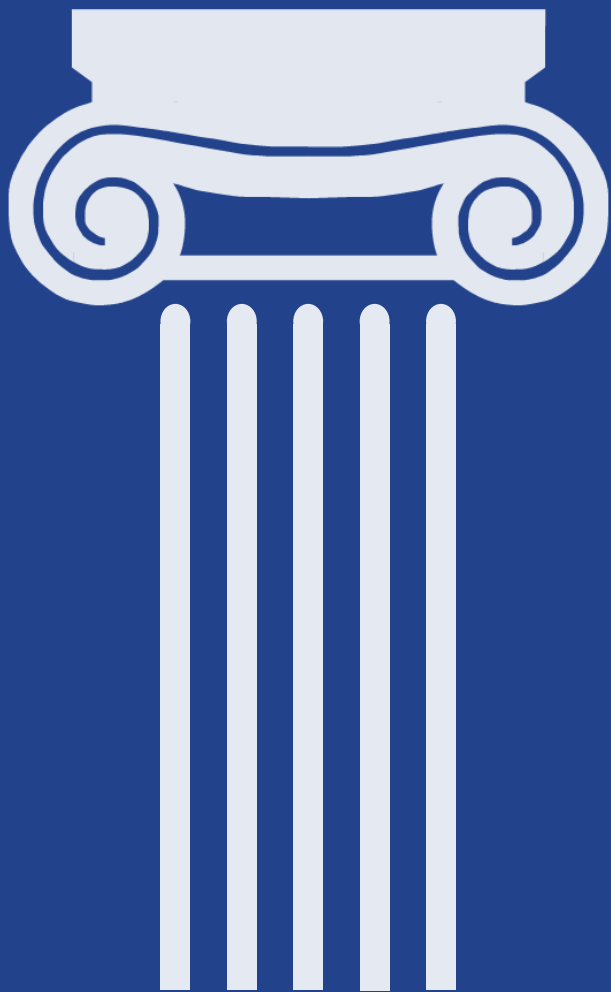


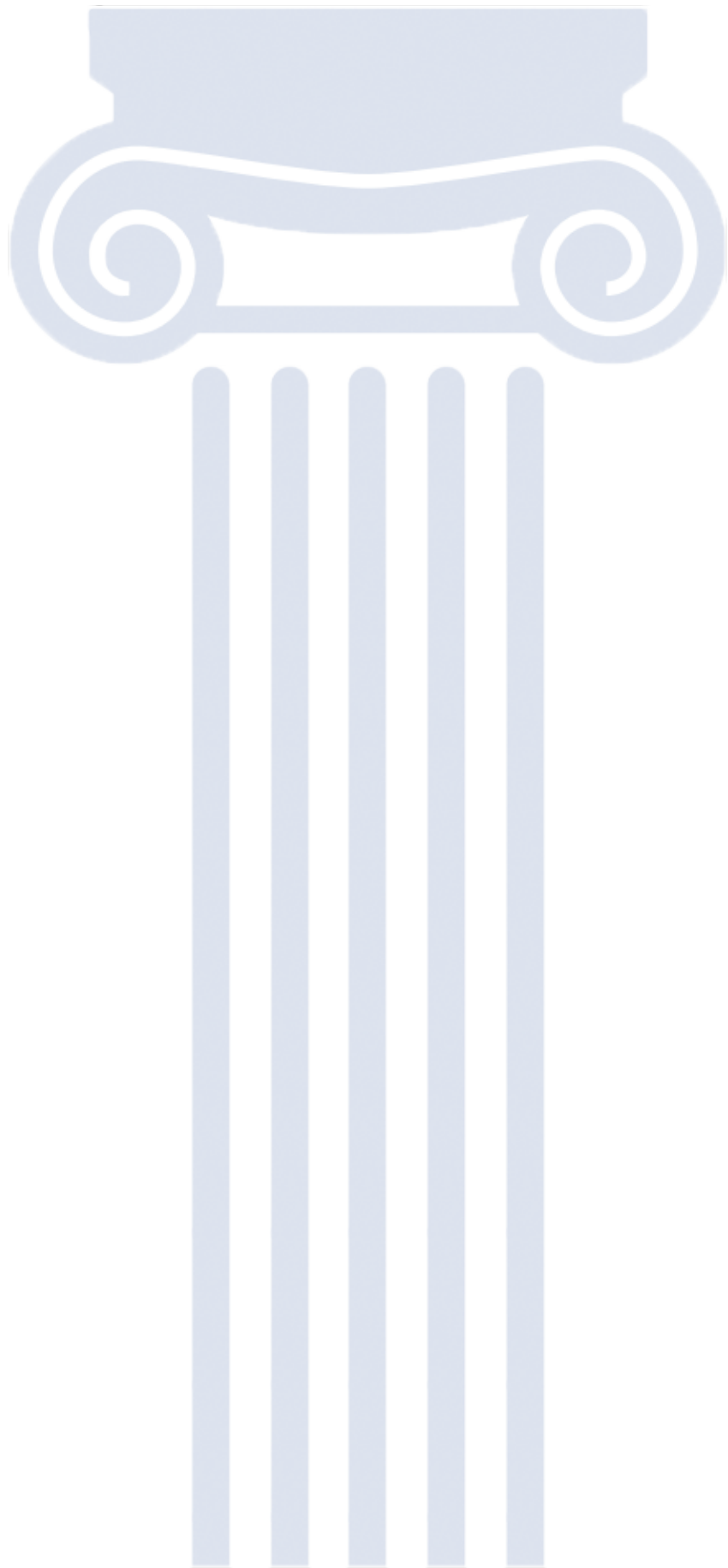
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# Letter from the Editor-in-Chief

Dear Readers,

Welcome to Vol. 6. No. 2 of the *Claremont Journal of Law and Public Policy* (CJLPP)! We are pleased to present our first print edition of 2019. Since our founding, we have operated on the principle that our writers delve into whatever legal or policy issues compel them. Our talented writers have never been assigned topics. As the mainstream news media continue to bombard and incite the American public with stories of governmental dysfunction and political injustice, our staff focuses on the issues they care about most. They hone in on the nuances of law and policy often pushed aside during the raucous political environment which has come to define the current Presidential administration. Vol. 6 No. 2 features topics ranging from college tuition equality and the role of workforce development in the United States, to the history of U.S.-China trade policy. To view our daily online content, visit [www.5clpp.com](http://www.5clpp.com).

As always, the print and online editions would not be possible without the dedicated and hardworking members of our team, who continued to write and edit throughout winter break. I am deeply appreciative of this talented group, including managing editor, Isaac Cui; print edition editors Arthur Chang, Audrey Jang, Lea Kayali, Frankie Konner, and Desiree Santos; digital content editors Bryce Wachtell and Diasy Ni; interview editor Matilda Msall; campus policy analysis editor Dina Rosin; webmaster Wentao Guo; and design editor Grace Richey. With graduation imminently approaching for some of us, we have already had to part with a few of our most dedicated and long-tenured members. Allie Carter, John Nikolaou, and Emily Zheng – thank you for all your work, we will do our best to continue it!

We are also excited to announce last semester's launch of a new division of the Journal on campus policy analysis. These articles will focus specifically on policies by and for the Claremont Colleges. With this new, hyper-localized content to our publication, we aim to engage even more of the Claremont community and bring greater awareness of how policies impact each of us on a daily basis. So far, we have published pieces on Title IX regulations at Pomona College, need-aware admissions for international students at the five colleges, and more.

The business side of CJLPP has been busily planning events since before the semester began. We recently hosted a lunchtime talk by Professor Heidi Haddad, as part of our "Office Hours Speaker Series," on her recently published book, *The Hidden Hands of Justice: NGOs, Human Rights, and International Courts*. We look forward to more professor and guest-speaker events throughout the semester, as well as a student-run debate in April on the campaign to decriminalize psychedelic mushrooms in Colorado. A huge thank you to our business director, Ande Troutman, and project manager, Carol Chen, whose commitment to the Journal make all of these events possible!

I would also like to express our gratitude to the Salvatori Center, the Athenaeum, and the 5C Politics, Legal Studies, and Public Policy departments, for their continued support, in addition to all of our readers, partners, and alumni. If you enjoy reading the Journal and are interested in submitting work for publication, we encourage you to visit the "Submissions" page on our website for details. And if you'd like to join our team, we invite you to visit our "Hiring" page for potential openings. For any further inquiries, please email us at [info.5clpp@gmail.com](mailto:info.5clpp@gmail.com).

Warmly,

Greer Levin  
Editor-in-Chief

# About

*The Claremont Journal of Law and Public Policy* is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and beyond. The *CJLPP* is also proud to spearhead the Intercollegiate Law Journal project. Together, we intend to build a community of students passionately engaged in learning and debate about the critical issues of our time!

# Submissions

We are looking for papers ranging from 4 to 8 single-spaced pages in length. Our journal is especially receptive to research papers, senior theses, and independent studies or final papers written for classes. Papers need not be on American law or public policy. Students in any field of study are encouraged to submit their work, so long as their piece relates to the law or public policy.

Please submit your work (Word documents only) and direct questions or concerns by email to [info.5clpp@gmail.com](mailto:info.5clpp@gmail.com). We use *Bluebook* citations. Include your email address on the cover page.

Selected pieces will be published in the print edition of the *Claremont Journal of Law and Public Policy*. Other pieces may be selected for online publication only. Due to the volume of submissions that we receive, we will only get in touch with writers whose work has been selected for publication.

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# Lessons from *Colorado River Ecosystem v. State of Colorado* for the Rights of Nature Movement in the United States

Audrey Younsook Jang (PO '19)  
Staff Writer

## I. Introduction

What if nature could sue in human courts? In 1972, legal scholar Christopher Stone wrote a seminal book proposing the extension of legal rights to non-human natural beings, for the sake of expanding legal standing.<sup>1</sup> The idea spread rapidly across interdisciplinary environmentalist circles, aided by a favorable reference in Justice Douglas's dissent to *Sierra Club v. Morton*.<sup>2</sup> Over the course of four decades, various countries and municipalities<sup>3</sup> have passed legislation affirming the rights of nature and demarcated non-human entities as plaintiffs in legal suits. In the United States, around forty communities<sup>4</sup> have passed Rights of Nature laws. Yet claims based on these local rights-of-nature provisions have often included conventional (human) plaintiffs "whose standing is less vulnerable to challenge," and the nonhuman plaintiff's standing in its own right "is not dwelt upon by the court."<sup>5</sup> The first lawsuit that sought legal personhood and rights for nature on the federal level, *Colorado River Ecosystem v. State of Colorado* was dismissed by a district court in December 2017—a mere three months after it was filed.<sup>6</sup>

When attorney Jason Flores-Williams filed the case, the Attorney General of Colorado issued a letter warning sanctions

under the Federal Rules of Civil Procedure and accusing him of failing to conduct "reasonable inquiry into the law and facts before signing [a] written motion."<sup>7</sup> Flores-Williams responded in an open letter, "[The case] will not be withdrawn. Legally, it should not be. Morally, it cannot be."<sup>8</sup> But five days thereafter, Flores-Williams quietly motioned to withdraw the case with prejudice.<sup>9</sup> While the lawsuit failed anticlimactically, this creative attempt to establish the legal personhood of nature in one sweeping court victory provides an opportunity for a broad appraisal of the Rights of Nature movement in the United States. Through the four counts for declaratory and prospective injunctive relief requested in the short-lived *Colorado River Ecosystem v. State of Colorado* lawsuit, I delve into the philosophical and moral arguments which support pursuing personhood for nature. By analyzing how Flores-Williams chose to construct this case, I appraise the practical logistics of introducing Earth Jurisprudence into American legal code.

## II. The Question of Standing

*The Colorado River Ecosystem* case began when the plaintiff filed a complaint<sup>10</sup> for prospective injunctive and declaratory relief in the U.S. District Court of Colorado.<sup>11</sup> The *first* count for declaratory relief asked the court to declare the Colorado

1 CHRISTOPHER STONE, *SHOULD TREES HAVE STANDING?: LAW, MORALITY, AND THE ENVIRONMENT* (Oxford Univ. Press 3d ed. 2010) (1972)

2 405 U.S. 727, 742 (1972) (Douglas, J., dissenting).

3 Notable international examples include Ecuador endowing the rights of nature in its constitution; India, New Zealand, and Columbia granting personhood to rivers; and Bolivia passing the Law of the Rights of Mother Earth in 2010. See *Advancing Legal Rights of Nature: Timeline*, CMTY. ENVTL. LEGAL DEF. FUND (Nov. 9, 2016), <https://celdf.org/rights/rights-of-nature/rights-nature-timeline/> (last updated Oct. 26, 2018). In January 2017, Ecuador's Esmeraldas Provincial Court ruled in favor of the world's first successful constitutionally-based Rights of Nature lawsuit. Julianne A. Hazlewood & The Communities of La Chiquita and Guadualito, *Court Issues Ruling in World's First "Rights of Nature" Lawsuit*, INTERCONTINENTAL CRY (Feb. 16, 2017), <https://intercontinentalcry.org/court-issues-ruling-worlds-first-rights-nature-lawsuit/> (last visited Jan. 27, 2019).

4 Pittsburgh is the largest U.S. city and Santa Monica is the first West Coast municipality to do so. *Rights of Nature: FAQs*, CMTY. ENVTL. LEGAL DEF. FUND (Nov. 9, 2016), <https://celdf.org/rights/rights-of-nature/rights-nature-faqs/> (last updated Sept. 24, 2018).

5 STONE, *supra* note 1, at 163.

6 Order at 1, *Colorado River Ecosystem v. State of Colorado*, No. 1:17-cv-02316-NYW (D. Colo. 2017), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171204\\_docket-117-cv-02316\\_order.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171204_docket-117-cv-02316_order.pdf).

7 Letter from Scott Steinbrecher, Senior Assistant Att'y Gen. of Colo., to Jason Flores-Williams, at 1 (Nov. 16, 2017), <https://www.documentcloud.org/documents/4320639-AG-s-Letter-to-Flores-Williams-on-Rule-11.html#document/p1/a390934>.

8 Letter from Jason Flores-Williams to Scott Steinbrecher, at 3 (Nov. 28, 2017), <https://www.documentcloud.org/documents/4320637-Response-to-AG-From-Flores-Williams.html#document/p1/a390932>.

9 See Unopposed Mot. to Dismiss Am. Compl. with Prejudice, *Colorado River Ecosystem v. State of Colorado*, No. 1:17-cv-02316-NYW (D. Colo. 2017), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171203\\_docket-117-cv-02316\\_motion-to-dismiss.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171203_docket-117-cv-02316_motion-to-dismiss.pdf).

10 Am. Compl. for Dec. and Inj. Relief, *Colorado River Ecosystem v. State of Colorado*, No. 1:17-cv-02316-NYW (D. Colo. 2017), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171106\\_docket-117-cv-02316\\_complaint.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171106_docket-117-cv-02316_complaint.pdf) [hereinafter Compl.].

11 Declaratory judgments define the legal rights of the parties in dispute, or establish the legal interpretation of a law, resolving a legal uncertainty without determining any damages caused. See Gary J. Wachtel, *Injunctive Relief & Declaratory Judgment Actions*, <https://www.garywachtel.com/practice-areas/injunctive-relief-declaratory/> (last visited May 3, 2018).

River ecosystem a “person capable of possessing rights,”<sup>12</sup> and the *second* count proposed that these rights be defined as the “right to exist,” “to flourish,” “to regenerate,” “to be restored,” and “to naturally evolve.”<sup>13</sup> Flores-Williams reasoned that the ecosystem’s present lack of legal recognition—and its consequent inability to bring a suit in its own name—violates the ecosystem’s constitutional rights to procedural due process and petition under the Fifth, Fourteenth, and First Amendments.

This argument is clearly circuitous. Nevertheless, the forced logic rests on a fundamental judgment that American “environmental law has failed to protect the natural environment because it accepts the status of nature and ecosystems as property”<sup>14</sup> rather than as the injured parties in and of themselves. To initiate judicial proceedings in American courts, a party must fulfill certain requirements for legal standing; to sue against environmental degradation, human plaintiffs must demonstrate an injury in fact to themselves rather than the degraded or polluted natural feature. The courts of the conservationist 1970s allowed for the imaginative expansion of standing, accepting environmental suits based on not just economic injury but harms to (human) plaintiffs’ recreational, conservational, and aesthetic interests. However, in a 1992 case called *Lujan v. Defenders of Wildlife*,<sup>15</sup> the Supreme Court ruled that the threat of a species’ extinction alone did not establish an individual and non-speculative private injury, and began to roll back the liberalization of standing of decades prior. The Court defined specific standing requirements, establishing that under Article III of the Constitution,<sup>16</sup> plaintiffs must (1) demonstrate that the defendant failed to fulfill a duty *under some law*, (2) show a concrete and imminent “injury in fact,” and prove (3) causation and (4) redressability.<sup>17</sup>

The Attorney General of the State of Colorado promptly moved to dismiss the case on the grounds that the plaintiff failed to fulfill standing requirements. The Motion to Dismiss characterized Flores-Williams’ Fourteenth Amendment claim that the ecosystem experienced “state intrusions into realms of personal privacy and bodily security” as an “extreme exertion . . . [that] is entirely inappropriate.”<sup>18</sup> Colorado’s Attorney General Cynthia Coffman evoked the political questions doctrine, rejecting the plaintiff’s decision to ask “the Court, rather than Congress or the Executive Branch, to declare that the ecosystem is a ‘person’”—she goes so far to warn that “such a declaration has the potential to alter the fabric of American domestic and foreign

policy.”<sup>19</sup> Citing the Ninth Circuit’s decision in *Cetacean Community v. Bush*<sup>20</sup> that “[p]erson’ does not . . . include animals and thus does not grant standing to animals to sue in their own name,” Colorado rejected Flores-Williams’ attempt to spin this fact into a justiciable issue.<sup>21</sup> The Motion also argued that the plaintiff also failed to meet the aforementioned requirements for standing under Article III: *Colorado River Ecosystem* alleged hypothetical future injuries but “fail[ed] to allege *when* those potential injuries may occur”<sup>22</sup> or that “those speculative future injuries could be fairly traced to any State action”;<sup>23</sup> nor did the plaintiff propose any reason—even a speculative one—that declaring the ecosystem a person would redress the alleged injuries.<sup>24</sup> The Attorney General maintained that Colorado operated exactly as it should have under the existing body of law regulating the use of the Colorado River, and that it did not display an intent to harm its ecosystem.<sup>25</sup>

The Environmental Law Center’s 2014 report “Standing in Environmental Matters” notes that “many environmental claims are non-justiciable due to lack of recognition in the western human rights regime.”<sup>26</sup> As in *Sierra Club*, many environmental cases brought by human plaintiffs fail to pass the test of standing. Humans who care about the degradation of the environment must prove a concrete, particularized, and redressable injury to themselves rather than the degraded or polluted natural feature—resulting in creative, ironic, or downright contorted interpretations of the conditions of standing like the claim to recreational injury of *Lujan*.<sup>27</sup> In *Sierra Club*, this procedural handicap prompted Justice Douglas to suggest the courts “simplify this critical question of standing by litigating environmental issues in the name of the inanimate object about to be despoiled, defaced, or invaded.”<sup>28</sup>

### III. Public Common Law as an Alternative to Right of Nature

Because the rules of standing doctrine were developed from common law precedents within an adversarial litigation system, they have historically been focused on “a *private* individual’s enforceable legal rights” and direct interests.<sup>29</sup> Cases like *Cetacean Community* and the *Colorado River Ecosystem* are an attempt to expand this private and individual legal right of standing directly to non-human natural entities—as opposed to appealing to the collective interest claims of a public trust or public nuisance suit. Public trust and public nuisance are common law avenues for balancing private and public interests.<sup>30</sup> With respect to environmental law, public trust protects col-

12 Compl., *supra* note 10, at 24 ¶ 66.

13 *Id.* at 25 ¶74.

14 *Id.* at 2.

15 504 U.S. 555 (1992).

16 See U.S. CONST. art. III, § 2 (stating that the “judicial power shall extend” to various “Cases” and “Controversies”).

*Lujan*, 504 U.S. at 560-61.

17 *Id.*

18 Def’s Mot. to Dismiss Am. Compl. at 17-18, *Colorado River Ecosystem v. State of Colorado*, No. 1:17-cv-02316-NYW (D. Colo. 2017), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171201\\_docket-117-cv-02316\\_motion-to-dismiss.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171201_docket-117-cv-02316_motion-to-dismiss.pdf) [hereinafter Mot. to Dismiss]. Note that the Fifth Amendment establishes the right to due process against the *federal* government, so it is “inapposite in this case.” *Id.* at 17.

19 *Id.* at 19.

20 386 F.3d 1169 (9th Cir. 2004).

21 Mot. to Dismiss, *supra* note 18, at 13-14.

22 *Id.* at 10.

23 *Id.*

24 *Id.* at 13.

25 *Id.* at 18.

26 ENVTL. LAW CTR. (ALBERTA) SOC’Y, *STANDING IN ENVIRONMENTAL MATTERS* 11 (Dec. 2014), <http://elc.ab.ca/media/98894/Report-on-standing-Final.pdf>.

27 *Lujan v. Defenders of Wildlife*, 405 U.S. 727 (1992).

28 *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).

29 ENVTL. LAW CTR. (ALBERTA) SOC’Y, *supra* note 26, at 7.

30 Albert C. Lin, *Public Trust and Public Nuisance: Common Law Peas in a*



Colorado River • Courtesy of Creative Commons

lective interests and resources against appropriation by private parties, while public nuisance protects against unreasonable interference with a right common to the general public, which encompasses a wide variety of conduct from public health to “public morals.”<sup>31</sup> The concept of public trust in particular confers a positive public right—an affirmative duty of the government to protect collective resources for the general public. Parallel to the liberalization of private law standing by friendly courts in the 1960s and 1970s, public law standing under these two common law principles have expanded to “fill in statutory interstices and, if necessary, even fashion federal [environmental] law.”<sup>32</sup> But as Albert Lin, professor of law at U.C. Davis, points out, “the interests protected by the doctrines are wholly anthropocentric, not eco-centric . . . [so the doctrines] are unlikely to catalyze a reconceptualization of humanity’s relationship with nature.”<sup>33</sup> Public trust and nuisance claims still face the challenges of proving causation, preemption, displacement, and justiciability. Moreover, given the uncodified nature of common law, public trust and public nuisance claims are privy to political moods. In “Standing and the Privatization of Public Law,” acclaimed legal scholar Cass Sunstein observed the “revival of private law model of standing” in evaluating public trust or nuisance claims.<sup>34</sup> Sunstein observed that the Supreme Court’s decisions to deny standing on a series of public common law cases reflects a return to using a private right as a predicate for judicial intervention—and “as a result, courts may not redress the systemic or probabilistic harms that Congress intended regulatory schemes to prevent.”<sup>35</sup>

#### IV. Suing the State

American courts usually refrain from hearing declaratory judgments cases except for cases involving a claim that a governmental agency has failed to comply with its own policies

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*Pod?*, 45 U.C. DAVIS L. REV. 1075, 1078 (2012).

31 *Id.* at 1082.

32 R. Trent Taylor, *The Obsolescence of Environmental Common Law*, 40 ECOLOGY L. CURRENTS 1, 2 (2013).

33 Lin, *supra* note 30, at 1081.

34 Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988).

35 *Id.* at 1433.

and procedures to the detriment of a plaintiff.<sup>36</sup> This tradition likely influenced Flores-Williams to bring his declaratory claim against the State of Colorado represented by the state governor, rather than Sunnyside Gold Corporation or another private entity that may have directly harmed the Colorado River Ecosystem. The *third* count of the complaint observed that “corporations operating in the State of Colorado have been afforded the rights of persons, including the right to appear in court and the rights secured by the First and Fourteenth Amendment, while the CO River Ecosystem has been denied such rights.”<sup>37</sup> Flores-Williams asserted that the State of Colorado’s “refusal” to recognize the ecosystem’s personhood has thus violated the ecosystem’s right to equal protection under the Fourteenth Amendment.<sup>38</sup> The *fourth* count of the complaint argued that this alleged oversight has led the State of Colorado “to approve permits and issue other regulatory approval” for certain activities that may violate the rights of the Colorado River ecosystem.<sup>39</sup> The complaint argued that the State of Colorado should be held responsible for the regulatory oversight that contributed to the 2015 breach of the Sunnyside Gold King Mine, for its participation in the 20th Century “Law of the River” treaties which continue to over-allocate the river’s water, and for state-sponsored construction and operation of dams that have caused population collapses along the river.<sup>40</sup> In essence, the plaintiff asked the court to declare that “certain activities permitted by, or carried out by, [the State of Colorado] may violate the rights of the natural communities creating the Colorado River . . . .”<sup>41</sup>

A positive right creates an affirmative obligation to fulfill that right, and thus requires prior agreement through contract between the parties in question. Certain environmental statutes, such as the Endangered Species Act,<sup>42</sup> do create such a positive right; the ESA creates an “affirmative government duty to take positive measures” to protect species whose existence is under quantifiable duress.<sup>43</sup> Lacking a similar law protecting the Colorado River, Flores-Williams instead constructed his case to argue that the State of Colorado has infringed upon preexisting negative rights of the river ecosystem—for its “policy and practice of failing and refusing to recognize the fundamental rights of the Colorado River Ecosystem . . . .”<sup>44</sup> He contended that since Colorado has already deprived the Colorado River’s ecosystem of its right to “flourish,” or “naturally evolve” by way of mining permits and water allocation treaties, the State has a positive duty to act to mitigate the harm.<sup>45</sup> As the concept of legal standing itself owes its origin to the protection of negative rights against infringement by the government,<sup>46</sup> there is a certain logical coherence to grounding such arguments in neg-

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36 Wachtel, *supra* note 11.

37 Compl., *supra* note 10, at 26 ¶ 84.

38 *Id.* at 27 ¶ 85.

39 *Id.* at 28 ¶ 93.

40 *Id.* at 28-31.

41 *Id.* at 33 ¶ 113(e).

42 16 U.S.C. §1531 *et seq.* (1973).

43 STONE, *supra* note 1.

44 Compl., *supra* note 10, at 25.

45 *See id.* at 27-33.

46 ENVTL. LAW CTR. (ALBERTA) SOC’Y, *supra* note 26.



ative rights delineated within the U.S. Constitution.<sup>47</sup> This argument, however, became a fallacy when Flores-Williams contended that the State of Colorado's *inaction* to confer standing to the ecosystem may have violated these negative rights. A negative right, by definition, cannot be infringed by *inaction*.

More importantly, these arguments were not founded on negative rights that are explicitly extended to nature. The corporate personhood posited as discriminatory by the plaintiff was adjudicated on the basis of *already existing* rights of individuals who make up those corporations; the U.S. Constitution unfortunately does not grant nature the same rights as "[a]ll persons born or naturalized in the United States . . ."<sup>48</sup> In addition to this lack of standing, the Attorney General argued that the lawsuit in *Colorado River Ecosystem* should be barred by Colorado's immunity from non-consensual suits, a negative right reserved for state governments under the Eleventh Amendment.<sup>49</sup> Article XVI of the Colorado Constitution explicitly declares the water of natural streams as the property of the public for the use of the people; the Colorado General Assembly legislated "one of [the] nation's most comprehensive statutory schemes to administer the use of this important public resource."<sup>50</sup> Given this established authority of the State to regulate and issue permits for the use of the Colorado River, the Attorney General declared the *Colorado River Ecosystem* complaint an "attack . . . attempting to wrest the control of state activities from the [S]tate itself,"<sup>51</sup> seeking to impinge upon the State's "sovereign control" over "all the earth, air, and water within its domain."<sup>52</sup>

## V. If Not By the Courts: The Guardianship Model

The Attorney General urged the court to reject the complaint's request to "make sweeping declarations that would fashion new law out of whole cloth."<sup>53</sup> She called the case a "non-judicial issue of public policy,"<sup>54</sup> chastising Flores-Williams for bypassing Congress and the Executive Branch and trying to establish the personhood and rights of the ecosystem through the backdoor of the Judicial Branch. It appears that the separation of powers constitutes a near impasse for the Rights of Nature movement. Contrary to the progressive theory of civil rights,<sup>55</sup> given the intense polarization on environmentalist is-

47 It is generally acknowledged that most of the rights guaranteed in liberal democratic constitutions are of the negative kind.

