of 1949 into legislation, his attempt to establish "a decent home and a suitable living environment for every American family" primarily focused on new construction and demolition.[51] The Housing Act of 1954 amended this law in order to promote rehabilitation of existing housing stock rather than demolition and new construction.[52] The housing stock after WWII was very limited.[53] Although many legislative measures provided a stimulus for the massive, national engagement into new home construction, the Housing Act of 1954 mitigated this process. The Housing Act of 1954 provided a legislative precedent for future responses to housing policy, policies that would be aimed not only at new construction but also at rehabilitating and renovating the existing housing stock. While there are similar overlaps between such responses, conflicting poverty alleviation strategies provide a theoretical starting point of this analysis.[54]

Place-based strategies were the dominant policy approach, and not the market-based alternatives that took its place in the late 1980s.[55] Prior urban research presented cultural explanations for the subordination of low-income African American (and Latino/a) families. This research included the *Moynihan Report* written by sociologist and, later, U.S. Senator Daniel P. Moynihan in 1965

50. Roger Biles, *Public Housing and the Postwar Urban Renaissance, 1949–1973*, *in* FROM TENEMENTS TO THE TAYLOR HOMES, *supra* note 20, at 143.

51. Harry S. Truman, Statement by the President Upon Signing the Housing Act of 1949 (July 15, 1994) (transcript available at THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-the-housing-act-1949 [perma.cc/MS8P-G2NS]).

52. *HUD Historical Background*, U.S. DEP'T OF HOUS. & URBAN DEV., OFF., OF POL'Y DEV. & RSCH. (2016), https://www.huduser.gov/hud_timeline/ [perma.cc/R6TT-SSN5].

53. *See* Deirdre A. Oakley & James C. Fraser, *U.S. Public-Housing Transformations and the Housing Publics Lost in Transition*, 15 CITY & COMMUNITY 349 (2016) (discussing how the transition from public housing as a viable option as predicated on a strong shift to private-public partnerships and mixed-income communities).

54. *See* GOETZ, *supra* note 9, at 111–12 (analyzing in detail the different approaches of housing the poor based on a shift from placed-based, or community development practices, to people-based, or opportunity neighborhoods/market-based solutions).

55. *Id.*

about the dependency and potential problem of the American Negro[56] and the depictions of Oscar Lewis's "culture of poverty" in which there was no way to change the aberrant behavior of poor individuals.[57] It wasn't until the work of William J. Wilson's book, *The Truly Disadvantaged*, in which causal explanations encompassed not only structural arguments but also theories of aberrant cultural behavior to the persistence of urban poverty.[58]

As a result of this dichotomy, large economic and political challenges, such as the incline and decline of the national economy due to deindustrialization, and adaptive individual characteristics, such as welfare dependency and the rise of female-headed households, created a system in which poverty persists.[59] According to Wilson, systemic, persistent poverty could be overcome with the implementation of equitable public policy aimed at increasing the opportunities for low-income individuals.[60] And while these conclusions were, and continue to be, widely argued among urban researchers,[61] their overall implications were seen through different policy initiatives and social experiments.

Nonetheless, the "underclass," a group typically associated with minority communities concentrated in urban areas, was consistently regarded as a less-deserving, poor segment of the population.[62] This description parallels the analysis of the "problem poor" described by Friedmann[63] and the "underclass" thesis, allowing one to provide a more appropriate theoretical basis. Paul E. Peterson discusses the poverty paradox and categorizes the "underclass" thesis as "lowly, passive, and submissive, yet at the

56. Daniel P. Moynihan, Off. of Pol'y Plan. & Rsch., *The Negro Family: A Case for National Action*, U.S. DEP'T OF LAB. (1965), https://web.stanford.edu/~mrosenfe/Moynihan's%20The%20Negro%20Family.pdf [perma.cc/L438-Y5X4].

57. OSCAR LEWIS, LA VIDA: A PUERTO RICAN FAMILY IN THE CULTURE OF POVERTY–SAN JUAN AND NEW YORK xlii (1966) (exploring how the responses by scholars and advocates demonstrate that, while Moynihan called for policy interventions, those suggestions were largely ignored).

58. WILLIAM J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (2d ed. 2012).

59. *See id.*

60. *See id.* at 118.

61. *See* Patrick Sharkey & Jacob W. Faber, *Where, When, Why, and for Whom Do Residential Contexts Matter? Moving Away from the Dichotomous Understanding of Neighborhood Effects*, 40 ANN. REV. SOCIO. 559, 560 (2014) (arguing that "[t]he focus on the term neighborhood, and all of the connotations it carries along with it, has distracted attention from the larger question of how different dimensions of the residential context, which operate at multiple geographic and social scales, become salient in the lives of individuals and families.").

62. Erol R. Ricketts & Isabel V. Sawhill, *Defining and Measuring the Underclass*, 7 J. POL'Y ANALYSIS & MGMT. 316 (1988).

63. *See* Friedman, *supra* note 31, at 652.

same time the disreputable, dangerous, disruptive, dark, evil, and even hellish. And apart from these personal attributes, it suggests subjection, subordination, and deprivation."[64] Peterson's critique identifies a culmination of operationalizations of the "underclass" in the field of urban poverty to explain the discursive nature of low-income, minority groups during and after the WWII era.[65] The "underclass" thesis suggests urban minorities were poor due to their inability to acculturate into American society.[66] They behaved in a manner that was not in line with mainstream American thought.[67] Thus, the characterization of the urban poor as being poor through their own vices led to different policy outcomes. As a result, their plight with urban poverty was perpetuated beyond the structural forces that shaped urban America after WWII.

Douglas Massey and Nancy Denton discuss poverty as a collection of many "social ills."[68] In their discussion of the creation of underclass communities, Massey and Denton wrote, "[p]overty, of course, is not a neutral social factor. Associated with it are a variety of other social ills such as family instability, welfare dependency, crime, housing abandonment, and low educational achievement."[69] Massey and Denton's discernment of the underclass further pinpoints how structural forces can heighten the effects of urban poverty: "[t]o the extent that these factors are associated with poverty, any structural process that concentrates poverty will concentrate them as well."[70] Massey and Denton's analysis not only built upon the structural and cultural arguments of William Wilson,[71] but also offered segregation as a causal explanation for the persistence of urban poverty due to social isolation.[72] This institutionalization of segregation not only restricted the choices of Black people to move to neighborhoods of opportunity, it fortified their isolation through different legal measures.

On the other hand, appropriate policy initiatives aimed at some of the most vulnerable segments of the population living in

64. Paul E. Peterson, *The Urban Underclass and the Poverty Paradox*, 106 POL. SCI. Q. 617, 617 (1991).

65. *Id.* at 618.

66. *See id.* at 623.

67. *See id.* at 632–33.

68. DOUGLAS MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 130 (1993).

69. *Id.*

70. *Id.*

71. *See* WILSON, *supra* note 58, at 118.

72. *See* MASSEY & DENTON, *supra* note 68, at 131.

public housing could have greatly changed patterns of segregation by providing greater upward mobility to residents. Instead, budgets were cut once veterans moved out, and the "submerged middle-class" found other housing options, leaving the poorest of the poor in public housing to fend for themselves.[73] Instead of spurring policy changes, middle class flight from public housing provided policymakers with a vignette for arguing that those remaining in public housing were poor due to their own control, and that if not forced, they would never escape deprivation on their own. The underclass would continue to become dependent on public housing as an ultimate solution for their housing needs. Thus, during the 1990s, housing policy took a new course of action: poverty deconcentration.[74] The goal was to relocate individuals to better neighborhoods since poor neighborhoods were deemed to be the obstacle limiting their life changes.[75]

The Gautreaux program was one of the first actions taken by the federal government to establish housing opportunities for low-income individuals outside of their poverty-stricken communities. In 1976, the Supreme Court decided *Hill v. Gautreaux*, a case in which Black public housing tenants and applicants brought separate class actions against the Chicago Housing Authority (CHA) and the Department of Housing and Urban Development (HUD) claiming that CHA had purposefully selected family public housing sites in Chicago to further segregate African Americans from White neighborhoods.[76] The plaintiffs argued that these actions were in direct violation of federal law and the Fourteenth Amendment.[77] Moreover, plaintiffs in the companion suit alleged that HUD was dually responsible for the discrimination because it provided financial assistance and other support to the CHA program.[78] Black people were located primarily in Black, low-income, urban areas and had virtually no chance of living in White, middle-income, suburban areas.[79] The Supreme Court ruled in favor of the plaintiffs and called for remedial action to ensure the non-discriminatory practice of providing housing options in White suburbs.[80] As a result, the CHA subsequently launched the

73. *See* Friedman, *supra* note 31, at 649.

74. *See generally* Jeff Crump, *Deconcentration by Demolition: Public Housing, Poverty, and Urban Policy*, 20 ENV'T & PLAN. D: SOC'Y & SPACE 581 (2002).

75. *See id.*

76. Hills v. Gautreaux, 425 U.S. 284, 286 (1976).

77. *Id.*

78. *Id.* at 286–87.

79. *Id.* at 288.

80. *Id.* at 306.

Gautreaux Program, which allowed public housing residents (and applicants) to apply for Section 8 vouchers, through which the government largely subsidized their rent in the private market.[81] Recipients could then theoretically choose to live in other parts of Chicago and most of its White suburbs.[82] Although redlining and restrictive covenants were still common practices, analyzing the mobility patterns of poor, minority groups allowed researchers to determine how "choice" played a role in life chances.

Subsequent research showed that between 1976 and 1998, approximately 7,000 families participated in the Gautreaux Program.[83] However, many families were excluded from this selection as well. James Rosenbaum, Stefanie DeLuca, and Tammy Tuck discuss this exclusion saying:

> By necessity, the program excluded people who seemed unlikely to handle program demands. It eliminated about one-third of applicants because their families were too large for apartments or because they had poor rent payment records, which would likely lead to eviction.[84]

The exclusion of families with the above-described characteristics from a program which offered them a "choice" to live in a White, suburban community directly identifies the perceived "problem poor." Indeed, it suggests the underclass operates at a heightened sense of deprivation. By relocating some residents from areas with concentrated poverty into White suburbs, there may have been higher costs associated with those left behind. Johnson, Ladd, and Ludwig wrote, "any reduction in the concentration of poverty could in principle impose offsetting costs on those poor families who were left behind in central city areas . . . ."[85] Again, the premise here is that certain members of the population, even within the poorest segment, are more deserving than others. Moreover, those most in need did not *deserve* the relief needed to increase their

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81. *See* JAMES E. ROSENBAUM & STEFANIE A. DELUCA, BROOKINGS INST., IS HOUSING MOBILITY THE KEY TO WELFARE REFORM? LESSONS FROM CHICAGO'S GATREAUX PROGRAM 2 (2000).

82. *Id.*

83. *Id.*

84. James E. Rosenbaum, Stefanie A. DeLuca & Tammy Tuck, *New Capabilities in New Places: Low-Income Black Families in Suburbia*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 150–75, 156 (de Souza Briggs ed., 2005).

85. *See* Michael P. Johnson, Helen F. Ladd & Jens Ludwig, *The Benefits and Costs of Residential Mobility Programmes for the Poor*, 17 HOUS. STUD. 125, 126 (2002).

life chances because they could not handle it. They were excluded from an opportunity to acculturate into mainstream suburban America due to social (family structure) and economic (rental payment records) indicators, characteristics which initially placed them into public housing. Due to the inequitable implementation of the Gautreaux Program, researchers turned to study the differences in outcomes for the individuals who were able to relocate versus those who were left behind.

Several studies concluded that the Gautreaux Program resulted in numerous ancillary benefits, such as increases in employment opportunities, education, and social integration.[86] Because of the beneficial effects of the Gautreaux Program, HUD, in consultation with policy experts and academics, designed and implemented the Moving-to-Opportunity (MTO) program in 1993.[87] Largely based on the Gautreaux Program, MTO would test several theories around neighborhood effects. Xavier de Souza Briggs, Susan Popkin, and John Goering discuss the process by which MTO was designed and implemented:

> HUD staff decided on a formal experimental structure in which families in public or assisted housing who volunteered to participate in MTO would be randomly assigned to: the "experimental" group, which would receive Gautreaux like relocation assistance and a "restricted" housing voucher that could be used to lease up only in a low-poverty neighborhood; a comparison group, which would receive a "regular" voucher with no special assistance or location restrictions; and a control group that would continue to receive assistance in the form of a public housing unit.[88]

MTO represented one of the largest social experiments to date, placing a total population of 4,608 families into randomized housing assignments in five of the largest housing authorities in the

86. *See* ROSENBAUM & DELUCA, *supra* note 81, at 2; *accord* JOHN M. GOERING & JUDITH D. FEINS, CHOOSING A BETTER LIFE?: EVALUATING THE MOVING TO OPPORTUNITY SOCIAL EXPERIMENT (2003); *accord* Ruby Mendenhall, Stefanie DeLuca & Greg Duncan, *Neighborhood Resources, Racial Segregation, and Economic Mobility: Results from the Gautreaux Program*, 35 SOC. SCI. RSCH. 892 (2006); *accord* Susan J. Popkin, James E. Rosenbaum & Patricia M. Meaden, *Labor Market Experiences of Low-Income Black Women in Middle-Class Suburbs: Evidence from a Survey of Gautreaux Program Participants*, 12 J. POL'Y ANALYSIS & MGMT. 556 (1993).

87. *See* XAVIER DE SOUZA BRIGGS, SUSAN J. POPKIN & JOHN GOERING, MOVING TO OPPORTUNITY: THE STORY OF AN AMERICAN EXPERIMENT TO FIGHT GHETTO POVERTY 47–51 (2010).

88. *Id.* at 52.

country.[89] The purpose of the program was to test how neighborhoods impact individual outcomes.[90] However, contrary to anticipated benefits, the results of MTO have been mixed. Jens Ludwig et al. found that MTO improved physical and mental health among adults, had no detectable effect on economic outcomes, youth schooling or physical health, and has mixed results by gender on other youth outcomes, with girls doing better on some measures and boys doing worse.[91] More recently, in the case of children, Raj Chetty found that "moving to a lower-poverty neighborhood when young (before age 13) increases college attendance and earnings and reduces single parenthood rates."[92] They also found that moving has slightly negative impacts, perhaps from the possible disruptions it causes.[93] However, while much attention has been focused on the impact of neighborhood conditions on individual outcomes, less attention has been given to the underlining issue that public policy structures these disadvantages and exacerbates marginalization. As such, popular discourse surrounding the life chances of poor people reflects a legacy of blaming communities for their own fate. Poor people were thought, by their own virtue, to never fully assimilate into mainstream America because of their residential locations, predominantly in urban areas with high levels of poverty and segregation. Given the history of housing policy and poverty alleviation strategies, the question thus becomes *why don't housing programs work for low-income communities of color?* Moreover, *to what extent are the social identities of target populations realized in the development and implementation of housing policy?*

In order to tease out the impacts of such considerations, we turn back to the post-WWII era for a deeper understanding of how public housing residents were perceived during the planning stages. Analysis of the post-WWII era is useful in determining the context

89. *See Moving to Opportunity (MTO)*, HUD USER OFF. OF POL'Y DEV. AND RES., https://www.huduser.gov/portal/datasets/mto.html [perma.cc/KS2M-9SDF]; *see generally HUD Historical Background*, U.S. DEP'T HOUS. & URB. DEV.: OFF. OF POL'Y DEV. & RSCH. (2016), https://www.huduser.gov/hud_timeline [perma.cc/U6VE-Z5SY] (displaying timeline of important housing policies in the twentieth and twenty-first centuries).

90. *See Moving to Opportunity (MTO)*, *supra* note 89.

91. *See* Jens Ludwig, Greg J. Duncan, Lisa A. Gennetian, Lawrence F. Katz, Ronald C. Kessler, Jeffery R. Kling & Lisa Sanbonmatsu, *Long-Term Neighborhood Effects on Low-Income Families: Evidence from Moving to Opportunity*, 103 AM. ECON. REV. 226, 227 (2013).