48 U.S. CONST. amend. XIV, § 1. Note that though *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), was adjudicated on First Amendment grounds, the corporation's rights were still based on individual human rights. And *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014), was litigated based on the term "person" in the Religious Freedom Restoration Act, not the text of the constitution. Thus, the complaint's citation to corporate rights conferred in *Citizens United* or *Hobby Lobby*, see Compl., *supra* note 10, at 18 ¶ 41, are not persuasive and easily distinguished from the extension of constitutional rights to nature.

49 See Mot. to Dismiss, *supra* note 18, at 3.

50 *Id.* at 5.

51 *Id.* at 4.

52 *Id.* at 5.

53 *Id.* at 18.

54 *Id.* at 2.

55 In 1989, historian Roderick Nash suggested that a movement to extend legal rights to nature follows a lineage of civil rights movements, a theory of history in which rights were expanded to a progressively larger constituency.

sue in American politics, it seems rather unlikely that the federal legislature would look favorably upon the still-fringe idea of giving rights to nature. Congress theoretically has leeway to expand the scope of "cases and controversies" fit for judicial review to encompass the rights of non-human entities.<sup>56</sup> However, Article III bars Congress from empowering the courts to entertain cases in which the purported plaintiff's injury is so remote and conjectural that there is no constitutional controversy. Would the Supreme Court accept a law that expressly provides for non-human plaintiffs, or would it interpret it as a violation of police powers? The *Lujan* decision illustrates the unlikelihood of a straightforward extension of legal rights to nature by way of a constitutional amendment.

In light of this constitutional constraint on Congress expanding judicial review, Christopher Stone proposed that the legislature apply the existing guardianship/conservatorship model in order to extend legal standing to non-human entities. States already recognize nonprofit organizations' participation in laws relating to nature conservation areas, biosphere reserves, and national parks. Similarly, Stone argued for establishing long-term guardians with the power to bring suit on behalf of specified natural objects. Continuous supervision over time would provide for a "deeper understanding of a broad range of problems."<sup>57</sup> Moreover, statutorily-provided, non-governmental guardians and trustees would ensure that value judgments on the "interests" of nature and proper definition of "injury in fact" would occur via legislative consensus-making instead of by judicial policymaking.

The complaint in *Colorado River Ecosystem* was constructed in the absence of a statute that establishes the procedure for claiming legal guardianship status on behalf of non-human natural objects. Nevertheless, Flores-Williams directly applied Stone's proposal, requesting that environmental group Deep Green Resistance, Living Rivers Executive Director, and Colorado Riverkeeper John Weisheit be granted representative standing as "next friends and guardians" for the Colorado River ecosystem.<sup>58</sup> Flores-Williams anticipated the concern that court dockets would be flooded with frivolous claims (such as, arguably, his own) with no statute determining the specific rules of conferring guardianship. He attempted to preemptively refute this allegation by showing demonstrated "genuine concern" for the ecosystem in the proposed human guardians—listing the addresses of the candidates as located in the Colorado River Basin, the "diversity of tactics" Deep Green Resistance engages in to protect ecosystems, as well as the previous work of the Living Rivers Executive Director and the Riverkeeper.<sup>59</sup>

## VI. The Moral Question

Flores-Williams fully acknowledged within the *Colorado River Ecosystem* complaint itself that his argument was not merely a legal one. Referring to the recent U.S. Supreme Court decision

See *Advancing Legal Rights of Nature: Timeline*, *supra* note 3.

56 See U.S. CONST. art. III, § 2.

57 STONE, *supra* note 1, at 11.

58 Compl., *supra* note 10, at 9-15.

59 *Id.*

to deny New Mexico's motion to file suit against Colorado for the breach of the Gold King Mine, Flores-Williams claimed that "the underlying policy problem here is the American legal system's insistence that the EPA and state environmental regulatory agencies provide adequate protections, and that [they] provide the only proper mechanisms for gaining recourse for injuries to ecosystems."<sup>60</sup> The tone is sarcastic and perhaps inappropriate for a legal document,<sup>61</sup> but it also expresses a deep frustration with the prevalent model of American jurisprudence in environmental affairs. Flores-Williams' entire complaint reads like a manifesto, using poetic and sweeping language to issue a fundamentally philosophical and ethical critique that American "environmental law has failed to protect the natural environment because it accepts the status of nature and ecosystems as property" rather than the injured parties in and of themselves.<sup>62</sup> He defined the Colorado River ecosystem as a "complex web" of "nearly infinite" relationships, describing the "water dancing as vapor on wind currents," the "intercourse of the Sun's energy and the Earth's atmospheric gasses," the "forest and fauna" and various species of animals, birds, fish, and humans that constitute them.<sup>63</sup> Underlying the complaint's admittedly weak legal arguments is the philosophical and moral belief that because the Colorado River is "essential to life,"<sup>64</sup> it should "possess the ability to protect itself from threats to its survival."<sup>65</sup> Here, Flores-Williams echoes Justice William Douglas's sentiment that as nature is the "living symbol of all the life it sustains or nourishes,"<sup>66</sup> its "voice . . . therefore, should not be stilled."<sup>67</sup> The attorney declared his high aspirations in the original complaint itself, claiming that the recognition of rights for the ecosystem is an "essential [moral] revolution, addressing the shortcomings of regulatory environmental law and bringing our legal framework in line with biological and scientific reality."<sup>68</sup>

Despite echoing many of the recommendations in *Should Trees Have Standing?*, Flores-Williams seems to have missed a critical point of the book. Christopher Stone himself emphatically re-

futed the prevailing assumption that legal rights necessitate an assumption of inherent and inalienable, natural moral rights in non-human natural beings.<sup>69</sup> Using the language of economists, Stone argued that establishing non-human natural objects' legal right to appear before the court would allow American law to consider the harm imposed on those objects as a cost in and of itself, accounting for the full costs of environmental damages.<sup>70</sup> Regardless of where one falls on the question of nature's sentience or inherent right to exist and flourish, one can appreciate the legal-operational benefits of providing an avenue for plaintiffs to bring environmental justice suits without constructing creative arguments that directly connect harm to a natural entity and a specific human disutility. Stone even suggested that legal personhood would also allow for suits to be brought *against* non-human natural entities, in order to demonstrate that legal rights of nature does not automatically place preservation above all other interests that may come before the court.<sup>71</sup>

## VII. Conclusion

Since *Should Trees Have Standing?* was published in 1972, the idea of giving rights to nature has emerged from radical circles to global conversations. But as Stone acutely observed, "as we move downward through the 'chain of being,' passing through creatures possessing decreasing degrees of sentience, and onto inanimates (such as mountains and lakes), one is inclined to become increasingly leery of our ability to fit the object into the legal system."<sup>72</sup> In the past fifty-some years, Rights of Nature claims made under the Endangered Species Act have seen the most success; the repeated rejection of standing for non-living objects such as the Colorado River Ecosystem supports this diagnosis. In his 2002 updated edition of *Should Trees Have Standing?*, Stone mused, "It is unclear that a suit in the name of a nonhuman presents any strategic advantages over a suit brought in the name of an individual under the fairly liberal rules for demonstrating injury in fact."<sup>73</sup>

Neither the liberal interpretation of human injury nor the development of public trust and nuisance doctrine fully resolves the issue of fulfilling increasingly strict requirements for standing in environmental suits. Allowing plaintiffs to bring suits on behalf of nature, whether under rights-based claims or guardianship duties or privileges, would more directly address the real grievances in environmental cases. Back in 1972 Stone fully acknowledged that an inanimate object like the Colorado River does not inherently have interests that are legible to the

60 *Id.* at 29 ¶ 99. In *New Mexico v. Colorado*, No. 22O147 (U.S. June 26, 2017), the State of New Mexico filed a motion for leave to file a bill of complaint against the State of Colorado for harms caused by the breach of the Gold King Mine. The Court did not write an opinion for the case, but it is widely understood that it deferred to the Environmental Protection Agency's decision to place the polluted site on the Superfund National Priorities list. In the *Colorado River Ecosystem's* complaint, Flores-Williams took on a tone of ridicule in commenting that "apparently, the Court believes that EPA's decision to list the District on the NPL completely resolves the harms that EPA, the State of Colorado, and others wrought on the Animas River, the CO River, and downstream." Compl., *supra* note 10, at 29 ¶ 98.

61 The Attorney General of Colorado opened her Motion to Dismiss the case with the critique that the complaint "is not based in law[ but r]ather, its arguments are based in rhetoric . . ." Mot. to Dismiss, *supra* note 18, at 2.

62 Compl., *supra* note 10, at 2.

63 *Id.* at 6-9.

64 *Id.* at 23 ¶ 58.

65 *Id.* at 23 ¶ 60.

66 *Sierra Club v. Morton*, 405 U.S. 727, 743 (1972) (Douglas, J., dissenting).

67 *Id.* at 749.

68 Compl., *supra* note 10, at 7 ¶ 12.

69 STONE, *supra* note 1, at 166.

70 *Id.* at 13.

71 Since suits brought to redress harms done to nature must imaginatively reinterpret the harms in anthropocentric terms, even when they succeed the polluted or degraded natural object itself is often not the true beneficiary of the damages won. If nature had legal personhood, a trust fund in the name of a natural entity, managed by a long-term guardian, could collect the damages won in their name. The funds could then be used for restoring named entity, research for its benefit, or to pay off liabilities for damages that *it* causes in the future. Of course, "intent to harm" would need to be redefined to account for non-human defendants.

72 STONE, *supra* note 1, at 168.

73 *Id.* at 64.

human-made construct of law. But just as copyright law creates intellectual property rights, tort law creates the right to privacy, and the policies of financial institutions create value for inherently valueless objects such as gold, Stone argued that the law can and should reconstitute nature from ownable property to a legal person—an entity endowed with the right to be represented by a human guardian.

The fantastic failure of *Colorado River Ecosystem v. State of Colorado* demonstrates that ethical moralizing is unlikely to move jurists, or the public, to issue a sweeping victory for the Rights to Nature movement. Even the oft-decried legal personhood of corporations, as the Motion to Dismiss points out, was predicated on anthropocentric logic of humans' individual rights.<sup>74</sup> If we determine that changing a river from state S to state S' constitutes a violation of some right that can be sued for damages, that right, too, would rely on a human-made judgment of what state of the river should be preserved and attained. Rights of Nature advocates in the United States should acknowledge and embrace the inherent anthropocentrism of attempting to imbue nature with legal rights, a human-made and individualistic construct, in order to fit environmental protection into existing jurisprudence. They should proceed with the hopeful assumption that the rhetorical power of the legal victory would in turn influence the public opinion of who or what is ownable and who or what can possess rights. The history of civil rights movements in this country suggests that legal will shapes our collective sense of morality at least as much as the converse.

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<sup>74</sup> See Mot. to Dismiss, *supra* note 18, at 20.

# A Black Feminist Critique on the Handling of Self Defense in Cases of Domestic Violence in the United States

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*“The colored woman of to-day occupies...a unique position in this country...She is confronted by both a woman question and a race problem, and is as yet an unknown or unacknowledged factor in both”*  
-- Anna Julia Cooper (1892)

Domestic violence affects people of all different racial and gender backgrounds. However, law enforcement agencies and courts in the United States fail to investigate or address the nuanced differences between how these various racial groups and genders experience domestic violence.<sup>1</sup> Instead, they lump everyone’s experiences together to tackle this pressing issue.<sup>2</sup> This causes experiences--particularly those of Black women--to be lost in the conversation despite the urgency of their situation. A 2007 Bureau of Justice Statistics report found that Black women are twice as likely than white women to be killed as a result of domestic violence.<sup>3</sup> However, Black women are disproportionately convicted by the legal system for retaliating against their abusers.<sup>4</sup>

Black feminist thought critiques the handling of self-defense cases involving victims of domestic violence when Black women are treated as violent criminals instead of as victims of violence. The political discourse around domestic violence has long left out the experiences of Black women,<sup>5</sup> and their experiences are crucial to understanding how to combat this problem. In the first section, I explain what Black feminist theory is and why we should utilize it to address the bias in sentencing for self-defense in cases of domestic violence. In the second section, I analyze the devastating effects of mass incarceration on Black women. In the final section, I point to four self-defense cases involving three Black women and one white woman who were victims of domestic violence and address the racial disparities in the outcomes of their cases with a Black feminist critique.

1 See *infra* Part III for examples of when courts have taken such a reductionist view.

2 Cf. Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender*, 11 VIOLENCE AGAINST WOMEN 38, 41-42 (2005) (addressing the perspective of traditional feminists on domestic violence).

3 SHANNON CATALANO ET AL., U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF VIOLENCE 3 (Sept. 2009).

4 Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN’S L.J. 191, 195 (1991).

5 Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) (addressing the approach of feminists and anti-racists who attempt to shape the discourse around domestic violence by universalizing the experiences of people of color and women via identity politics).

## I. Why We Need and Should Care about Black Feminist Theory

The primary reason a Black feminist framework is necessary to handle instances of self-defense in cases of domestic violence is the fact that women are not a monolithic group. When faced with generalizations about women, Black feminist theory compels us to ask the question: “which women?” The Combahee River Collective Statement, which is a document written in 1977 that influences both contemporary Black feminist theory and identity politics, articulates the core beliefs held by Black feminists and critiques the shortcomings of white feminism. Black feminism rejects the notion that human behavior is determined by physiology and examines the complex ways in which gender and minority status influence the experiences of Black women by putting them at the forefront of conversations around racism, sexism, and class oppression. By not recognizing the “interlocking oppression”<sup>6</sup> that Black women face within and beyond the legal system because of their race and gender, courts are unable to effectively handle cases of self-defense where domestic violence is a factor.

Another reason we should care about Black feminist theory is that the particular danger Black women face in abusive relationships makes discussion about self-defense more pertinent. In an analysis of 2014 homicide data, the Violence Policy Center found that Black women are almost three times more likely to die at the hands of a current or ex-partner than members of other racial backgrounds.<sup>7</sup> Furthermore, the Institute on Domestic Violence in the African American Community at the University of Minnesota found that “[a]mong the African-American women killed by their partner, almost half were killed while in the process of leaving the relationship, highlighting the need to take extra precautions at that time.”<sup>8</sup> These studies illustrate that Black women face more danger in domestic violence situations than any other racial group. Consequently, the courts cannot address the needs of domestic

6 HOW WE GET FREE: BLACK FEMINISM AND THE COMBAHEE RIVER COLLECTIVE 4 (Keeanga-Yamahtta Taylor ed., 2017).

7 VIOLENCE POL’Y CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2014 HOMICIDE DATA 6 (Sept. 2016), <http://www.vpc.org/studies/wmmw2016.pdf>

8 UNIV. OF MINN. INST. ON DOMESTIC VIOLENCE IN THE AFRICAN AMERICAN COMMUNITY. FACT SHEET: INTIMATE PARTNER VIOLENCE (IPV) IN THE AFRICAN AMERICAN COMMUNITY, [http://www.freemariassnow.org/uploads/2/4/9/8/24987034/factsheet.idvaac\\_aapcfv-community\\_insights.pdf](http://www.freemariassnow.org/uploads/2/4/9/8/24987034/factsheet.idvaac_aapcfv-community_insights.pdf) (last visited Jan. 18, 2019).

violence survivors without looking at domestic violence from a Black feminist lens. Also, the courts should not ignore the uniquely dangerous situations Black women find themselves in when trying to leave abusive relationships and simultaneously punish them harshly for the actions they take to protect themselves.

## II. The Effects of Mass Incarceration on Black Women

While mass incarceration disproportionately impacted the Black community in the post-Reagan era,<sup>9</sup> it was particularly devastating for Black women.<sup>10</sup> There are a myriad of factors that can explain the disproportionate arrest rates for Black women. For example, historian Kali Nicole Gross reports that Black women were routinely scapegoated for larceny in the domestic service sphere by their white employers in the late nineteenth century and early twentieth century.<sup>11</sup> The criminal courts often sided with white employers in these court cases because of biases against Black women due to racial stereotypes about their purported criminality. This indicates the degree to which Black women have historically been vulnerable to the harsh and punitive nature of the U.S. criminal justice system, so it should come as no surprise that when the Reagan Administration monetarily incentivized arrests during the War on Drugs, the arrest rate for Black women skyrocketed by 828 percent.<sup>12</sup> During this time, Black women were still experiencing partner violence that largely went unaddressed by law enforcement.<sup>13</sup> Research suggests that there is a strong linkage between battered women and illegal behavior. According to the National Resource Center on Domestic Violence,

[T]he overwhelming majority of women defendants in the criminal justice system have extensive histories of childhood and adult abuse that may result in homelessness, substance abuse and economic marginality that force them into survival by illegal means . . . . Low-income women of color are most at risk for abuse and most at risk for being criminalized, entrapped and forced by abusive policies into the corrections system.<sup>14</sup>

Thus, the effects of mass incarceration have not only been devastating for Black women because of racial biases in the criminal justice system, but also because of intimate partner violence that low-income Black women experience at higher rates. Black feminist theory compels us to look at the effects of mass

9 Michelle Alexander, Opinion, *America's New Jim Crow System*, GUARDIAN (Mar. 31, 2011), <https://www.theguardian.com/commentisfree/2011/mar/31/america-jim-crow-race-war-on-drugs> (last visited Jan. 8, 2019).

10 See generally Connor Maxwell & Danyelle Solomon, *Mass Incarceration, Stress, and Black Infant Mortality*, CTR. FOR AM. PROGRESS (June 5, 2018), <https://www.americanprogress.org/issues/race/reports/2018/06/05/451647/mass-incarceration-stress-black-infant-mortality/> (last visited Jan. 8, 2019); Roberts, Dorothy E., *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

11 Kali Nicole Gross, *African American Women, Mass Incarceration, and the Politics of Protection*, 102 J. AM. HIST. 25 (2015).

12 *Id.*

13 *Id.*

14 MARY GILFUS, NAT'L RESOURCE CTR. ON DOMESTIC VIOLENCE, WOMEN'S EXPERIENCES OF ABUSE AS A RISK FACTOR FOR INCARCERATION 13 (Dec. 2002), <https://vawnet.org/material/womens-experiences-abuse-risk-factor-incarceration>.

incarceration on Black women from an intersectional lens in order to understand the ways Black women are oppressed by their race, gender, and class.

## III. Case Studies

This section examines four self-defense cases centered on women facing domestic violence. I argue that understanding the racial dynamics in these cases by means of a Black feminist perspective is necessary to address the sentencing disparities among women who defend themselves against their abusers.

### *A. State of Missouri v. Celia, A Slave*<sup>15</sup> (1855)

*State of Missouri v. Celia, A Slave* is a historical example of systematic legal discrimination against a Black woman, due to her race and gender, in a self-defense case. Celia's case occurs during a time when slavery was still legal in the United States and Black people did not have the right to testify in court because of their race. The defendant, Celia, was on trial for murder and had endured repeated sexual abuse from her slave master, Robert Newsom, from the ages of fourteen through nineteen. Celia mothered two of his children, both of whom became slaves. Missouri law made it illegal "to take any woman unlawfully against her will and by force, menace or duress, compel her to be defiled."<sup>16</sup> However, Judge William Hall, who presided over the case, did not instruct the jury that Celia fell within the statutory term "any woman."<sup>17</sup> This gave them no leeway to consider Celia's murder of her sexually abusive slave master as a justifiable act of self-defense. Celia was first discriminated against due to her status as a slave. Then she was discriminated against because Black women were perceived as sexually promiscuous and unchaste; for these reasons, the law did not recognize Celia as it recognized white women. Historian Teresa Zackodnik writes that white men believed the presence of Blackness in a woman who appeared to be racially ambiguous would reveal a "tainted" blood that carried the so-called traits of a wanton sexuality.<sup>18</sup> Any evidence of Blackness served as a reminder to white men that Black women were promiscuous and unchaste, and that was the lens through which the all-white male jury viewed Celia during the trial. Furthermore, historians such as Jennifer Morgan write that the rape of Black women was profitable for slavery.<sup>19</sup> Colonial slave laws such as the Virginia 1662 Decree maintained that a child born to an enslaved woman was a slave regardless of whether the father was a free Englishman.<sup>20</sup> White men were thus able to disregard a Black woman's need for protection because the survival of slavery depended upon her ability to produce more Black bodies to be enslaved.<sup>21</sup> The consequence of the Missouri Supreme Court's refusal to recognize a Black woman's

15 *State of Missouri v. Celia, A Slave: 1855*, ENCYCLOPEDIA.COM (2002), <https://www.encyclopedia.com/law/law-magazines/state-missouri-v-celia-slave-1855> (last visited Jan. 18, 2019).

16 *Id.*

17 *Id.*

18 Teresa Zackodnik, *Fixing the Color Line: The Mulatto, Southern Courts, and Racial Identity*, 53 AM. Q. 420, 431 (2001).

19 JENNIFER L. MORGAN, LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY 70-75 (2004).

20 *Id.*

21 *Id.*

womanhood or a Black woman's humanity in *Celia* set a legal precedent that contributed to the experiences of Black women being overlooked, even in cases of self-defense against domestic violence. Analyzing *Celia* from a Black feminist lens shows us that the legal system's discrimination towards Black women stems back to slavery and reveals that Black women were not afforded the same protections as white women because of their status as slaves.

*B. State of Tennessee v. Cyntoia Brown*<sup>22</sup> (2014)

The case of the *State of Tennessee v. Cyntoia Brown* is a prime example of how Black feminist theory could have helped the courts better understand and better treat the experiences of Black women who are victims of domestic violence and sex trafficking, and the self-defense tactics they employ for survival. The U.S. Department of State defines child sex trafficking as the following: "When a child (under 18 years of age) is induced to perform a commercial sex act, proving force, fraud, or coercion against their pimp is not necessary for the offense to be characterized as human trafficking. There are no exceptions to this rule: no cultural or socio-economic rationalizations should prevent the rescue of children from sexual servitude."<sup>23</sup> At the age of sixteen, Cyntoia Brown was recruited for prostitution by a forty-three year old man named Johnny Mitchell Allen and shot him with a handgun from her purse when she thought he was reaching for a gun under his bed.<sup>24</sup> Court documents show that, at the time of the murder, Brown had a history of rape and abuse committed by a pimp by the name of "Cut Throat."<sup>25</sup> She struggled with mental health issues, having been diagnosed with Borderline Personality Disorder.<sup>26</sup> Additionally, at the time of her arrest, a forensic psychiatrist testified at the trial that Brown was suffering from cocaine withdrawal and marijuana intoxication.<sup>27</sup> These extenuating circumstances help to explain why Brown took the actions she did when she thought her life was in danger.<sup>28</sup> They also show how her confession to police occurred at a time when she might have been impaired or not fully able to understand the nature of the police interrogation.<sup>29</sup>

The extenuating circumstances surrounding Brown's case should have been considered more in the court's review and by Brown's attorney. Despite her being sixteen years old at the time of the murder, a child according to the law, Brown was tried as an adult and sentenced to life in prison. The fact that she had sustained past abuse was not taken into consideration in court. The court's lack of recognition of Brown as a minor who was a victim of sex-trafficking and of partner violence lead to her receiving a sentence of life in prison without the possibility of parole until she is sixty-nine years old. Brown's attorneys

chose not to factor in evidence of her mental health history because they believed it would have painted her in a negative light. A theoretical Black feminist framework would have allowed the court to see the unique position Brown was in as a young Black woman, much like Celia, who was sexually trafficked and retaliated after the abuse became too much. The fact that Brown is a Black woman who has been sexually exploited should have triggered a historical review of the sexual exploitation Black women have endured at the hands of men. Then, the courts should have examined the way they dealt with cases involving the sexual exploitation of Black women in the past, allowing for a consideration of the social and legal history of society's treatment of Black women. This kind of consideration from courts would be a first step in rectifying their treatment of Black women. If these measures were already a part of the court's review, the sentencing practices of the court would not have been as punitive.

Historical review is important in cases like *Brown* because it can lead the court to implement rehabilitative measures instead of relying on punitive punishment. The tough on crime agenda was born out of covert racist language that blamed African-Americans for a surge in crime without accounting for racial profiling and discrimination<sup>30</sup> and costs the United States billions of dollars each year. According to the Prison Policy Initiative, the annual cost of mass incarceration is about \$182 billion a year for private individuals and local, state, and federal governments.<sup>31</sup> In addition to punishment being expensive, incarceration appears to have little effect on reducing crime. According to James Gilligan, a clinical professor of psychiatry and adjunct professor of law at New York University, "Two-thirds of prisoners reoffend within three years of leaving prison, often with a more serious and violent offense."<sup>32</sup> This means that punitive punishment is not adequate to address high recidivism rates. The National Institute on Justice offers five things about deterrence, one being that "the police deter crime when they do things that strengthen a criminal's perception of the certainty of being caught."<sup>33</sup> However, this method leaves room for racial profiling which contributes to the racial disparities in state and federal prisons. Since the American prison system is set up to profit from the forced labor of incarcerated individuals rather than rehabilitate them,<sup>34</sup> consideration of the social and legal history of society's treatment toward specific groups can help courts develop a better approach to dealing with prisoners that leads to lower recidivism rates. In light of Cyntoia Brown re-

22 *State of Tennessee v. Cyntoia Brown*, No. M2007-00427-CCA-R3-CD (Tenn. Crim. Ct. App. July 22, 2008).

23 *Definitions and Methodology*, U.S. DEPT OF STATE (2012). <https://www.state.gov/j/tip/rls/tiprpt/2014/226645.htm> (last visited Feb 2, 2019).

24 *State v. Brown*, No. M2007-00427-CCA-R3-CD.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 See generally Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough On Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3 (2013).

31 PETER WAGNER & BERNADETTE RABUY, PRISON POL'Y INITIATIVE, FOLLOWING THE MONEY OF MASS INCARCERATION (2017). <https://www.prisonpolicy.org/reports/money.html>.

32 James Gilligan, *Punishment Fails. Rehabilitation Works*, N.Y. TIMES (Dec. 19, 2012), <https://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/punishment-fails-rehabilitation-works?module=ArrowsNav&contentCollection=undefined&action=keypress%ion=FixedLeft&pgtype=undefined> (last visited Nov. 17, 2018).

33 *Five Things About Deterrence*, NAT'L INST. OF JUSTICE (2016), <https://nij.gov/five-things/pages/deterrence.aspx> (last visited Feb. 2, 2019).