92. Raj Chetty, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 855 (2016).

93. *Id.*

surrounding the growing stigmatization of the population being aided and subsequent policy approaches. Similar to Theda Skocpol's thesis concerning the U.S. and its transformation of the welfare state,[94] we maintain that veterans (particularly White veterans) and rural, farming communities were seen as more deserving than Black, low-income urban communities. As a result, policies aimed at the veterans and farmers were focused more on individuals (or market-based approaches) through direct aid. On the other hand, the urban poor were not seen as deserving, and as a result, policies aimed at this particular population focused more on neighborhood redevelopment (or placed-based approaches) through disruptive, neighborhood revitalization efforts. Given the intersection of their racial and social identity, strategies to address the housing crisis undoubtedly results in further marginalization and diverse forms of inequality.

III. The Social Construction of Deservedness Among Target Populations

As previously pointed out, policymakers' framing and social construction of target beneficiary populations had a profound impact on the development of public housing policy, which will be explicated in subsequent sections of this Article. However, prior to illustrating how target populations were socially constructed by housing policy agents in the post-WWII era, it is important to understand the role that constructing visions of target populations played in the development and implementation of public policy more generally.

Audie Klotz and Cecilia M. Lynch maintain that how policy actors construct notions of deservedness among target populations results in how knowledge about social groups, and the policies that benefit them, are reinforced and disseminated throughout society.[95]

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94. For example, in Theda Skocpol's book, PROTECTING SOLDIERS AND MOTHERS, she argues that the United States led efforts related to social spending in the world in terms of its elderly, disabled, and dependent citizenship. Changes were due to the political reform of the Progressive era. Because of party politics and generational changes in representation, the U.S. became a *maternalistic* welfare state. THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS 311–524 (1992). We argue that this same notion was evident in the U.S. during the post-WWII period as a time of extreme racial tension domestically and its involvement in the world system more broadly. *See, e.g.*, Prentiss A. Dantzler & Aja D. Reynolds, *Making Our Way Home*, 26 J. WORLD-SYSTEMS RSCH. 155 (2020) (for a more recent, brief attempt to elucidate the role of housing policy in contributing to the subjugation of Black people through the commodification of Black bodies and spaces).

95. *See* AUDIE KLOTZ & CECELIA M. LYNCH, STRATEGIES FOR RESEARCH IN

These social constructions of target populations are typically in competition with one another, since there is commonly more than one, with each construction conveying either alternative or buttressing stories and myths about a particular population.[96] These competing constructions of populations are interpreted by other policymakers, social groups and the public to explain why a particular population is advantaged or disadvantaged, whether a group's disadvantage stems from individual characteristics or the surrounding social system, and whether or not they should be deserving of public assistance.[97] Because the constructions are competing and typically promulgated by various news media outlets, elected officials, policymakers, and program benefit gatekeepers, these constructions of target populations are used to justify which social groups are deserving or not of assistance and resources.[98] According to Mohamad G. Alkadry and Brandi Blessett, even those administering programs and distributing resources to target populations can, intentionally and unintentionally, engage in the social construction of target populations, either through their management and administrative actions, inclusiveness in the policy development process, or their own messages to the public.[99]

CONSTRUCTIVIST INTERNATIONAL RELATIONS (2014); *see also* Anne Larson Schneider & Helen M. Ingram, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 AM. POL. SCI. REV. 334 (1993) (arguing that the construction of target populations influence policy choices and become embedded in policy as messages that are then absorbed by the population).

96. *See* Schneider & Ingram, *supra* note 95, at 335.

97. *See* THOMAS A. BIRKLAND, AFTER DISASTER: AGENDA SETTING, PUBLIC POLICY, AND FOCUSING EVENTS 131–50 (1997); *see, e.g.*, SCHNEIDER & INGRAM, *supra* note 95, at 335 ("Social constructions are often conflicting and subject to contention. Policy directed at persons whose income falls below the official poverty level identifies a specific set of persons. The social constructions could portray them as disadvantaged people whose poverty is not their fault or as lazy persons who are benefitting from other peoples' hard work.").

98. *See* Anne Schneider & Mara Sidney, *What Is Next for Policy Design and Social Construction Theory?*, 37 POL'Y STUD. J. 103, 105 (2009); *see also* Brandi Blessett, *Disenfranchisement: Historical Underpinnings and Contemporary Manifestations*, PUB. ADMIN. Q. 3–50 (2015) [hereinafter Blessett, *Disenfranchisement*] (using social construction and critical race theory to analyze policies designed to impose a specific effect on target populations, finding a rise in disenfranchisement policies designed to target minority groups).

99. *See* Mohamad G. Alkadry & Brandi Blessett, *Aloofness or Dirty Hands? Administrative Culpability in the Making of the Second Ghetto*, 32 ADMIN. THEORY & PRAXIS 532, 533 (2010) (arguing "public administrators in the second part of the twentieth century acted to further the interests of an economic elite at the expense of power-deprived and poor African-American communities"); *see also* Brandi Blessett, Tia Sherèe Gaynor & Mohamad G. Alkadry, *Counternarratives as Critical Perspectives in Public Administration Curricula*, 38 ADMIN. THEORY & PRAXIS 267, 271 (2016) (arguing that public administrators can engage, intentionally or

Moreover, Gaynor argues that many of these social constructions are based on perspectives and myths harbored by the socially powerful and often serve as the dominant narratives that shape society's social construction of reality.[100] As such, the potential effect of the social construction of deservedness reaches wider than the public housing policy that is discussed in this Article,[101] but also to political engagement and inclusion,[102] community development,[103] social support benefits[104] and, with increasing importance, disaster recovery resources.[105]

Specifically, Schneider and Ingram argue that the social construction of target populations specifically refers to:

> (1) the recognition of the shared characteristics that distinguish a target population as socially meaningful, and

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unintentionally, in social construction of minority groups that can further marginalization).

100. *See* Tia Sherèe Gaynor, *Vampires Suck: Parallel Narratives in the Marginalization of the Other*, 36 ADMIN. THEORY & PRAXIS 348, 350 (2014).

101. *See* Mara S. Sidney, *Contested Images of Race and Place: The Politics of Housing Discrimination*, *in* DESERVING AND ENTITLED: SOCIAL CONSTRUCTIONS AND PUBLIC POLICY 111–37 (2012) (examining the impact of social constructions on the legislative processes that resulted in the Fair Housing Act of 1968 and the Community Reinvestment Act of 1977).

102. *See* Blessett, *Disenfranchisement*, *supra* note 98, at 5 (highlighting the "increasing efforts by state legislatures around the country to marginalize those deemed as 'the other' through the enactment of disenfranchisement legislation").

103. *See* ASHLEY E. NICKELS & JASON D. RIVERA, COMMUNITY DEVELOPMENT AND PUBLIC ADMINISTRATION THEORY: PROMOTING DEMOCRATIC PRINCIPLES TO IMPROVE COMMUNITIES iii (2018) (illustrating how "public administrators and public managers can engage in community development planning and implementation that results in more equitable and sustainable long-term outcomes").

104. *See, e.g.*, Suzanne Mettler & Joe Soss, *The Consequences of Public Policy for Democratic Citizenship: Bridging Policy Studies and Mass Politics*, PERSPECTIVES ON POLITICS 55, 61 (2004) (explaining that "any policy that sets forth eligibility criteria for benefits or rights, or establishes guidelines for citizen participation, implies that certain individuals are fully included within the polity and others are not, at least not to the same degree"); *accord* Joe Soss & Sanford F. Schram, *A Public Transformed? Welfare Reform as Policy Feedback*, AM. POL. SCI. REV. 111 (2007); *accord* Richard C. Fording, Joe Soss & Sanford F. Schram, *Devolution, Discretion, and the Effect of Local Political Values on TANF Sanctioning*, 81 SOC. SERV. REV. 285 (2007).

105. *See, e.g.*, M. Justin Davis & T. Nathaniel French, *Blaming Victims and Survivors: An Analysis of Post-Katrina Print News Coverage*, 73 S. COMMC'N J. 243 (2008) (using a social constructionist perspective, the study analyzed the power of news media to shape cultural understanding of the people involved in Katrina, and found that post-Katrina news coverage shifted the blame to the victims and survivors and that these understandings of victims and survivors ultimately impacted the disaster relief responses); *accord* Claire Connolly Knox, *Language-Based Theories and Methods in Emergency and Disaster Management*, *in* DISASTER AND EMERGENCY MANAGEMENT METHODS: SOCIAL SCIENCE APPROACHES IN APPLICATION (Jason D. Rivera ed., Routledge ed.) (forthcoming July 2021).

> (2) the attribution of specific, valence-orientated values, symbols, and images to the characteristics. Social constructions are stereotypes about particular groups of people that have been created by politics, culture, socialization, history, the media, literature, religion, and the like.[106]

In this way, when politicians or other policy actors attempt to provide benefits to a particular population, they try to describe the group in positive ways that make them seem *deserving*. Whereas, when politicians and policy actors attempt to restrict, limit, or take away policy and program rewards (or even develop punitive policies) the same actors try to disseminate a vision of the target population in negative ways. In this way, when policy actors want to characterize a particular social group as undeserving of benefits, they actively strive to shift any prevailing positive images of the population to negative depictions. Typically, through the political and policy process, contestation and escalation of these images occurs,[107] as competing actors and policy advocates attempt to construct a more convincing and lasting image of the target population. Finally, as time and politics change, the social construction of the target population has the potential to change. Change can occur once politically powerful social groups are replaced with new ones, and/or as the interests of those constructing the image of target populations change.[108]

Extant literature concerned with the historiography of housing policy does not fully explain the effects of the stigmatization of the urban poor during the post-WWII recovery phase. Therefore, this Article provides a needed corrective in the understanding of divergent policy approaches based on the perceptions of the target population. By performing a historical

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106. Schneider & Ingram, *supra* note 95, at 335.

107. *See* Anne Larson Schneider & Mara Sidney, *What Is Next for Policy Design and Social Construction Theory?*, 37 POL'Y STUD. J. 103, 106 (2009) ("Policy processes often involve contestation over these images as actors seek to justify distribution of benefits or burdens to these groups."); *see also* Blessett, *Disenfranchisement*, *supra* note 98, at 9 (explaining that "power [has been] concentrated in the hands of Whites, which has empowered them with the authority and resources to create policies, influence the economic and political decisions that govern the country, and shape the images of people and places as worthy and deserving or dependent and deviant").

108. MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT 15 (2015) (describing the role of working- and middle-class African Americans in shaping crime policy after the Civil Rights Movement and arguing that "middle-class African Americans sought to curtail behaviors among the poor that would perpetuate stereotypes and undercut middle-class claims of equality").

analysis using congressional testimony during the height of post-WWII housing debate, we test our hypothesis surrounding the social construction of target populations as a way to uncover the root disdain for public housing.

IV. Congressional Debates on Temporary Housing Efforts

On January 17, 1945, there was a series of hearings held before the Special Committee on Post-War Economic Policy and Planning on recovery efforts.[109] These hearings were held pursuant to a resolution made by the 78th Congress in order to determine post-WWII assistance to veterans, specifically in terms of housing.[110] The timing of these hearings places them at the nexus of the core argument of this Article and provides a critical lens into the planning process of housing solutions for returning veterans and rural farmers versus the urban poor. Although these hearings do not specifically discuss the racial dynamics at play, their results fundamentally contribute to racial inequality through bifurcated policy responses. The hearings contained a myriad of public officials and private stakeholders including administrators from the Veterans Administration (VA), the Department of Agriculture (DOA), the Mortgage Bankers Association of America (MBAA), the American Planning and Civic Association (APCA), as well as the National Housing Agency (NHA).[111] Given the plethora of stakeholders here, it helps to elucidate how different actors framed the housing crisis and policy responses for their respective groups.

The opening statement was made by the Administrator of Veterans' Affairs and of Retraining and Reemployment Administration under the Office of War Mobilization, General Frank T. Hines:

> I have, of course, a great interest in this housing program, not only from the standpoint of the effect that it has upon the veteran who desires to build or buy a home, but it has a bearing upon the reemployment of the veteran, and also has a great bearing upon the citizenship of our country.[112]

109. *See Post-War Economic Policy and Planning: Hearings Before the Subcomm. on Hous. and Urban Redevelopment of the Special Comm. on Post-War Econ. Pol'y and Plan.*, 79th Cong. 1761–74 (1945) [hereinafter *Post-War Economic Policy and Planning: Hearings*].

110. *Id.* at 1761.

111. *Id.* at 1759.

112. *Id.* at 1761.

General Hines' construction of the housing problem provides useful insight into the perceived importance that housing places on an individual's sense of civility. Housing is not just important from a residential stance, but it also has a "bearing upon the reemployment of the veteran," as well as the validation of citizenship.[113] Due to an extreme concentration on homeownership since the days of President Herbert Hoover, housing was made a political issue, and as such, homes took part in legitimizing an individual's national identity.[114] However, temporary housing was necessary in order for veterans to reclaim their status into middle-class America. This issue of civility is particularly interesting given its connection with housing. As an indication of decorum and respect, the reintegration of the veteran into American society lies in their ability to ascertain decent living accommodations. Beyond the realm of housing, veterans were the focus of other key legislation that had a bearing on their reentry into civil society.

In his testimony before the Subcommittee on Housing and Urban Redevelopment of the Special Committee on Post-War Economic Policy and Planning, General Hines identified the Servicemen's Readjustment Act of 1944, commonly known as the G.I. Bill of Rights, a law which provided aid to returning veterans for their reentry into civilian life.[115] Senator Robert A. Taft of Ohio, Chairman of the Subcommittee, acknowledged the post-war housing problem as well, stating: "Our main interest is to see how that is going to fit in with the whole post-war housing problem . . . calling perhaps for the construction of 1,260,000 homes a year for 10 years."[116] This shortage would undoubtedly require a long-term strategic plan for housing for returning veterans, as well as support from the federal government.

General Hines identified the course of the G.I. Bill, saying in testimony that the bill "gives the Veterans' Administration an interest in the post-war housing problems. This is so, although the act is veterans', and not a housing act."[117] General Hines depicted the housing problem as one of great interests to the VA.[118] Because

113. *Id.*

114. *See* Janet Hutchinson, *Shaping Housing and Enhancing Consumption: Hoover's Interwar Housing Policy*, *in* FROM TENEMENTS TO THE TAYLOR HOMES, *supra* note 20, at 81–82 (arguing that "during the 1920s Hoover's efforts made ownership of a single-family home . . . a primary goal of American housing policy").

115. *Post-War Economic Policy and Planning: Hearings*, *supra* note 109, at 1761–62, 1764.

116. *Id.* at 1761.

117. *Id.* at 1761–62.

118. *Id.*

of the threat of many veterans not receiving the support they needed to reenter into civil life, the VA's goal was to make this topic a political issue.[119] The construction of the housing problem in America during the post-WWII era describes a state in which the VA took interest in a divergent field of domestic affairs in order to appease the population it sought to aid.[120] This action pinpoints a critical juncture in the study of housing policy given the conditions surrounding the return of veterans to the homeland. The overall impact of the G.I. Bill was largely to benefit the segment of the population seen as deserving.[121] The legislation did not focus on one particular resource that was lacking; rather it encompassed a variety of programs devoted to improving veterans' reentry into civil society.[122] General Hines supported this proposition in his testimony, saying:

> I would further urge that Congress if it gives consideration, as it doubtless will, to the question of post-war housing, consider the housing problem as a whole and not as one pertaining particularly to veterans. I believe it is a correct conclusion that veterans will benefit more by sound economy and by sound general programs conceived in the interest of all than they possibly could by special differentiations based upon their status as veterans. In this respect I think the Congress acted wisely in making the Veterans' Readjustment Act of 1944 a veteran's act and not an education or housing act.[123]

Not only did General Hines' testimony identify the need for post-war housing as a whole, but he also directed attention to the nation's housing problem. He expressed confidence that the federal government would act, but he was not sure in what fashion.[124] His remarks reflected an urgency that federal action seeking to aid veterans not only identify veterans as the sole beneficiaries of population-specific policies; rather, General Hines' viewed veterans as being more likely to benefit from economic and social policies that were generalized.

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119. *Cf. id.* at 1765 (statement of Gen. Hines) (criticizing the legislature's "complete lack of understanding . . . of the desires and characteristics of veterans").