34 KARA GOTSCH & VINAY BASTI, SENTENCING PROJ., CAPITALIZING ON

ceiving clemency from Gov. Haslam after serving fifteen years in prison,<sup>35</sup> it is now clearer than ever for the courts to move in the direction of restorative justice. Brown should have never been condemned to die in prison as a sixteen-year-old and, even though her release from prison is a step forward in the right direction, the state could have taken even further actions by ordering her immediate release from prison, expunging her records, and paying forth reparations. Research shows that people with records have a much harder time finding jobs after getting out of jail, and the circumstances are much worse for Black people with records who are already less likely to be hired for jobs than convicted white felons.<sup>36</sup>

### C. *Alexander v. State of Florida* (2013)<sup>37</sup>

This case provides another striking example of how harshly courts can initially respond to self-defense when it comes from Black women. Alexander was convicted of aggravated assault by the district court for firing a warning shot at her husband, who had a well-documented history of violence, and she was sentenced to twenty years in prison<sup>38</sup> Alexander was denied immunity by the court<sup>39</sup> under Florida's Stand Your Ground Law which states that "[A] person is justified in the use of deadly force and does not have a duty to retreat if: (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or [other conditions]."<sup>40</sup> The court did not believe that she met the burden of proof at her pre-trial hearing given her version of the facts.<sup>41</sup> Studies have found that jurors are likely to have implicit biases against black people due to racialized caricatures equating blackness to savagery and criminality.<sup>42</sup> Black women suffer from these racist stereotypes in ways that are compounded by their gender, and it shows when they try to seek relief for their grievances. Alexander's request for re-evaluation of the facts was also denied by the appellate court, but it reversed her sentence because "the jury instructions on self-defense were er-

roneous."<sup>43</sup> Alexander agreed to a plea bargain that stipulated that "she serve three years in prison and two years confined to her house,"<sup>44</sup> and in 2017 she was free. A lack of an intersectional framework led to this outcome of her case.

### D. *People v. Sheehan* (2013)<sup>45</sup>

*People v. Sheehan* (2013) highlights the racial disparity in circumstances of self-defense in a domestic violence case. Barbara Sheehan, a white woman, shot her husband who was a former New York Police Department Sergeant; she was acquitted of murder charges. Sheehan was physically abused by her husband during their twenty-four years of marriage and retaliated by firing eleven bullets from two guns. Although Sheehan ultimately had to serve prison time for assault weapon charges, she undoubtedly benefited from white supremacy in her sentencing because the law has historically prioritized the protection of white women over Black women.<sup>46</sup> The battered woman defense often brings about mixed results in court because scholars find that "battered women accused of killing their partners in self-defense are convicted at about the same rate as others accused of murder."<sup>47</sup> However, as previously stated, Black women are punished more harshly than white women for retaliating against their abusers. Therefore, even though women face discrimination based on their gender in the legal system, the fact that Sheehan is a white woman and not a Black woman means that she can still be supported by a system that upholds white dominance and can receive lighter sentencing than she would if she were a woman of color.

## IV. Conclusion

The legal system must rectify its treatment of Black women who are victims of domestic violence in cases of self-defense. Black women have historically been excluded from protection against violence and as a result their experiences of domestic violence have been ignored. As I have argued throughout this entire paper, Black feminist theory critiques the handling of self-defense cases involving victims of domestic violence because the law has treated Black women as violent criminals instead of as battered women. White women continue to benefit from white supremacy as victims of domestic violence because the law has historically afforded them more protection by recognizing their womanhood. It is time for Black women to be included in the political discourse around domestic violence because the problem cannot be resolved until the needs of Black women are addressed. The NAACP found that Black women are jailed at twice the rate of white women.<sup>48</sup> The four cases I have discussed are indicative of the trends we see in sentencing and conviction rates. However, Black women are more than statistical trends, and their experiences with domestic violence and mass incarceration deserve immediate attention.

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35 Mallory Gafas & Tina Burnside, *Cyntoia Brown Is Granted Clemency After Killing Man Who Bought Her for Sex* CNN (Jan. 7, 2019), <https://www.cnn.com/2019/01/07/us/tennessee-cyntoia-brown-granted-clemency/index.html> (last visited Feb. 3, 2019).

36 Candace Manriquez Wrenn, *Re-Entering the Workforce After Prison Harder For Non-Whites*, ARIZ. PUB. MEDIA (Sept. 29, 2018), <https://news.azpm.org/p/news-articles/2018/9/28/138061-re-entering-the-workforce-after-prison-harder-for-non-whites/> (last visited Jan. 12, 2019).

37 *Alexander v. State of Florida*, 107 So. 3d 422 (Fla. Dist. Ct. App. 2013).

38 Christine Hauser, *Florida Woman Whose 'Stand Your Ground' Defense Was Rejected Is Released*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/us/marissa-alexander-released-stand-your-ground.html> (last visited Feb. 3, 2019).

39 *Id.*

40 FLA. STAT. § 776.012 (2005). The relevant statutory language has since been amended. See WEST'S F.S.A. § 776.012, effective June 20, 2014 (current through the 2018 Second Regular Session of the 25th Legislature).

41 *Alexander*, 107 So. 3d at 422.

42 Silvia L. Mazzula, *Jury Bias: Can You Argue the Facts When Race Enters the Mix?*, PSYCHOL. BENEFITS SOC'Y (Aug. 22, 2017), <https://psychology-benefits.org/2017/08/22/jury-bias-can-you-argue-the-facts-when-race-enters-the-mix/> (last visited Nov. 18, 2018).

43 *Id.*

44 *Id.*

45 *People v. Sheehan*, 106 A.D.3d 1112 (N.Y. Sup. Ct. App. 2013).

46 Gross, *supra* note 11.

47 *Battered Woman's Defense Brings Mixed Results*, CBS N.Y. (Sept. 24, 2011), <https://newyork.cbslocal.com/2011/09/24/battered-womans-defense-brings-mixed-results/> (last visited Jan. 12, 2019).

48 *Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet/> (last visited Jan. 18, 2019).

# An Analysis of U.S.-China Trade Policy

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China's dramatic rise as the sole challenger and threat to America's global hegemony received its most poignant admission from Vice President Mike Pence in an October 2018 speech that laid out various accusations and alleged offenses against the country. With allegations ranging from interfering with the midterm elections to impeding the freedoms of its own people to threatening the regional stability of the Pacific,<sup>1</sup> the speech marked a fundamental shift in American foreign policy by explicitly conceding China's position as an American adversary.

While the Trump Administration's dramatic change in tone may concern many who have a stake in either of these economies, by finally addressing Beijing's unfair trade practices that previous administrations had failed to confront, Trump's militant approach may be the push that America needs to challenge China's rising threat to its global hegemony.

Trade between the world's two largest economies continues to operate at exceptionally high levels, with Chinese exports to America comprising 19 percent of the country's total exports in 2017,<sup>2</sup> and American trade with China encompassing 15.8 percent of the country's total trade in August of 2018.<sup>3</sup> Considering the important role that bilateral trade plays in the strength of their economies, this new sign of open hostility from the United States in its conduct with China may cause many to question how trade policies between the two will be affected. While the protectionist nature of Trump's presidency has increased the prospect of future tariffs, one should consider an analysis of the complicated history of trade policy between both countries to better understand the nature of the world's most important trade relationship and how it may pan out.

## I. History of Chinese-American Trade

Rising trade tensions between the two superpowers has been brewing ever since former U.S. President Bill Clinton normalized trade relations with China by signing the U.S.-China Relations Act in 2000.<sup>4</sup> From issues ranging from cheap labor

harming American industries to intellectual property (IP) theft to currency manipulation, today China's tightly knit state-controlled economy presents the greatest threat to American economic power since the Cold War. With an estimated 3.4 million American jobs between 2001 and 2015 thought to have been lost due to America's trade deficit with China,<sup>5</sup> it is perhaps unsurprising that President Trump adopted a protectionist stance in his successful presidential campaign. Whilst the threat of China's economic and geopolitical growth had always loomed over the horizon of successive American presidents, China's success today as an emerging superpower can very much be attributed to the failure of past administrations to address and counter its practices.

### A. China's Economic Reforms under Deng

China's development from an agrarian economy to the world's largest exporter has been remarkable since its former leader, Deng Xiaoping, instituted a series of economic reforms known as "socialism with Chinese characteristics," which shifted the country towards a system of state-capitalism in the 1980s.<sup>6</sup> In instituting reforms like the gradual privatization of agricultural production, Deng encouraged a bottom-up approach of economic development in China that played a vital role in aiding the capitalist transition of the Chinese economy.<sup>7</sup> By later establishing "special economic zones" that allowed for more flexible governance to invite foreign investment, China carefully engineered its industrialization, with rapid urbanization further fueling its growth in the 1990s and early 2000s.<sup>8</sup>

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manage Chinese violations of WTO guidelines ever since Beijing joined the WTO in 2001, precipitating tensions between the two countries).

5 See, e.g., *The Growing Trade Deficit With China Has Led to a Loss of 3.4 Million U.S. Jobs Between 2001 and 2017*, ECONOMIC POL'Y INST. (Oct. 23, 2018), <https://www.epi.org/press/the-growing-trade-deficit-with-china-has-led-to-a-loss-of-3-4-million-u-s-jobs-between-2001-and-2017/> (last visited Jan 12, 2019) (Whilst various factors may have contributed to losses in US jobs in the stated period, e.g., shifts in industries and technology, a significant portion of American job losses stems from the growth of America's lopsided trade deficit with China).

6 CHINA.ORG, BUILDING A SOCIALISM WITH A SPECIFICALLY CHINESE CHARACTER BUILDING A SOCIALISM WITH A SPECIFICALLY CHINESE CHARACTER (June 30, 1984), <http://www.china.org.cn/english/features/dengxiaoping/103371.html> (excerpting speech by Deng Xiaoping delivered at the second session of the Council of Sino-Japanese Non-Governmental Persons).

7 See, e.g., Marc Blecher, *reviewing* SUSAN L. SHIRK, THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA (1993), 68 PACIFIC AFFAIRS 259, 260 (1995) (Although there are various interpretations of the effects of Deng's leadership in China, there is widespread acceptance among scholars that a shift in the country's economic model to capitalism from communism was the most profound factor in triggering China's substantial economic growth).

8 Jin Wang, *The Economic Impact of Special Economic Zones: Evidence from Chinese Municipalities*, 101 J. DEV. ECON. 133 (2013).

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1 *Vice President Mike Pence's Remarks on the Administration's Policy Towards China*, HUDSON INST. (Oct. 4, 2018), <https://www.hudson.org/events/1610-vice-president-mike-pence-s-remarks-on-the-administration-s-policy-towards-china102018>.

2 Kimberly Amadeo, *The Real Reason American Jobs Are Going to China*, THE BALANCE (Nov. 21, 2018), <https://www.thebalance.com/u-s-china-trade-deficit-causes-effects-and-solutions-3306277> (last visited Oct. 28, 2018).

3 *Trade in Goods with China*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/balance/c5700.html> (last visited Jan. 17, 2019).

4 See, e.g., Gabe Lipton, *The Elusive 'Better Deal' With China*, ATLANTIC (Aug. 14, 2018), <https://www.theatlantic.com/international/archive/2018/08/china-trump-trade-united-states/567526/> (last visited Jan. 12, 2019) (arguing that America has faced an uphill battle to constrain and



In 1980, U.S. exports to China totaled \$3.8 billion USD while imports to China totaled around \$1.1 billion USD.<sup>9</sup> China's per capita GDP around this time hovered around \$195 USD, compared to America's which was \$12,597 USD. As trade between the United States and China increased steadily during Reagan's presidency, the primary economic concern for the White House was how America should counter its lopsided trade with an increasingly mercantilist Japan.<sup>10</sup> Cracks in what was becoming an increasingly enveloped trade relationship began to appear, with the digitalization of the 1980s opening the door to the growing advent of piracy in China.<sup>11</sup> With American intellectual property such as computer software, music, and movies all susceptible to the theft from China, American industries grew increasingly wary that they weren't receiving proper protection from either government.

With *laissez-faire* reforms in the Chinese economy spurring calls for adjustments in civil liberties, in 1989 student leaders and activists led an unprecedented protest in Beijing against the Chinese government in favor of democratic reforms. As protestors assembled in Tiananmen Square to make their feelings clear, the central government declared martial law and soldiers shot scores of students and activists who had gathered to protest. With the Chinese government wary of any calls for greater democratization, the incident still remains a taboo topic in China today; Google searches and mentions of the occurrence continue to be heavily restricted.<sup>12</sup> The events of Tiananmen Square also fundamentally altered the American-Chinese relationship, with the restrictive and authoritarian nature of the Chinese government placed in contrast to the values of freedom and political autonomy promoted by America in its conduct of relations with other countries.

### B. Growing Integration under Clinton

With the rise in influence of another authoritarian state leaving many Americans wary after the end of the Cold War, 1992 Democratic Presidential Candidate Bill Clinton lambasted Reagan's heir, George H.W. Bush, for "coddling dictators" in his soft response to Beijing for the events in Tiananmen.<sup>13</sup> In a 1993 speech, the newly elected Clinton later affirmed his commitment to human rights: "the core of this policy will be a resolute insistence upon significant progress on human rights in

China."<sup>14</sup> With the escalation of the Balkan War and genocide grabbing the attention of Western media and Clinton's administration, the issue of China's human rights record was quickly ignored and slipped underneath Clinton's rug. In 1999 Clinton signed a free-trade agreement with Beijing which paved the way for China's entry into the World Trade Organization.<sup>15</sup> During a 1999 speech announcing the deal, Clinton declared, "Today China embraces principles of economic openness, innovation and competition that will bolster China's economic reforms and advance the rule of law."<sup>16</sup> Terming the agreement "a profoundly important step in the relationship between the United States and China," Clinton's approval of China culminated in its 2000 acceptance into the World Trade Organization, which in turn signified its successful integration into the capitalist world economy.

China's per capita GDP had grown substantially from \$315 USD in 1990 to \$959 USD in 2000, with the country importing \$16.2 billion of U.S. goods and exporting \$100 billion of its goods to the United States.<sup>17</sup> The United States, for comparison, had a per capita GDP of \$36,449 USD in 2000. With a trade deficit between the two countries becoming increasingly clear and growing rapidly, China's role as a reliable and crucial trading partner had been put under greater scrutiny. American firms also grew increasingly concerned about a requirement under Chinese law that American firms operating in China transfer their IP and expertise to Chinese partners.<sup>18</sup> With Chinese firms easily able to replicate the prowess and IP of American firms through the advent of cut-rate labor costs and a cheaper yuan, the trade deficit continued to balloon with the value of the imbalance totaling \$698.8 billion by the time President Barack Obama took office in 2009.<sup>19</sup>

### C. Obama's Asia Pivot

Wary of China's growing geopolitical influence and its practices in currency manipulation, Obama sought to contain and channel China's ambitions peacefully, with previous presidents ineffective at recognizing and countering Beijing's growing threat to American hegemony. This culminated in Obama's advent of the Trans-Pacific Partnership (TPP), which solicited a plan to promote greater interdependent economic self-sufficiency for developing countries across the Pacific.<sup>20</sup> With millions of

9 *Trade in Goods with China*, *supra* note 3.

10 See, e.g., John Hemmings & James Amedeo, *Lessons from the America-Japan Trade War of the 1980s*, NAT'L INTEREST (July 2, 2018), <https://nationalinterest.org/feature/lessons-america-japan-trade-war-1980s-24882> (When contextualizing this issue, the growth of the newly industrialized Japanese economy in the 1980s presented a threat to many sectors of America's economy in the period, with Japan able to grow its trade surplus with the United States by selling goods and items at more affordable prices).

11 Kristie M. Kachuriak, *Chinese Copyright Piracy: Analysis of the Problem and Suggestions for Protection of U.S. Copyrights*, 13 PENN. ST. INT'L L. REV. 599, 599 (1995).

12 Cate Cadell, *Tea and Tiananmen: Inside China's New Censorship Machine*, REUTERS (Sept. 28, 2017), <http://www.reuters.com/article/us-china-congress-censorship-insight/tea-and-tiananmen-inside-chinas-new-censorship-machine-idUSKCN1C40LL>.

13 Opinion, *Coddling China, Constructively*, N.Y. TIMES (Nov. 18, 1993), <https://www.nytimes.com/1993/11/18/opinion/coddling-china-constructively.html>.

14 Bill Clinton, Statement by the President On Most Favored Nation Status for China (May 28, 1993), *available at* <https://china.usc.edu/statement-president-clinton-most-favored-nation-status-china-1993>.

15 *China, U.S. Sign Trade Pact*, CNNMONEY (Nov. 15, 1999), <https://money.cnn.com/1999/11/15/worldbiz/wto/>.

16 *Id.*

17 *Trade in Goods with China*, *supra* note 3.

18 Section 301, *Tariffs, and Chinese Trade and Investment*, CTR. FOR STRATEGIC & INT'L STUDIES (Mar. 23, 2018), <https://www.csis.org/analysis/section-301-tariffs-and-chinese-trade-and-investment>.

19 See, e.g., Joshua P. Meltzer, Op-Ed, *The U.S. Trade Deficit, China and the Need to Rebalance Growth*, BROOKINGS (Feb. 14, 2011), <https://www.brookings.edu/opinions/the-u-s-trade-deficit-china-and-the-need-to-rebalance-growth/> (A significant factor in the growth of the trade deficit is "linked to the undervaluation of the Renminbi (RMB), which is a result of it being pegged to the U.S. dollar. Like all cheap assets, the RMB's undervaluation has led to excess demand for Chinese goods (in the form of imports), and for the RMB to pay for these goods.").

20 James McBride & Andrew Chatzsky, *What Is the Trans-Pacific Partner-*

U.S. jobs thought to have been lost as a result of cheaper Chinese labor, TPP hoped to curb the nefarious nature of China's state-managed economy and narrow the growing trade deficit between Beijing and Washington in its provisions that reduced trade barriers and established more mature mechanisms for investor-state dispute settlement.<sup>21</sup> While the plan was explicit in its exclusion of China, Obama intended to utilize the success of TPP to later coerce China into signing and accepting its terms.<sup>22</sup> While Obama's pivot to Asia grew out of a concern to stifle China's growing economic prowess, in openly asserting a desire to contain China, Washington allowed Beijing to view the move as an attempt to undermine their burgeoning influence.<sup>23</sup> "TPP allows America—and not countries like China—to write the rules of the road in the 21st century," declared Obama in 2016 as the pact was signed in Auckland.<sup>24</sup> With American hostility toward China so public in Obama's conduct, Beijing grew wary of America's emergence as an economic adversary.

In response, Xi Jinping fashioned a new Chinese-led development bank, with the establishment of the Asian Infrastructure Investment Bank (AIIB) seen as a counter to the Washington DC-based World Bank.<sup>25</sup> In announcing the inception of the AIIB at a Balinese resort in October 2013, Xi laid out his vision for the new multinational bank to bankroll the development of roads, rails, and power grids across many developing countries across Asia. With much of the Asia-Pacific region grossly in need of further investment for development, Beijing envisioned that the bank would foster much needed financing to push the region towards becoming the new center of wealth in the world. In many ways a rebuke to the Obama-led creation of TPP, China quickly signed many nations up, including American allies like Britain, Australia, and Germany. America and Japan were both notably absent from the original fifty-seven countries that signed up for the bank. With the bank granting China a proper platform to set the agenda on the forces of trade and development in the global economy, its formation as the embodiment of an increasingly tense economic rivalry foreshadowed the brewing trade war that envelops these two countries today.

The election of Donald Trump, and the subsequent collapse of TPP, encapsulated the failure of Obama's attempted "pivot

to Asia" in containing the rise of China. Yet warnings of this strategic miscalculation had not gone unheard in Washington. In 2010, Robert Lightizer, a former deputy trade representative under Reagan, had cautioned Congress on how American policymakers "did not recognize the extent to which China's economic and political system [was] fundamentally incompatible with [the] conception of the WTO."<sup>26</sup> Lightizer was critical of how access to cheaper Chinese production had hurt American workers and noted how inaction on the policy front had allowed the trade deficit between the countries to grow fervently in China's favor.

## II. Current State of Affairs under Xi and Trump

Since Obama's election in 2008, China's economy has grown substantially to become the world's second largest, overtaking regional rival Japan. While China's per capita GDP has grown past \$8,000 USD, so has its trade surplus with Washington, with exports of goods to the United States outpacing imports by almost \$2.3 trillion USD.<sup>27</sup> Given the perception that the collapse of industry in the American Midwest was due to this trade deficit,<sup>28</sup> it is not difficult to see Trump's appeal to many in lambasting China for its nefarious manipulation of currency and its state-led support of industries. Resolute to not repeat the "incompetence" of past administrations in allowing China to "take advantage" of the United States on trade, Trump opted to utilize the most combative means to confront China's economic resurgence.<sup>29</sup> In July 2018, Trump greatly escalated his resolve on the matter by instituting a twenty-five percent tariff on an estimated thirty four billion dollars of imported Chinese goods, which was hastily followed by similar measures from China.<sup>30</sup> This was followed by months of tit-for-tat tariffs, with Trump's actions met by similar responses from Beijing as risks of a growing trade war rocked the global economy.

As such, in avowing that the United States "will not back down" from confronting China's aggression in his speech on October 4, Mike Pence embodied the explosion of a powder keg that decades of growing tensions between the United States and China over trade had amounted to.<sup>31</sup> With Pence's accusations of Chinese interference in the midterm elections evoc-

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ship (TPP)?, COUNCIL ON FOREIGN RELATIONS (last updated Jan. 4, 2019), <https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp> (last visited Jan. 17, 2019).

21 Kevin Granville, *What Is TPP? Behind the Trade Deal That Died*, N.Y.

TIMES (last updated Jan. 23, 2017), <https://www.nytimes.com/interactive/2016/business/tpp-explained-what-is-trans-pacific-partnership.html>.

22 Michael J. Green, *The Legacy of Obama's "Pivot" to Asia*, FOREIGN POL'Y (Sept. 3, 2016), <https://foreignpolicy.com/2016/09/03/the-legacy-of-obamas-pivot-to-asia/>.

23 See, e.g., John Ford, *The Pivot to Asia Was Obama's Biggest Mistake*, THE DIPLOMAT (Jan. 21, 2017), <https://thediplomat.com/2017/01/the-pivot-to-asia-was-obamas-biggest-mistake/>.

24 Michael Bradley, *Biggest Ever Trade Deal Signed as US Seeks to Counter China*, YAHOO! NEWS (Feb. 3, 2016), <https://www.yahoo.com/news/pacific-rim-nations-sign-us-led-trade-deal-234210619--finance.html?ref=gs>.

25 See, e.g., Jane Perlez, *China Creates a World Bank of Its Own, and the U.S. Balks*, N.Y. TIMES (Dec. 4, 2015), <https://www.nytimes.com/2015/12/05/business/international/china-creates-an-asian-bank-as-the-us-stands-alooft.html?r=0>.

26 Prepared Testimony of Robert Lightizer at \*1, in *Evaluating China's Past and Future in the World Trade Organization: Hearing before the U.S.-China Econ. & Security Rev. Comm'n*, 111th Cong. 66 (2d Sess. June 9, 2010), available at <https://www.uscc.gov/sites/default/files/6.9.10Lightizer.pdf>.

27 *Trade in Goods with China*, supra note 3.

28 Sabrina Rodriguez, *Report: Trade Deficit with China Has Cost Millions of U.S. Jobs*, POLITICO (Oct. 23, 2018), <https://www.politico.com/newsletters/morning-trade/2018/10/23/report-trade-deficit-with-china-has-cost-millions-of-us-jobs-383238>.

29 Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 9, 2017, 3:39 PM), <https://twitter.com/realdonaldtrump/status/928769154345324544?lang=en>.

30 Han Wei, Fran Wang & Leng Cheng, *Update: U.S. Names Products Targeted by \$200 Billion in New Tariffs*, CAIXIN GLOBAL (July 11, 2018), <https://www.caixinglobal.com/2018-07-11/quick-take-us-threatens-tariffs-on-additional-200-billion-in-china-goods-101299025.html>.

31 Alex Ward, *Pence Says US "Will Not Back Down" from China's Aggression in Fiery Speech*, VOX (Oct. 4, 2018), <https://www.vox.com/2018/10/4/17936514/pence-china-speech-text-hudson>.

ative of previous rhetoric seen in the Cold War, it is clear that the Trump Administration will not seek to counter Chinese growth through cooperation, but rather through explicit aggression.

### III. Implications of the Trade War

In many ways, the bullish change of direction in U.S. policy toward China offers a refreshing take on an issue that past administrations had failed to realize and effectively confront. By imposing tariffs on Chinese products that comprise components of lucrative items like cars and computers, Trump hopes to erode China's prominence at the center of the global supply chain, with producers electing to look to other sources for these goods.<sup>32</sup> However, this may come at the expense of American consumers, with the loss of cheaper Chinese goods resulting in higher prices on consumer goods for Americans.<sup>33</sup> As such, a further escalation of tariffs may risk dampening overall economic growth in both countries, resulting in a lose-lose situation. Due to the sheer size of the U.S. economy and its structural openness, the overall effects may be limited to a few industries.<sup>34</sup> Furthermore, because the United States is not a big source of imports to China, the impact on Chinese consumers may also be limited with China more able to find substitute sources of supply for the affected imports. It is telling, for one, that China has transferred its imports of soy bean, a major component of its food and beverages, from the United States to Brazil and Argentina.<sup>35</sup> Other American imports may follow.

Yet with Chinese products accounting for over twenty-one percent of American imports, the effects of the tariffs will be felt by Chinese manufacturers.<sup>36</sup> A study by the Standard and Charter Bank of Hong Kong estimates that the ten percent tariffs imposed by Trump will slow Chinese economic growth by 0.4 percentage points, and the twenty-five percent tariffs, as planned by Trump in January 2019, will slow China's growth rate further by 0.6 percentage points.<sup>37</sup> On the flip side, the imposition of Chinese tariffs on American products is estimated to slow the American economy by a miniscule 0.1 to 0.2 per-

centage points. As such, on paper, Trump's tariffs hurt China more than China's tariffs hurt America, with Beijing's economy more dependent on its exports than Washington's. However, with China able to divert those products to other export markets, the effects of Trump's tariffs may be cushioned by China's ability to diversify its foreign markets. With Xi openly exploring trade deals to occupy the void that the protectionist policies of Trump have made, in the long run America may lose out as China is able to shift its exports elsewhere.

In diving headfirst towards a further deterioration of relations, Trump risks losing a trade partner that has fueled substantial economic growth since the 1990s. While millions of American jobs have been lost or negatively affected by the rise of China's economy and its trade surplus with Washington, in raising tariffs on imported goods, Trump risks raising the prices of these goods in the U.S. market, and consumers will be forced to pay much more than before. Since the tariffs, steel and aluminum prices have risen immensely, with many goods seeing price increases going up as much as thirty-six percent since the start of last year.<sup>38</sup> With the rise in prices leaving many U.S. producers and firms to ponder whether they should move production out of the country,<sup>39</sup> Trump has put the long-term future of millions of American jobs at risk as a result of his conduct.

With Trump and China continuing to be unwavering in firing off tit-for-tat tariffs against each other, the question on who will cave in or prevail continues to leave many stumped. Chinese tech tycoon and founder of Alibaba, Jack Ma, warned investors in September that "it's going to last long, it's going to be a mess . . . [for] maybe 20 years."<sup>40</sup> With Trump's aversion to what he sees as the failures of past administrations to counter America's trade deficit with China emboldening his desire to revert to more aggressive stances, one can expect that the Administration's bullishness will continue. Furthermore, mounting debt as a result of costly infrastructure spending from China has reduced Beijing's ability to use public spending to boost investments.<sup>41</sup> To put it frankly, China is running out of money to counteract the effects of Trump's tariffs. With the IMF previously warning that China's debt-fueled growth remains an unsustainable long-term solution to its economy, Trump's tariffs

32 See, e.g., Alex Ward, *Trump's China Strategy Is the Most Radical in Decades – and It's Failing*, Vox (Sept. 19, 2018), <https://www.vox.com/world/2018/9/18/17790600/us-china-trade-war-trump-tariffs-taiwan> (noting that a significant goal of Trump's tariffs is to deliberately target and cripple sectors of China's economy).

33 See, e.g., Andy Kiersz, *Here's Exactly How Trump's Trade War with China Could Affect You*, BUSINESS INSIDER (Oct. 12, 2018), <https://www.businessinsider.com/trump-trade-war-tariffs-china-effect-2018-10> (listing how trade war may result in rise in prices of consumer goods).

34 See, e.g., Patrick Seitz, *U.S.-China Trade War Seen Having Limited Impact on Tech Firms*, INVESTOR'S BUSINESS DAILY (July 6, 2018), <https://www.investors.com/news/technology/us-china-trade-war/> (noting that tech, like other industries in America's economy, will not be greatly impacted by trade war).

35 *China to Start Buying More Argentine Soybeans: Oil World*, REUTERS (2018), <https://in.reuters.com/article/soybeans-china/china-to-start-buying-more-argentine-soybeans-oil-world-idINKCN1M51T5>.

36 Milton Ezrati, *Trade War From The Chinese Side*, FORBES (Oct. 3, 2018), <https://www.forbes.com/sites/miltonezrati/2018/10/03/trade-war-from-the-chinese-side/#6040091b6e10>.

37 *Id.*

38 Bob Bryan, Shayanne Gal & Jenny Cheng, *Trump's Trade War Is Getting Serious – Here's Why It Started, What It Means for the US Economy, and How It Could Hit You*, BUSINESS INSIDER (July 28, 2018), <https://www.businessinsider.com/trump-trade-war-tariffs-effect-on-economy-prices-consumer-stocks-2018-7#prices-for-goods-hit-by-trumps-tariffs-are-already-starting-to-rise-5>.

39 He Huifeng, *Trade War Forces Firms to consider pulling out of U.S. and China* (29 October, 2018), <https://www.scmp.com/economy/china-economy/article/2170699/trade-war-forces-companies-consider-pulling-operations-out>.

40 Jack Ma, *Speech at the Alibaba Annual General Investors Conference* (September 18, 2018) <https://www.bloomberg.com/news/articles/2018-09-18/alibaba-s-jack-ma-warns-u-s-china-trade-war-could-last-20-years>.

41 See, e.g., Xin En Lee, *Trump's Tariffs Threaten China's Economy. It Already Has Cracks*, CNBC (Sept. 24, 2018), <https://www.cnbc.com/2018/09/24/trumps-trade-war-threatens-chinese-economy-china-already-has-cracks.html> (mounting debt as a result of costly infrastructure spending is expected to significantly slow the growth of the Chinese economy over the coming years as many borrowers struggle to repay).

may instigate further harm on China's economy.<sup>42</sup> However, China has shown that it is not afraid to bite back, with Beijing using tariffs to target sectors and industries in America littered with Trump's support base in America's heartlands.

Ultimately, considering the growing trade tensions between the superpowers that has compounded over the past three decades, a certain sense of inevitability can be evinced from Mike Pence's aggressive speech. While Trump has been right to address and criticize China's trade policies, in exerting aggressive tariffs as a response, he risks hurting the global economy as well as his own. Meanwhile, Xi continues to be resolute in his determination to strengthen China's hand, with Beijing exploring deals and relations with other countries at a time when America has grown more insulated and protectionist. As such, from a short-term perspective, America may be seen as the winner by instigating further harm on the slowing Chinese economy. Yet with the bombastic nature of Trump encouraging the pursuit of other trade wars with trading partners like Europe and Canada, the political effects and the loss of its sense of global goodwill may wind up hurting the United States more in the long term.

#### IV. Possible Solutions

With a trade war inevitably hurting both sides in the short term and the long term, a concrete solution for Trump may be to utilize sanctions to force China to come to the table in negotiating a bilateral investment treaty. This indeed may be the President's strategy, with Trump tweeting that the United States is "under no pressure to make a deal with China, they are under pressure to make a deal with us."<sup>43</sup> By forcing China to come to the table, talks can resume on an agreement that will end the trade war and enact an outcome that will benefit both sides. Both leaders can heed advice from previous free-trade agreements that the United States has signed that have proved to be mutually beneficial. In this regard, the U.S.-Singapore Free Trade Agreement or the South Korea-U.S. Free Trade Agreement should be used as templates by both administrations as a possible solution. Both agreements eliminated tariffs on each other's goods while creating new protections for multinational financial services, labor rights, intellectual property, and the environment, and both encouraged greater economic cooperation.

If this is the end goal for Trump, he may succeed in strong-arming China towards an agreement that has evaded past presidents. Yet considering the bullish nature of his counterpart, achieving this would still require elements of tactful diplomacy in coercing the Chinese, a trait that Trump isn't known for. With the slowing growth of the Chinese economy putting further pressure on Xi to seek a more comprehensive solution, Trump's tactic of applying "maximum pressure" in order to enact a solution more conducive to his terms may prove successful if he continues to wait it out.

Ultimately, considering the sanguine nature of each leader, the

prospects of an end may come down to the political survival of both. With Xi immune from being voted out of power by the democratic nature of American politics, Trump will have to hope that the effects of China's tariffs will not substantially slow the buoyant economy that his support seems to be riding on. Furthermore, with elections on the horizon in 2020, Trump may not have much time before his own tenure is threatened. In this case, China may be wise to continue to hold their nerve and hope that Trump will be the one who blinks first.

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42 Larry Elliott, *China's Debt Levels Pose Stability Risk, Says IMF*, THE GUARDIAN (Dec. 6, 2017), <https://www.theguardian.com/world/2017/dec/07/china-debt-levels-stability-risk-imf>.

43 *Trump Says US Under 'no pressure' for China Trade Deal*, BBC (Sept. 14, 2018), <https://www.bbc.com/news/business-45517670>.

# The Dangers of Voting: *San Francisco's Non-citizen Voting for Education*

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## I. Introduction

In 2016, San Francisco passed Proposition N, a charter amendment that extended voting rights to non-citizen parents, specifically for elections regarding the Board of Education.<sup>1</sup> At the time, it was reported that an estimated “one-third of children in the [San Francisco Unified School District] have foreign-born parents.”<sup>2</sup> The charter amendment was intended to provide representation for marginalized families in the San Francisco school system. However, the 2016 ballot measure did not provide details for policy implementation.<sup>3</sup> It was only after the measure passed that implementation was discussed.<sup>4</sup>

The recent 2018 election season provided the opportunity for the charter amendment to be taken into action. However, the fears regarding the Trump Administration's stripping of immigrant rights that, in 2016, rallied support behind Proposition N, may be the same ones dampening its impact in 2018. This paper argues that this measure faces the danger of becoming a purely symbolic act of reform that hurts the people it intends to serve. First, I examine the text of the charter amendment introduced by Proposition N (2016). Then, I evaluate the risks and cost of the charter amendment's implementation, as well as the amendment's impact on turnout on the 2018 election.

## II. Political Context

Proposition N passed in 2016. At the time, it was pushed forward by then-Board of Supervisor members Eric Mar and Malia Cohen. Previously, the same measure had been on the ballot in 2004 and 2010, but was defeated both times. Supervisor David Campos, who was involved in previous attempts to pass the measure, stated that its defeat in 2010 was the re-

sult of “get[ting] lost” on a ballot of fifteen local propositions.<sup>5</sup> However, in 2016, the measure passed amid a larger ballot of twenty-five local propositions. Therefore, its success in 2016 indicates another variable may have bolstered the support for its passage.

One potential variable is the backlash against then-presidential nominee Donald Trump. In the November 2016 election, San Francisco had record voter turnout of 80.71 percent of registered voters.<sup>6</sup> Out of those voters, only 9.23 percent of San Franciscans voted for President Trump in the presidential election.<sup>7</sup> Prior to its passage, then-Supervisor Eric Mar stated that the “anti-Trump” political climate could help raise awareness for Proposition N (2016).<sup>8</sup> It is possible that the passage of the measure may have been riding on the coattails of backlash against Trump's presidential campaign, particularly against anti-immigrant sentiments. However, the charter amendment that was ushered in by Proposition N (2016) is also set to sunset in 2022—after the first term of Trump's presidency.

After the measure passed, meetings on how implementation would be done were held by city officials and community organizations that were involved in the campaign for Proposition N. The SFUSD Board of Education and at least ten community organizations were involved in these talks with city supervisors.<sup>9</sup> Early in the process, individuals involved in the community organizations suggested using school databases or safe addresses for voters, although these were not used.<sup>10</sup>

## III. Policy Analysis of Proposition N (2016)

A significant feature of Proposition N is not what it includes, but what it lacks. The measure of Proposition N (2016) was introduced as a charter amendment to expand the voting demographic. As a charter amendment, it alters the charter doc-

1 Benjy Sarlin, *San Francisco Allows Undocumented Immigrants to Vote in School Elections*, NBC NEWS (July 20, 2018, 1:09 PM), <https://www.nbc-news.com/politics/immigration/san-francisco-allows-undocumented-immigrants-vote-school-elections-n893221> (last visited Nov. 12, 2018).

2 *Id.*

3 *San Francisco, California, Non-Citizen Voting in School Board Elections Amendment, Proposition N (November 2016)*, BALLOTPEdia, [https://ballotpedia.org/San\\_Francisco,\\_California,\\_Non-Citizen\\_Voting\\_in\\_School\\_Board\\_Elections\\_Amendment,\\_Proposition\\_N\\_\(November\\_2016\)](https://ballotpedia.org/San_Francisco,_California,_Non-Citizen_Voting_in_School_Board_Elections_Amendment,_Proposition_N_(November_2016)) (last visited Nov. 12, 2018).

4 Helena Ong, *Community Leaders Strategize How Noncitizen Can Vote Amid Trump's Vow of Deportation*, S.F. PUB. PRESS (Dec. 14, 2016), <https://sfpublicpress.org/news/2016-12/community-leaders-strategize-how-noncitizens-can-vote-amid-trump-vow-of-deportation> (last visited Nov. 12, 2018).

5 Lisette Mejia, *Why did Prop D. Fail?*, MISSION LOCAL (Nov. 12, 2010), <http://missionlocal.org/2010/11/why-did-prop-d-fail/> (last visited Nov. 12, 2018).

6 *Historical Voter Turnout*, S.F. DEP'T OF ELECTIONS, <https://sfelections.sfgov.org/historical-voter-turnout> (last visited Nov. 12, 2018).

7 *Consolidated General Election, November 8, 2016, Official Summary Report*, S.F. DEP'T OF ELECTIONS, <https://sfelections.org/results/20161108/data/20161206/summary.pdf> (last visited Nov. 14, 2018).

8 *Proposition N: Enabling Non-Citizen Parents to Vote in School Board Elections*, BREAKING DOWN THE BALLOT, S.F. PUB. PRESS (Sept. 30, 2016), <https://sfpublicpress.org/election2016/prop-n>, (last visited Nov. 14, 2018).

9 Ong, *supra* note 4.

10 *Id.*

ument of San Francisco which defines the government system. Charter cities, like San Francisco, are different from general law cities as they allow citizens more autonomy over local government. This highlights the focus on local populations and demographics. The text of the amendment focused on outlining the limitations. This new voting demographic of non-citizens was required to be: a resident of San Francisco, of legal voting age, not in prison or parole for a felony, and a parent/guardian of a child in San Francisco Unified School District (SFUSD).<sup>11</sup> This includes parents with visas, green-cards, and other forms of residency, including those who are undocumented in San Francisco. Another limit of the measure is that they can only vote on positions for Board of Education.<sup>12</sup> This narrow scope in the measure's policy demonstrates its intended target on parents in the SFUSD system. It intends to better incorporate marginalized families into the SFUSD. The argument behind the policy is that by providing voting rights to these parents, parents would be more invested in the quality of their children's education.

The measure's policy also included a sunset provision for 2022. The sunset provision stipulates that the charter amendment, introduced by Proposition N (2016), will "expire by operation of law on December 31, 2022, or on December 31 immediately following the third election for members of the Board of Education . . . ."<sup>13</sup> It also provides the opportunity for the charter amendment to be formally reauthorized by the Board of Supervisors "by ordinance" after the sunset in 2022.<sup>14</sup> However, this also creates a demand for the charter amendment to prove itself as an impactful policy before the sunset deadline. Because the charter amendment is specific to elections, the measure only has 2018, 2020, and 2022 to prove itself. The impact can be measured by the turnout of the new demographic. With significant turnout, the policy can demonstrate how this charter amendment is necessary to parental involvement in the quality of education in the SFUSD. However, without significant turnout, the policy is at risk of becoming only a symbol for reform that fails in practice to actually support these marginalized groups.

Most significantly, the measure that Proposition N (2016) proposed to voters lacked any defined implementation policy. The text of the policy does not state anything with regard to how the city intends to implement the charter amendment for incorporating the new voting demographic. Because of the lack of implementation strategy outlined in the policy, we must look to the 2018 election to see how the city decided to execute it.

#### IV. 2018 Election: Challenges to Implementation

The 2018 election was a defining point for the success of the charter amendment. It provided the first opportunity for charter amendment to prove its impact, with three out of the seven seats up for grabs on the Board of Education. It also established

11 S.F. CHARTER art. XIII, § 13.111(a)(1)(B) (current through Nov. 8, 2016).

12 *Id.* art. XIII, § 13.111(a)(1) (limiting provision to "elections for the Board of Education of the Unified School District").

13 *Id.* art. XIII, § 13.111(a)(2).

14 *Id.*

the foundation for how the policy is implemented. However, it ran up against several issues, introducing security risks and additional costs.

First, the process of voting can hurt non-citizens who are seeking citizenship. This non-citizen voting right, allowed by Proposition N, extends to those with visas, green-cards, and other legal immigrants potentially seeking a path to citizenship. However, if these non-citizen voters ever apply for citizenship, they will have to disclose that they have registered/voted in a U.S. election. This can be damaging to their citizenship process, which may not take into account individual city policies. In fact, grounds for deportation include whether the individual "has voted in violation of any federal, state, or local constitutional provision, statute, ordinance, or regulation."<sup>15</sup> Although the charter amendment of Proposition N (2016) provides the right to vote within the San Francisco, the state law of California does not acknowledge non-citizen voters.<sup>16</sup> Especially with the development of the U.S. Citizenship and Immigration Services' task force to denaturalize citizens,<sup>17</sup> any ambiguity in the process may hurt their application. The task force is denaturalizing citizens for lying on these type of questions.<sup>18</sup> This is particularly significant under the Trump Administration, as the "uncertainty of Trump's immigration policies is keeping immigrants on edge."<sup>19</sup> Even if those seeking citizenship have the right to vote in San Francisco, they are more likely to be cautious and to avoid exercising that right. This will significantly impact the turnout of that demographic, as well as putting at risk those who ignore those dangers.

Even non-citizens who are not seeking citizenship have reason to be concerned, especially undocumented residents. When the measure was passed in 2016, then-outgoing Supervisor Mar stated the importance of "a really strong privacy policy . . . to ensure their contact information and perennial info isn't revealed or given over to the federal government or any entity like enforcement."<sup>20</sup> However, the execution in the 2018 election failed those expectations. Voting registration forms requires voters to use their name and address. While this would not be an issue for citizen voters, it presents a security concern for non-citizen voters. According to the city's Election Chief John Arntz, "non-citizens who opt to vote will be listed on a separate roster from citizens and will get a ballot with just the

15 8 U.S.C.A. § 1227(a)(6)(A) (West) (current through P.L. 115-281).

16 *See, e.g.*, Emily Green, *Proposal to let Non-Citizens Vote for SF School Board Resurrected*, S.F. GATE (June 7, 2016; 3:28 PM), <https://www.sfgate.com/bayarea/article/Proposal-to-let-noncitizens-vote-for-SF-school-7967016.php> (last visited Jan. 13, 2019).

17 *See e.g.* Amy Taxin, *APNewsBreak: US Launches Bid to Find Citizenship Cheaters*, ASSOCIATED PRESS (June 11, 2018), <https://apnews.com/1da389a535684a5f9d0da74081c242f3> (last visited Jan. 11, 2018).

18 Masha Geesen, *In America, Naturalized Citizens No Longer Have An Assumption of Permanence*, NEW YORKER (June 18, 2010), <https://www.newyorker.com/news/our-columnists/in-america-naturalized-citizens-no-longer-have-an-assumption-of-permanence> (last visited Nov. 14, 2018).

19 Hansi Lo Wang, *Green Card Holders Worry About Trump's Efforts To Curtail Immigration*, NPR (Feb. 21, 2017; 4:59 AM), <https://www.npr.org/2017/02/21/516375460/green-card-holders-worry-about-trump-s-efforts-to-curtain-immigration> (last visited Nov. 14, 2018).

20 Ong, *supra* note 4.

school board contest.”<sup>21</sup> This roster might eventually, against the initial intentions of its creators, become a ready-to-go list for U.S. Immigration Customs and Enforcement (ICE). The non-citizen voting registration form came with the notice that names and addresses “may be obtained by Immigration and Customs Enforcement (ICE) and other agencies, organizations, and individuals.”<sup>22</sup> This is because any citizen’s individual voting history is on record. Although these records do not reveal what a person has voted for, they do indicate who has voted in the past.<sup>23</sup> In general, California government keeps these records confidential, but they can be made available for campaign, scholarly and government use.<sup>24</sup> This occurs for all citizens, and non-citizens are unlikely to be exempt from this practice. In fact, there has been precedent of ICE attempting to use voting records. In North Carolina, ICE submitted a subpoena of voting records under the determination that “19 foreign nationals had been indicted . . . for illegally voting in North Carolina’s 2016 election cycle.”<sup>25</sup> This puts those who are undocumented at risk of identified and being deported. These security risks go directly against the initial promises made when Proposition N (2016) was passed.

Although San Francisco identifies itself as a sanctuary city, the cities’ policies for the sanctuary city are designed around lowering crime by allowing anyone to come forward to police and fire departments without fear.<sup>26</sup> This does not necessarily extend to voting records. In response to these risks, San Francisco’s Board of Supervisors unanimously voted to approve additional warnings for those who register under Proposition N.<sup>27</sup> Supervisor Sandra Fewer admitted that if ICE issued a subpoena for records, like in North Carolina, “we would have to turn them over.”<sup>28</sup> These warnings, while providing important information to the security of the new voting, may have also impacted the turnout for the worse.

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21 Olga R. Rodriguez, *San Francisco Is Allowing Noncitizens to Vote, But Few Will*, CHI. TRIB. (Oct. 23, 2018; 1:51 PM), <https://www.chicagotribune.com/news/nationworld/ct-san-francisco-noncitizens-voting-20181023-story.html> (last visited Nov. 14, 2018).

22 Madison Park, *Noncitizens in San Francisco Can Register to Vote, But Only for School Board Elections*, CNN (July 20, 2018), <https://www.cnn.com/2018/07/20/us/noncitizens-vote-san-francisco/index.html>.

23 Meta S. Brown, *Voter Data: What’s Public, What’s Private*, FORBES (Dec. 28, 2015; 9:30 PM), <https://www.forbes.com/sites/meta-brown/2015/12/28/voter-data-whats-public-whats-private/> (last visited Nov. 14, 2018).

24 *Are Voter Information and Other Records Requests Public Records?*, FIRST AMENDMENT COALITION (June 14, 2009), <https://firstamendmentcoalition.org/2009/06/are-voter-information-and-other-records-requests-public-records/> (last visited Feb. 3, 2019).

25 See, e.g., Jennie Neufeld, *Vox Sentences: If You Voted in North Carolina, ICE Wants to See Your Record*, VOX (Sept. 7, 2018; 8:00 PM), <https://www.vox.com/vox-sentences/2018/9/7/17833376/north-carolina-voting-records-ice-voter-fraud-japan-disasters> (last visited Nov. 14, 2018).

26 *Sanctuary City Ordinance*, S.F. OFF. OF CIVIC ENGAGEMENT & IMMIG. AFFAIRS, <https://sf.gov/ocea/sanctuary-city-ordinance-0> (last visited Nov. 15, 2018).

27 S.F. Ord. No. 128-18, *effective* June 30, 2018; see also S.F. MUN. ELECTIONS CODE art. X, § 1003(a) (notice for non-citizen voters).

28 See, e.g., Phil Matier, *SF Gave Undocumented Immigrants Voting Rights. Now It’s Worried About ICE*, S.F. CHRON. (Mar. 5, 2016; 6:00 AM), <https://www.sfchronicle.com/bayarea/matier-ross/article/SF-gave-undocumented-immigrants-voting-rights-12726237.php> (last visited Nov. 15,

Furthermore, these type of warnings have created additional costs. When Proposition N was proposed to voters in 2016, there was the expected cost of a “minimum \$160,000 per election to print and distribute voting materials, train poll workers, and separately register people who would become eligible to vote.”<sup>29</sup> However, the Board of Supervisors unanimously approved of additional legislation to providing warnings and spread public information about the charter amendment. This resulted in a cost of approximately \$310,000, although Supervisor Fewer had called for up to \$500,000 to provide these type of warnings and information.<sup>30</sup> These are additional costs that voters were not aware of when deciding on Proposition N in 2016.

Ultimately, these costs have only shown very low impact. A large part of the \$310,000 was spent on providing information and helping spread awareness for the right to vote. The Department of Elections took out multiple newspaper ads in multiple languages and had staff provide “registration training with community organizations, went into schools, sent 35,000 informational packets home with students, put up posters and tabled at events.”<sup>31</sup> However, despite the efforts of the Department of Education, non-citizen voters still had very low turnout. Although San Francisco had record turnout for a midterm election,<sup>32</sup> it was reported that only sixty-five non-citizen voters had registered to vote.<sup>33</sup> As a result, the cost of \$310,000 can be divided into approximately \$4,700 per voter. With only three elections for non-citizens to vote before the sunset deadline, the 2018 election was not a strong start for demonstrating the potential for change that the new voting demographic has. While lack of turnout was likely the result of those security concerns, those risks are also not expected to go away anytime soon.

## V. Conclusion

San Francisco’s policy of non-citizen voting has broad implications for other cities looking to implement similar policies. Proposition N is significant because it differs significantly from other examples of non-citizen voting in the United States in

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2018).

29 Letter from Ben Rosenfield, San Francisco Controller, to John Arntz, San Francisco Elections Chief (Aug. 15, 2016), <http://sfelections.sfgov.org/sites/default/files/Documents/candidates/Controller%20Statement%20Prop%20N%20-%20Non-Citizens%20Voting%20in%20School%20Board%20Elections.pdf>.

30 See, e.g., Phil Matier, *SF Spends \$300,000 to Register Noncitizen Voters—A Whopping 49 Sign Up*, S.F. CHRON. (Oct. 28, 2018; 4:00 AM), <https://www.sfchronicle.com/bayarea/matier-ross/article/SF-spends-300k-register-noncitizen-voters-how-much-13340917.php> (last visited Jan. 11, 2019).

31 Ida Mojada, *Non-Citizen Voters Reluctant to Register for School Board Election*, S.F. WKLY. (Oct. 11, 2018; 9:00 AM), <http://www.sfweekly.com/news/non-citizens-voters-reluctant-to-register-in-school-board-election/> (last visited Nov. 14, 2018).

32 Jonathan Bloom, *After Record Voter Turnout, San Francisco Reacts to Election Results*, NBC BAY AREA (Nov. 7, 2018; 8:13 PM), <https://www.nbcbayarea.com/news/local/After-Record-Voter-Turnout-San-Francisco-React-to-Election-Results-499998931.html> (last visited Nov. 14, 2018).

33 See, e.g., *School Board Results Nearly Finalized in City’s 1st Election With Non-Citizen Voters*, S.F. GATE (Nov. 14, 2018; 4:11 PM), <https://www.sfgate.com/news/bayarea/article/School-Board-Results-Nearly-Finalized-In-City-s-13393264.php> (last visited Jan. 11, 2018).

that the amendment only allows the newly enfranchised voters to participate in certain elections. For example, several municipalities in Maryland also allow for non-citizen voting, however, these municipalities allow for non-citizen voting on all local level elections.<sup>34</sup> This poses fewer safety issues as non-citizen voters are not placed on a separate roster from citizen voters. Chicago is another example. The city has had non-citizen voting since 1989 for local school council elections.<sup>35</sup> However, the Chicago school system has significant differences from SFUSD. The positions for Board of Education in Chicago are not elected, but rather appointed by the mayor. Instead, Chicago uses decentralized, “local ‘site councils’,” so residents—citizen or non-citizen—do not vote for Board of Education, but instead for councils of individual schools in their residential area.<sup>36</sup> This focuses on anyone within residential area of the local school regardless of citizenship status.

So while the concept of non-citizen voting is not radical in the United States, San Francisco’s interpretation for SFUSD is unique. Moreover, San Francisco has a broad reach of influence. Two years after Proposition N passed in San Francisco, Montpelier, Vermont and Boston considered similar policies.<sup>37</sup> Ultimately, the charter amendment introduced by Proposition N (2016) is at risk of becoming simply a symbol of reform. Proposition N (2016) was put up on a pedestal as “a shining example of the city’s progressive, forward-thinking policies.”<sup>38</sup> The measure’s passage suggests that the symbolic problem of incorporating marginalized families into their children’s education is seemingly solved. But in practice, the risk surrounding voting fails to support these marginalized groups. Proposition N (2016), as a ballot measure, provided a lever that alleviated social tension surrounding families marginalized by immigration in San Francisco. However, it is failing to generate meaningful reform beyond symbolism. Furthermore, this symbol of reform may undermine activists who are still working for better representation of marginalized groups in the education system. While the underlying assumptions of Proposition N (2016) regarding representation of marginalized group may have been valid, this is an issue of intent versus outcome. The struggle over implementation of the policy puts the supporters at odds with the very cause of representation that they are trying to support.

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34 See, e.g., Aaron Kraut, *Takoma Park Stands by Non-U.S. Citizen Voting Law*, WASH. POST (Mar. 14, 2012), [https://www.washingtonpost.com/local/takoma-park-stands-by-non-us-citizen-voting-law/2012/03/13/gIQAVBcgBS\\_story.html?utm\\_term=.bb9b7c51d702](https://www.washingtonpost.com/local/takoma-park-stands-by-non-us-citizen-voting-law/2012/03/13/gIQAVBcgBS_story.html?utm_term=.bb9b7c51d702) (last visited Nov. 14, 2018).

35 Nik DeCosta-Klipa, *Allowing Non-Citizens with Legal Status to Vote Isn't Unprecedented. But Would It Work in Boston?*, BOS. GLOBE (July 10, 2018), <https://www.boston.com/news/politics/2018/07/10/boston-non-citizen-voting> (last visited Nov. 14, 2018).

36 *Id.*

37 *Id.*; see also Doug Criss, *Vermont's Capital Could Allow Non-Citizens to Vote in Local Elections – An Idea as Old as America Itself*, CNN (Apr. 10, 2018; 12:28 PM), <https://www.cnn.com/2018/04/10/politics/vermont-noncitizens-vote-trnd/index.html>, (last visited Nov. 13, 2018).