120. *Id.*

121. *See* SUZANNE METTLER, SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION 6 (2005) (describing the benefits veterans received as a result of the G.I. Bill of Rights).

122. *Id.* at 9 (identifying the G.I.'s education and training programs as having a significant impact on civic participation).

123. *Post-War Economic Policy and Planning: Hearings*, *supra* note 109, at 1772.

124. *See id.* (recognizing that Congress would give due consideration to the broader need for post-war housing).

Because of the inequitable distribution of policy outcomes, the negative effects of post-war housing could have been mitigated if housing was transformed into low-income housing to lessen the burden of substandard housing conditions existing at this time for an even more marginalized group of people, particularly segregated Black communities. This transformation would have necessitated sustained financial support in terms of maintenance and operation. However, that was not the primary goal of the federal government, nor was it in the interest of several stakeholders of this congressional hearing.

The Secretary of Agriculture, Claude R. Wickard (accompanied by Raymond C. Smith), provided another account of how the housing crisis was felt by people outside of cities.[125] In his opening statement, Wickard noted, "About two-thirds of the Nation's farm families are ill-housed. Nearly half the inadequate houses are beyond repair. Slums usually are associated with cities, yet the average level of farm housing is far below that of the city dwellings."[126] For Wickard, the state of housing for farm families set it apart from urban housing. In his statement, Wickard went on to ask, "Why have gains in farm housing fallen short of urban gains? One reason, undoubtedly, has been the high visibility of urban slums. Even the casual passer-by can't help noticing them."[127] Wickard continued to note that the housing problem in rural spaces is an often-neglected area of support, as families in this space suffer from low-density, substandard housing, and low incomes.[128] Moreover, Wickard emphasized that the NHA and the DOA both agree "on the principle that rural and urban people are equally entitled to help from the National Government in improving housing standards."[129]

However, Wickard also believed that improvement of rural housing should be done by private enterprise, even though he stated that the federal government has the ultimate responsibility of helping all families achieve adequate housing.[130] Moreover, Wickard tied in notions of self-sufficiency, saying: "I believe both agencies agree that long-range housing projects ultimately must be

125. *Id.* at 1887. Raymond C. Smith was the Chief Program Analyst of the Bureau of Agricultural Economics and Chairman of the Department of Agriculture's Inter-Bureau Committee on Post-War Programs.

126. *Id.*

127. *Id.* at 1888.

128. *See id.* at 1890–92.

129. *Id.* at 1892.

130. *Id.*

able to stand on their own financial feet—that the use of subsidies, when necessary, should be temporary, and should be used constructively so as to remove the need of further subsidies as soon as possible."[131] Wickard, like Hines, tied the nature of the housing problem to a specific population. In this case, rural farm families are the suggested target for federal intervention.[132] While Wickard does note that the housing crisis is perverse for urban and rural residents, his recommendations reveal the need for targeted approaches, with rural families and areas being a more deserving group given the historical neglect and that housing conditions were tied to employment opportunities realized on the farms they hold.[133] Farmers function within a broader discussion of land ownership, which typically ties one's social status to particular places.[134] Ownership realized through land attainment increases the political power of this social group, which heightens political responses given the construction of their identities as socially deserving.[135] Yet, Black communities suffered from segregationist policies that restricted their control of land and further defined their identities as socially undeserving of federal attention.

V. Temporary Housing Versus Permanent Relief

The presence of post-war housing would become a political issue. If the federal government was to commit to providing temporary housing relief for returning veterans and rural families, as well as other special programs, then what was to become of that "temporary" relief? Housing advocates were able to hold onto the stock of temporary housing, yet they were unable to maintain adequate funding for operations and maintenance once the population inhabiting it was replaced with one of less political significance.[136] The testimony given hereafter further highlights the contention of keeping the war housing stock temporary.

In terms of facilitating provisional relief to returning veterans, participants of the hearings, such as General Hines and others representing the MBAA, including L.E. Mahan, President of MBAA,

131. *Id.*

132. *Id.*

133. *Id.* at 1888.

134. For a discussion of Black subjectivity, racial exploitation, and housing policy, see Dantzler & Reynolds, *supra* note 94.

135. *See id.* at 156 ("The commodification of property relates to the global production of power relationships between those who own and those who do not.").

136. *See* GOETZ, *supra* note 9, at 31–33 (discussing the lack of funding for maintenance and capital improvements).

believed that the stock should be demolished after the veteran population moved out.[137] In 1945, testimony from Mr. Mahan clearly emphasized this point: "We recommend that the program for disposition of real estate, including war housing, be centralized in one agency and that careful consideration be given to an orderly liquidation of all real property."[138] The MBAA's position was that the operation and maintenance of war housing should not be maintained or operated by the federal government, and it was up to other institutions to provide housing to their own respective groups.[139] According to the MBAA, it was not the role of the federal government in maintaining and operating national programs that would benefit others if they weren't adhering to their original purpose.[140] Mr. Mahan further discusses this stance in his testimony: "In preparing this report we adhere to the general principle that private enterprise and local communities should be responsible for the development of housing needs of the people. The Federal Government, however, has a clear responsibility to help private enterprise and local communities to do the job."[141] The discussion here identifies a theoretically interesting paradox in the understanding of federal involvement in the national housing crisis. Mr. Mahan's responses placed the responsibility of providing adequate and affordable housing in the hands of local communities and private industry and not under the direction of the federal government.[142] Furthermore, the MBAA expressed an opinion opposed to the establishment of traditional public housing under federal oversight: "Our association wishes to go on record as opposing public housing wherein the Federal Government becomes the direct owner or operator of housing property. The social and political implications of public ownership are well known to the student of political economy."[143]

However, the MBAA's testimony here lacks the understanding of housing issues as they existed in 1945, specifically between Whites and Blacks in urban America, being heavily concentrated in areas that were production zones of war industry. For example,

137. *See Post-War Economic Policy and Planning: Hearings*, *supra* note 109, at 1852 (statement of L.E. Mahan).

138. *Id.* at 1852.

139. *See id.* at 1852–54 (statement of L.E. Mahan) (recommending that properties be demolished and the federal government serve in a limited capacity to address the acute shortage of housing).

140. *Id.* at 1854.

141. *Id.*

142. *Id.*

143. *Id.* at 1852.

Hirsch's account of the housing situation in Chicago, IL, illustrates the influence of national action in fortifying racial color lines as well as an effort "to make the novel federal presence in urban America as unobtrusive as possible."[144] Perhaps this was in response to the changing neighborhood racial composition that was taking place during and after the war. Such analysis goes beyond the scope of this Article, yet previous work has analyzed the changing state of America, as well as the fortification of racial boundaries that existed during this era.[145]

Nevertheless, further observation of the testimony depicts not only a call for temporary war housing for returning veterans, but also a disbelief in temporary housing for the poor altogether.[146] This stance is never more evident than in the discussion between Senator Taft and Mr. Mahan, President of the MBAA, as Senator Taft questioned Mr. Mahan whether he opposed the future sale of temporary war housing to local city government or public housing authorities.[147] Mr. Mahan stated, "That is our [MBAA] opinion, and I think that is also the opinion of the Hancock-Baruch report."[148] However, the designation of temporary versus permanent housing is clouded in its understanding as identified in the Hancock-Baruch *Report on War and Post-War Adjustment Policies*.[149] In his response to Mahan, Senator Taft says, "I do not think the[] [Hancock-Baruch report] distinguish[es] very much between what may be called permanent war housing and the war housing everybody agrees ought to be gotten rid of somehow."[150]

During 1943, Bernard M. Baruch and John M. Hancock of the Office of War Mobilization[151] launched a study of the entire

144. HIRSCH, *supra* note 45, at 14.

145. *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (providing recent discussions on segregation and the legacy of redlining across the U.S.); *see also* JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES (2018) (same).

146. *See Post-War Economic Policy and Planning: Hearings*, *supra* note 109, at 1852.

147. *Id.* at 1863.

148. *Id.*

149. BERNARD M. BARUCH & JOHN M. HANCOCK, REPORT ON WAR AND POST-WAR ADJUSTMENT POLICIES (1944).

150. *See Post-War Economic Policy and Planning: Hearings*, *supra* note 109, at 1863.

151. BARUCH & HANCOCK, *supra* note 149, at 3. The Office of War Mobilization was an independent agency of the U.S. Government formed on May 27, 1943. *See* Exec. Order No. 9347, 8 Fed. Reg. 7183 (May 27, 1943). President Roosevelt established this agency by Executive Order 9347 to coordinate all governmental agencies into the WWII efforts. *Id.*

demobilization question of surplus supplies.[152] They saw war housing as surplus, which could later be liquidated to offset economic demands.[153] On February 15, 1944, their nationally known *Report on War and Post-War Adjustment Policies*, discussed actions to facilitate the post-war adjustment policies to "prepare for peace in a time of war."[154] This report identified the three main categories of tasks for demobilization efforts: contract termination, surplus property disposal, and ensuring jobs and housing were sufficiently available for returning veterans.[155] The disposition of war housing raised many concerns about the dilution of temporary housing and its identity as war housing or public housing.[156]

Despite Mr. Mahan's discontent with public housing, he points out confusion with the nature of war housing altogether. The construction of the housing problem is muffled by the misunderstanding of the difference between temporary versus permanent war housing.[157] Both indicate different responses by the federal government as well as differing levels (short- versus long-term) of commitment. This confusion is expanded by Mahan's response to the disposal of war housing to local communities:

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152. *See generally* BARUCH & HANCOCK, *supra* note 149, at 1–3. Bernard M. Baruch was an American financier and political consultant. John M. Hancock was an American engineer and Wall Street banker. During WWII, Baruch and Hancock were appointed to consultatory positions in the Office of War Mobilization by President Roosevelt. *Bernard M. Baruch*, HARVARD BUS. SCH., https://www.hbs.edu/leadership/20th-century-leaders/Pages/details.aspx?profile=bernard_m_baruch [perma.cc/429G-7P2J]; *John M. Hancock Papers, 1903–1956*, UNIV. N. DAKOTA: DEP'T OF SPECIAL COLLECTIONS DIGITAL FINDING AIDS, https://apps.library.und.edu/archon/?p=collections/controlcard&id=536, [perma.cc/3ZVD-EWDN].

153. *See generally* BARUCH & HANCOCK, *supra* note 149, at 23 (delegating war housing to the National Housing Agency while specifying that the "Surplus Administrator may similarly use any other Government agency for disposal of any special type of properties").

154. *Id.* at 1. The full report was focused on how best to demobilize soldiers and civilians after WWII. It also discussed how to return the government's workforce to peacetime leadership. Its purpose was to minimize the economic disturbance, individual hardship, and suffering following the War.

155. *See* Clifton E. Mack, *Disposition of Federally Owned Surpluses*, 10 LAW & CONTEMP. PROBS. 633, 638 (1944) (discussing the intended disposition of federal surpluses). In times of war, production levels are high for materials, as there is no defined level of necessary supplies when there is no certainty over the war's end. *Id.* at 633. As Mack notes, "the presence of a surplus of supplies indicates the availability of enough supplies." *Id.*

156. *See, e.g.*, *Post-War Economic Policy and Planning: Hearings*, *supra* note 109, at 1863 (statement of L.E. Mahan) (expressing concern that dispositions of war housing be made on a case-by-case basis so as not to destroy public housing where it would benefit the community).

157. *Post-War Economic Policy and Planning: Hearings*, *supra* note 109, at 1871–72.

> I do think every situation must be studied. It is very difficult to lay down any general rule. There may be situations where it might be highly advantageous to dispose of it for public housing in a certain community to supply a housing need. It would be ridiculous to destroy housing units where they are needed in a community.[158]

This notion of disposal goes beyond need in this instance. Mahan identifies the housing shortage as a community-based issue when it was a national issue requiring federal attention. Further evidence to support this claim is observed in the testimony of MBAA as they discuss the nature of the permanent federal administrative organizations of the housing agencies:

> We believe that such Government agencies as are created in a time of emergency should be liquidated as soon as that emergency has passed, and that in our established system of government, agencies created to meet special emergencies should not be perpetuated when those emergencies have ceased; otherwise, there is a likelihood that our whole economy might be distorted by Government interference in normal business pursuits.[159]

The comments made here by MBAA display two different points: 1) the federal government should only act in times of emergency and once that emergency is thwarted, the federal government should no longer be involved, and 2) the long-term support of public housing is not due to an emergency and as said before, local communities and private enterprise can and will solve the problem with help from the federal government.

This is a particularly interesting argument in terms of the position of the representatives of MBAA and the timing of these events in the aftermath of the Great Depression. The problems of returning veterans and rural families are depicted as an emergency requiring immediate and committed aid from the federal government. Support from the federal government should be multi-faceted while offering several avenues of relief. On the other hand, the national housing problem is not categorized as an emergency requiring immediate and committed aid from the federal government. Nor should the federal government address the problem of the need for low-income, affordable housing through long-term interventions. Local communities and private enterprise

158. *Id.* at 1863.
159. *Id.* at 1852.

have the ability to solve these issues. The federal government should be in the business of supporting these agents in order to provide relief for those in need. However, other witnesses did not fully agree with this sentiment.

In his opening statements, prior to his election as President, representing the APCA, General Ulysses S. Grant III noted that the control over post-war housing should be taken out of the hands of the federal government and relegated to local communities.[160] Grant stated:

> [T]he various permanent housing units erected under various agencies can probably make their best contribution to post-war housing if they are turned over to such local housing authorities as desire to acquire them and use them for permanent low-rent housing. The Government should retire from the ownership and management of projects built to command high rentals. But the sooner the diverse ownership and operation of housing within the Federal Government is either consolidated or turned back to local communities, the better. We favor the local community whenever it is able and willing to take over.[161]

Grant's position here is quite complicated given his pro-business viewpoints during this hearing.[162] He notes how the government should be facilitating the growth of housing construction while also applauding the efforts made by the government in establishing the Federal Housing Administration, the Federal Home Loan Bank Administration, and the Home Owners' Loan Corporation.[163] And given his planning background, Grant's suggestions tie housing development into initiatives driven by local planning commissions. However, Grant also notes that the blight in cities is extreme and that any federal involvement should be centered on positioning states to subsidize cities in a coordinated urban development strategy.[164] Such efforts would reposition the APCA under the purview of the NHA and allow local municipalities to engage in redevelopment efforts such as slum clearance.[165] While Grant does not discuss the actual people living in these

160. *Id.* at 1901. General Grant appeared in lieu of Frederic Adrian Delano, President of the American Planning and Civic Association, and uncle to President Roosevelt. *Id.*

161. *Id.* at 1902.

162. *See id.* ("The Government's activities in the field of housing should be such as to foster the revival of the home-building industry.").

163. *Id.*

164. *Id.* at 1903–04.

165. *Id.* at 1903–06.

neighborhoods, he does highlight a significant change in the delegation of resources and local control to redevelop urban areas, even including efforts such as slum clearance in the pre-Civil Rights Era.[166] As such, Grant's proposed measures would have disproportionally impacted low-income communities of color who occupied urban spaces.[167] Part of this stance could have been Grant thinking of his own future political career and expanding the purview of the government. However, housing advocates reframed the nature of the problem and focused attention not on urban development strategies but on targeted aid to families.

Dr. Caroline F. Ware, a prominent member of the American Association of University Women and a professor at American University, provided testimony beginning with a joint statement on housing representing several organizations at this hearing.[168] In her statement, Ware furthers the idea that any approaches to housing policy must be made for all people since it is not only just a veterans' issue, but also an American family issue. In her statement, Ware said:

> It is a matter of common knowledge that household rent and household operation take, on the average, 29 percent of the family budget, a larger item than anything except food; that enough decent dwellings do not now exist to house the American people properly, even if all families had enough money to rent decent homes, and that a large proportion of American families could not afford a decent home even if houses were available at rents which represent adequate standards under sufficient present conditions of private construction.[169]

Ware addresses this concern for veterans and depicted a broader picture of housing for American families. The issue was not rooted in a need for housing just for returning veterans. It fell into other economic and social concerns. These concerns are rooted in the position of many American families—that even if enough housing existed, they could not afford to buy these places.

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166. *Id.* at 1904.

167. *See supra* note 10, and accompanying text.

168. Ms. Ware's joint statement on housing reflected the opinion of the American Association of University Women, American Home Economics Association, Consumers Union, General Federation of Women's Clubs, League of Women Shoppers, Inc., National Board, Young Woman's Christian Association, National Council of Jewish Women, National Council of Negro Women, and the National Women's Trade Union League. *Post-War Economic Policy and Planning: Hearings*, *supra* note 109, at 1909.

169. *Id.* at 1909–10.

In addition, changes in economic status of American families should not automatically displace them out of affordable housing options. Ware stated:

> Furthermore, families whose incomes fall in the "no man's land" between the top of the income brackets for which public housing has been built and the bottom of the private housing bracket should not be overlooked, but must be provided for in one way or another. Measures should be sufficiently flexible, too, to apply to families whose incomes change, so that, for example, families would not have to go house-hunting and children be separated from their playmates and forced to change schools because of an increase in the family income.[170]

Ware's statements rely on an idea rooted in changing the economic and social landscape of American life. Ware further identifies the purpose of the federal government—to provide assistance to all of its individuals. Yet, as Ware stated, it requires the full backing of the federal government.[171] This is exemplified in her discussion with Senator Taft when asked how long it would take to achieve this goal, Ware replied, "[i]f we do it, really do the whole job of good houses in good neighborhoods for all the people in 10 years, I think, Senator, we should be proud."[172]

The levels of concern of both witnesses pinpoints a strong difference of opinion in regard to the degree of federal involvement in solving the housing shortage. While representatives of the MBAA and the APCA agree on the housing issue, the MBAA feels that the solution is present within local communities and private enterprises and not federal government. Yet, Ware, as a representative of several civic and community-based organizations, notes how housing was a national issue requiring full backing of all members including the federal government in supplying adequate housing to fill the needs of American families.[173] Her characterization of the housing crisis as an issue for all American families broadens the scope of suggested policy solutions. However, in crafting the argument as such, Ware draws attention away from housing policy as a racialized process, to one purely focused on class dynamics. History has shown that subsequent housing construction boomed in the 1940s through the mid-1960s, yet part of this growth

170. *Id.* at 1910.
171. *Id.*
172. *Id.* at 1914.
173. *Id.* at 1910.

further segregated Black communities from White spaces.[174] Yet, as we have argued in this Article, the design and implementation of public housing policy was fraught with constructivist arguments of deservedness depending on the targeted groups even in its earlier years of development.

VI. Contemporary Constructions of Deservedness Within Housing Policy

While this Article looks at the construction of deservedness during the post-WWII economic recovery and planning era, similar discussions have been carried forth in current times. For example, on June 7, 2017, HUD Secretary Ben Carson submitted written testimony before the Senate Appropriations Committee Subcommittee on Transportation, Housing and Urban Development, and Related Agencies.[175] In his statement, Carson said, "I want our efforts to assist those in need and to support a path to self-sufficiency. At the same time, we are keenly focused on efficiency throughout the agency with the mindset of doing more with less."[176] President Trump's 2018 budget request included a 15 percent decrease from the 2017 enacted level, with approximately 80 percent of HUD's budget authority dedicated to rental assistance.[177] In his remarks, Carson suggested that it's time to look at rental assistance through a series of questions including "[d]oes it help or hurt?"[178] Budget cuts and a consistent framing of government assistance as being tied to dependency have been reflected in annual proposals that link HUD funds to programs that promote self-sufficiency and the value of work.

Figure 1 illustrates the allocation of funds across the 2019 and 2020 enacted budgets in addition to the 2021 President's proposed budget.[179] Funds for several federal housing programs including Native American Programs, the Public Housing Capital Fund, the

174. *See supra* note 10 and accompanying text.

175. *Review of the FY2018 Budget for the U.S. Department of Housing & Urban Development: Hearing Before the S. Appropriations Comm. Subcomm. on Transp., Hous. & Urb. Dev., & Related Agencies*, 115th Cong. (2017) (statement of Ben Carson, Secretary of Housing and Urban Development), https://archives.hud.gov/testimony/2017/SOHUDtestimonyFY18Budget.pdf [perma.cc/555G-JVX7] [hereinafter *Review of the FY2018 Budget*].

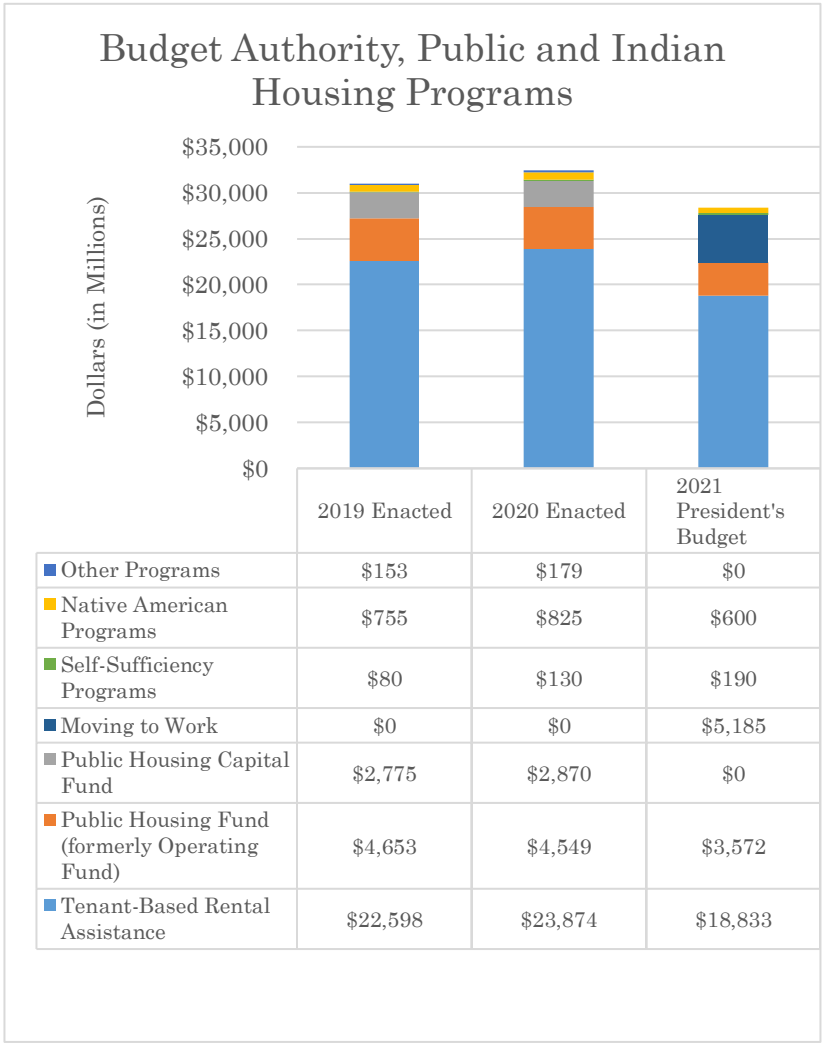
176. *Id.* at 1.

177. *Id.*

178. *Id.* at 2.

179. U.S. DEP'T OF HOUS. & URB. DEV., FISCAL YEAR 2021 BUDGET IN BRIEF 10 (2020), https://www.hud.gov/sites/dfiles/CFO/documents/BudgetinBrief_2020-02_06_Online.pdf [perma.cc/FFF6-4YLV].

Public Housing Fund (formerly Operating Fund), and Tenant-Based Rental Assistance have proposed decreases while Self-Sufficiency Programs and the Moving to Work Demonstration Program have proposed increases.



	2019 Enacted	2020 Enacted	2021 President's Budget
Other Programs	$153	$179	$0
Native American Programs	$755	$825	$600
Self-Sufficiency Programs	$80	$130	$190
Moving to Work	$0	$0	$5,185
Public Housing Capital Fund	$2,775	$2,870	$0
Public Housing Fund (formerly Operating Fund)	$4,653	$4,549	$3,572
Tenant-Based Rental Assistance	$22,598	$23,874	$18,833

Figure 1. HUD Enacted and Proposed Budgets for Public and Indian Housing Programs, 2019 – 2021.

While Congress has routinely provided higher levels of funding than President Trump's budget requests, the proposals reflect a legacy of conceptualizing public assistance as a cause of

dependency. While Carson argues that these proposed cuts allow the department to do more through efficiency measures which reallocate funds to other priorities,[180] these cuts have been reflected by the increasing numbers of households needing assistance, with relatively similar levels of federal funding for these programs since 2007.[181] Moreover, these measures do little to nothing to address the affordable housing crisis that plagues urban and rural spaces across the country.[182]

As the ongoing pandemic exacerbates the affordable housing crisis, many advocates have called for housing assistance as a way to stabilize households and communities.[183] Although the Federal CARES Act and other state and local provisions have provided modest relief, without a strong commitment of federal funding to all families, especially those within lower income groups,[184] the long-term effects of the pandemic will undoubtedly drive further divides along the lines of race and class, among other positionalities (for example gender, age, housing tenure status, etc.). Moreover, while these policies may not have racist intent, they disproportionately affect communities of color.[185] In crafting policies that promote inclusive and sustainable communities, it is important to note that the design and implementation of such efforts are predicated upon the construction of narratives of deservedness by policymakers and other political actors.

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180. *Review of the FY2018 Budget*, *supra* note 175, at 2 (statement of Ben Carson, Secretary of Housing and Urban Development).

181. G. THOMAS KINGSLEY, URB. INST., TRENDS IN HOUSING PROBLEMS AND FEDERAL HOUSING ASSISTANCE 2 (2017), https://www.urban.org/sites/default/files/publication/94146/trends-in-housing-problems-and-federal-housing-assistance.pdf [perma.cc/Y9QJ-WSYB].

182. *See* Steffen Wetzstein, *The Global Urban Housing Affordability Crisis*, 54 URB. STUD. 14 (2017) (discussing the growing problem of unattainably expensive urban housing).

183. *See* Elora Raymond, Dan Immergluck, Lauren Sudeall, Frank S. Alexander, Michael Rich, Dan Pasciuti, John Travis Marshall, Prentiss Dantzler & Allen Hyde, *Towards an Emergency Housing Response to COVID-19 in Georgia*, MEDIUM (Mar. 20, 2020), https://medium.com/@elora.raymond/towards-an-emergency-housing-response-to-covid-19-in-georgia-8f05c54f26d3 [perma.cc/W5QV-5YNQ].

184. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

185. *See* Emily Benfer, David Bloom-Robinson, Stacy Butler, Lavar Edmonds, Sam Gilman, Katherine Lucas McKay, Zach Neumann, Lisa Owens, Neil Steinkamp & Diane Yentel, *The COVID-19 Eviction Crisis: An Estimated 30-40 Million People in America Are at Risk*, ASPEN INST. (Aug. 7, 2020), https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/ [perma.cc/U8ZE-BGSN].

Conclusion

Returning veterans served their country; their time spent fighting WWII should be compensated by the country they chose to protect. Rural families were historically neglected and suffered from inadequate property valuations and low incomes. It was the responsibility of the federal government to support various policy initiatives (including financial, housing-specific, and workforce training programs) in order to mitigate the process by which White veterans would reenter society and rural families would gain their fair share of economic resources. Simultaneously, the urban poor, consisting of large proportions of Black people living in deprivation in the time of a national housing crisis, were deemed as socially undeserving of federal housing and as a result, national policy would not focus on them. The housing shortage after WWII was not deemed as a chronic emergency for all, but a needed intervention for some. As a result, even though many local housing authorities and local governments obtained housing from the disposal of postwar housing under WWII legislation and policy initiatives, the support needed to maintain and operate these developments was never seen as long-term due to the categorization of the "urban crisis" existing as one more reliant on the understanding of social identity and deservedness rather than a chronic emergency. As Blessett has stated, "[t]ypologies become embedded into society's subconscious and are difficult to alter. Therefore, it is important to acknowledge the leverage of such conceptions on informing public opinion and policy decisions."[186] Given the historiography around housing assistance and the role of the government, we suggest that contemporary debates are mere reflections of a legacy of political and racial conflicts over *who* deserves governmental support. Moreover, the historical progression of the public housing debate, and the social construction of target populations that has evolved alongside it, should be a lesson in the study of other policies that affect our contemporary society.

186. Blessett, *Disenfranchisement*, *supra* note 98, at 8.

Ain't No Taxing High Enough: Using Land Value Taxation to Combat the Nation's Rental Affordability Crisis

Robert Stephen Earnest†

Introduction

Across the United States, cities are losing affordable rental housing[1] at an alarming rate.[2] In some of the nation's fastest-growing areas, rental rates have soared, while rental vacancies have reached a historic low.[3] At the same time, housing prices are rising nearly twice as fast as inflation and wage growth, keeping homeownership out of reach for many renters.[4] As a result, a large and growing number of renters across the country are denied a stable place to live, which research consistently demonstrates is essential for creating safe and healthy communities.[5] However, not all renters are affected equally; the effects of rising rental rates are disproportionately felt by low-income earners.[6] Indeed, a renter

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1. It is widely accepted that for housing to be "affordable," housing costs should not exceed 30% of household income. For an overview of the 30% of income standard, see CHRISTOPHER HERBERT, ALEXANDER HERMANN & DANIEL MCCUE, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., MEASURING HOUSING AFFORDABILITY: ASSESSING THE 30 PERCENT OF INCOME STANDARD 2–4 (2018).

2. *See* STEVE GUGGENMOS & KEVIN BURKE, FREDDIE MAC MULTIFAMILY RES. CTR., DIMINISHING AFFORDABILITY – INESCAPABLE: QUANTIFYING THE RELATIONSHIP BETWEEN POPULATION GROWTH AND MULTIFAMILY RENTAL AFFORDABILITY 2 (2019) (finding that nearly 86% of metro areas saw a reduction in affordable housing between 2010 and 2017).

3. *See* JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., THE STATE OF THE NATION'S HOUSING 2019, at 1–4 (Marcia Fernald ed., 2019) [hereinafter STATE OF THE NATION'S HOUSING 2019].

4. *See id.* at 4.

5. *See, e.g.*, ROBERT WOOD JOHNSON FOUND., WHERE WE LIVE MATTERS FOR OUR HEALTH: THE LINKS BETWEEN HOUSING AND HEALTH 5 (2008) (discussing the relationship between affordable housing and health).

6. Low-income is defined as earning 80% or less of the median income for a given metro area (AMI). *Income Limits*, URB. HOMESTEADING ASSISTANCE BD., https://uhab.org/resource/2020-income-limits/ [perma.cc/THE7-4JBY].

working full-time and earning a minimum wage cannot afford a two-bedroom apartment—let alone a single-family home—in any one of the nation's more than three thousand counties.[7] But low-income earners are not alone in experiencing rental housing affordability issues: middle-income earners[8] are increasingly finding themselves priced out of communities as well.[9]

Not only does rental affordability affect individuals differently based on income, but it also varies across cities, suburbs, small towns, and rural areas. For instance, over the past decade, thriving urban centers like Austin, San Francisco, and Minneapolis-Saint Paul have struggled to add enough affordable units for low- and middle-income renter households to keep pace with demand,[10] while New Orleans lost almost two-hundred such units between September 2018 and August 2019.[11] However, this is not to say that rural areas are unaffected by the affordable rental housing crisis: roughly one quarter of the nation's most rural areas have seen a significant increase in the percentage of residents sending more than half of their income to their landlords.[12]

The number of households and regions affected by rising rental rates, combined with the detrimental impact of high housing prices

7. NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2 (2019).

8. Middle-income is understood as earning above 120% of AMI. *Income Limits*, *supra* note 6.

9. JENNY SCHUETZ, COST, CROWDING, OR COMMUTING? HOUSING STRESS ON THE MIDDLE CLASS, BROOKINGS INST. (May 7, 2019), https://www.brookings.edu/research/cost-crowding-or-commuting-housing-stress-on-the-middle-class/ [perma.cc/2LKK-TUES].