38 Scott Schafer, *Noncitizens will soon be able to vote in San Francisco – For School Board*, NPR (May 3, 2017; 7:55 M), <https://www.npr.org/2017/05/03/526703128/non-citizens-will-soon-be-able-to-vote-in-san-francisco-for-school-board> (last visited Nov. 14, 2018).



# Millions of Undocumented Students with a Financial Burden: *The Need for Tuition Equality*

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There are nearly eleven million undocumented immigrants in the United States today. Almost 3.9 million of those people are students. They are a part of the American community and attend the same schools as all children in the United States; however, the path to higher education for undocumented students is far more challenging than it is for citizens. For undocumented people, getting high paying jobs is extremely challenging because they are not legally authorized to work in the United States. In order to improve their chances of getting a high paying job, many people wish to go to college, but not everyone can afford tuition. This results in a cyclical issue: an individual cannot go to college, gets a lower paying job, and then cannot afford for their children to go to college. Consequently, undocumented people are further marginalized socio-economically.

Tuition for universities in the United States continues to increase, to the point where some schools cost more money per year than the average American's annual salary. However, public schools tend to be far more affordable for residents of that state. While Ohio State University, a public school, costs around ten thousand dollars per year for in-state students, not including room and board,<sup>1</sup> out of state students pay over thirty thousand a year, not including room and board.<sup>2</sup> Therefore, in-state tuition is very enticing for low-income students. However, what happens to a student who has lived in the United States since childhood but cannot pay in-state tuition anywhere because they are not a legal resident? In many cases, that student will not be able to get a higher education and will be further marginalized in society because of it. The solution to this issue called "tuition equality" refers to laws that allow students who are not legal residents of the country to get in-state tuition rates at public institutions of higher education. With more and more undocumented students on the path to post-secondary school prevented from pursuing their dreams of higher education due to financial burdens, the need for tuition equality is ever pertinent. A lack of tuition equality prevents the students and our society from reaching its potential.

## I. Tuition Equality Today

Tuition equality is a policy that allows undocumented students to pay in-state tuition, even if they are not legally in that state.

1 BASIC COSTS: TUITION, ROOM AND BOARD FOR INCOMING STUDENTS, OHIO STATE UNIVERSITY, <http://undergrad.osu.edu/cost-and-aid/basic-costs> (last visited Jan. 22, 2019) (estimating total cost for 2018-2019 academic year).

2 COSTS & FINANCIAL AID, KENYON COLLEGE, <https://www.kenyon.edu/admissions-aid/financial-aid/> (last visited Jan. 22, 2019) (estimating total cost for 2018-2019 academic year at \$68,440).

The laws often work by granting in-state tuition to any student who has spent a certain number of years in secondary school within that state or has received their GED in that state. The challenge is that immigration laws are federally determined, but tuition laws are state determined.<sup>3</sup>

Today, twenty states and the District of Columbia offer tuition equality.<sup>4</sup> As seventy-five percent of the United States's foreign-born population reside in these states,<sup>5</sup> they are critical in offering tuition equality.

While tuition equality greatly increases the chances of undocumented students obtaining higher education, some of those students still cannot afford to pay the full in-state tuition. Some students need Federal Student Aid in order to afford their in-state school. However, in most states it is essentially impossible for undocumented students to receive federal and state financial aid. Nonetheless, in select states, such as California, Minnesota, New Mexico, Oregon, Texas and Washington, undocumented students are able to receive state financial aid.<sup>6</sup>

Conversely, some states prohibit in-state tuition for undocumented immigrants, or even public university attendance. Arizona, Georgia, and Indiana "specifically prohibit in-state tuition rates for undocumented students."<sup>7</sup> Many undocumented students were brought to America when they were children. As a result, these students know no other place than the United States as home; however, they are prohibited from attending college in the country they call home. This practices are actively preventing them from achieving further success and integration into the community.

Alabama and South Carolina go one step further and prohibits [sic] undocumented students from enrolling at any public postsecondary institution.

3 Diana Ali, *In-State Tuition for Undocumented Students: 2017 State-Level Analysis*, NASPA FOUND. (July 21, 2017), <https://www.naspa.org/rpi/posts/in-state-tuition-for-undocumented-students-2017-state-level-analysis> (last visited Nov. 22, 2018).

4 *Basic Facts About In-State Tuition*, NAT'L IMMIG. LAW CTR. (last updated June 1, 2018), <https://www.nilc.org/issues/education/basic-facts-instate/> (last visited Nov. 22, 2018). The states that have these laws are California, Colorado, Connecticut, Florida, Hawaii, Illinois, Kansas, Kentucky, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Texas, Utah, and Washington.

5 *Id.*

6 *Undocumented Student Tuition: Overview*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 29, 2015), <http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx>.

7 *Id.*

The U.S. Immigration and Customs Enforcement wrote in 2008 that “individual states must decide for themselves whether or not to admit illegal aliens into their public postsecondary institutions.”<sup>8</sup>

This means that undocumented students who have excelled in their primary education in Alabama or South Carolina are forbidden from attending any public college or university within their state. Furthermore, it is unlikely that these undocumented students will be able to afford private education.

## II. Why Tuition Equality Can Help

There is significant opposition to offering undocumented students in-state tuition for fear of them taking opportunities from citizens. However, in the long run, tuition equality can result in less taxpayer money spent and greater improvement for the state. College educated people are likely to earn and spend more money, therefore boosting the economy. Some experts will often say that there is no point for undocumented students to go to college because they will not have a permit to work after they graduate.<sup>9</sup> There is concern that undocumented students without a work permit have little chance of finding work after graduation,<sup>10</sup> for “[e]ven if undocumented students attend college, they will not be employable if they are still undocumented after graduation.”<sup>11</sup> However, with the implementation of the Deferred Action for Childhood Arrivals (DACA) program, this has become less of a concern. With DACA in place, an undocumented immigrant who finishes high school in the US is able to legally work and get a driver’s license in the United States.<sup>12</sup> This means that instead of doing low-skill tasks and getting paid a small wage under the table, an undocumented immigrant can get a legal job and make more money. In fact, “a survey of undocumented youth found that, since the enactment of DACA, seventy percent of survey respondents reported getting their first job or starting a new job. Additionally, forty-five percent reported increased job earnings.”<sup>13</sup> This means that with DACA, undocumented students who graduate college have a significantly higher chance of getting a job after college than before.

Another concern regarding implementing tuition equality is that it will incentivize undocumented people to stay in the United States and use taxpayer money longer than they would otherwise. However, “a large proportion of undocumented college-age individuals are likely to stay in the United States even if they don’t have access to higher education. It is in the

best interest of everyone to provide access to higher education for the undocumented students that reside in the state.”<sup>14</sup> As undocumented students will likely stay in the United States regardless, it would make sense to allow them to get a higher education and a higher paying job, so that they are able to contribute more to society and pay more taxes through their work.

## III. The Truth About Taxpayer Money

People also often complain that offering undocumented immigrants in-state tuition or financial aid will take away taxpayer money or opportunities for legal citizens. However, in reality, students who do not receive access to a college education can cost the state money. A report published by the National Conference of State Legislatures noted that when the system fails to help students succeed in college, it “results in higher costs to state prisons and state welfare systems.”<sup>15</sup> A college education can help people contribute to society in a far greater way.

The truth is that undocumented people already contribute to society, more so than they benefit from it. They are statistically paying more in tax dollars than they are receiving in benefits. A report from San Diego State University found that “in 2010 undocumented immigrants paid an estimated \$13 billion into the social security system, but only received \$1 billion in benefits contributing to \$12 billion in cash flow.”<sup>16</sup> Undocumented immigrants pay a higher portion of their income in taxes than the top one percent does.<sup>17</sup> There is a misconception spread around America that immigrants are reaping the benefits of the United States system without contributing to it when in fact they are getting very little return on their investment.<sup>18</sup> They are benefiting American society, and it is time that the United States government starts to benefit them. If undocumented immigrants are paying taxes to the government, then it is logical that the government should at least support those people in the education, as they do all other taxpayers.

## IV. The Moral Reason for Tuition Equality

Tuition equality laws are in place to support students who came to America illegally, but often those children were so young that they had no choice in the matter. Tuition equality allows these students to further their education and contribute to society in a way they could not without a college education. As stated previously, tuition is growing more and more expensive, and it is unrealistic to expect undocumented students to be able to afford to pay out of state tuition. A College Board Trends in College Pricing report conducted in the 2008-2009 academic

8 *Id.*

9 Justin Chan, *America’s Undocumented College Students Face Roadblocks to Employment After Graduation*, FORBES (May 15, 2017), <https://www.forbes.com/sites/justinchan/2017/05/15/what-job-prospects-do-undocumented-students-have/#55c69e035131>.

10 Ali, *supra* note 3.

11 *Undocumented Student Tuition: Overview*, *supra* note 6.

12 See generally *Deferred Action for Childhood Arrivals (DACA)*, U.S. Dep’t of Homeland Security (last published June 23, 2018) <https://www.dhs.gov/deferred-action-childhood-arrivals-daca> (last visited Feb. 21, 2019).

13 ZENEN JAIMES PÉREZ, CTR. FOR AM. PROGRESS, REMOVING BARRIERS TO HIGHER EDUCATION FOR UNDOCUMENTED STUDENTS 11 (Dec. 2014), <https://www.luminafoundation.org/files/resources/removing-barriers-for-undocumented-students.pdf>.

14 *Undocumented Student Tuition: Overview*, *supra* note 6.

15 *Id.*

16 SAN DIEGO STATE UNIVERSITY, UNDOCUMENTED AND IMMIGRANT STUDENTS. SAN DIEGO STATE UNIVERSITY, [https://go.sdsu.edu/education/cescal-conference/files/06163-7\\_Data\\_One\\_Sheet.pdf](https://go.sdsu.edu/education/cescal-conference/files/06163-7_Data_One_Sheet.pdf) (last visited Nov. 21, 2018).

17 *Id.*

18 Vanessa Williamson, *Americans Are Proud to Pay Taxes – Except When They Think Others Are Cheating*, WASH. POST (Apr. 18, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/18/americans-are-proud-to-pay-taxes-except-when-they-think-others-are-cheating/?hpid=hp\\_hp-top-table-main-immigration%3Acheating%3Ahomepage%2Ft&utm\\_term=.9b429a21d9d5](https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/18/americans-are-proud-to-pay-taxes-except-when-they-think-others-are-cheating/?hpid=hp_hp-top-table-main-immigration%3Acheating%3Ahomepage%2Ft&utm_term=.9b429a21d9d5).

year found that, “the average cost of attending a public four-year college for in-state students was \$7,020. The same education for out-of-state students cost an average of \$11,528.”<sup>19</sup> In a survey of undocumented immigrants, “the majority of the respondents—sixty-one percent—reported that their household income was less than \$30,000.”<sup>20</sup> That means that if students are not permitted to pay in-state tuition, their college education could cost a student more than one-third of their family’s income. Consequently, college tuition could be impossible to afford, especially if there is more than one child in the family. This demonstrates a large need for tuition equality.

While there are other options for students in regards to scholarships, they are not always guaranteed through all four years in college. Private scholarships or loans are often temporary, many times covering the only first year or two.<sup>21</sup> This “leads to many undocumented students taking whole semesters or years off from their schooling in order to work and save money to return to school or to help pay down some of the college debt they have already incurred.”<sup>22</sup> The result is an undue burden on undocumented students because other students can experience a continuous education of four years and then enter the job market. However, solely for financial reasons, undocumented immigrants are forced to postpone their education. It is true that other students do take semesters or years off of college, however the reasons for the wider student population typically “cite lack of academic preparation as the main reason for leaving school—undocumented students typically cite finances as the most important factor. It is not uncommon for undocumented students to remain in school for seven to ten years in order to earn a bachelor’s degree.”<sup>23</sup> Undocumented students are not frequently leaving school for lack of preparation, but instead for a lack of funds for tuition. This is of great concern because, as a report published by the Center of American Progress puts it,

[T]he more time students spend out of school, the more likely they will not return to finish their degrees.

Additionally, undocumented students have lower completion rates for bachelor’s degrees compared with their U.S.-citizen counterparts. This finding suggests that at some point after enrollment, undocumented students experience unanticipated burdens to completing their bachelor’s degrees—most commonly financial in nature—leading to greater dropout rates.<sup>24</sup>

## V. The Benefit to Society

If all states were to allow undocumented students to pay in-state tuition, it would increase the amount of people able to get a college education. This would allow them to obtain higher pay-

ing jobs, providing a boost to the economy. With fewer people statistically relying on government subsidies, in prison, or impoverished, the education would pay for itself. Undocumented immigrants with a college education can lead to an increase in wealth for the state.<sup>25</sup> The logical progression is that if they get a college degree, they will inevitably make more money in their job and spend more money in return, further boosting the economy. Also, the incentive to go to college would encourage more students to stay in high school and increase the state’s overall graduation rates.<sup>26</sup> Moreover, the students coming out of college would benefit the United States economy as a whole. Increasingly, the US needs college educated people. In fact, by 2020, “65% of jobs will require post-secondary education and training beyond high school.”<sup>27</sup> These jobs cannot be filled by solely legal residents, the United States in 2020 is projected to “fall short by 5 million workers with postsecondary education—at the current production rate.”<sup>28</sup> With a growing need for people with computer science and engineering skills, it is also important to recognize that undocumented students are studying STEM at a higher rate than other students. In a survey taken, “about 28 percent [of the students] were majoring in science, technology, engineering, or math (STEM) fields, an area that is arguably suffering from a shortage of qualified candidates in the U.S. That’s a little higher than the national rate.”<sup>29</sup> Therefore, it would be entirely beneficial and necessary to support those students in their academic journey.

## VI. Conclusion

Undocumented students have a far greater challenge completing school than their peers. It is a moral obligation for the American government to support these students financially in their education. In the past thirty years the price of a college education has increased by a thousand percent.<sup>30</sup> It is increasingly challenging for an average American to afford a college education, especially if they are an undocumented immigrant. According to the Atlantic, 87.9 percent of undocumented students said that cost was one of the most significant factors when it came to their college selection.<sup>31</sup> For many students, it is altogether a prevention. Studies have found that higher education is very closely linked with pathways to citizenship.<sup>32</sup> In a recently proposed immigration bill, “S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act, included an accelerated pathway to legalization for undocumented young people who had completed at least two years of higher education.”<sup>33</sup> For undocumented children to legally live and work in the United States, education can be a critical factor. If laws make it so that these students cannot afford college, it leaves them in a limbo in which they strain to make a living wage, struggle to get citizenship, and live in fear of being deported.

19 *Undocumented Student Tuition: Overview*, *supra* note 6.

20 Quartz Sonali Kohli. *Why U.S. Colleges Should Welcome Undocumented Immigrants*, ATLANTIC (Feb. 2, 2015), <https://www.theatlantic.com/education/archive/2015/01/why-us-colleges-should-welcome-undocumented-immigrants/385049/> (last visited Nov. 22, 2018).

21 PÉREZ, *supra* note 13, at 25.

22 *Id.*

23 *Id.*

24 *Id.* (footnote omitted).

25 Ali, *supra* note 3.

26 *Id.*

27 SAN DIEGO STATE UNIVERSITY, *supra* note 16.

28 *Id.*

29 Kohli, *supra* note 20.

30 PÉREZ, *supra* note 13, at 1.

31 Kohli, *supra* note 20.

32 PÉREZ, *supra* note 13, at 2.

33 *Id.*

Every year, approximately sixty-five thousand undocumented students graduate from high school in America.<sup>34</sup> Every year a large portion of those graduates do not continue on to college because they cannot afford to do so. Instead, some fill minimum wage jobs, struggle to make ends meet, and are unable to follow their dreams. This need not be their only option. Tuition equality laws across all of America could be extremely beneficial in enabling more and more undocumented students to get a college education. They could then contribute even more to society, make and spend more money, and potentially get citizenship. Beyond tuition equality, all states should offer financial aid to undocumented students and legal U.S. citizens. Both groups pay taxes and both groups attended high school in the United States, so logically, both should be treated the same regarding tuition finances. There are currently eleven million undocumented people living in the United States. How does it benefit the country if the United States government puts laws in place that prevent those eleven million people from attaining secondary education? The answer is simple: it doesn't. It is better for everyone in society both socially and economically if undocumented immigrant students have access to higher education. Advocates of tuition equality laws state that "it's cruel and wrongheaded to deny undocumented students' higher education and an opportunity to obtain legal status. They argue that these students would ultimately pay more taxes and make greater contributions as professionals and citizens."<sup>35</sup> It makes logical, economic, and moral sense that all fifty states implement tuition equality laws.

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<sup>34</sup> *Id.* at 1.

<sup>35</sup> Eddy Ramirez, *Should Colleges Enroll Illegal Immigrants?*, U.S. NEWS & WORLD REPORT (Aug. 7, 2008), <https://www.usnews.com/education/articles/2008/08/07/should-colleges-enroll-illegal-immigrants> (last visited Nov. 22, 2018).

# Building Ladders and Raising Floors: *Workforce Development's Role in Advancing Socioeconomic Opportunity*

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Guest Contributor

## I. Introduction

In 2014, the Workforce Innovation and Opportunity Act (WIOA), a reauthorization of a major federal workforce development and job training law, passed 95-3 in the Senate and 415-6 in the House.<sup>1</sup> In 2017, the Trump administration issued an executive order on apprenticeships, and three separate bipartisan apprenticeship bills were introduced in Congress.<sup>2</sup> The historic and current bipartisan consensus on the value of federal workforce development programs is striking, especially considering the backdrop of historic political polarization and congressional unproductivity.<sup>3</sup> This continuing political consensus stems from a belief within politicians of both parties that workforce development is necessary to addressing a “skills gap,” where there are too few sufficiently qualified workers in the labor market to fill employer demand for high-skill labor. The idea of a skills gap has convinced analysts on both sides of the aisle that workforce development is a primary solution for two of the most severe socioeconomic crises of our time: wage stagnation and chronic unemployment, and the inequality and poverty they cause.<sup>4</sup>

This paper analyzes the degree to which federal workforce development policy is an effective tool for reducing or eliminating wage stagnation and chronic unemployment for disadvantaged workers. Section II describes the status quo in workforce development and outlines the scope of wage stagnation and chronic unemployment. Section III evaluates the dual claim that a

skills gap both exists and is in large part responsible for stagnating wages and rising unemployment. Section IV proposes evidence-based recommendations on what effective workforce development policy might look like, and concludes.

I argue that the basics of the consensus on workforce development—that a “skills gap” of some form is a major contributor to socioeconomic inequity, and that workforce development can be an effective solution—are true. However, it is incomplete in several key ways. It overestimates and misunderstands the scope, nature, and impact of the skills gap relative to other factors affecting wage stagnation and unemployment. This has led to an overestimation of the degree to which workforce development can be a solution to these problems. At the same time, it underestimates the degree to which policymakers must overhaul federal workforce development systems in order to make a real impact on the problem—current workforce development policy is making little more than a dent in wage stagnation and chronic unemployment. In other words, workforce development does indeed have potential to be an effective and significant policy response to wage stagnation and chronic unemployment, but it requires substantial reform and investment as well as robust accompanying policies aimed at increasing worker power and work supports. Understanding these policy nuances is important: Unless we change the current direction of workforce development policy, millions of Americans will continue to suffer from avoidable poverty, unemployment, and despair, which destroys communities, erodes our society, and disgraces the democratic ideals of this nation.

## II. Background and Status Quo

### A. Defining Workforce Development

Workforce development is a broad term for a range of policies, funding streams, and programs that help people prepare for and find jobs, as well as supportive services related to these efforts (such as wage subsidies, child care and transportation vouchers, case management, etc.).<sup>5</sup> All programs intervene on the “supply” side of the labor market, addressing information gaps, skills gaps, and other barriers to employment that make individual disadvantaged workers less visible and less desirable to prospective employers. The central question of this paper is whether such an approach is an effective solution to wage stag-

1 Speaker Boehner Joins Bipartisan Congressional Signing of WIOA Bill, AM. FORWARD (July 11, 2014), <http://www.americaforward.org/speaker-boehner-joins-bipartisan-congressional-signing-of-wioa-bill/>.

2 Roy Maurer, *Apprenticeships, Funds for Job Training Boosted in Bills Before Congress*, SOC'Y FOR HUM. RESOURCE MGMT. (Feb. 21, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/apprenticeships-funds-job-training-bills-before-congress.aspx>; <https://www.whitehouse.gov/presidential-actions/3245/>.

3 For more on the history of workforce development policy, see STEPHEN A. WANDNER ET AL., AARP PUB. POLY INST., *SELECTED PUBLIC WORKFORCE DEVELOPMENT PROGRAMS IN THE UNITED STATES* 48-50 (2015), <https://www.aarp.org/content/dam/aarp/ppi/2015/aarp-selected-public-workforce-development-programs.pdf>.

4 See, e.g., Tamar Jacoby, *This Way Up: New Thinking About Poverty and Economic Mobility*, AM. ENTERPRISE INST., <http://www.aei.org/spotlight/this-way-up-home/> (last visited Jan. 18, 2019); LAWRENCE ABER ET AL., AEI/BROOKINGS WORKING GROUP ON POVERTY & OPPORTUNITY, *OPPORTUNITY, RESPONSIBILITY, AND SECURITY: A CONSENSUS PLAN FOR REDUCING POVERTY AND RESTORING THE AMERICAN DREAM* (2015), <https://www.brookings.edu/wp-content/uploads/2016/07/Full-Report.pdf>.

5 GINA ADAMS ET AL., URBAN INST., *BRIDGING THE GAP: EXPLORING THE INTERSECTION OF WORKFORCE DEVELOPMENT AND CHILDCARE* 8-9 (May 2015), <https://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000225-Bridging-the-Gap.pdf>.

nation and chronic unemployment, particularly for the disadvantaged populations who are most impacted.

### *B. Wage Stagnation and Chronic Unemployment*

Wage stagnation and chronic unemployment have become enormously pressing social problems that ravage disadvantaged communities, deepen poverty, and increase inequity. Between 1948 and 1979, hourly compensation for workers rose by ninety-one percent and productivity growth rose by ninety-seven percent.<sup>6</sup> Since 1979, however, real median hourly wages for American workers have grown by only fourteen percent, even as productivity has risen by another ninety-seven.<sup>7</sup> About twenty-six percent of that gap can be explained by inequality, measured by the difference between the average and the median wage, while another eleven percentage points can be described by decrease in labor share of profits, with a greater amount of profit going to capital instead.<sup>8</sup> The wage stagnation crisis is largely limited to low and middle wage workers. While middle-wage workers' wages are up only six percent since 1979, and low wage workers' are down five percent, those with very high wages saw a forty-one percent increase.<sup>9</sup> Wage stagnation impacts millions of low-wage workers in the United States. In 2016, 41.7 million workers were earning under twelve dollars an hour, and 58.3 million workers were earning fifteen an hour.<sup>10</sup> The total labor force in the United States in 2016 consisted of 159.9 million workers, meaning that approximately twenty-six percent of workers were earning under twelve dollars an hour, and thirty-six percent were earning under fifteen.<sup>11</sup>

Chronic unemployment, too, has become a major socioeconomic problem. The unemployment rate has reached a sixteen-year low of 4.1 percent, but there remain millions of Americans who face barriers to employment that lead to long-term unemployment and exit from the labor force. In March 2018, the long-term unemployed (those jobless for twenty-seven weeks or more) accounted for 20.3 percent of the unemployed, or 1.3 million people.<sup>12</sup> The United States also currently has a historically high seven million able-bodied, working age men who are no longer participating in the labor market (also termed by the Department of Labor as “discouraged workers”), a number that has been rising consistently over the past few decades.<sup>13</sup> The nation

suffers a high rate of youth “disconnection,” where youth are neither in school nor working. In 2016, there were 4.6 million disconnected youth, teenagers and young adults between the ages of sixteen and twenty-four who are neither in school nor working, and 11.7 percent of youth are considered disconnected.<sup>14</sup> In Los Angeles alone, there are seventy-three thousand disconnected youth, accounting for 13.7 percent of total Los Angeles youth ages sixteen to twenty-four.<sup>15</sup> These subgroups overlap, but altogether, they account for millions of workers overall.

These social problems are not only destructive for the individuals they affect. They impact families and communities as well. Low wages and unemployment have been linked to a host of other social and economic afflictions, such as violence, familial breakdown, drug usage, and intractable poverty—and these ills are acknowledged by policy analysts on both sides of the aisle.<sup>16</sup> It is therefore imperative that American society and government deal with these problems quickly and effectively, and as long as the skills gap is a major cause, workforce development plays a part in the solution.

### *C. Current Workforce Development Policy*

The federal government is the largest investor in public workforce development programs. However, the federal government spends about three and a half trillion dollars, or two percent of the national GDP, on higher education, while it spends a comparatively paltry six billion, or 0.03 percent of the GDP, on workforce development.<sup>17</sup> The centerpiece of federal workforce development policy is WIOA, a reauthorization of the Workforce Investment Act (WIA) of 1998. WIOA authorizes the direct provision of several types of employment and training services. It also indirectly provides training to clients through Adult, Dislocated Worker, or Youth formula grants under Title I of the Act that fund local and state training programs. WIOA's programs are administered through one of more than 560 Local Workforce Investment Boards (LWIBs), which in turn operate through 2,500 American Job Centers (AJCs), where all WIOA services are provided.<sup>18</sup> AJCs primarily provide employment services such as job search assistance, career

6 Lawrence Mishel et al., *Wage Stagnation in Nine Charts*, ECON. POLY INST. (Jan. 6, 2015), <https://www.epi.org/publication/charting-wage-stagnation/>.

7 REVITALIZING WAGE GROWTH: POLICIES TO GET AMERICAN WORKERS A RAISE 4 (Jay Shambaugh & Ryan Nunn eds., 2018) [hereinafter REVITALIZING WAGE GROWTH].

8 *Id.* at 4-5.

9 Mishel et al., *supra* note 6.

10 *Millions of Low-Wage Workers in the US Are Struggling to Survive*, OXFAM AM. (June 21, 2016), <https://www.oxfamamerica.org/explore/stories/millions-of-low-wage-workers-in-the-us-are-struggling-to-survive/>.

11 *Civilian Labor Force (CLF16OV)*, FED. RESERVE BANK OF ST. LOUIS (last updated Jan. 4, 2019), <https://fred.stlouisfed.org/series/CLF16OV> (last visited Jan. 18, 2019).

12 *Long-Term Unemployed Account for 20.3 Percent of Unemployed in March 2018, Down from a Year Earlier*, U.S. DEP'T OF LABOR BUREAU LABOR STATISTICS (Apr. 11, 2018), <https://www.bls.gov/opub/ted/2018/long-term-unemployed-account-for-20-3-percent-of-unemployed-in-march-2018-down-from-a-year-earlier.htm>.

13 *Where did all the men go?*, AM. ENTERPRISE INST. (May 8, 2017),

<http://www.aei.org/publication/where-did-all-the-men-go/>.

14 SARAH BURD-SHARPS & KRISTEN LEWIS, SOC. SCIENCE RES. COUNCIL MEASURE OF AM., MORE THAN A MILLION REASONS FOR HOPE: YOUTH DISCONNECTION IN AMERICA TODAY, at i (Mar. 2018), <http://www.measureofamerica.org/youth-disconnection-2018/>.

15 GARY PAINTER ET AL., UNIV. SOUTHERN CALIF. SOL PRICE CTR. FOR SOC. INNOV., OPPORTUNITY YOUTH IN THE CITY OF LOS ANGELES 6 (2017), [https://socialinnovation.usc.edu/wp-content/uploads/2018/02/Opportunity-Youth-in-the-City-of-Los-Angeles\\_5.4.17.pdf](https://socialinnovation.usc.edu/wp-content/uploads/2018/02/Opportunity-Youth-in-the-City-of-Los-Angeles_5.4.17.pdf).

16 *See, e.g.*, Jacoby, *supra* note 4; ABER ET AL., *supra* note 4; *see generally* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED (1989).

17 INGRID SCHROEDER ET AL., PEW, FEDERAL AND STATE FUNDING OF HIGHER EDUCATION (2015), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/06/federal-and-state-funding-of-higher-education>; REVITALIZING WAGE GROWTH, *supra* note 7, at 35.

18 KRISTIN WOLFF, MATHEMATICA POLY RES., GOVERNING THE PUBLIC WORKFORCE SYSTEM: THE STRUCTURE AND PRIORITIES OF LOCAL WORKFORCE INVESTMENT BOARDS

skill workshops, case management and counseling, and information and vouchers so that workers have access to training.<sup>19</sup>

WIOA's impact on employment and earnings is mixed, at best, and that is partly due to the nature of its programs. Its service provision is dominated by its least intensive program. Eighty-four percent of all adult workers and ninety-one percent of all dislocated workers (workers who have been terminated and are unlikely to return to their previous industry or occupation) received employment and job search assistance. However, only one to two percent of all workers received training through WIOA. To put it another way, the AJCs served just over nineteen million job seekers with job search services, but only two to three-hundred thousand workers with job training. Due to reduced funding for staff, the majority of those receiving job search services were offered self-service systems with a computer to look for jobs. More intensive staff assistance—interviewing, counseling, placement, and job development services—was only provided to about half of customers.<sup>20</sup> A comprehensive study by the Mathematica Policy Center found that the receipt of training did not tend to boost employment or earnings after fifteen months, nor did it tend to significantly increase the individual's chances of working in the field they had studied (though the authors acknowledge that it might be too soon to judge the impacts of training).<sup>21</sup> The use of self-service systems also had little impact on employment, though the receipt of intensive staff assistance raised quarterly earnings by six-hundred dollars, or by about seventeen percent.<sup>22</sup>

Unfortunately, the relatively promising impacts of intensive services do not reach most customers due to staff shortages and lack of funding. Consistent with the broad trend of workforce development spending, WIOA has seen a forty-percent cut of its state job training formula grants from \$4.6 billion in 2001, to \$2.8 billion in 2018.<sup>23</sup> Funding reduction has resulted in a drop in the number of AJCs from 3,582 in 2003 to 2,479 now, with greatest losses in rural areas.<sup>24</sup> WIA's reauthorization as WIOA saw an eighty million dollar boost to formula grants, alongside numerous reforms aimed at improving training, instituting more rigorous data collection, and increasing alignment of workforce systems, among other changes, but the reauthorization only restored funding to its 2010 level.<sup>25</sup>

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(2015), <https://www.mathematica-mpr.com/our-publications-and-findings/publications/governing-the-public-workforce-system-the-structure-and-priorities-of-local-workforce-investment>.

19 WANDNER ET AL., *supra* note 3, at 13.

20 SHEENA MCCONNELL ET AL., MATHEMATICA POLY RES., PROVIDING PUBLIC WORKFORCE SERVICES TO JOB SEEKERS: 15-MONTH IMPACT FINDINGS ON THE WIA ADULT AND DISLOCATED WORKER PROGRAMS 40 (2016), <https://www.mathematica-mpr.com/our-publications-and-findings/publications/providing-public-workforce-services-to-job-seekers-15-month-impact-findings-on-the-wia-adult>.

21 *Id.* at 87.

22 *Id.* at 125.

23 *State Job Training Grant Funding Has Fallen by Almost 40% Since 2001*, CTR. FOR BUDGET & POLY PRIORITIES, <https://www.cbpp.org/state-job-training-grant-funding-has-fallen-by-almost-40-since-2001> (last visited Jan. 18, 2019).

24 WANDNER ET AL., *supra* note 3, at 7.

25 ADAMS ET AL., *supra* note 5, at 13.

As this brief discussion of current WIOA implementation has demonstrated, WIOA's workforce development system is ill-funded, inaccessible to many, unable to provide intensive services to many customers, and dubious in its effectiveness when it comes to training and other types of services. These deep-seated problems call into question the current system's basic ability to perform the expansive goals that policymakers have set before it. Before discussing broad reforms to the workforce development system, it is important to evaluate its necessity through an analysis of the skills gap and the common arguments made for and against its existence.

### III. Evaluating the Claim of a Skills Gap in the Labor Market

#### *A. Issues in Labor Market Supply—Disadvantaged Workers and the Skills Gap*

This section will discuss the skills gap as it pertains to labor market supply: does a skills gap exist among low wage and unemployed workers, and is a lack of skills primarily responsible for their low outcomes in the labor market? An analysis of the demographics of these vulnerable populations reveals that wage stagnation and chronic unemployment have had a disproportionate impact on people of color and those with a high school diploma or less, implying that social disadvantage and a lack of education or training contributes to poor labor market outcomes. Over half (53.5 percent) of the low wage workforce has attained high school degree or less, compared to about a third of the overall labor force;<sup>26</sup> 46.5 percent of the low wage workforce were workers of color, compared to twenty-two percent of the overall labor force.<sup>27</sup> The chronically unemployed tend to have high numbers of older (14.8 percent are age fifty-six to sixty-five), minority (22.6 percent black, 19.0 percent Hispanic), and low educational attainment (18.1 percent dropped out of high school) workers.

Discouraged workers and disconnected youth share similar concentration among black men with a high school diploma or less.<sup>28</sup> Indeed, among these groups in particular, labor market participation has declined steeply over the last few decades. In 1964, prime-age men with a high school degree or less participated in the labor force at roughly the same rate as their college-educated peers (97 percent versus 98 percent). By 2015, college-educated male labor force participation remained the same, but men with a high school degree or less were partic-

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26 VERNON BRUNDAGE, JR., U.S. DEP'T OF LABOR BUREAU OF LABOR STATISTICS, PROFILE OF THE LABOR FORCE BY EDUCATIONAL ATTAINMENT (Aug. 2017), <https://www.bls.gov/spotlight/2017/educational-attainment-of-the-labor-force/pdf/educational-attainment-of-the-labor-force.pdf>; David Cooper, *Raising the Minimum Wage to \$15 by 2024 Would Lift Wages for 41 Million American Workers*, ECON. POLY INST. (Apr. 26, 2017), <https://www.epi.org/publication/15-by-2024-would-lift-wages-for-41-million/>.

27 U.S. DEP'T OF LABOR BUREAU OF LABOR STATISTICS, REPORT 1070, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2016 (Oct. 2017), <https://www.bls.gov/opub/reports/race-and-ethnicity/2016/home.htm> [hereinafter BLS, LABOR FORCE BY RACE AND ETHNICITY].

28 JOSH MITCHELL, URBAN INST., WHO ARE THE LONG-TERM UNEMPLOYED?, at 4 (Aug. 2013), [https://www.urban.org/research/publication/who-are-long-term-unemployed/view/full\\_report](https://www.urban.org/research/publication/who-are-long-term-unemployed/view/full_report); BURD-SHARPS & LEWIS, *supra* note 14, at 8.

ipating at a rate of 83 percent, a fourteen point drop from 1964.<sup>29</sup> Among black male high school dropouts in 2008, the employment rate was a mere forty percent—and when currently incarcerated men were accounted for, it dropped to a devastating twenty-five percent.<sup>30</sup> Chronic unemployment itself seems to feed the cycle of unemployment: due to skills degeneration and demotivation, the long-term unemployed are more than twice as likely to have left the market altogether as to have settled into steady, full-time work.<sup>31</sup> These demographic data suggest that there is, in fact, severe skills and education deficiency among the millions of workers who suffer most from low wage work and chronic unemployment.

There is evidence that the converse to this assertion is also true: the highly educated, trained, and credentialed enjoy an “education premium” in the labor market that results in progressively higher wages and rates of employment as more education and training are attained. In 2017, for example, the unemployment rate for workers with a Bachelor’s degree was 2.5 percent, their median usual weekly earnings were \$1,173, and the labor participation rate was 73.5 percent.<sup>32</sup> By contrast, workers with only a high school diploma had an unemployment rate of 4.6 percent, earnings of \$712 per week, and a labor participation rate of 57.8 percent—and workers with less than a high school diploma had a 6.5 percent unemployment rate, earnings of \$520 per week, and a 44.8 percent labor participation rate.<sup>33</sup>

Undergraduate degrees aside, even less advanced degrees afforded an education premium when compared to a high school diploma or less. Workers with an Associate’s degree have an unemployment rate of 3.4 percent and weekly earnings of \$836, and workers with “some college” but no degree have an unemployment rate of 4.0 percent with earnings of \$774 per week.<sup>34</sup> They have a combined labor participation rate of 66.2 percent, which is nearly ten percentage points higher than that of workers with a high school diploma, and twenty higher than that of workers with less than a high school diploma.<sup>35</sup> Occupational certificates and licenses also carry an extremely strong premium on the labor market, showing that college need not be the only way to benefit from the educational premium. For workers six-

teen and over with a certificate or license, the labor participation rate is 87.5 percent, and the rate of unemployment is 2.2 percent, surpassing and rivalling the labor outcomes of workers with professional degrees. Importantly, aggregate racial discrepancies in labor force participation disappear when isolating only workers with certificates or licenses. Unfortunately, black workers with a certification or license only make up 14.5 percent of the total black civilian non-institutionalized population above sixteen, as compared to 17.7 percent for white workers.<sup>36</sup> The population of white workers already enjoys a much higher number of college-educated workers for whom a certification or license would not be necessary – fifty percent of white workers have at least an Associates’ degree, compared to forty-one percent of black workers.<sup>37</sup> This implies that improving education and training can be an important, if imperfect, way to close racial gaps in labor market outcomes and relieve socioeconomic deprivation in communities of color, but that access to education and training is still unequal.

These statistics are important to demonstrate that there is indeed a firm empirical basis for arguing that, at a very general level, greater education and training do correlate with higher earnings and employment outcomes. However, the data complicate this narrative by showing that relatively less advanced degrees can still afford a sizeable bump in labor market prospects, affording employment and earning outcomes that can even rival that of much more advanced degrees. It also shows that access to education and training is unequal, and that creating greater access to lucrative education and training can help reduce the impacts of wage stagnation and chronic unemployment on disadvantaged communities. From the perspective of the supply side of the labor market, then, a skills gap of some form does exist, and addressing it can be a significant way to deal with the problems stated above.

That said, it is still important to qualify that statement with the recognition that there are other factors, both directly and indirectly related to labor market factors, that have led to the current state of affairs, and that providing workforce development and training alone cannot be enough. There are also many other barriers to employment that negatively impact disadvantaged workers’ chances in the labor market that do not directly have to do with a skills gap. Disadvantaged workers and communities often suffer from limited transportation,<sup>38</sup> a lack of affordable child-care,<sup>39</sup> or disconnection from the social networks through which most workers find employment.<sup>40</sup> They also face age and racial discrimination, the employment

29 EXEC. OFF. OF THE PRESIDENT OF THE U.S. (OBAMA), THE LONG-TERM DECLINE IN PRIME-AGE MALE LABOR FORCE PARTICIPATION at 2 (June 2016). [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160620\\_cea\\_primeage\\_male\\_lfp.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160620_cea_primeage_male_lfp.pdf).

30 Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 2010 DAEDALUS 8, 12-13 (Summer).

31 Gary Burtless, *Long-Term Unemployment: Anatomy of the Scourge*, BROOKINGS INST. (July 27, 2012), <https://www.brookings.edu/articles/long-term-unemployment-anatomy-of-the-scourge/>; Kristen Bahler, *Unemployment Is Really Low. So Why Can't These People Find Jobs?*, TIME (May 22, 2017), <http://time.com/money/4758109/unemployment-is-really-low-so-why-cant-these-people-find-jobs/>.

32 *Employment Projections*, U.S. DEP’T OF LABOR BUREAU OF LABOR STATISTICS (last updated Mar. 27, 2018), [https://www.bls.gov/emp/ep\\_chart\\_001.htm](https://www.bls.gov/emp/ep_chart_001.htm) (last visited Jan. 18, 2019); *Economic News Release: Table A-4*, U.S. DEP’T OF LABOR BUREAU OF LABOR STATISTICS (last updated Jan. 4, 2019), <https://www.bls.gov/news.release/empst.r04.htm> (last visited Jan. 18, 2019).

33 *Economic News Release: Table A-4*, *supra* note 32.

34 *Employment Projections*, *supra* note 32.

35 *Economic News Release: Table A-4*, *supra* note 32.

36 CAMILLE L. RYAN & KURT BAUMAN, U.S. CENSUS BUREAU, P20-578, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2015, at 2 (Mar. 2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p20-578.pdf>.

37 BLS, LABOR FORCE BY RACE AND ETHNICITY, *supra* note 27.

38 BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, A PERSPECTIVE FROM MAIN STREET: LONG-TERM UNEMPLOYMENT AND WORKFORCE DEVELOPMENT (Dec. 2012), <https://www.federalreserve.gov/communitydev/barriers-for-workers.htm>.

39 *Child Care Needs and Barriers to Employment*, UNIV. OF WISCONSIN MILWAUKEE-EMPLOYMENT & TRAINING INST., <https://www4.uwm.edu/eti/barriers/caresum.htm> (last visited Jan. 18, 2019).

40 Antoni Calvó-Armengol & Matthew O. Jackson, *The Effects of Social*



consequences of a criminal record, or they may be dealing with disability and health problems, drug addiction, mental illness, or other personal barriers to employment.<sup>41</sup> Some of the greatest barriers to employment has been mass incarceration and criminal records, which have taken a disproportionate toll on young, undereducated black men and boys. Previous incarceration accounted for over one-half of the decline in participation rates among black men ages twenty-five to thirty-four without a high school education between 1979 and 2000.<sup>42</sup> Additionally, if one were to account for men in prison or jail, employment among black high school dropouts declines from forty to twenty-five percent in 2008.<sup>43</sup> By 2008, these men were more likely to be locked up than employed.<sup>44</sup> Workforce development alone cannot eliminate these structural disadvantages—they are rooted in broader reforms related to health, criminal justice, infrastructure, and other policy areas.

*B. Issues in Labor Market Demand—Employers and the Skills Gap*  
This section discusses the skills gap as it pertains to labor market demand: do good-paying jobs require higher education now than they did before, and are employers really experiencing a shortage of qualified workers to fill skilled positions?

There is evidence to suggest that the composition of middle-wage jobs is changing, and that the new “good jobs” increasingly require more education and training than the ones they are replacing. The impacts of deindustrialization, globalization, and automation, among other factors, have served to decrease the number of physical, male-dominated jobs like manufacturing, construction, and transportation.<sup>45</sup> These jobs tended to require only a high school diploma, though they were also “good jobs,” which Anthony Carnevale, director of Georgetown University’s Center on Education and the Workforce, defines as a job with a minimum annual income of at least thirty-five thousand dollars.<sup>46</sup> While manufacturing, transportation, and construction still make up fifty-five percent of the thirty million “good jobs” without a BA, their

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*Networks on Employment and Inequality*, 94 AM. ECON. REV. 426 (2004); see also WILSON, *supra* note 16.

41 See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004); ELEANOR KRAUSE & ISABEL SAWHILL, BROOKINGS INST., WHAT WE KNOW AND DON’T KNOW ABOUT DECLINING LABOR FORCE PARTICIPATION: A REVIEW (May 2017), [https://www.brookings.edu/wp-content/uploads/2017/05/ccf\\_20170517\\_declining\\_labor\\_force\\_participation\\_sawhill1.pdf](https://www.brookings.edu/wp-content/uploads/2017/05/ccf_20170517_declining_labor_force_participation_sawhill1.pdf).

42 Harry J. Holzer et al., *Declining Employment Among Young Black Less-Educated Men: The Role of Incarceration and Child Support*, 24 J. POLY ANALYSIS & MGMT. 329, 345 (2005).

43 Western & Pettit, *supra* note 30, at 12.

44 *Id.*

45 See WILSON, *supra* note 16; THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS (2014); Darrell West, *Will Robots and AI Take Your Job?*, BROOKINGS INST. (Apr. 18, 2018), <https://www.brookings.edu/blog/techtank/2018/04/18/will-robots-and-ai-take-your-job-the-economic-and-political-consequences-of-automation/>.

46 ANTHONY P. CARNEVALE ET AL., GEORGETOWN CTR. ON EDUCATION & WORKFORCE, GOOD JOBS THAT PAY WITHOUT A BA 1 (2017), <https://goodjobsdata.org/wp-content/uploads/Good-Jobs-wo-BA.pdf>.

share is declining in the face of skilled-services industries like health care, finance, and information technology that tend to require a certificate or Associate’s degree and are less susceptible to being automated.<sup>47</sup> This is situated within a broader context of declining “good jobs without a BA” as a share of the labor force—while sixty percent of good jobs did not require a BA in 1991, only forty-five percent did not require it in 2012.<sup>48</sup> To break the data down further, the share of good jobs for BAs rose from forty to fifty-five percent; for Associate’s degrees and workers with some college but no degree, their share dropped from twenty-seven to twenty-five percent; and for workers with high school diplomas and high school dropouts, their share dropped from thirty-two to twenty percent.<sup>49</sup>

It is clear employers are indeed seeking greater education and training from workers, and that particular fields, such as health care, finance, advanced manufacturing, and information technology are growing most as a result.<sup>50</sup> The declining share of “good jobs” without a BA also further constricts the labor market outcomes of many in the low-wage workforce or chronically unemployed, as they are disproportionately likely to have a high school diploma or lower. From this perspective, the skills gap thesis holds.

The skills gap explanation becomes more dubious when it comes to evaluating whether or not employers are truly facing shortages of qualified employees for positions. Most of the evidence for shortages comes from polling of employers by human resources consultancy groups. A prominent example of this is a study conducted by the Manpower Group polling employers across six sectors, which purportedly found that forty-nine percent of respondents felt that talent shortages were undermining their ability to serve their customers.<sup>51</sup> This is nonscientific proof of skill shortages at best, and what little analysis of employers’ difficulties in filling positions has not supported its validity. One study by Paul Osterman and Andrew Weaver, professors at the MIT Sloan School of Management, found that while seventy percent of manufacturing plants complained of hiring difficulties due to skill gaps, only twenty-five percent of them experienced job vacancies that lasted for longer than three months, and only then in highly specific and specialized occupations.<sup>52</sup>

Beyond this data, employers simply do not seem to behave as they should if they were in a serious skills shortage. For exam-

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47 HARRY HOLZER, BROOKINGS INST., JOB MARKET POLARIZATION AND U.S. WORKER SKILLS: A TALE OF TWO MIDDLES 2 (2015), [https://www.brookings.edu/wp-content/uploads/2016/06/polarization\\_jobs\\_policy\\_holzer.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/polarization_jobs_policy_holzer.pdf).

48 CARNEVALE ET AL., *supra* note 46, at 4.

49 *Id.*

50 *Id.*

51 James Bessen, *Employers Aren’t Just Whining—the ‘Skills Gap’ Is Real*, HARVARD BUSINESS REVIEW (Aug. 25, 2014), <https://hbr.org/2014/08/employers-arent-just-whining-the-skills-gap-is-real>; HARVARD BUSINESS SCH., BRIDGE THE GAP: REBUILDING AMERICA’S MIDDLE SKILLS 6 (Nov. 2014), <https://www.hbs.edu/competitive-ness/Documents/bridge-the-gap.pdf>.

52 Andrew Weaver & Paul Osterman, *Skills Demand and Mismatch in U.S. Manufacturing*, 70 ILR REV. 275, 288-89 (2017).

ple, especially in the context of a tight labor market, one might expect that firms would generally raise wages in order to attract workers to fill the shortage, but this has not materialized (except for in highly in-demand careers, like nursing, where wages have risen significantly alongside demand for labor).<sup>53</sup> When it comes to employers providing training to employees, firms have drastically cut back, which is ironic considering the main complaint was a lack of sufficient skills. Between 2003 and 2013, the number of employer-sponsored formal programs that combine on-the-job learning with mentorships and classroom education had declined by forty percent.<sup>54</sup> Most of the training that is provided by employers is provided to workers with BAs, while workers with only a high school diploma receive the least training of any educational level.<sup>55</sup> Peter Capelli, professor at University of Pennsylvania's Wharton School of Business, has also argued that most of the polling of industries is nonspecific and broad enough that the polls are not useful indicators of hiring difficulties. He asserts that the real problem is not an undereducated work force, but firms that increasingly wish to shift the burden of education and training from their human resources departments to schools and the public sector.<sup>56</sup> Whatever the motivation, there is little evidence to suggest that employers are facing severe shortages of workers on a widespread basis. However, certainly skills shortages do still exist in relatively specialized occupations and industries, such as health care and advanced manufacturing.

The skills gap does exist in some form on both the supply and demand ends of the labor market, and wages and good jobs certainly require more education and training on average than they did in previous decades. However, the problem of skills shortages is much more contained to certain subsets of disadvantaged and undereducated workers who often face a variety of other barriers to employment. Additionally, the number of jobs with true skills shortages is much smaller and more contained to certain sectors than the consensus portrays. There is little to suggest that the new middle-skill jobs can connect more than a substantial minority of low-wage and unemployed workers to "good jobs" without a BA, nor can it solve other issues that lead to wage stagnation, such as declining union power, the increasing share of profits for capital over labor, diminished labor market dynamism, and other factors that decrease worker power relative to management.<sup>57</sup> We should therefore not regard workforce development as a ticket to the middle class for everyone, but rather as an untapped opportunity that can significantly help substantial numbers of workers if proper public policy is implemented.

53 Catherine Gewertz, *Is There Really a 'Skills Gap'?*, EDWEEK (July 18, 2017), <https://www.edweek.org/ew/section/multimedia/is-there-really-a-skills-gap.html>; *Nursing Salaries Are on the Upswing*, NURSE.COM (Jan. 2017), <https://www.nurse.com/blog/2017/01/05/nursing-salaries-are-on-the-upswing/>.

54 C. Jeffrey Waddoups, *Did Employers in the United States Back Away from Skills Training during the Early 2000s?*, 69 ILR REV. 405, 414 (2016).

55 Robert I. Lerman et al., *The Scope of Employer-Provided Training in the United States*, in JOB TRAINING POLICY IN THE UNITED STATES 211, 225 (Robert A. Straits & Stephen A. Wandner, eds., 2004).

56 Peter H. Cappelli, *Skills Gap, Skill Shortages, and Skill Mismatches: Evidence for the US*, 68 ILR REV. 251, 275 (2015).

57 See REVITALIZING WAGE GROWTH, *supra* note 7.

## IV. Recommendations and Conclusions

### A. Effective Workforce Development Policies and Models

The previous section established the existence and significance of a skills gap to wage stagnation and chronic unemployment, even if that skills gap is quite different from what the political consensus portrays. This section surveys literature on effective workforce development policy that accounts for those realities and accomplishes significant reduction, though not elimination, of wage stagnation and chronic unemployment. In broad strokes, an effective workforce development system must receive much more funding, its programs must target specific sectors and establish partnerships with intermediary institutions to train workers, it must have a greater number of trained counselors and staff to provide career guidance, and it must invest in quality supportive services that reduce other barriers to employment besides the skills gap.

The skills gap is limited to highly specific sectors and occupations, and workforce development should be targeted accordingly. One of the most effective workforce development approaches to emerge in recent years has been sectoral strategies, where workforce development entities directly partner with employers in high-demand sectors to tailor training delivery and certification to the needs of the prospective employer.<sup>58</sup> The sectoral model vastly increases a worker's employability as compared to standard strategies. The conventional approach of providing skills and training as a stand-alone service lacks the sectoral approach's direct connection to employers who have a need for skilled labor, and models discussed below demonstrate why that connection is important to success.

An example of a successful sectoral program is the Project QUEST program in San Antonio, Texas, which supported training in occupations across multiple sectors, including health services and information technology. It provided specific instruction in participants' fields of interest, alongside intensive services like remedial instruction, basic education training, life skills training, counseling, and job training assistance.<sup>59</sup> Project QUEST participants also received supportive services through referrals to agencies that provided help with child care, food, transportation allowances, and other services as needed.<sup>60</sup> Six years after the program, Project QUEST participants earned an average of \$28,204, which was \$5,080, or twenty-two percent, more than the control group. Participants were also nearly fifteen percent more likely to be engaged in year-around work. The program was particularly successful for individuals without a high

58 KEVIN HOLLENBECK, W.E. UPJOHN INST. FOR EMPLOYMENT RES., Policy Paper No. 2015-018, THE ROLE OF SECTORAL INITIATIVES IN SOLVING THE EMPLOYMENT PROBLEMS OF OPPORTUNITY YOUTH 3 (2014), [http://research.upjohn.org/cgi/viewcontent.cgi?article=1017&context=up\\_policypapers.3](http://research.upjohn.org/cgi/viewcontent.cgi?article=1017&context=up_policypapers.3).

59 Tazra Mitchell, *Research Note: Sectoral Skills Training Programs for Low-Income Workers Can Yield Sustained Earnings and Employment Gains, New Evaluation Finds*, CTR. FOR BUDGET & POLY PRIORITIES (June 20, 2017),

<https://www.cbpp.org/research/family-income-support/research-note-sectoral-skills-training-programs-for-low-income>.

60 *Id.*

school diploma or GED, as sixty-six percent of program participants without a GED had earnings above \$24,000, compared to just thirty-nine percent of those who did not participate. Similarly, participants of Per Scholas, a technology training program for unemployed or underemployed individuals, were making \$22,503 after three years, which was twenty-seven percent higher or \$4,829 more than the control group.<sup>61</sup> And participants of the Wisconsin Regional Training Program, which provided short-term pre-employment training in construction, manufacturing, and health care to disconnected youth, had greater rates of employment and average annual earning increases of \$4,500 (about eighteen percent) than a control group.<sup>62</sup>

Sectoral training is one example of a specific programmatic strategy that the public workforce development apparatus should utilize more intensively. However, there are more systemic and structural reforms necessary as well, and policymakers might look to the highly successful Danish model of workforce development for inspiration. The Danish labor market model is as follows: active labor market policies through workforce development, a high degree of job mobility due to limited employment protection legislation, generous unemployment benefits, and social partners' (such as labor union, private, or nonprofit actors) role in labor market policies.<sup>63</sup> The Danish system has accomplished a 73.6 percent employment rate, a 2.4 percent unemployment rate, and a 2.0 percent youth unemployment rate, the last of which is particularly notable compared to the American youth unemployment rate of 8.5 percent.<sup>64</sup> Part of this success is due to a much greater investment in workforce development—Denmark spends 1.7 percent of its GDP on it—but it is also due to the nature of their program. Danish workforce development programs contain job search assistance, individualized job counseling, public and private job training, on-the-job training, and education, among other services, and are administered in tandem with strong unions, businesses, and other related entities.<sup>65</sup> Participation in workforce development program is both a right and an obligation, and participation is mandatory to receive unemployment benefits, which offsets any disincentives from the benefits' generosity.