10. In Austin, cost-burden rates for low- and middle-income renter households increased from 9% in 2000 to 25% in 2015. CARL HEDMAN, DIANA ELLIOTT, TANAYA SRINI & SHIVA KOORAGAYALA, URB. INST., AUSTIN AND THE STATE OF LOW- AND MIDDLE-INCOME HOUSING 18 (2017). Since 2010, San Francisco has seen a combined 31% decrease in housing for low- and middle-income earners. Ida Mojadad, *Affordable Housing Lags Far Behind High-Income Housing, Report Shows*, SF WEEKLY (Oct. 17, 2019), https://sfweekly.com/news/affordable-housing-jobs-link/ [perma.cc/WD2L-Y8PH]. Furthermore, between 2011 and 2017, the Minneapolis-Saint Paul metro area added only 9,000 new affordable units, which is well below the 52,570 units that were demanded. METRO. COUNCIL, AT A LOSS: AFFORDABLE HOUSING PRODUCTION IN 2017 3 (2019).

11. James Brasuell, *Affordable Housing Losing Ground in New Orleans*, PLANETIZEN (Oct. 1, 2019), https://www.planetizen.com/news/2019/10/106468-affordable-housing-losing-ground-new-orleans [perma.cc/WD45-4APL].

12. Patrick Sisson, *The Rent's 'Too Damn High' in Rural America, Too*, CURBED (Apr. 2, 2019), https://archive.curbed.com/2019/4/2/18291233/rent-apartment-rural-affordable-housing [perma.cc/7XCL-SVZ7].

on homelessness,[13] health outcomes,[14] and income inequality,[15] have sparked a nationwide conversation about the affordable housing crisis and have prompted government intervention. At the federal level, lawmakers have proposed a host of reforms, including modifications to the Low-Income Housing Tax Credit (LIHTC) program[16] and increased investment in the federal Housing Trust Fund.[17] State and municipal governments have also taken action to make housing more affordable. For example, in 2019, the City of Minneapolis amended its zoning ordinance to allow duplexes and triplexes on lots previously zoned exclusively for single-family use.[18] Oregon followed suit by prohibiting single-family zoning in cities with populations of 25,000 or more.[19] Similarly, the City of Dallas created an accessory dwelling unit overlay district making it legal for homeowners to rent out small units built on their property,[20] while San Diego County has taken steps to streamline its building permitting process, thereby increasing the rate at which new rental

13. KATHLEEN MCCORMICK, LINCOLN INST. OF LAND POL'Y, HOUSING THE HOMELESS 21 (2018) ("The main reason people become homeless today . . . is because they cannot find housing they can afford.").

14. ROBERT WOOD JOHNSON FOUND., *supra* note 5, at 5.

15. *See* Matthew Rognlie, *Deciphering the Fall and Rise in the Net Capital Share: Accumulation or Scarcity?*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2015, at 1, 51 (finding that rising housing costs negatively affect the distribution of income).

16. The LIHTC incentivizes property owners to construct affordable rental units for low- and middle-income tenants by reducing the tax burden on the property subject to the credit. JILL KHADDURI, CARISSA CLIMACO & KIMBERLY BURNETT, U.S. DEP'T OF HOUS. & URB. DEV., WHAT HAPPENS TO LOW-INCOME HOUSING TAX CREDIT PROPERTIES AT YEAR 15 AND BEYOND? 1 (2012). Under current law, the value of LIHTC properties is set at a below-market rate for thirty years. *Id.* at 6–7. However, in some cases, owners can pursue a qualified contract option, which allows them to convert the units to market rate after fifteen years. *Id.* at 7. The Save Affordable Housing Act (SAHA) would repeal the qualified contract option. *See Senators Young and Wyden Introduce Legislation to Protect Affordable Housing*, U.S. SENATOR TODD YOUNG OF INDIANA (June 25, 2019), https://www.young.senate.gov/newsroom/press-releases/senators-young-and-wyden-introduce-legislation-to-protect-affordable-housing [perma.cc/UM8A-L24K] (discussing the SAHA).

17. *See, e.g.*, Diana Budds, *Elizabeth Warren Doubles Down on Affordable Housing Legislation*, CURBED (Dec. 11, 2018), https://archive.curbed.com/2018/12/11/18136027/elizabeth-warren-affordable-housing-bill [perma.cc/6QUN-GNWS] (discussing a bill that would allot an additional $450 billion to the federal Housing Trust Fund, which is used to develop new affordable rental units).

18. MINNEAPOLIS, MINN., CODE § 521.10(1) (2020). For a general discussion of the Minneapolis zoning reform, which was the first of its kind in the nation, see Erick Trickey, *How Minneapolis Freed Itself from the Stranglehold of Single-Family Homes*, POLITICO (July 11, 2019), https://www.politico.com/magazine/story/2019/07/11/housing-crisis-single-family-homes-policy-227265 [perma.cc/3H89-D5EL].

19. OR. REV. STAT. § 197.758 (2019).

20. DALLAS, TEX., CODE § 51A-4.510 (2018).

housing is built.[21] Underlying these reforms is the intuitive principle that more housing means lower housing costs. Ultimately, however, even though these reforms may be necessary to bolster new housing development, they may not be sufficient.[22]

What may be sufficient is a centuries-old tax idea known as land value taxation, which municipal governments have used recently as a means to raise revenue without increasing taxes for homeowners.[23] Land value taxation, briefly, is a tax regime that assesses higher tax rates on land values than on building values. What makes it attractive in the affordable housing context is its ability to incentivize housing development and, thus, lead to higher levels of housing construction.[24] Of course, the goal of this Note is not to suggest that land value taxation is a panacea for our nation's affordable housing woes, but rather to introduce it as a tool worthy of serious consideration. To demonstrate this claim, this Note begins by briefly discussing the recent origins and impacts of the widening gap between supply of—and demand for—affordable rental housing. Part I concludes that one of the main drivers of high housing costs is a shortage of supply and argues that the single-rate property tax system is partly responsible for this supply shortage. Part II posits land value taxation as an alternative to this system. Part III.A argues that land value taxation can augment federal, state, and local efforts to produce more affordable housing. Part III.B addresses how three potentially adverse consequences of enacting a land value tax could be mitigated.

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21. Charles T. Clark, *County Looks to Streamline Permit Process to Bolster Housing*, SAN DIEGO UNION-TRIB. (July 24, 2019), https://www.sandiegouniontribune.com/news/politics/story/2019-07-24/county-to-look-bolstering-housing-by-streamlining-discretionary-permit-process [perma.cc/NCT7-HZRD].

22. For example, recent evidence shows that "upzoning"—the practice of changing a zoning code to allow for taller and/or denser construction—may not be as effective at encouraging development as its proponents argue. *See* Yonah Freemark, *Upzoning Chicago: Impacts of a Zoning Reform on Property Values and Housing Construction*, 56 URB. AFF. REV. 759, 783 (2020) (finding that upzoning had no effect on housing supply).

23. The tax was most recently enacted in Millbourne, Pennsylvania, to striking effect: two of the city's largest parcels, formerly unused, have since come under development, while homeowners have seen their property tax bills slashed by nearly a third. J. Brian Charles, *Leaning on the Land*, GOVERNING (Sept. 2019), https://www.governing.com/topics/finance/gov-land-tax.html [perma.cc/3N5E-XDKY].

24. *See infra* Part II.A; Mason Gaffney, *Tax Reform to Release Land*, *in* LAND-VALUE TAXATION: THE EQUITABLE AND EFFICIENT SOURCE OF PUBLIC FINANCE, 75–76 (Kenneth C. Wenzer ed., 1999) (demonstrating that the single-rate property tax stands as a formidable obstacle to new housing construction).

I. Why Has Rental Housing Become So Unaffordable?

While the current affordable rental housing crisis is one of the worst in recent memory, "[t]he mismatch between the number of people needing homes and the amount of affordable housing available [is not] unique to this moment in history . . . ."[25] In fact, to some degree, the United States rental market has always struggled to supply housing at affordable rates.[26] However, commentators and scholars generally agree that the current affordability crisis began when the subprime mortgage crisis hit in 2007, resulting in nearly three million homeowners losing their homes to foreclosure.[27] These former owner-occupants flocked to an already-crowded rental market, exacerbating the problems caused by a shortage of affordable rental housing.[28] This, in turn, caused the number of cost-burdened renter households—those who spend at least 30 percent of their monthly income on rent—to drastically increase, as former homeowners competed with lower-income renters for affordable units.[29] Indeed, in 2016, nearly half of renters were cost-burdened compared to 20 percent in 1960.[30] While the overall number and percentage of cost-burdened households has marginally decreased since the foreclosure crisis of the late 2000s, homeowners have accounted for much of this reduction.[31] Yet this does not mean that homeownership has become less expensive: overall burden rates have dropped primarily because homeowners have either refinanced into lower-cost mortgages, benefited from income growth, or left homeownership altogether.[32] Moreover, due to today's tighter mortgage underwriting practices,[33] exchanging

25. Bryce Covert, *The Deep, Uniquely American Roots of Our Affordable-Housing Crisis*, THE NATION (May 24, 2018), https://www.thenation.com/article/give-us-shelter/ [perma.cc/6BBZ-7MTM].

26. *See id.* (chronicling the history of affordable housing in the United States).

27. *Id.*; *see also* Gregg Colburn & Ryan Allen, *Rent Burden and the Great Recession in the USA*, 55 URB. STUD. 226, 241 (2018) (finding that "rent burden has unambiguously increased post-recession").

28. Covert, *supra* note 25.

29. *Id.*

30. STATE OF THE NATION'S HOUSING 2019, *supra* note 3, at 31. Moreover, "[t]he share of renter households that were *severely* rent burdened—spending 50 percent or more of monthly income on rent—increased by 42 percent between 2001 and 2015, to 17 percent." PEW CHARITABLE TRUSTS, AMERICAN FAMILIES FACE A GROWING RENT BURDEN 4 (2018) (emphasis added).

31. In 2017, "[t]he number of cost-burdened owners stood at 17.3 million[,]" or 22.5%. STATE OF THE NATION'S HOUSING 2019, *supra* note 3, at 31.

32. *Id.*

33. *Id.* at 3. For example, the Federal Housing Administration, which insures mortgages for riskier borrowers, has adopted a rule that will subject roughly 40,000

monthly rent for a monthly mortgage payment is not an option for a substantial majority of tenants, and thus their housing options largely remain limited to apartment buildings.[34] As a result, "cost-burdened renters now outnumber cost-burdened homeowners by more than 3 million."[35]

At the same time, for a variety of reasons, the United States' large renter population continues to grow larger.[36] Between 2006 and 2016, in roughly a quarter of the nation's one hundred largest cities, the population changed from homeowner- to renter-majority.[37] During the same time, eleven of the largest cities in the United States saw double-digit growth in the number of renters, while seven of those cities saw renter growth exceeding 20 percent.[38] Renter growth has also accelerated in mid-sized cities like Denver, Nashville, and Charlotte, which are among the fastest-growing rental markets in the nation.[39] Unsurprisingly, the increased demand for rental housing has caused rental markets to tighten even further, leading to historically low vacancy rates and

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to 50,000 loans per year to manual review. Under the previous rule, those loans would have been approved automatically. Paul Davidson, *Fewer First-Time Home Buyers Likely to Qualify for Mortgages Under Tougher FHA Standards*, USA TODAY (Mar. 25, 2019), https://www.usatoday.com/story/money/2019/03/25/home-loans-fewer-first-timers-get-mortgages-under-tough-standards/3271050002/ [perma.cc/AF98-6WGL].

34. Manufactured homes—also called mobile homes—have been, and continue to be, a popular, low-cost option for individuals who cannot afford or do not desire to purchase site-built homes. *See* Ann M. Burkhart, *Bringing Manufactured Housing into the Real Estate Finance System*, 37 PEPP. L. REV. 427, 428 (2010) (observing that "[u]p to two-thirds of the new affordable homes built each year have been manufactured"). However, there are currently multiple factors that make manufactured housing a less viable alternative to rental housing. *See id.* at 441–42 (discussing how the legal characterization of manufactured homes as personal property in a majority of states has led to reduced credit availability for manufactured home purchases). *See generally* Daniel R. Mandelker, *Zoning Barriers to Manufactured Housing*, 48 URB. LAW. 233 (2016) (discussing the land use obstacles to manufactured housing construction).

35. STATE OF THE NATION'S HOUSING 2019, *supra* note 3, at 4.

36. *See id.* at 3 ("[E]stimates [of renter households] show[ed] an uptick in early 2019, in keeping with Joint Center projections of about 400,000 net new renter households annually over the coming decade.").

37. Balazs Szekely, *Renters Became the Majority Population in 22 Big US Cities*, RENTCAFE (Jan. 25, 2018), https://www.rentcafe.com/blog/rental-market/market-snapshots/change-renter-vs-owner-population-2006-2016/ [perma.cc/BY69-CR7H].

38. INGRID GOULD ELLEN & BRIAN KARFUNKEL, N.Y.U. FURMAN CTR. & CAPITAL ONE, RENTING IN AMERICA'S LARGEST METROPOLITAN AREAS 12 (2016).

39. Diana Olick, *High Rents Trickle Down to Smaller Cities*, CNBC (Feb. 20, 2015), https://www.cnbc.com/2015/02/19/high-rents-trickle-down-to-smaller-cities.html [perma.cc/5FRH-AGMV].

higher rents.[40] According to the U.S. Census Bureau's Housing Vacancy Survey, the national vacancy rate for rental units in early 2019 was 6.9 percent, the lowest it has been since 1986,[41] while "overall rents [have risen] at . . . twice the pace of overall inflation."[42]

However, unlike previous trends, large cities like Atlanta and Phoenix are generally not the areas experiencing the most drastic rent increases; smaller cities like Madison, Alabama and Maryland Heights, Missouri have seen their rental rates increase by between 6 and 7 percent each year.[43] And even though it tends to be the case that individuals living in cities with higher costs of living tend to have higher incomes,[44] a majority of rental units in United States metro areas continue to remain unaffordable to the average metro renter.[45]

Demand has certainly contributed to growing rental housing unaffordability, as changing household formation, steady job growth, and progressively lower turnover rates combine to drive rental rates upwards.[46] Rising home prices also play an important role by deterring potential homebuyers from entering the housing market.[47] Yet research shows that if this increased demand had been matched by increased housing construction, rental rates would generally be much lower than they currently are.[48] However, even

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40. STATE OF THE NATION'S HOUSING 2019, *supra* note 3, at 27. Rent growth for multifamily apartments in 150 metro areas increased from 2.6% in the first quarter of 2018 to 3.3% in the first quarter of 2019. *Id.* Furthermore, rent growth for single-family units increased from 2.7% in the first quarter of 2018 to 3.2% in January 2019. *Id.*

41. *Id.* at 38. In some places, such as the Minneapolis-Saint Paul metro area, rental vacancy rates are as low as 2 percent. Jim Buchta, *Low Vacancy Rates Make It Tough for Twin Cities Apartment Renters*, STAR TRIB. (Aug. 26, 2019), https://www.startribune.com/low-vacancy-rates-make-it-tough-for-twin-cities-apartment-renters/558031542/ [perma.cc/K8RL-Y3GC].

42. STATE OF THE NATION'S HOUSING 2019, *supra* note 3, at 4.

43. *See* Chris Salviati, *November 2019 Rent Report*, APARTMENT LIST (Oct. 29, 2019), https://www.apartmentlist.com/rentonomics/november-2019-rent-report/ [perma.cc/TU5U-ND4Q] (city data available in table of recent rent estimates).

44. GOULD ELLEN & KARFUNKEL, *supra* note 38, at 15, 18.

45. *Id.* at 18.

46. Olick, *supra* note 39.

47. Laura Kusisto, *More Renters Giving Up on Buying a Home*, WALL ST. J. (Apr. 3, 2018), https://www.wsj.com/articles/more-renters-give-up-on-buying-a-home-1522773685 [perma.cc/L8FE-8SFQ].