The workforce development system works as well as it does because it operates alongside generous unemployment insurance, a robust social safety net, and weak employment protections

to create an extremely dynamic and flexible labor market. For that reason, the Danish system is often called the “flexicurity” system, as work is flexible, but access to robust job training and unemployment benefits makes workers secure.<sup>66</sup> Because workers are not dependent on employers for health care and a living wage, they are willing to quit more easily, and because employers are not bound by restrictive employment protections, they can fire poor workers more easily. The competition among firms for workers and workers for employment leads to a virtuous cycle of rising wages and skill level—while job security is low, employment security is extremely high, and Danes have the highest level of job satisfaction in Europe.<sup>67</sup> Such a system may be attractive in the capitalist American context, as it would provide a much needed increase in labor market dynamism while channeling free market competition in the interests of the worker.

Any expansion of the American workforce development system along these lines would require substantial investment, as the United States currently spends only about six billion dollars on workforce development at the federal level, or roughly 0.03 percent of its GDP.<sup>68</sup> If the federal government matched Denmark's spending, at 1.7 percent of the GDP, it would expand workforce development spending to three-hundred and fifteen billion dollars, which is more than fifty times what we spend now and a little less than half of federal discretionary spending on defense. This would undoubtedly be a massive expansion, but it is important to account for savings in the provision of unemployment benefits, disability benefits, and incarceration, as well as extra revenue from an expanded tax base of productive workers. Such a large expansion would also undoubtedly have major impact for millions of workers—using Project QUEST's per-participant cost of about ten-thousand dollars, we might estimate that three-hundred and fifteen billion dollars could provide sectoral training to over thirty-one million workers.<sup>69</sup> It is also not necessarily mandatory that workforce development spending be scaled up to three-hundred and fifteen billion, especially not on a quick scale. However, the stark difference in Danish and American spending should emphasize the degree to which the federal government underinvests in workforce development, considering that much of the money invested in effective workforce development ultimately flows back into society.

### *B. Limits, Implementation Challenges, and Conclusions*

The evidence suggests that an effective workforce development system that follows the strategies and frameworks discussed above would have a far more significant impact on wage stagnation and chronic unemployment than the current workforce development system. However, there are important limits and implementation challenges that must be accounted for as well. The number of middle-wage jobs that are available through skills training and education cannot cover all disadvantaged workers. Even the best workforce development system could

61 Ladonna Pavetti, *Opportunity -Boosting Job Preparedness Takes Significant Investment, Evidence Shows*, CTR. ON BUDGET & POLY PRIORITIES (Apr. 12, 2018), <https://www.cbpp.org/research/poverty-and-inequality/opportunity-boosting-job-preparedness-takes-significant-investment>.

62 HOLLENBECK, *supra* note 58, at 6.

63 JAN HENDELIOWITZ, DANISH NAT'L LABOUR MARKET AUTHORITY, DANISH EMPLOYMENT POLICY: NATIONAL TARGET SETTING, REGIONAL PERFORMANCE MANAGEMENT AND LOCAL DELIVERY 3 (Feb. 2008), <https://www.oecd.org/employment/leed/40575308.pdf>.

64 *Id.* at 4; *Monthly Youth (16-24) Unemployment Rate in the United States from December 2017 to December 2018 (Seasonally Adjusted)*, STATISTA, <https://www.statista.com/statistics/217448/seasonally-adjusted-monthly-youth-unemployment-rate-in-the-us/> (last visited Jan. 18, 2019).

65 DANISH MINISTRY OF EDUCATION NAT'L EDUCATION AUTHORITY, THE DANISH VOCATIONAL EDUCATION AND TRAINING SYSTEM 27 (2d ed. 2008), [http://static.uvm.dk/Publikationer/2008/VET2/The\\_Danish\\_VET\\_System\\_web.pdf](http://static.uvm.dk/Publikationer/2008/VET2/The_Danish_VET_System_web.pdf).

66 HENDELIOWITZ, *supra* note 63, at 9.

67 *Id.* at 7.

68 *Public Spending on Labour Markets*, OECD, <https://data.oecd.org/social-exp/public-spending-on-labour-markets.htm> (last visited Jan. 18, 2019).

69 Pavetti, *supra* note 61.

not accomplish the elimination of low-wage work and unemployment by itself—the Danish system, for example, is partly able to achieve its goals due to strong unions, comprehensive health coverage and education, and other measures to increase equity and provide a basic economic floor for all citizens.<sup>70</sup> We should also be realistic about the ability of workforce development to raise earnings, as even in the most successful programs, annual wages increase by between five and ten thousand dollars on average. These are substantial earning boosts, but not all nor even most of those participating in previously described programs necessarily earned enough money to be considered “middle class” after participation. That said, many of those participating in these programs came from extremely disadvantaged backgrounds, and it is undoubtedly true that participation aided employment and earnings significantly compared to their starting point.

Finally, a workforce development overhaul cannot be the only policy response to wage stagnation and chronic unemployment. Alongside the skills gap and workforce development, policymakers must address increasing corporate investment in stock buybacks over wage increases, a stagnated minimum wage, union decline, mass incarceration and other barriers to employment, disability benefits reform, and other issues that contribute enormously to wage stagnation and chronic unemployment.<sup>71</sup> They must both build ladders to socioeconomic opportunity by eliminating skills deficiencies and other barriers to employment, and raise floors by strengthening economic security for workers whose wages suffer due to factors that have nothing to do with their lack of skills. If an overhaul of workforce development accompanies a comprehensive social policy response to these crises, the reality of an American Dream for all is within reach.

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70 HENDELLOWITZ, *supra* note 63, at 8.

71 *See generally* REVITALIZING WAGE GROWTH, *supra* note 7; Shayne Spaulding et al., URBAN INST., EXPANDING ECONOMIC OPPORTUNITY FOR YOUNG MEN AND BOYS OF COLOR THROUGH EMPLOYMENT AND TRAINING (Feb. 2015), <https://www.urban.org/sites/default/files/publication/39436/2000097-expanding-economic-opportunity-for-boys-and-young-men-of-color-through-employment-and-training-1.pdf>; Tazra Mitchell, *Promising Policies Could Reduce Economic Hardship, Expand Opportunity for Struggling Workers*, CTR. ON BUDGET & POLY PRIORITIES (updated Sept. 7, 2018), <https://www.cbpp.org/research/poverty-and-inequality/promising-policies-could-reduce-economic-hardship-expand-opportunity> (last visited Jan. 18, 2019); HARRY HOLLER, URBAN INST., PRIORITIES FOR FEDERAL WORKFORCE AND HIGHER EDUCATION POLICY (Sept. 2017), <https://www.urban.org/research/publication/priorities-federal-workforce-and-higher-education-policy>; ECON. POLY INST., A REAL AGENDA FOR WORKING PEOPLE (2017), <https://www.epi.org/workers-agenda/a>

# The Public Health Crisis of Unsheltered Homelessness: *Defending the Problem and Exploring Solutions for a Patient Population that the US Health Care System Does Not Reach*

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Guest Contributor

## I. Introduction: Health of the Unsheltered Homeless

The health of homeless persons has been a subject of medical and public health research since the 1970s, when urban planners began documenting exceptionally high mortality rates in the most impoverished regions of Los Angeles and Boston.<sup>1</sup> In the early stages of public health research on the homeless population, it was assumed that individuals living in shelters and those living outside had the same health conditions, mortality patterns, and health care needs. However, more recent research suggests that the physical state of being “unsheltered” can increase an individual’s vulnerability to a multitude of health conditions, and increase their likelihood of early death.<sup>2</sup> Homeless individuals are considered unsheltered if their primary residence is in “a place not meant for human habitation” such as a car, park, sidewalk, an abandoned building, or on the street.<sup>3</sup> There are approximately 553,742 people experiencing homelessness in the United States today, and approximately 192,875 (about one third) are considered unsheltered.<sup>4</sup>

The Health Care for the Homeless (HCH) program, created under the 1987 McKinney-Vento Act, provided federal grants for fifteen health centers that would specialize in treating homeless patients.<sup>5</sup> Administered by the Department of Health and Human Services, the HCH program now funds over 200 HCH programs in all fifty states. Yet despite this ongoing effort to facilitate access to health services through federal legislation, homeless persons living in the United States today still present with extremely poor health outcomes, particularly those who are unsheltered. No policy action has been taken to address the persistently poor health outcomes and difficulty accessing traditional health services among the unsheltered homeless population. In this paper, I will review the most recent research findings on the public health crisis of unsheltered homelessness, and introduce “Street Medicine” as a

possible solution. Finally, I will provide policy recommendations for the sustainability and expansion of the Street Medicine field.

A recent study conducted by Boston Health Care for the Homeless Program found that unsheltered homeless individuals were three times more likely to die during the ten-year study period than sheltered individuals.<sup>6</sup> The leading causes of death—cancer, nonpoisonous injuries, and heart disease—were described by the researchers as “treatable and preventable.”<sup>7</sup> Studies have also noted a negative association between the number of unsheltered nights reported by homeless individuals and the probability of accessing all health services, including physical health, mental health, and substance abuse treatment services.<sup>8</sup> This is likely due to structural, economic, and social barriers that complicate the process of seeking and accessing health care for the unsheltered homeless.<sup>9</sup> A high prevalence of substance use disorders and mental illness among the unsheltered population can complicate the care-seeking process.<sup>10</sup> Unsheltered homeless individuals are twice as likely as sheltered individuals to report failure to receive medical care due to lack of transportation.<sup>11</sup> Furthermore, a lack of health insurance,<sup>12</sup> and a general mistrust of people and institutions<sup>13</sup> can also be significant barriers to accessing health care. After years of feeling stigmatized by, and isolated from, society at large, unsheltered homeless individuals often need to re-establish trust with a health-care provider before accepting care.<sup>14</sup> This process takes time, and the American health care system’s emphasis on productivity means that providers rarely have time to focus on building relationships with patients. Therefore, unsheltered homelessness remains a sig-

6 Jill S. Roncarati et al., *Mortality Among Unsheltered Homeless Adults in Boston, Massachusetts, 2000-2009*, 178 JAMA INTERNAL MED. 1242 (2018).  
7 *Id.*

8 Kristen Faye Linton & Michael S. Shafer, *Factors Associated with the Health Service Utilization of Unsheltered, Chronically Homeless Adults*, 29 SOC. WORK PUB. HEALTH 73 (2014).

9 Jim Withers, *Street Medicine: An Example of Reality-Based Health Care*. 22 J. HEALTH CARE FOR POOR & UNDERSERVED. 1, 1 (2011).

10 David Montgomery, *The Homeless Get Sick; ‘Street Medicine’ Is There for Them*, PEW (Sept. 8, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/09/18/the-homeless-get-sick-street-medicine-is-there-for-them>.

11 Richard L. Douglass et al., *Health Care Needs and Services Utilization Among Sheltered and Unsheltered Michigan Homeless*, 10 J. HEALTH CARE FOR POOR & UNDERSERVED 5, 13 (1999).

12 Linton & Shafer, *supra* note 8, at 76.

13 Levy & O’Connell, *supra* note 1, at 2330.

14 *Id.* at 2331.

1 Bruce D. Levy & James J. O’Connell, *Health Care for Homeless Persons*, 350 NEW ENG. J. MED. 2329, 2331 (2004).

2 Travis P. Baggett et al., *Mortality Among Homeless Adults in Boston: Shifts in Causes of Death Over a 15-Year Period*, 173 JAMA INTERNAL MED. 189 (2013).

3 *What Is the Official Definition of Homelessness?*, NAT’L HEALTH CARE FOR THE HOMELESS COUNCIL, <https://www.nhchc.org/faq/official-definition-homelessness/> (last visited Nov. 10, 2018).

4 *State of Homelessness*, NAT’L ALLIANCE TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-report/> (last visited Nov. 11, 2018).

5 See 42 U.S.C.A. § 11301 *et seq.* (West) (current through P.L. 115-281).

nificant public health problem that cannot necessarily be solved by funding more HCH hospitals and clinics.

Under a public health framework, improving the physical and mental health of the unsheltered homeless is a matter of improving population health. Yet the sheer economic cost of ambulatory and emergency department service utilization by the unsheltered homeless also points to the need for a policy solution.<sup>15</sup> Studies have reported that the majority of emergency service use by homeless individuals was initiated due to the exacerbation of medical problems that could have been cared for in a primary care setting.<sup>16</sup> In a primary care setting, patients generally receive “preventative” health services: physical health, mental health, and substance use services that identify and address mild health conditions before they become severe health crises.<sup>17</sup> Reducing emergency service utilization and improving health outcomes among the unsheltered homeless will require improving their access to preventative health services. Street Medicine is both a health care delivery method and an “emerging medical field”<sup>18</sup> that shows promise to facilitate this access.

## II. Street Medicine

### A. Defining Street Medicine

Street Medicine is “the provision of health care directly to those living on the streets of our communities.”<sup>19</sup> While homeless health care services are most often provided within a hospital or clinic setting, Street Medicine brings hospital-level health services outdoors, thereby targeting the unsheltered homeless population.<sup>20</sup> The goal of Street Medicine is to improve health care outcomes and reduce morbidity and mortality among the subset of Americans who cannot access traditional health services due to various barriers. Programs can take the form of traveling “medical vans and buses”<sup>21</sup> fully equipped with health care providers and supplies or “street outreach teams” that drive or walk from encampment to encampment, carrying medical supplies in backpacks. As described by Dr. Jim Withers, founder of the Pittsburgh Street Medicine organization Operation Safety Net, Street Medicine is “a more radical attempt to create a care relationship on the terms of those who have been largely excluded from our system of organized health care.”<sup>22</sup>

Research studies by Linden and Shafer<sup>23</sup> and Nymathi et al.<sup>24</sup> provided recommendations for street outreach teams based on health care service utilization patterns by unsheltered homeless persons. Collectively, these studies recommended that Street Medicine programs not restrict themselves to providing physical health services

but, rather, incorporate a variety of comprehensive health services in order to meet the diverse health needs of the unsheltered homeless population.<sup>25</sup> Linden and Shafer recommended that psychologists and other mental health professionals be included on Street Medicine teams in order to address the high prevalence of mental health conditions among the unsheltered homeless.<sup>26</sup> To address the unfortunately high prevalence of sexual assault and high vulnerability to STD infections among the female unsheltered population, Nyamathi recommended that street teams include “violence prevention, STD risk reduction, and family planning” services.<sup>27</sup> Given their finding that health insurance was the most significant factor that facilitated access to all health services, Linden and Shafer recommended that Street Medicine providers take on the role of enrolling uninsured individuals.<sup>28</sup> In response to the high prevalence of substance use disorders among the unsheltered homeless, many studies also recommended that Street Medicine teams help to connect individuals with treatment services.<sup>29</sup>

### B. Street Medicine: Implications and Limitations

The small body of research on health outcomes, mortality patterns, and health service utilization trends specific to the unsheltered homeless is a major limitation for the development and widespread implementation of Street Medicine across the United States. Given that researchers only recently began separating the unsheltered homeless from sheltered homeless in mortality and service utilization studies, findings from the earlier studies may be skewed by sheltered population data. Therefore, it may be optimal for those designing Street Medicine programs to utilize only findings from studies that separated sheltered data from unsheltered data, in order to design programs that cater to the specific health needs of the population they serve. Another limitation is that a large portion of the studies were conducted in Boston and have not been replicated in other cities. The fact that Boston is extremely well-resourced in terms of homeless services and health care services may have skewed the findings.<sup>30</sup>

Another limitation to the widespread implementation of Street Medicine is its lack of a strong theoretical framework. The Street Medicine Institute has published an instructional manual for providers hoping to start a program in their community, however, this manual is based on providers’ experiences practicing Street Medicine, not on public health theory. Dr. Jim O’Connell, who is considered the co-founder of Street Medicine along with Dr. Jim Withers, has suggested that community-based Street Medicine efforts should follow “a public health approach.”<sup>31</sup> This would entail communities viewing massive death rates of the unsheltered homeless as “public health crisis,” and mobilizing a task force of EMS, hospital, and Detoxification Center personnel to

15 Linton & Shafer, *supra* note 8, at 74; see also DENNIS P. CULHANE, THE COST OF HOMELESSNESS: A PERSPECTIVE FROM THE UNITED STATES (2015).

16 Stephen Wesley Hwang et al., *Causes of Death in Homeless Adults in Boston*, 126 ANN. INTERNAL MED. 625 (1997).

17 Linton & Shafer, *supra* note 8, at 78.

18 Withers, *supra* note 9, at 1.

19 *Id.*

20 *Id.*

21 Linton & Shafer, *supra* note 8, at 79.

22 Withers, *supra* note 9, at 1.

23 Linton & Shafer, *supra* note 8.

24 Adeline M. Nyamathi et al., *Sheltered versus Nonsheltered Homeless Women*, 15 J. GEN. INTERNAL MED. 565 (2000).

25 Linton & Shafer, *supra* note 8, at 79; see also Nyamathi et al., *supra* note 24, at 572; Roncarati et al., *supra* note 6, at 1247.

26 Linton & Shafer, *supra* note 8, at 79; Nyamathi et al., *supra* note 24, at 572.

27 Nyamathi et al., *supra* note 24, at 572.

28 Linton & Shafer, *supra* note 8, at 79.

29 *Id.*; see also Roncarati et al., *supra* note 6, at 1247.

30 *Id.*

31 James J. O’Connell et al., *A Public Health Approach to Reducing Morbidity and Mortality Among Homeless People in Boston*, 11 J. PUB. HEALTH MGMT. & PRAC. 311, 311 (2005).

formulate an integrated community response.<sup>32</sup> O’Connell recommends this theoretical framework based on his experience as a leader in Boston’s effort to address unsheltered homeless deaths in the 1990s. However, it is unlikely that the “public health approach” would be effective in cities that are less well-resourced than Boston in terms of medical and homeless services.

Although the small body of research and lack of a strong theory-based framework appear to be limiting the development and implementation of Street Medicine, the most substantial barrier is the lack of a reliable funding source for current and prospective Street Medicine organizations. Even though many unsheltered homeless individuals are eligible for and are enrolled in Medicaid, there is currently no way for Street Medicine providers to bill Medicaid for services. This is due to the fact that Medicaid coding requirements have not been adapted for services provided in a street-based setting.

### III. Implementing Street Medicine

#### *A. A Solution to Address the Funding Barrier to Street Medicine Implementation*

When patients are covered by Medicaid, authorized healthcare providers may receive payments from the Medicaid program on a “fee for service” basis.<sup>33</sup> In order to receive payment, the provider must enter into the patient’s medical record a numerical code corresponding to the service location, or the Point of Service (POS) code.<sup>34</sup> The Center for Medicare and Medicaid Services (CMS) includes forty-nine coded location categories within the POS database, however, “street/open-air” is not one of them.<sup>35</sup> Certain Street Medicine providers have entered the “other” code for open-air encounters, however, health networks that fund Street Medicine often discourage this practice for fear that it will prompt a CMS investigation.<sup>36</sup> Many healthcare organizations that serve indigent patient populations rely on Medicaid as a primary or secondary funding source. Not being able to bill Medicaid forces Street Medicine organizations to rely on inconsistent funding sources, such as hospital funders and private donations, which creates financial strain and limits their capacity to serve.<sup>37</sup>

In order to gain Medicaid-billing capacity, the Street Medicine Institute should request CMS’ approval for a new POS code designated for Street Medicine encounters. CMS invites interested parties to request the creation of a new POS code, or modify an existing code, by submitting an application to the CMS POS Workgroup that includes “all information necessary to support the request.”<sup>38</sup>

<sup>32</sup> *Id.*

<sup>33</sup> Carol Wilkins et al., *A Primer on Using Medicaid for People Experiencing Chronic Homelessness and Tenants in Permanent Supportive Housing* 74 (July 2014), prepared for U.S. DEP’T OF HEALTH & HUM. SERVS., available at <https://aspe.hhs.gov/system/files/pdf/77121/PSHprimer.pdf>.

<sup>34</sup> *Id.*

<sup>35</sup> *Place of Service Codes for Professional Claims*, CTRS. FOR MEDICARE & MEDICAID SERVS. (last updated Nov. 2016), [https://www.cms.gov/Medicare/Coding/place-of-service-codes/Place\\_of\\_Service\\_Code\\_Set.html](https://www.cms.gov/Medicare/Coding/place-of-service-codes/Place_of_Service_Code_Set.html) (last visited Jan. 17, 2019).

<sup>36</sup> Private correspondence between author and Brett Feldman, U.S.C. Keck School of Medicine Clinical Assistant Professor of Family Medicine.

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

<sup>38</sup> *Process for Requesting New Codes or Modification of Existing Codes*, CTRS. FOR MEDICARE & MEDICAID SERVS. (last updated Oct. 19, 2015),

The Workgroup approves or rejects requests based on “the appropriateness of, and business need for, the requested code, its effect on existing POS codes, and the impact of the coding change on health care payers.”<sup>39</sup> Several medical interest groups have been successful in creating a new POS code, the American Telehealth Association being the most recent example. The creation of POS code .02 (Telehealth) enabled healthcare providers to bill Medicaid for a variety of health services provided through video conferencing.<sup>40</sup> Like Telehealth, Street Medicine is a health care delivery method targeted at a subgroup of Medicaid beneficiaries that faces barriers to accessing care. Street Medicine and Telehealth are also similar in that both involve a patient receiving health services in an out-of-hospital environment. Given these similarities, the Street Medicine Institute should structure its CMS request similarly to how the American Telehealth Association structured theirs in order to increase the likelihood of approval and thereby secure Medicaid as a funding source for Street Medicine organizations.

#### *B. Requesting a New POS Code: Limitations and Implications*

Given the lack of Street Medicine research publications, it is unlikely that CMS officials will fully appreciate how and why it is an effective health care delivery method for unsheltered homeless persons. To educate CMS on the benefits of Street Medicine, the Street Medicine Institute should include in its request existing research and patient success stories from well-established Street Medicine organizations. The Institute may also consider conducting and including in the CMS request a comprehensive study that demonstrates the collective impact of all Street Medicine programs in the United States. If the Institute is able to change CMS coding policy, it may thereafter need to focus on changing state policies in order to ensure that Street Medicine providers in all states can bill Medicaid. Nonetheless, Telehealth provides a perfect example of how, through incremental but persistent policy change, medical special interest groups can become integrated into mainstream health care billing systems. As the global leader in developing the field and practice of Street Medicine,<sup>41</sup> SMI is ideally positioned to affect this change that would increase financial stability of the Street Medicine movement, and thereby fuel its widespread implementation.

### IV. Conclusions

Despite the existence of over two hundred homeless health care organizations in the US today, unsheltered homelessness remains a critical, unresolved public health problem. Street Medicine provides a solution to this problem by bringing preventative health services directly to those who cannot access services in a clinical setting. The lack of a sustainable funding source is the most significant limitation to the expansion of Street Medicine; however, the creation of Medicaid POS code would help to sustain the growth of the Street Medicine field and legitimize it in the eyes of the larger health care system.

[https://www.cms.gov/Medicare/Coding/place-of-service-codes/New\\_or\\_Modified\\_Codes.html](https://www.cms.gov/Medicare/Coding/place-of-service-codes/New_or_Modified_Codes.html) (last visited Jan. 17, 2019).

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

<sup>40</sup> KS DEP’T OF HEALTH & ENV’T, KMAP GEN. BULLETIN 17109, UPDATED: NEW POS CODE FOR TELEHEALTH (May 2017), [https://providers.amerigroup.com/Documents/KSKS\\_POSTelehealth.pdf](https://providers.amerigroup.com/Documents/KSKS_POSTelehealth.pdf).

<sup>41</sup> *About Us: What is the Street Medicine Institute?*, STREET MED. INST., <https://www.streetmedicine.org/about-us-article> (last visited Nov. 11, 2018).

# India Emerging in the Economic World

## Interview with Dhruva Jaishankar

Conducted by Ittai Sopher (PZ '19) and Delaney Hewitt (SC '20)  
Staff Writers

*Dhruva Jaishankar is a Fellow in Foreign Policy at the Brookings Institute in Washington, D.C. and at Brookings India in New Delhi. He researches India's role in the economic system and global developments in politics, economics, and society in India. Jaishankar earned his undergraduate degree in history and classics from Macalaster College and his master degree from Georgetown in security studies. Jaishankar sat down with CJLPP to discuss India's growing economy, competitive military, and developing relationship with the United States.*

**CJLPP:** How have the recent tariffs set forward by the U.S. impacted the working relationship between India and the U.S.?

**Jaishankar:** I think a lot of this comes back to President Trump and his election, the circumstances under which he was elected, and his promises to his voter base. Clearly Trump's election, and it's been reinforced even by recent restructuring by the Republican Party in the midterms that just happened yesterday, had been influenced by a certain dissatisfaction with the political economic order. They believe that while the U.S. is, by every measure, one of the most open economies in the world, that other countries are less open, and therefore have not been playing by the same rules and have put the U.S. at a disadvantage, particularly in labor intensive industries. In some ways, I think that Trump's economic policies, whatever you might think of them, are coming from that place. They're coming from very strong and deep political convictions that are held by a sizable percentage of the U.S. electorate. Now, after articulating these concerns, and identifying them, whether tariffs are the best way to go about addressing them or fixing them, is certainly a debatable issue.

The focus of those tariffs has really been on China, which Trump, and some of his close advisors, seem to believe are primarily responsible for the situation. Now, I understand there was a debate within the White House and amongst Trump's advisors last year on how to apply those tariffs, and against whom. And, a decision was made to apply them rather widely. So, countries like India, where I'm from, were affected by those tariffs. Although, not nearly to the same degree as China has been. Specifically, steel and aluminum export tariffs were applied against them. To India it was to the scale of roughly 240 million dollars but that is completely dwarfed by the amounts on exports which China is exporting, which may soon go up to 500 billion dollars, more than 2000 times the amount waged on India. What Trump seems to have done, for now, has really shaken China in particular, and we are seeing Beijing now, trying to broker more favorable terms with other countries,



including Japan India, and Southeast Asia. Now, whether that materializes remains to be seen. So that has interjected a great deal of uncertainty into the international community.

**CJLPP:** You mentioned that there might be more favorable opportunities for places like Japan and India. How can India seize this moment?

**Jaishankar:** I think there are certain sectors that have been targeted in particular. Many of these are areas where China has built up a large export capacity. It's unclear right now whether any country, India or anyone else for that matter, is able to meet demands in a short amount of time, and whether they can do so without further exasperating some of the trade deficits that Trump has identified as a problem. That, I think, remains to be seen. But certainly, it is very difficult for any country to take advantage in the short term of these situations. There has been one example where India has benefited directly from some of the tensions between the U.S. and China. The U.S. has, amongst other things, tightened investment scrutiny of Chinese investments in the United States, and has actually blocked investments in certain sectors on national security grounds. That's actually opened up opportunities for Indian businesses which have taken advantage of that and actually are investing more in the U.S. as a result. So there are these indirect implications.

**CJLPP:** In terms of China, you mentioned in an article in *The Interpreter* that, recently, Beijing has adopted a less confrontation-



*al approach in its economic diplomacy. What do you see India and China's relationship looking like going forward, considering the regional disputes that are at play?*

**Jaishankar:** I think, structurally, India and China are moving in the direction of a more competitive relationship. Whether it is on the boundary dispute between the two countries, they have a very large territorial dispute; whether it's on trade issues, India has a very large trade deficit, again, with China – which it believes is in large part, but not exclusively, due to lack of market access in China; whether it's our regional security issues and increased Chinese influence in India's periphery, including the Indian Ocean; or whether it's on global governance, including the UN Security Council or the Nuclear Suppliers Group and other bodies where India and China are loggerheads. In all of these areas we're seeing a more competitive relationship shape up. In the last six months to a year we've seen a cooling of temperatures after a military standoff that happened last year, in 2017, in disputed territory. Since then, we've seen a slight thawing of that. However, despite a more positive tone in the relationship, none of the real critical concerns that either side has have been redressed. And therefore, I suspect that while we do have a bit of a timeout right now between Beijing and New Delhi, after next year or perhaps in the future, we will be in for a much more competitive relationship.