48. *See, e.g.*, MAC TAYLOR, CAL. LEGIS. ANALYST'S OFF., CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES 12 (2015) ("[O]ur analysis suggests that . . . if a county with a home building rate in the bottom fifth of all counties during the 2000s had instead been among the top fifth, its median home prices in

though the stock of new housing has been slowly but steadily increasing,[49] demand has continued to outpace supply in all but three markets across the United States.[50] Thus, the current affordable rental housing crisis is largely a consequence of there simply not being enough units available for the renters who seek them.[51]

Multiple factors help to explain this supply problem. Labor shortages in the residential construction sector, for instance, have both increased the price of labor and prolonged development schedules, making construction more costly and more time-consuming.[52] Hefty development fees also impose onerous burdens on housing production.[53] Indeed, one study found that development fees for multifamily housing complexes in Fremont, California totaled nearly $75,000 per unit.[54] Likewise, land use regulations, such as building codes and zoning ordinances, prevent units from being built in areas where they otherwise would be.[55] When demand

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2010 would have been roughly 25 percent lower."); STATE OF THE NATION'S HOUSING 2019, *supra* note 3, at 12 ("To meet [robust demand for rental units and starter homes], the supply of . . . housing will have to increase significantly.").

49. STATE OF THE NATION'S HOUSING 2019, *supra* note 3, at 1 (observing that "additions to the housing stock have grown at an average annual rate of . . . 10 percent").

50. Julia Falcon, *Apartment Supply Exceeds Demand in Only 3 U.S. Markets*, HOUSINGWIRE (Sept. 23, 2019), https://www.housingwire.com/articles/50205-apartment-supply-exceeds-demand-in-only-3-us-markets/ [perma.cc/TJM2-H6DU].

51. While many, if not most, commentators and advocates agree that housing supply is the greatest barrier to affordability, some do not. *See generally* Vicki Been, Ingrid Gould & Katherine O'Regan, *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL'Y DEBATE 25 (2019) (arguing that more housing will not adequately address affordability challenges); Ron Feldman*, The Affordable Housing Shortage: Considering the Problem, Causes and Solutions* (Fed. Reserve Bank of Minneapolis, Banking & Policy Working Paper No. 02-2, 2002) (concluding that a shortage of income is largely behind the housing affordability problem).

52. STATE OF THE NATION'S HOUSING 2019, *supra* note 3, at 2.

53. *See, e.g.*, Mark Skidmore & Michael Peddle, *Do Development Impact Fees Reduce the Rate of Residential Development?*, 29 GROWTH & CHANGE 383, 392–94 (1998) (finding that development fees in DuPage County, Illinois, reduced the rate of residential construction by 25%).

54. Sarah Mawhorter & David Garcia, *It All Adds Up: The Cost of Housing Development Fees in Seven California Cities*, TERNER CTR. FOR HOUS. INNOVATION (Mar. 3, 2018), https://ternercenter.berkeley.edu/blog/it-all-adds-up-the-cost-of-housing-development-fees-in-seven-california-cities/ [perma.cc/7YJV-XGV9].

55. Building codes regulate the design and construction of buildings, which creates compliance costs and discourages developers from building additional units. David Listokin & David B. Hattis, *Building Codes and Housing*, 8 CITYSCAPE 21, 37 (2005). Zoning ordinances dictate how land in a particular jurisdiction can be used and typically impose limits on building size, height, and bulk, which further constrains rental housing supply. *See* Edward L. Glaeser, Joseph Gyourko & Raven

for housing is strong, the net effect of these obstacles is to raise land and housing prices.[56]

However, this Note posits that another factor is also to blame for rental housing unaffordability: the single-rate property tax. The single-rate property tax is problematic because it is primarily a tax on building values, and because buildings are among the most expensive and durable capital goods that exist, a tax on building values is usually large and long-lasting.[57] Thus, the single-rate property tax stands as a formidable obstacle to new housing construction.[58] Because lack of housing supply is one of the main drivers of our current affordability crisis, a strong case can be made for reforming the single-rate property tax system to one that is more growth-friendly.[59] Land value taxation, by simultaneously rewarding landowners who develop their land and punishing those who do not, represents such a reform. While land value taxation has traditionally been praised for its ability to control the effects of urban sprawl[60] and combat urban blight,[61] its ability to stimulate development—and thus lead to a greater housing stock—indicates that it may be able to reduce the pressures that demand is currently exerting on rental housing prices. Many state and local legislatures have debated enacting a land value tax; a few of them have even

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Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331, 366 (2005) (finding that the substantial gap between the price of housing and construction costs "suggests the power of land use controls in limiting new construction").

56. STATE OF THE NATION'S HOUSING 2019, *supra* note 3, at 8.

57. Gaffney, *supra* note 24, at 75–76.

58. *Id.*

59. While the problems of the single-rate property tax could be solved by outright repealing it, "[t]he loss in revenue . . . would have to be made up with other taxes . . . or with massive cuts in government services." Richard F. Dye & Richard W. England, *The Principles and Promises of Land Value Taxation*, *in* LAND VALUE TAXATION: THEORY, EVIDENCE, AND PRACTICE 4 (Richard F. Dye & Richard W. England eds., 2009) [hereinafter Dye & England, *Principles and Promises*]. Thus, the case for reforming the single-rate property tax is stronger than the case for eliminating it.

60. *See, e.g.*, Seong-Hoon Cho, Seung Gyu Kim & Roland K. Roberts, *Measuring the Effects of a Land Value Tax on Land Development*, 4 APPLIED SPATIAL ANALYSIS & POL'Y 45, 47 (2011) ("A higher tax rate on land than on land improvements . . . is a potential policy tool to moderate sprawl . . . ."); H. Spencer Banzhaf & Nathan Lavery, *Can the Land Tax Help Cure Urban Sprawl? Evidence from Growth Patterns in Pennsylvania*, 67 J. URB. ECON. 169, 177 (2010) (finding that "[a]dopting the split-rate tax results in a 4-5% point increase per decade in the growth of the density of housing units for the first two decades").

61. *See* Elaine S. Povich, *Can Extra Taxes on Vacant Land Cure City Blight?*, PEW (Mar. 7, 2017), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/07/can-extra-taxes-on-vacant-land-cure-city-blight [perma.cc/87N3-46HG] (discussing a push in Hartford, Connecticut, to assess higher taxes on unused land so as to hasten development and reduce blight).

done so.[62] Nevertheless, most have rejected the idea, usually citing concerns about its effectiveness and impact.[63] However, as this Note argues, a land value tax can be effective at encouraging more housing development and thus reducing net housing costs, and there are ways to mitigate its potentially adverse consequences. Thus, state and local governments should consider using land value taxation in their campaigns to make housing more affordable.[64]

II. Land Value Taxation: History and Description[65]

The land value tax is a type of property tax. The property tax is one of the oldest and most widely-used revenue sources in the United States.[66] For local governments, it is also one of the most important, accounting for roughly half of local tax revenue.[67] Property taxes are assessed for real property and personal property, but because real property is generally much more valuable than personal property, it provides the basis for almost all of the revenue

62. Fairhope, Alabama; Arden, Delaware; and Pittsburgh, Pennsylvania are among the cities that have enacted some variant of the land value tax. Steven C. Bourassa, *The U.S. Experience*, *in* LAND VALUE TAXATION: THEORY, EVIDENCE, AND PRACTICE, *supra* note 59, at 11–12. The City of Amsterdam, New York adopted land value taxation in 1995, but repealed it the following year before its effect could be observed. *Id.* at 12. Oregon, among other states, also briefly experimented with land value taxation during the latter part of the twentieth century. *See generally* Richard W. Lindholm & Roger C. Sturtevant, *American Land Tax Roots: Plus Experimentation in Oregon*, *in* LAND VALUE TAXATION: THE *PROGRESS AND POVERTY* CENTENARY 83–94 (Richard W. Lindholm & Arthur D. Lynn, Jr. eds., 1978) (discussing the land value tax movement in Oregon).

63. *See, e.g.*, Bourassa, *supra* note 62, at 16 (describing how an opponent to Pittsburgh's land value tax argued it "was confusing and was causing residential neighborhoods to lose out at the expense of downtown interests").

64. This Note's discussion of land value taxation is confined to state and local governments because most legal and economic scholars agree that the federal government is constitutionally prohibited from assessing taxes on real property. *See* Richard D. Coe, *The Legal Framework in the United States*, *in* LAND VALUE TAXATION: THEORY, EVIDENCE, AND PRACTICE, *supra* note 59, at 130 (noting that the federal Constitution forbids Congress from laying direct taxes and that real property taxes are generally assumed to be direct taxes within the meaning of the Constitution). *But see* Steven B. Cord, *Legal Suggestions for Enacting a Land Value Tax* 8–14 (Lincoln Inst. of Land Pol'y, Working Paper, 1999) (describing the various ways by which the federal government could constitutionally assess a land value tax).

65. For the purposes of this Note, I make no distinction between land value taxation and split-rate variants of the real property tax that tax land at a much higher rate than improvements.

66. Dye & England, *Principles and Promises*, *supra* note 59, at 3.

67. *See* MYRON ORFIELD, AMERICAN METROPOLITICS 88–89 (2002); *see also* Bethany P. Paquin, *Chronicle of the 161-Year History of State-Imposed Property Tax Limitations* 1 (Lincoln Inst. of Land Pol'y, Working Paper WP15BP1, 2015).

derived from property taxes.[68] For real property, most jurisdictions use a single-rate property tax regime, under which land and improvements to the land, such as buildings, are taxed at the same rate.[69] The operation of a single-rate property tax system can be demonstrated by the following hypothetical. Suppose that a parcel of land is valued at $10,000 and the sole improvement to that land—a restaurant—is valued at $20,000. If the statutory property tax rate is fixed at 5 percent, then the actual amount of property tax owed under a single-rate property tax regime would be $1,500: $500 for the land and $1,000 for the restaurant.[70] Thus, as should be clear from this hypothetical, the single-rate property tax "is actually *two* types of taxes[:] one upon building values, and the other upon land values."[71] Yet despite its reputation as a mainstay of local government finance, the single-rate property tax has long faced fierce public opposition.[72]

While people generally tend to dislike taxes, the single-rate property tax has generated special controversy because it is regressive[73] and can fluctuate widely from year to year.[74] There are also relatively few ways to reduce the amount of property tax owed.[75] The opposition to the property tax has not been confined to

68. JOYCE ERRECART, ED GERRISH & SCOTT DRENKARD, TAX FOUND., STATES MOVING AWAY FROM TAXES ON TANGIBLE PERSONAL PROPERTY 2 (2012). Not only is real property generally more valuable than personal property, it also tends to appreciate in value over time. In contrast, personal property, like cars and boats, tends to lose value as it ages. This is another reason why personal property taxes tend to make up a relatively small percentage of total local property tax revenue.

69. Dye & England, *Principles and Promises*, *supra* note 59, at 4 n.1.

70. This hypothetical assumes a taxable value of 100%. If a state were to instead mandate that a 50% assessment ratio be applied to real property, then the amount of property tax owed in this hypothetical would be $750: $250 for the land and $500 for the restaurant.

71. Alanna Hartzok, *Pennsylvania's Success with Local Property Tax Reform: The Split Rate Tax*, 56 AM. J. ECON. & SOC. 205, 205 (1997) (emphasis added).

72. Ninety-five percent of voters on Debate.org voted in favor of abolishing the single-rate property tax. *Should Property Taxes Be Abolished?*, DEBATE, https://www.debate.org/opinions/should-property-taxes-be-abolished [perma.cc/2YNN-5H6U]. Indeed, the public reaction to the tax has been so hostile that forty-six states have enacted some form of legislation that limits local authority to tax property. *See* Paquin, *supra* note 67, at 3. The most well-known (and most influential) of these limitations is Proposition 13, the 1978 California taxpayer initiative that capped property taxes at 1 percent. *Id.* at 8.

73. It is regressive because low-income individuals spend a greater percentage of their income on housing than high-income individuals and thus are more heavily impacted by real property taxes. CHARLES E. GILLILAND, PROPERTY TAXES: THE GOOD, THE BAD, AND THE UGLY 1 (2013).

74. *Id.*

75. In most states, veterans, the elderly, disabled individuals, and owners of designated residential homesteads can qualify for a partial exemption, but few exemptions beyond those exist. *Id.* at 2.

the public sphere either—economists have long decried the tax as both inefficient and inequitable: inefficient because, by taxing use, it discourages economic development; inequitable because it allows landowners to profit from a resource that derives its value from community rather than individual efforts.[76] It was for these reasons that Henry George, a nineteenth-century activist and political economist, recommended that taxes on buildings be eliminated in favor of a much higher single tax on the value of unimproved land.[77] Theoretically, this tax would have to be high enough to compensate for the decrease in revenue caused by the elimination of the building tax. Thus, in the restaurant hypothetical described above, under the single tax regime envisioned by George, the amount of property tax owed would still be $1,500, but it would be derived solely from the value of the land. This concept, where land value is taxed at a different, higher rate than building value, is known as land value taxation. However, the modern interpretation of land value taxation differs from the traditional single tax version proposed by George, who believed that the single tax should be the *only* tax from which governments would derive their property tax revenues.[78] In

76. *See* Dye & England, *Principles and Promises*, *supra* note 59, at 3–4.

77. *See generally* HENRY GEORGE, PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS, AND OF INCREASE OF WANT WITH INCREASE OF WEALTH: THE REMEDY (1879), *available at* https://tile.loc.gov/storage-services/service/gdc/gdcscd/00/03/70/63/30/7/00037063307/00037063307.pdf [perma.cc/K2LY-PEP7]. While land value taxation is most famously associated with Henry George, the origins of the theory can be found in the works of classical economists John Stuart Mill and Adam Smith. *See* JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY bk. V (Jonathan Riley ed., Oxford Univ. Press 1994) (1848) ("[T]he existing land-tax . . . ought not to be regarded as a tax, but as a rent-charge in favour of the public; a portion of the rent, reserved from the beginning by the State, which has never belonged to or formed part of the income of the landlords, and should not therefore be counted to them as part of their taxation."); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS bk. V (T. Nelson & Sons ed., 1873) (1776) ("Ground-rents, so far as they exceed the ordinary rent of land, are altogether owing to the good government of the sovereign, which . . . enables them to pay so much more than its value for the ground which they build their houses upon . . . Nothing can be more reasonable than that a fund, which owes its existence to the good government of the state, should be taxed peculiarly, or should contribute something more than the greater part of other funds, towards the support of that government.").

78. *See* GEORGE, *supra* note 77, at 371 ("Tax manufacturers, and the effect is to check manufacturing; tax improvements, and the effect is to lessen improvement; tax commerce, and the effect is to prevent exchange; tax capital, and the effect is to drive it away. But the whole value of land may be taken in taxation, and the only effect will be to stimulate industry, to open new opportunities to capital, and to increase the production of wealth."). While there are certain benefits to the single tax, many scholars have not given the idea serious consideration because it is unlikely that a state or local government, in the absence of other taxes, could raise

contrast, the modern interpretation of land value taxation does not require the total elimination of taxes on building values—taxes on building values are merely reduced, while taxes on land values are increased.[79] This approach to land value taxation is known as split-rate taxation and is the one that has been used by nearly all of the jurisdictions that have experimented with land value taxation.[80] Yet because the single tax and the split-rate tax are each variants of the land value tax, they both rest on the same theoretical observations.

Two observations underlie land value tax theory. The first observation is that all taxes, like taxes on income and sales, generally operate to raise prices and discourage both production and consumption.[81] When a government assesses a tax on a good, the cost of producing that good increases by the amount of the tax.[82] Therefore, in order for suppliers to keep consumer purchases at pre-tax levels, the price of the good supplied must fall by the amount of the tax.[83] However, as a matter of theory and practice, this result will not occur because at a lower price, suppliers will see their profits decrease and will be unwilling to supply the good demanded.[84] Thus, because suppliers control the amount of the good they are willing to supply, they will respond to taxes by passing most of the cost of the tax onto consumers.[85] In this way, taxes operate to raise prices. Naturally, if the price of a good increases, some consumers will purchase less of it.[86] Accordingly, suppliers

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land taxes high enough to continue funding government services at their present level without violating the Constitution. *See generally* Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. UNIV. L. REV. 189 (2002) (discussing how taxation may be deemed an unconstitutional taking of private property if it unduly burdens individual property interests).

79. *See generally* Vernon I. Saunders, *In Defense of the Two-Rate Property Tax*, *in* LAND-VALUE TAXATION: THE EQUITABLE AND EFFICIENT SOURCE OF PUBLIC FINANCE, *supra* note 24, at 269–76 (describing the use of land value taxation throughout the twentieth century).

80. For example, all of the cities in Pennsylvania that had enacted a land value tax continued to tax building values, albeit at a significantly lower rate than land values. For a complete list of these cities and the rates imposed, see Dye & England, *Principles and Promises*, *supra* note 59, at 15.

81. Wallace E. Oates & Robert M. Schwab, *The Simple Analytics of Land Value Taxation*, *in* LAND VALUE TAXATION: THEORY, EVIDENCE, AND PRACTICE, *supra* note 59, at 58 [hereinafter Oates & Schwab, *Simple Analytics*]; *see also* GEORGE, *supra* note 77, at 371.

82. *See* Oates & Schwab, *Simple Analytics*, *supra* note 81, at 56.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 58.

will respond to lower consumer demand by producing less of the good.[87] Yet because these consumers were willing to purchase the good at its previous price, and because the actual cost of producing the good has not changed, it should be produced and consumed.[88] Thus, taxes generally lead to higher prices and, as a result, lower levels of production and consumption. The same analysis applies to taxes on building values, which have the effect of reducing construction levels and raising rents. This is because buildings are part of a firm's production costs. Thus, unless the economic benefits of improving a parcel of land outweigh the costs associated with an increased tax burden, a landowner will only improve their land until the point where it no longer becomes economically feasible—where they can no longer raise rents high enough to pay the tax—or decide not to build on the land at all, thereby avoiding the tax altogether. Thus, the single-rate property tax—at least in part—keeps the housing stock at less-than optimal levels by creating a disincentive to build.

The second observation is that there are two fundamental differences between land and other objects that render the first observation inapplicable to land. First, whereas producers can respond to high taxes by merely decreasing the amount of the goods they produce, higher taxes cannot diminish the supply of land because land is fixed in quantity.[89] Therefore, although a tax on land value would require landowners to pay more, "it gives them no power to obtain more for the use of their land, as it in no way tends to reduce the supply of land."[90] It is precisely this ability to reduce supply that gives suppliers the power to pass taxes onto consumers in the first place. However, because the supply of land cannot be reduced, landowners cannot pass taxes on their land to tenants. Second, land is immobile; unlike capital, it cannot be relocated to a different jurisdiction to evade tax authorities.[91] Thus, taxes on land

87. *Id.*

88. Economists use the term "deadweight loss" to describe this loss in economic welfare. *Id.*

89. Although this statement is largely true, it is not *completely* true, as there are a few instances where land has been "created." For instance, "the Back Bay neighborhood in Boston was created by filling the tidewater flats of the Charles River over a 25-year period beginning in 1857." *Id.* at 56 n.4. Likewise, much of the land in the Streeterville neighborhood in Chicago was created through a combination of landfilling and natural accretion. Joseph D. Kearney & Thomas W. Merrill, *Contested Shore: Property Rights in Reclaimed Land and the Battle for Streeterville*, 107 NW. UNIV. L. REV. 1057, 1058 (2015).

90. GEORGE, *supra* note 77, at 373.

91. Arguably, this is true about buildings, too, but whereas buildings can be reduced in size or demolished completely, land cannot.

are unavoidable: every landowner would be required to register their land and pay the tax on their land holdings. Together, these two theoretical observations imply that the single-rate property tax regime unduly burdens housing construction and that a switch to land value taxation would free up more land for development and put land to its best and highest possible use without harming renters.

III. Using Land Value Taxation to Increase Affordability

A. How Land Value Taxation Can Create More Affordable Rental Housing

Conventional property taxes discourage landowners from improving their land by causing their taxes to rise.[92] Because land value taxation shifts most or all of the tax on improvements onto land, landowners would be able to add more value to their land without any or with insignificant tax increases, which reduces the average tax rate on their property.[93] In cities where demand is strong, among the main reasons for the lack of affordable rental housing is that there are not enough rental units available to accommodate demand, not enough moderately-priced homes into which renters can move, or some combination of the two.[94] Thus, switching to a land value tax system could help to spur development in high-demand areas so as to increase the available rental housing stock.

The incentive effects of land value taxation can be demonstrated by the following hypothetical. Suppose that there are two residential properties, each in a different part of the city. One is a small, single-family house built on a large lot and located in a high-valued neighborhood near the city's central business district; the other is a much larger multifamily rental housing unit built in a neighborhood much further away from the city's core where properties are assessed at lower values. Suppose also that the land and building values of the single-family house are each $200,000, while the multifamily unit has land valued at $50,000 and improvements valued at $350,000. Under a single-rate property tax

92. *See* discussion *supra* notes 81–88 and accompanying text; *see also* Arthur P. Becker, *Principles of Taxing Land and Buildings for Economic Development*, *in* LAND AND BUILDING TAXES 12 (1969).

93. *Id.* at 25; *see also* TAYLOR, *supra* note 48, at 13 ("Building more units on the same plot of land allows a developer to spread land costs across more units, lessening the impact of land costs on the cost of each unit. This is because land costs are fixed and do not increase if a developer builds additional units.").

94. STATE OF THE NATION'S HOUSING 2019, *supra* note 3, at 11, 27.

regime, both parties pay the same amount of tax, as both have a total assessed value of $400,000. However, under a land value tax regime, where the tax on building values is eliminated or significantly reduced, that would no longer be the case. The tax burdens of the two properties would not be equally shared. This is because to receive a similar amount of tax revenue, the city would have to increase the tax rate on land values to make up for the reduced tax on building values.[95] Thus, the multifamily unit property would end up paying a lower share of total collections, while the underused land in the higher-valued neighborhood would see its tax share increase.

Not only does this result seem intuitively more fair, as lands—in contrast to building values—are created by community efforts, not individual ones, it also provides an economic incentive for owners of higher-valued but vacant or underused land to develop that land beyond its present use.[96] It incentivizes development of underused land by means of both *stick* (the tax on land value) and *carrot* (the absence of tax on building values), rewarding both the construction of new buildings and the renovation of old ones. Vacant lots acquire new buildings, as owners either ramp up development to meet a higher tax burden or sell to someone else who will improve it. In the United States, on average, 17 percent of large cities' land area is considered to be vacant or underdeveloped,[97] and many of these cities have the highest rents and lowest vacancy rates.[98] The incentive effects of land value taxation would likely be most powerful in these cities because land values tend to be the highest in urban areas.[99] Thus, in the hypothetical described above, because the tax on land values would increase under a land value tax regime, the owner of the single-family property would have much

95. However, even if the city did not raise rates high enough to receive the same amount in revenue, the land tax on the single-family property would still be much higher than the land on the multifamily property, simply because the former is more valuable than the latter.

96. Harold S. Buttenheim, *Unwise Taxation as a Burden on Housing*, 48 YALE L.J. 240, 245 (1938).

97. Galen D. Newman, Ann O'M. Bowman, Ryan Jung Lee & Boah Kim, *A Current Inventory of Vacant Urban Land in America*, 21 J. URB. DESIGN 302, 311 (2016).

98. A study conducted by PropertyShark and Yardi Matrix found that Dallas, Las Vegas, Austin, San Antonio, Phoenix, Minneapolis, and Atlanta were among the top ten cities in terms of the total vacant land area in their commercial business districts. To view the results of this study, visit https://www.commercialcafe.com/blog/study-development-vacant-land-major-us-cbd/ [perma.cc/7Y87-8796].

99. Buttenheim, *supra* note 96, at 241 (observing that "[w]here population concentrates, the demand for land is greater than for equally advantageous sites where population is sparse").

more of an incentive to redevelop the home as a duplex or other multiple-family property, which would add more units to the city's rental housing stock.[100]

Land value taxation not only provides a powerful economic incentive for landlords to build more housing; by reducing or removing building taxes, it encourages greater intensity of land use, and so is more favorable to apartment construction than homebuilding.[101] In contrast, single-rate property taxation tends to favor larger parcels and thus discourages vertical construction.[102] This is because tall buildings are more costly to construct than short buildings, which makes them more valuable for assessment purposes.[103] As developers build skywards, they encounter increasing capital costs resulting in part from higher taxes.[104] Conversely, "horizontal spread enjoys decreasing capital costs . . . and saves on capital by consuming more land."[105] This forced demand for land in part explains the "sprawling" nature of so many American cities.[106] Accordingly, assessing a higher tax rate on land values and reducing the rate on building values would cause developers to substitute capital for land and thus would very likely lead to more construction of rental housing.

Because of its depressing effects on land price, a switch to a land value tax regime would also help to curb speculation in land markets. Land speculation occurs when individuals buy or sell land with the expectation of profiting from the transaction.[107] Land speculation not only raises land prices, but also removes land from the market that could otherwise have been put to productive use.[108]

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100. *Id.*

101. Gaffney, *supra* note 24, at 89.

102. *Id.*

103. Construction of tall buildings is generally more expensive than construction of short buildings "because of their need for sophisticated foundations, structural systems to carry high wind loads, and high-tech mechanical, electrical, elevator, and fire-resistant systems." Mir M. Ali & Kheir Al-Kodmany, *Tall Buildings and Urban Habitat in the 21st Century: A Global Perspective*, 2 BUILDINGS 384, 386 (2012).

104. Gaffney, *supra* note 24, at 76.

105. *Id.*

106. *Id.* (observing that "[i]n time[, building taxes] also lead[] to urban expansion"). Another one of the main contributors to urban sprawl has been and continues to be single-family zoning because of its general prohibition on vertical development. *See id.*; *see also* Trickey, *supra* note 18.

107. *Speculation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

108. Speculation in land was one of the main drivers of the U.S. housing price boom between 2000 and 2006. Charles G. Nathanson & Eric Zwick, *Arrested Development: Theory and Evidence of Supply Speculation in the Housing Market*, 73 J. FIN. 2587, 2623 (2018). For example, in Las Vegas, which has a relatively large

The single-rate property tax system, by keeping landholding costs relatively low, makes it economically feasible for speculators to buy up land and await a rise in its value without making any improvements. Under a land value tax regime, however, speculation would be less possible. This is because shifting a larger tax burden onto land would have the effect of *lowering* land prices by making land less attractive as an investment vehicle—more owners would sell land not to make a profit but to relieve themselves of a tax liability. Therefore, because the *use* (as opposed to the ownership) of land would primarily have economic value, the costs to many owners of holding land in speculation would simply become too onerous to justify continued ownership or nondevelopment.[109] In addition to its arresting effects on construction, the single-rate property tax system makes rental housing less affordable because it allows landlords to shift their taxes onto their tenants, resulting in higher rents.[110]

However, under a land value tax regime, this shifting would not occur because the land is fixed in supply.[111] Landlords could not raise the price of their land in response to a higher land tax because at a higher price, less land would be demanded, which would result in an excess supply of land and downward pressure on the cost of land. Thus, a higher tax on land values is "borne entirely by landowners" and therefore would not raise rents.[112] On the contrary, higher land taxes would lead to lower land prices, which would cause rents to fall and thus would further aid in making rental housing more affordable.[113]

Underlying the previous analysis are two assumptions about landlord behavior: that land value taxation will effect the timing of

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supply of undeveloped land, speculation in the land markets caused land prices to quadruple between 2000 and 2006, rising from $150,000 per acre to roughly $700,000 per acre. *Id.* at 2590.

109. Harry G. Brown, *Land Speculation and Land-Value Taxation*, *in* LAND-VALUE TAXATION: THE EQUITABLE AND EFFICIENT SOURCE OF PUBLIC FINANCE, *supra* note 24, at 46, 56 ("[L]and-value taxation, resting equally on land whether used or unused, must discourage [land speculation]").

110. WALTER A. MORTON, HOUSING TAXATION 100 (1955) (finding that while building taxes on owner-occupied property must be paid by the owner, "[w]here . . . the property is occupied by a tenant, he may pay all or any part of a higher house tax through higher rents"). However, in some states, like Minnesota, certain tenants are able to claim a refund for all or at least a part of this amount. *See* MINN. DEP'T OF REVENUE, PROPERTY TAX AS A PERCENTAGE OF RESIDENTIAL RENT 1 (2005) (describing Minnesota's Property Tax Refund Program).

111. *See* discussion *supra* notes 89–90 and accompanying text.

112. Oates & Schwab, *Simple Analytics*, *supra* note 81, at 57.

113. *See id.*

landlords' decisions to develop and that they will respond by building residential, as opposed to mainly commercial, structures.

i. More Landowners Will Improve Their Land

The first assumption is that land value taxation will affect the timing of development, meaning that landlords will actually respond to the tax by improving their land. While some commentators are skeptical that this would be the case,[114] empirical evidence from Australia and the United States, while very limited, does show that greater construction activity tends to follow when higher land taxes are assessed. For example, in Australia, from 1921 to 1923, while only 7 percent of the municipalities in the state of Victoria levied a tax only on land values, they were responsible for nearly half of all new housing construction in that state,[115] a finding which is made all the more significant by the fact that only 16 percent of the state's population lived in those areas.[116] Likewise, from 1921 to 1940, in South Australia, housing construction was consistently more remarkable in the areas that used land value taxation than in the areas that taxed land and building values at equal rates.[117] In general, across Australia, the states with a higher number of municipalities using land value taxation generally had higher residential building activity levels. In contrast, Tasmania, where land value taxation was not practiced at all, had the lowest.[118] While additional factors, such as population growth, help to explain these trends, the relationship between land value taxation and building activity is significant and consistent enough to suggest that the former was a central influence on the latter.

In comparison with Australia, the adoption of land value taxation in the United States has been less widespread—almost all of the experience with it has been in Pennsylvania and Hawaii—and thus, the data on its effects are even more limited.[119] Nonetheless, the evidence indicates that the tax's enactment in

114. *See id.* at 71.

115. Saunders, *supra* note 79, at 272. Moreover, "[f]rom 1954 to 1958, the 19 percent of municipalities that used [land value taxation] accounted for 62 percent of new home construction" while the five municipalities that switched to land value taxation in 1958 saw a 34 percent greater increase in construction over the next four years than the nearby areas that continued to tax building values. *Id.*

116. E.J. Craigie, *Australia*, *in* LAND VALUE TAXATION AROUND THE WORLD 22 (Harry G. Brown ed., 1955).

117. *Id.*

118. *Id.*

119. Bourassa, *supra* note 62, at 11. Even though other states and cities have experimented with land value taxation at varying points throughout time, little to no data for them exists.

those jurisdictions was generally followed by higher levels of development. The most famous example of the land value tax in the United States is the one adopted in 1913 by the City of Pittsburgh, which was required by Pennsylvania law to assess a lower tax rate on building values than on land values.[120] After expanding its tax on land values in 1979 to about five times the one on building values, the City saw a 70 percent increase in annual building permit values in the decade following the expansion.[121] In contrast, permit values in thirteen other major Rust Belt cities that did not assess a land value tax (including Cincinnati, Detroit, and Buffalo) dropped significantly during the same time period.[122] Likewise, Oil City, Pennsylvania saw a 58 percent increase in new construction activity in the first three years after it adopted a land value tax compared to the three years preceding the adoption.[123] Harrisburg, once considered the most economically distressed city in the United States, also benefited greatly from land value taxation: its total number of vacant buildings decreased from over four thousand in 1982 to five hundred in 1994.[124] Stephen Reed, the mayor of Harrisburg at the time, directly attributed its success to the City's adoption of the land value tax.[125] However, one of the primary reasons for why these cities responded so favorably is because there was high demand for improvements. In a few other Pennsylvania cities, like Clairton, land value taxation failed to bring about new development because the demand was simply absent.[126] Without

120. Specifically, the law required all "second-class cities," of which Pittsburgh was one, to provide "for gradual increases in the land tax rate and gradual reductions in the improvement tax rate over a period of 12 years." *Id.* at 12.

121. Hartzok, *supra* note 71, at 208. Despite this documented success, support for the tax began to wane after a property assessment in Allegheny County in 2001 led to significant increases in land values and tax bills for resident taxpayers. Bourassa, *supra* note 62, at 16. Even though these increases resulted from infrequent and inaccurate assessments and substandard rate-setting procedures, it was the tax that came under fire. *Id.* The nail in the coffin for Pittsburgh's experimentation with land value taxation came when Mayor Tom Murphy, who initially supported the tax and was being challenged in the upcoming mayoral election, revised his position after it became a high-profile political issue. *Id.* Nonetheless, despite the abolition of the land value tax as a source of general revenue in Pittsburgh, the City still uses a land-based tax to finance the Downtown Pittsburgh Business Improvement District. *Id.*

122. Wallace E. Oates & Robert M. Schwab, *The Impact of Urban Land Taxation: The Pittsburgh Experience*, 50 NAT'L TAX J. 1, 9 (1997) [hereinafter Oates & Schwab, *Impact of Urban Land Taxation*].

123. Saunders, *supra* note 79, at 272.

124. Hartzok, *supra* note 71, at 209–10.

125. *Id.* at 210 (quoting Mayor Reed, who stated that "[t]he two-rate system has been and continues to be one of the key local policies that has been factored into this initial economic success").

126. Bourassa, *supra* note 62, at 23.

demand to exert pressure on land values, taxes generally remained low and thus gave landowners no real incentive to build or sell to someone who would.[127]

Outside of Pennsylvania, the other major U.S. experience with land value taxation occurred in 1963 when Hawaii adopted the tax statewide.[128] Following the enactment, the State saw a boom in building activity similar to the ones that occurred in Pittsburgh, Oil City, and Harrisburg.[129] However, because the tax was primarily adopted as part of a larger effort to promote tourism, this boom was mostly in hotel building, not residential construction.[130] Ultimately, local backlash against the new, taller construction and its rapid, urban transformation of Hawaii's Waikiki Beach led the state legislature to rescind the law that created the tax,[131] even though poor zoning and planning decisions were arguably more responsible for the character change than land value taxation per se.[132] Yet, in many ways, this backlash was a testament to land value taxation's *success* at encouraging development, not its failure.

ii. More Residential Structures Will Be Built

The other assumption underlying this analysis is that owners of vacant or underdeveloped land would generally respond to higher land taxes by building more residential structures than commercial structures. Of course, this does not necessarily have to be the case. Unlike zoning ordinances and building codes, real estate taxes cannot require or prohibit specific land uses, but can only provide economic incentives. Indeed, the Pittsburgh construction boom was largely in commercial building activity; there was only a slight increase in residential construction.[133] Likewise, as was previously mentioned, most of the new development in Hawaii came from the hotel building sector.[134]

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127. *Cf.* Oates & Schwab, *Simple Analytics*, *supra* note 81, at 56 (supplying the economic analysis).

128. Bourassa, *supra* note 62, at 14.

129. *Id.* at 17.

130. *Id.*

131. *Id.* at 17–20. In fact, singer/songwriter Joni Mitchell reportedly wrote her famous lyric "they paved paradise and put up a parking lot" while visiting Waikiki in 1972. *Id.* at 17.

132. RICHARD F. DYE & RICHARD W. ENGLAND, LINCOLN INST. OF LAND POL'Y, ASSESSING THE THEORY AND PRACTICE OF LAND VALUE TAXATION 14 (2010).

133. Oates & Schwab, *Impact of Urban Land Taxation*, *supra* note 122, at 8–9. However, at the time, the national housing market was in a building slump, so even a slight increase in residential construction is worth noting. *Id.*

134. Bourassa, *supra* note 62, at 17.

Yet there are three reasons why it is safe to make this assumption. One reason is that most, if not all, of the jurisdictions discussed in this section adopted or used land value taxation with a specific goal in mind—either to promote tourism, revitalize a downtown business district, or spur economic development generally—and, in almost every case, the tax successfully achieved that goal.[135] Thus, if a government adopted land value taxation intending to increase rental housing production, it stands to reason that it could achieve that goal by assessing the tax in a way that favors dense residential building.[136] A second reason is that rental units are income-producing properties and so would naturally be attractive development options for landowners seeking to offset their increased tax burdens. The third reason is that municipal zoning ordinances often prohibit commercial building in residential zones, so owners of vacant or underdeveloped lots zoned for residential use would be compelled to construct residential structures. Some of these structures would undoubtedly be multifamily units.[137] In sum, it seems likely that cities would see an increase in the number of rental units by switching to a land value tax regime, which would reduce the pressures of demand on supply and thus lead to more affordable housing for low- and middle-income renters.

B. Consequences of Adopting Land Value Taxation and How to Mitigate Them

While land value taxation can be used to positively impact the lives of renters nationwide, there are three groups that the tax may negatively impact: homeowners, manufactured home residents, and independent ("family") farmers. These groups stand to be harmed because they either own large tracts of underdeveloped land, as is usually the case with homeowners and independent farmers, or rent the land upon which they live from landlords who would be incentivized under a land value tax regime to convert the land to a different use, as is usually the case with manufactured home

135. *See generally id.* at 11–25 (comparing land value taxes in Pennsylvania and Hawaii).

136. For example, landowners could have their land tax rates reduced so long as they developed and operated a multifamily housing complex on the parcel burdened by the tax. However, should the complex be demolished or converted to a use other than multifamily, the rate would be adjusted back to its original level. In this way, the land value tax would encourage development of land generally, but housing development specifically.

137. Of course, this could not happen on lots zoned for single-family use, which indicates why zoning reform is necessary to create more affordable housing.

residents. The impacts on these groups, to the extent that they will occur at all under a land value tax system, can and should be mitigated or, if possible, avoided altogether.

i. Homeowners

Because land value taxation incentivizes greater intensity of land use, it naturally favors multifamily housing over single-family housing and thus benefits renters rather than homeowners.[138] However, even though homeowners, on average, tend to be wealthier than renters and are thus less likely to face affordability challenges,[139] it remains the case that many homeowners are cost-burdened.[140] Insofar as the purpose of enacting a land value tax is to create more affordable housing generally, it would be counterproductive for housing to become *less* affordable as a result of adopting the tax. Nonetheless, a switch to a land value tax regime would likely not unduly burden homeowners for two reasons. First, land taxes increase with land values, and single-family properties are typically—although not always—located in less urban, lower-value areas.[141] Therefore, single-family properties would likely face lower land taxes than buildings located in more urban, higher-value areas. Second, because higher taxes on land values would be accompanied by lower taxes on building values, most single-family homeowners would likely see their actual property tax payment either decrease, remain the same, or increase by a negligible amount.[142] Thus, land value taxation, while certainly more

138. *See* discussion *supra* notes 101–106 and accompanying text.

139. In 2016, the median net worth of a homeowner was $231,400, whereas the median net worth of a renter or non-homeowner was $5,200. Jesse Bricker, Lisa J. Dettling, Alice Henriques, Joanne W. Hsu, Lindsay Jacobs, Kevin B. Moore, Sarah Pack, John Sabelhaus, Jeffrey Thompson & Richard A. Windle, *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, 103 FED. RES. BULL. 1, 13 (2017).

140. STATE OF THE NATION'S HOUSING 2019, *supra* note 3, at 31.

141. *See* Emily Badger & Quoctrung Bui, *Cities Start to Question an American Ideal: A House With a Yard on Every Lot*, N.Y. TIMES: UPSHOT (June 18, 2019), https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html [perma.cc/2EVH-N6C7] (discussing how, compared to urban communities, in suburban communities "a higher share of land is devoted to housing, and a higher share of that housing is required to be single-family"). This is because land is usually cheaper at the edge of every city, and so that is where people tend to own homes. *See* R. Pendall, *Do Land-Use Controls Cause Sprawl?*, 26 ENV'T & PLAN. B 555, 556 (1999) (discussing land value in suburban areas and observing the general principle that "more sprawl occurs where land values are lower").

142. Ultimately, however, the actual amount of property tax paid by homeowners under a land value tax regime will depend on their land intensity, which is the land

favorable to apartment-building, does not necessarily make homeowning more costly.

However, while it is unlikely that very many homeowners will be negatively affected by a switch to land value taxation, one group of homeowners deserves special consideration: those who are asset-rich but cash-poor.[143] These individuals tend to be those who purchased a home long ago for a low price and saw that home's value greatly appreciate over the following years.[144] Still, their wages failed to appreciate at the same rate, leaving them with considerable housing wealth but little to no liquid assets.[145] Even though these types of homeowners are arguably not presently cost-burdened, they may become cost-burdened under a land value tax system if the increase to their property tax payment is more than they are presently able to pay.[146] One way to avoid this issue is to grandfather these individuals into their previous property tax payments until death or the property is sold.[147] Another way is to introduce land value taxation with a lower split rate that gradually increases over a period of time.[148] Lastly, just like how many jurisdictions allow veterans, senior citizens, and disabled individuals to defer all or part of their property tax payments,[149] a deferral category could be created for those who are unable to pay their property tax because of undue burden.[150] Thus, while land value taxation does have the potential to harm these types of homeowners, this harm is not inevitable and can be mitigated or eliminated.

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value divided by the total value (land value plus building value). What this generally means is that less intensely developed parcels are more likely to see a tax increase, while the opposite is true for more intensely developed lots. For a study of how different classes of homeowners would be impacted under a land value tax regime, *see* DYE & ENGLAND, LINCOLN INST. OF LAND POL'Y, *supra* note 132, at 28–30.

143. PETER HULSEMAN, ADAM ROVANG, DEVIN BALES & HOANG THE NGUYEN, NW. ECON. RES. CTR., LAND VALUE TAX ANALYSIS: SIMULATING THE TAX IN MULTNOMAH COUNTY 28 (2019).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 28–29.

148. *Id.* at 29. For example, instead of assessing a 70/30 or 90/10 land-to-building value ratio, the first year of implementation could begin with a 55/45 or 60/40 land-to-building value ratio. This rate would then slowly increase over the following years, which would ease the harshness of the impact on these types of homeowners.

149. *See* GILLILAND, *supra* note 73, at 2.

150. HULSEMAN ET AL., *supra* note 143, at 29.

ii. Manufactured Home Residents

Manufactured home residents may either be burdened or benefited under a land value tax system depending on whether their home is assessed as real or personal property. While states generally differ in how they classify manufactured homes,[151] most states treat manufactured homes as personal property for assessment purposes unless the resident owns the land on which the home is situated.[152] Because the vast majority of manufactured home residents own the land upon which their home is located,[153] they likely pay both building and land taxes, and thus would be affected by a land value tax system in the same way that owners of site-built homes would be affected.[154] In contrast, roughly one-fourth of manufactured home residents do not own the land on which their home is situated,[155] so a land value tax system would largely affect them in the same way that it would affect renters generally.[156] However, an essential difference between multifamily housing and manufactured housing is that multifamily housing is a relatively intensive land use, while manufactured housing is not. For manufactured home residents who rent rather than own their land, this distinction makes little difference as far as rental rates are concerned, because landlords cannot pass higher land taxes onto their tenants.[157] Still, the distinction does make a difference in a

151. Burkhart, *supra* note 34, at 442–45.

152. *See, e.g.*, FLA. STAT. § 320.015 (2020) ("A mobile home is to be considered real property only when the owner of the mobile home is also the owner of the land on which the mobile home is situated and said mobile home is permanently affixed thereto."); WIS. DEP'T OF REVENUE, PROPERTY TAX GUIDE FOR MANUFACTURED AND MOBILE HOME OWNERS 6 (2020) (stating that a manufactured home can only be considered personal property if it is situated on land owned by someone other than the homeowner). *But see* IDAHO CODE § 63-303 (2016) ("Manufactured homes shall be assessed as other residential housing . . . .").

153. *See* Julia O. Beamish, Rosemary C. Goss, Jorge H. Atiles & Youngjoo Kim, *Not a Trailer Anymore: Perceptions of Manufactured Housing*, 12 HOUS. POL'Y DEBATE 373, 381 (2001) (finding that 93% of double-section and 73% of single-section manufactured home residents owned the land on which their home was located). One reason for why this finding may be surprising is that manufactured home residents have long been thought of as predominantly low-income when they actually encompass a range of income groups. *See* Burkhart, *supra* note 34, at 435 (describing the misperceptions about manufactured home residents).

154. *See* discussion *supra* note 142 and accompanying text (observing single-family homeowners would likely see their actual property tax payment either decrease, remain the same, or increase by a negligible amount).

155. Beamish et al., *supra* note 153, at 381.

156. *See* discussion *supra* notes 110–111 and accompanying text (noting under a land value regime, landlords will be less likely to shift their taxes onto their tenants through charging higher rents).

157. *See supra* text accompanying notes 111–113; Oates & Schwab, *Simple Analytics*, *supra* note 81, at 57.

landlord's decision about whether to let their land continue in its current use or redevelop it for a more intensive use. What this means is that, under a land value tax regime, a landlord is more likely to redevelop their land when a manufactured home resident is renting it than when it is already being used to provide site-built multifamily rental housing. However, governments can avoid this undesirable outcome by completely exempting land that is being rented for manufactured home use from the increased land tax. Exempting land should not be problematic because manufactured homes located on leased land are typically assessed as personal property and thus are not charged a building tax. Therefore, governments would not lose revenue by exempting these types of homes from the higher land tax; they would simply not gain more revenue.

iii. Independent Farmers

Because land value taxation disfavors low-density development,[158] independent farmers stand to be hit the hardest by a land value tax system, as farms typically encompass many acres of unimproved land. Yet "[f]arms provide value without full development"[159] and so even though it is the intention of land value taxation to encourage landowners to free up unused or underused land for development, it would generally be unwise to create a system that makes farm operation impossible, inefficient, or at the very least, highly difficult.[160] Therefore, in order to avoid the hardship that farmers could theoretically face under a land value tax system, farms could be excluded from the system entirely and instead taxed at whatever rate was assessed under the previous system.[161] Alternatively, farms could be "given a current use

158. *See* discussion *supra* notes 101–106 and accompanying text.

159. HULSEMAN ET AL., *supra* note 143, at 28.

160. *But see* Alanna Hartzok, *Pennsylvania Farmers and the Split-Rate Tax*, *in* LAND-VALUE TAXATION: THE EQUITABLE AND EFFICIENT SOURCE OF PUBLIC FINANCE, *supra* note 24, at 264 (arguing that "farm owners with larger amounts of land value pay disproportionately less in taxes [under a single-rate property tax regime] than those with less valuable holdings" and that "[o]vertaxing buildings and undertaxing land favor large farming operations that are not necessarily the most efficient.").

161. HULSEMAN ET AL., *supra* note 143, at 28. It is worth noting here that the net worth of farm households tends to be much higher on average than that of non-farm households. *See* ASHOK K. MISHRA, HISHAM S. EL-OSTA, MITCHELL J. MOREHART, JAMES D. JOHNSON & JEFFREY W. HOPKINS, U.S. DEP'T OF AGRIC., INCOME, WEALTH, AND THE ECONOMIC WELL-BEING OF FARM HOUSEHOLDS 14 (2002) (finding that the total net worth of an average farm household in 1999 was $563,562). Thus, whether most farmers would actually become cost-burdened under a land value tax regime is debatable.

exemption that allows them to continue to operate without undue tax burden."[162] Ultimately, however, because farms tend to be located in rural areas where land is not highly valued, there is reason to believe that many farms, and specifically those with proportionately higher building-to-land ratios, would not be drastically affected by a land value tax—or even affected at all.[163]

Conclusion

As America's affordable housing crisis has worsened, local governments have begun to look inwards and reform some of the very laws and policies responsible for leading us here.[164] Yet the single-rate property tax regime, which has contributed significantly to that crisis by restricting rental housing supplies, has so far gone undetected and thus has managed to avoid the same fate as single-family zoning.[165] Both theory and empirical evidence suggest that land value taxation is an effective tool for freeing up land for development and creating more units for the renters who seek them. Thus, switching to a land value taxation is the next step that local governments should take to combat the nation's growing affordable rental housing crisis.

162. HULSEMAN ET AL., *supra* note 143, at 28.
163. Hartzok, *supra* note 160, at 265.
164. *See* discussion *supra* notes 16–22 and accompanying text.
165. *See, e.g.*, Trickey, *supra* note 18.

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