*CJLPP: What do the military capabilities of India look like? And, if we could bring Pakistan into the equation, what does the situation look like there?*

**Jaishankar:** China, Pakistan, and India are all nuclear armed countries. They have very large standing armies. China traditionally had the largest, but China is undergoing military reforms, and, as part of that, they're actually shrinking the size of their army a little bit. Pakistan also has a sizable military force. So, these are three countries that are very heavily armed, and have actually quite a wide array of military tools at their disposal from submarines to, in China and India's cases, aircraft carriers to large standing armies, to very capable combat forces. I think that all of them are major markets for defense suppliers, including Russia, the United States, and Europe. So, we are seeing a sort of growing militarization in the region and a growing arms race. Now, the nature of it is China's military modernization is underway. Its technological abilities have really substantially increased in the last decade or so. The People's Liberation Army is undergoing radical transformation that should be complete in the next three or four years where they are actually creating joint commands amongst other things. India is, of course, monitoring these developments and is trying to arm the border to basically deny or prevent Chinese adventurism.

Now, given that the two sides have nuclear capabilities, the prospect of large-scale conflict is very low, but the prospect of small-scale tensions bubbling over is certainly very real. So, I think that is something to watch out for, and India is obviously making defense preparations to prevent or deter any sort of adventurism. With Pakistan, there is a different dynamic to some degree, because Pakistan has traditionally been a smaller country than India, but has often been, strangely enough, the revisionist country. It has been the aggressive party in most cas-

es, including in wars in 1965 and in 1999. We still see the Pakistan military developing an infrastructure that basically trains finance recruits and militants, which are then infiltrated across the border into India. So, this low-level conflict is still a daily reality that India and Pakistan confront. That will continue. So, in some ways it's a slightly different type of conflict that India has to deal with on its western border with Pakistan.

*CJLPP: What do the current nuclear capabilities of India look like? Have they deescalated since the Cold War times?*

**Jaishankar:** One of the interesting things is that China and India have very different types of nuclear postures than the U.S. and the Soviet Union, and subsequently Russia had. Essentially these are reserve nuclear forces, they are not on alert. They are often de-mated, meaning the nuclear warheads and the delivery systems are not in the same place even. They generally have smaller arsenals, and a commitment to what is called "First Use." They will not use nuclear weapons unless nuclear weapons are used against them. This has actually prevented, so far, a nuclear arms race between China and India. I think that is important to keep in mind. Now, both are actually diversifying and modernizing their delivery systems, so they are getting more sophisticated. India recently effectively seems to have operationalized the ability to launch nuclear missiles from submarines, which has given it what is deemed to be a survival strike capability. Pakistan is a slightly different case. Pakistan might have the fastest growing nuclear arsenal in the world. They have effectively done a few things and the sum total of these developments is that they are developing more, and smaller, nuclear weapons for tactical use. This could have a very potentially destabilizing effect on nuclear security, because basically the temptation to use them in battlefield scenarios increases. It's no longer just a strategic weapon used for political level deterrence. This is a very worrisome development but hasn't been getting very much attention.

*CJLPP: If we could move our conversation to economics, domestically in India, what would you say the impact has been on economic policies since Prime Minister Modi came to power?*

**Jaishankar:** I think it's politically very fraught-ish. In India, we are going into election season in the next few months. There will be an election by the spring of next year. I think one of the issues that will be debated very hotly is Modi's economic legacy; what has he done, what has he not done? I think the picture is certainly mixed and critics will point to the fact that growth levels are not as much as was promised or as was expected. It has been a 6.5-7.5 percentage, so pretty healthy by international standards, so at least the trajectory is positive but perhaps below what India is capable of doing.

Some large-scale reforms have not materialized for a number of reasons, partly Modi does not have control of the upper house. In his first year in particular, he tried to pass legislation on issues like land reform that would help modernize the economy, and he wasn't able to pass that. And then, other developments have been somewhat controversial including a move in 2016 to remove roughly 80 percent of India's hard currency from the market. So, some of the overnight large notes became void.

This ended up having an effect for about half a year on the economy. Some of these steps have been somewhat controversial. Now, on the other hand, there has been a number of significant developments, one is major tax reform that has made it easier for intra-Indian trade to take place. This has been messy in terms of its implementation, but it will certainly have long term effects. There has been a widening of the tax base as well. So, revenues have increased for the government. There's also been a certain degree of fiscal prudence. There have been attempts at self-curbing the government deficit, which again will have long term implications. I think supporters of Modi will point to a lot of these things as positives. Critics will, of course, stress some of the others I've mentioned.

**CJLPP:** *What is the role of the caste system in the current economic situation and which caste group also would you say is the fastest growing population?*

**Jaishankar:** That's a demographic issue, and I think you would have to ask the second part of that. Caste is pervasive in India, but it's also a very complicated system and I think sometimes the descriptions you see of the caste system outside of India oversimplify it. Effectively, caste is a basic element of individual identity in India. And it really sort of defines communities there. There is a great amount of caste variation across India. So, you have different dynamics in different parts of India, as well. One of the issues that has become somewhat interesting, but also, again, quite pervasive is that India has long had a policy of positive discrimination against historically disadvantaged castes. They're known as Scheduled Caste and Scheduled Tribes and they're roughly twenty-five percent of the population. There are mandatory quotas for people with those backgrounds, in government, in parliament, in public universities, and in other public institutions.

In recent years, particularly in the last twenty-five years or so, there has been an attempt at widening this system to cover other disadvantaged castes and it's led to a very strange phenomenon. Which is, people in upper castes actually advocating for their status to be downgraded, so they can partake in these quotas and this reservation system. This has become a very hot topic in state level politics particularly, also national level politics in India, in terms of the distribution of power amongst communities. You also have this phenomenon, particularly that started in the 1990s of caste based political parties emerging. There's a state in north central India called Uttar Pradesh, which is home to about 200 million people, so it has about the population of Brazil and they have two very large parties which have at times been in power. These parties have really represent disadvantaged castes, and they have been elected to statewide office. You have now the emergence of caste politics even amongst traditionally disadvantaged castes, as well. In some ways, identity politics has persevered in India.

**CJLPP:** *Thank you for clarifying that. I found a really interesting article from CNN where you talked about these megamonuments in India. What are the larger political implications of spending on megamonuments?*

**Jaishankar:** I think there is a lot of spending, but in the grand scheme of things it is not really all that much. India recently unveiled the largest statue in the world, which is of one of the founding leaders of India. He was the first Deputy Prime Minister of India. I think it cost roughly 400 million dollars, which may seem like a lot of money, particularly for a poor country like India, but I think it's believed that the political benefits of this will far outweigh the material cost of this. We are seeing this proliferation, in this case it was a national figure and was inaugurated by the Prime Minister, but in many other cases these are state level initiatives. Often these statues being built are of local leaders and local heroes. In some ways it's a confluence of a number of factors. I think one: India and Indian companies finally developing the technological and technical capabilities to build these things and having the financial resources to finance these. That's obviously one. And two, I think is part of changing cultural norms in some ways and the rediscovery in many cases of these local leaders. But I would stress how much local politics actually plays a role. For example, one of the statues that may even eclipse the one that was recently built will be possibly built in the city of Bombay in Mumbai, which is in India's financial capitol, for a local level hero. So, it will be this large equestrian statue built and very much will have to do with state level identity and state level politics.

**CJLPP:** *For my final question I wanted to ask you about the recent currency swaps between Japan and India of \$75 billion. Why is this significant for India?*

**Jaishankar:** This represents a few things. One, it shows a willingness on the part of many countries, including India, to try to diversify a little away from the dollar as a reserve currency. So, these exchanges in other currencies is actually a way to do that. A couple of days before Japan announced the \$75 billion swap with India, they announced a \$30 billion swap with China, as well. So, that is indicative of a trend that is taking place. I think the other issue, more immediately for India, is that the rupee has devalued significantly against the dollar for a number of reasons. This agreement with Japan has helped to stem the tide a little bit. So, this was, in some way, also driven by very immediate concerns. Finally, I think the other thing is that it is a way of incentivizing and facilitating trade with Japan and an economic partnership with Japan. Japan is emerging as a very major partner for India. So, I think this particular agreement is in some way representative of all those trends: a long-term diversification from the dollar, an immediate move on the part of India to stem the devaluation of the rupee, and an attempt at trying to facilitate economic relations with Japan.

**CJLPP:** *Thank you so much for your time and expertise, Mr. Jaishankar.*

# Challenges of Marijuana Legalization and the Search for Alternative Policy Solutions

## *Interview with Dr. Kevin Sabet, co-founder of Smart Approaches to Marijuana*

Conducted by Jordan Hollinger (PZ '19)  
Staff Writer

*Advisor under three administrations for the Office of National Drug Control Policy, and co-founder of Smart Approaches to Marijuana, Dr. Kevin Sabet is on the forefront of drug and marijuana policy discussions. Dr. Sabet and his nonprofit encourage alternative solutions to marijuana policy besides the trend towards legalization, warning of the public health implications and the threat of commercialization of the drug. He recently gave the concluding speech in a series of talks on marijuana policy held at Claremont McKenna College.*

**CJLPP:** *You've been described as "the quarterback of the new anti-drug movement" and as a "prodigy of drug politics" based on your work at Berkeley and beyond. Further, you've been identified by some as marijuana legalization's "biggest enemy" – often in criticism. How would you say your approach to drug policy – specifically regarding marijuana – differs from that of the "status quo?"*

**Sabet:** Well, look, I'm skeptical of current policies, and I know that we can't go back – or that we shouldn't go back – to criminalization, or a "war on people," or stigmatizing drug users. That's not a way to help, that's not a way to bring addiction out of the shadows or get people off of drugs. You don't do that by stigmatizing them. You certainly don't saddle people with criminal records and then expect they're going to do well in life because they messed up when they were seventeen years old and they had drugs on them. I definitely look at that with a skeptical eye. I will admit, when Rolling Stone said that I was "the biggest enemy of legalization" – I always wanted to be in Rolling Stone, but not for that. Obviously, as a kid I wanted to be in Rolling Stone as an awesome rocker, but I was in Rolling Stone for another reason. I definitely think I'm skeptical of the current policy, but I'm also skeptical of this shiny new thing called marijuana legalization that's being touted to get rid of Mexican drug cartels, solve budget crises, cure cancer and epilepsy, and save the environment, and I just think that maybe that's not right, either. I think there's more of a middle ground, which I know is unpopular in today's politics, to be a centrist. I've worked for Republicans and Democrats – it's more frowned upon now, but I'm proud that I've done this. I think that, at some point, we're going to calibrate on drug policy more in the middle. We've gone from one extreme to now another extreme on marijuana. I know at some point we're going to recalibrate. I just hope it's when I'm alive, so I can see it.

**CJLPP:** *In an Op-Ed for the New York Times, you wrote that*



*drug policy is a hotbed for extremism and that there is a dire need to "give drug-policy centrists a voice."<sup>1</sup> How would you say your policy opinions differ from what you would call extreme?*

**Sabet:** I think there's extreme thinking that it's either "drug-free" or "free drugs." I think we should go towards "drug-free" generally, just like we should be poverty-free, AIDS-free, cancer-free, tobacco-free. I think that's a lofty goal, but on the other hand I think that, when we over-criminalize to do that, we can be making the problem worse. But I also think that on the other side, to say that commercializing drugs and especially marijuana is the answer, this is not good for public health or public safety and isn't the direction we should be headed.

**CJLPP:** *Similarly, you are the only person to have been appointed an advisor for the Office of National Drug Control Policy by both a sitting Democratic and Republican President. How do you think your experiences under three different administrations has prepared you to talk about drug policies?*

**Sabet:** Well, it hasn't prepared me for anything in the Trump era, because it doesn't resemble anything. But I think it gives a sort of credibility. I'm not coming from a partisan view; I'm vigorously non-partisan, and I have always stated that. I don't

<sup>1</sup> "Overdosing on Extremism," New York Times, Kevin Sabet. 1 Jan 2012

like it when people peg me into a hole. Like you mentioned earlier about online criticism, I actually think that the marijuana industry and pro-legalization advocates are truly distraught by the idea that an organization like SAM [Smart Approaches to Marijuana] is trying to occupy the middle. They would likely prefer if we were more extreme, more on the Right, so that they could say we are extremist and that we only serve maybe twenty percent of the population. I think the fact that we've attracted so much attention and criticism, especially from online circles, is because we do change minds. Multiple people after hearing me talk have said that I've brought things up that they've never heard articulated. I get that all the time. I pity the person who sits next to me on an airplane and asks me what I do, because I'll just talk their ear off. Yet, I do really think that these arguments do resonate. The issue is, we don't have the megaphone that the [marijuana] industry has or the ability to get that message out in a way that everyone can hear.

**CJLPP:** *You mentioned the Trump administration earlier. Could you talk further about what the biggest differences between what the current administration is doing in regard to drug policy versus what you've seen earlier in your career?*

**Sabet:** I don't think the current administration is doing much in drug policy, period. There's no drug czar that's been appointed by the Senate yet. I think they've given some lip service to the opioid epidemic, which I don't say necessarily pejoratively, because I do think giving lip service to an issue is very important for a presidency – but it also has to be backed up with real policy steps. I did see the FIRST STEP Act – the criminal justice reform the President just announced yesterday – which I do think is a step in the right direction. But I just don't think there's much going on with drug policy right now. It's very difficult to comment on – even two years in, there's not much going on.

**CJLPP:** *Why do you think there is such divergence in the discussion on drug policy? How do you think the policy differences between these two extremes can be overcome – particularly in California, where public opinion is now largely favoring towards legalization?*

**Sabet:** I think that if people are given more options than just legalization or criminalization, they actually will take those other options. There have been polls that show, even in California, when you give people the decriminalization option, they prefer that. Or, if you give people legalization but they can ban it on the local level, more people prefer that. More California cities have banned medical marijuana shops than those that haven't. That's remarkable, when you tend to think of California as the "bastion of marijuana." In Colorado, the majority of cities and towns have banned shops in their own communities. It confirms the idea that this isn't just something that everybody's doing, this isn't something that everyone wants to do, this is something that a pretty small minority of people want to do, and they have convinced the majority that this is something that's no big deal. I think this is something that is to be continued. It's not settled any more than when we had criminalization laws. Drug policy is something that's constantly evolving, it's always in motion.

**CJLPP:** *Why do you think it is that public opinion is shifting steadily in favor of marijuana legalization, especially among youth? Do you think this trend is cause for alarm – or is it just a societal response to such "extremist" policies, as you've described?*

**Sabet:** I think it's everything. I think a part of it is a response to the "Just Say No" and the "DARE" era. I think part of it is the fact that, generally, our politics and preferences have become more libertarian in recent years. I think it has to do with the wrong perception that we have jails and prisons that are only filled with marijuana offenders, people who've only smoked a joint or something. I think it's partly that the medical marijuana issue has opened the door to legalization – which was a deliberate plan. Forty years ago, the head of NORML [National Organization for the Reform of Marijuana Laws] said that he would "use medical marijuana as a red herring to give marijuana a good name" – that's his exact quote. And that's what they've done. Rather brilliantly, I have to hand it to them. From a PR perspective, it's been brilliant for them, and I think for money, frankly. There's been a lot of money over not just ten years but forty years of funding marijuana advocacy. I think a lot of it is a culmination of that.

**CJLPP:** *You've said before that the recent models for marijuana legalization as seen in Colorado and California are models "of failure, not success."<sup>2</sup> Can you explain what about these policy models are cause for concern?*

**Sabet:** They're driven by the commercialization of marijuana. They're driven by encouraging heavy users. If they were driven by personal liberty, we would see decriminalization laws. If they were driven by minimizing public health outcomes, we would see very heavy regulations on edibles. We would not see pot gummy bears, we would not see THC concentrates of ninety-nine percent. We would see limits [on THC concentrations], maybe ten percent. We would see other major zoning regulations. We're not seeing that, because it's driven by, frankly, a small band of lobbyists who are promoting this.

**CJLPP:** *You've written extensively about the need to prevent "Big Tobacco 2.0," either in the shape of a new "Big Marijuana" or the resurgence of the tobacco industry into the commercial marijuana industry. How would you say this concern can be addressed? What policies should states follow to avoid this outcome?*

**Sabet:** First, I don't think people know that marijuana is a big industry. Let me correct that: they know that there's money to be made, but I don't think they know that alcohol or tobacco interests are behind it, or pharma. If I could redo the 2016 California campaign [against marijuana legalization], I would only fund billboards or TV ads that say "Big Tobacco is coming" – something in-your-face like that. It makes no sense to do what California is doing, to get stricter on tobacco and yet looser on marijuana. That makes no sense, from any perspective. You could say that marijuana has medical properties – then separate the medical aspect for a minute. That could be a separate issue. A lot of people are conflating medical, decriminalization, and

<sup>2</sup> "Rand Paul Gets It Wrong, Sonia Sotomayor Gets It Right on Pot," Huffington Post, Kevin Sabet. 23 Sep 2015

legalization. I think that's part of the strategy of the pro-side, to conflate things. They say, "We need legalization; we need it because this person in a wheelchair needs it." Well, that's like saying we need heroin legalization because a person in a wheelchair needs morphine, just because they come from the same plant. No, those are very different things, even though they're from the same plant. I think there's a constant conflation of terms which benefits the pro-side.

**CJLPP:** *How would you compare the issues of marijuana versus other drug-related public policy dilemmas, such as the difficulties posed by alcohol use, or the omnipresent opioid and prescription medicine addiction crises?*

**Sabet:** We have to understand that we often talk about drugs in a vacuum, as if they're their own things. The reality is, people that have problems with any drug often have problems with multiple drugs. It's not like someone is saying "I've only ever used heroin." First of all, they probably didn't start with heroin, they probably started with marijuana or alcohol. In fact, new research is showing that marijuana is replacing alcohol and tobacco as the "first drug of choice." So, I think we need to realize that these things are all interrelated. That's why I get very worked up when people say that marijuana is the answer to opioid addiction. That, I think, is a really dangerous thing and I think it's a repetition of our history. Cocaine was the answer to alcoholism a hundred years ago; heroin was the answer to cocaine. You've seen this before, saying that this one drug is the answer to another drug. I think that's a very dangerous path. I think that if you talk to any person in treatment or public health – ER doctors, treatment and medical professionals – they will tell you that these drugs are all intertwined, that this isn't something that we should always disentangle.

**CJLPP:** *You've criticized practices like "supervised injection sites" for heroin addicts, writing that such an initiative "could be a precursor to efforts to fully legalize drugs such as heroin."<sup>3</sup> Could you speak more about why you think this practice would be detrimental to public health?*

**Sabet:** It was a while ago when I talked about that. I haven't done as much research on supervised injections because currently I've been preoccupied with weed. But, I will say that I worry when we start making drug use easier. It's one thing to say that there's something for a small amount of people that we haven't been able to get into treatment, but it's a very fine line from that to opening up a supervised injection site for anyone who wants to use it. I do worry about making drugs easier to use. If you told somebody that we're going to combat tobacco by opening up places to smoke cigarettes, I think they would laugh. If you said we're going to reduce alcoholism by increasing the number of places where you can drink, that doesn't feel right to me. So, I'm skeptical on things like supervised injection sites, but I'll admit that I do need to read up more on some of the current science.

**CJLPP:** *Why have you focused your efforts on campaigning against marijuana legalization specifically?*

**Sabet:** It's definitely not something I planned on telling my parents that I wanted to do when I grew up. I think, in some ways, although the internet would say different, I'm definitely an unlikely advocate on this. I've been interested in drug policy, generally. I love coming back to campuses like this, because it reminds me of the other path I almost took, which is the academic path. We're out here at seventy-five degrees at two p.m. talking about whatever we want – I don't know how it could get any better than that. Instead, I traded it for personal attacks and begging for money as the head of a non-profit, literally begging for money, talking to donors while traveling around like a mad-man and not seeing my family. I'm doing that. I like what I'm doing. I think Patrick [Former Rep. Patrick J. Kennedy, co-founder of SAM] once called me a "happy warrior" – which is true, I am a happy warrior. But it's not something I always thought I was going to do.

I have always been interested in drug policy, since I was young, but I see drug addiction as another form of injustice. I grew up as a member of the Baha'i faith, and as a member of the Baha'i faith I grew up with an acute feeling of wanting to pursue justice, that justice is the highest pursuit. I was interested when I was young with the persecution of Baha'is in Iran. I was interested very much in Apartheid, with what was going on in South Africa. I was interested in learning about power structures around the world, with how certain people propagated power against others. I really didn't think of addiction in the same way. My parents didn't even really drink – I've never seen alcohol in my house, let alone drugs. It was never anything that preoccupied my mind. Then, a series of events led me to really understand that addiction really is another form of injustice. I am pursuing justice, but maybe in a way that even surprises me a little.

**CJLPP:** *You've touched on this earlier, so I'd like to talk more specifically about it. How would you compare America's marijuana policy direction with that of other countries, such as the Netherlands, where marijuana is widely decriminalized yet not legalized?*

**Sabet:** We make the Netherlands look like Saudi Arabia. It is much more controlled and frowned-upon in the Netherlands. They don't allow mass commercialization, they have limits on the products, they don't openly allow it, in terms of the selling of it – although they do have consumption rooms, which we don't have here. But generally, it's much tamer there. So, when people say we should legalize marijuana or that we should vote yes on the California initiative, or the Colorado, or Michigan, because we should be more like the Netherlands – that's laughable because the Dutch now look at us in horror. It's funny – I go to the UN a lot, when I was in the government especially. We would always have playful exchange with the Dutch, asking if they're high or if they remembered to come to the meeting because they're high. And now, who's wearing that shoe? I would hide from the Dutch if I went there now because they would say, "Do you know you have Sesame Street characters advertised on a Colorado pot shop? What are you guys thinking?" The tables have really turned. I think what we're doing is very different from what the Dutch are doing.

<sup>3</sup> "Should Cities Run Clinics to Help Heroin Users Shoot up Safely?" KevinSabet.com. 4 Apr 2016

*CJLPP: Do you think the system built in the Netherlands is applicable here?*

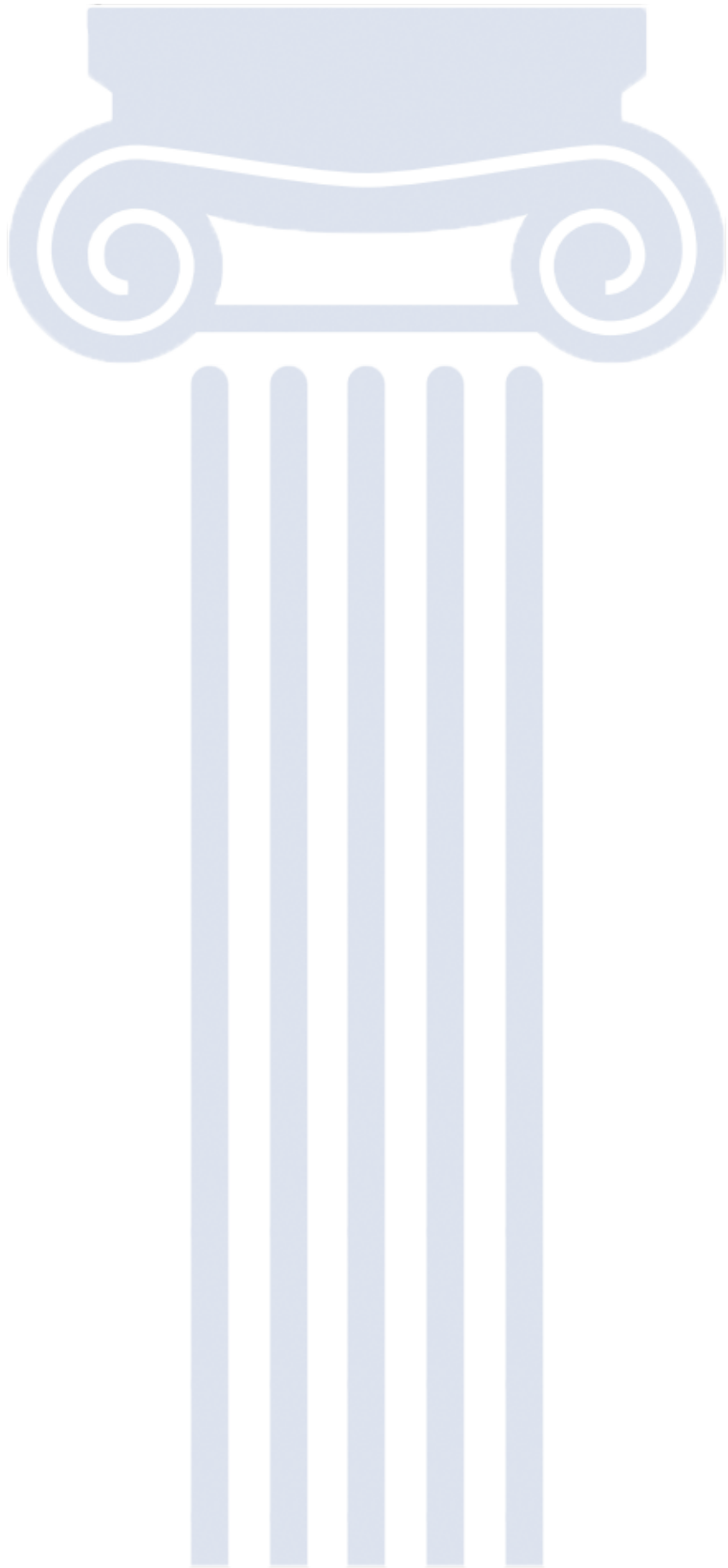
**Sabet:** I think it would be very difficult to have that here, because we have a culture of commercialization in a way that they don't. If we were like, say Finland, then maybe. But nothing in our past of dealing with legal intoxicants leads me to think that we would ever put public health over private property. Nothing.

*CJLPP: As a final question, I want to ask if there are any other particular drug-related policy issues you believe the public should be better educated on. What about college students, particularly?*

**Sabet:** I think the issue of e-cigarettes is a fascinating one. There's so much we don't know about it, and although we know that it's probably safer for you to be vaping than smoking two packs a day, beyond that, we don't know a lot. There's also been a lot of interesting research on trying to entice smokers to vape, but it's very hard to do that because it's actually a very different thing in terms of feeling. A lot of smokers just don't want to vape. There was once a study somebody wanted to do of people in AA [Alcoholics Anonymous]. If you know people in AA, smoking is a big part of it, unfortunately. A lot of people who are in AA, after the meetings they'll smoke outside. Researchers decided to find people from AA and give them vapes to smoke instead of cigarettes. They couldn't even recruit enough people for that study, because they couldn't find people who would be willing to vape instead of smoke. So, I think that's a very important issue.

And, I would urge young people to research what's behind the marijuana legalization movement, how they are being targeted just like their parents were targeted for tobacco when they were teenagers. I think we're going through it all over again. I would encourage more independent research, because right now it's just accepted as no big deal. Wouldn't you agree? It's less stigmatized than alcohol, even. I think that is a cause for concern. I would encourage people to do their own research. No one should take my word for it. I hope that everybody in my talks would look up what I just said. I hope that everyone looks up everything Karen O'Keefe [Director of State Policies for Marijuana Policy Project] said. I hope everyone does their own research with a true open mind. And research doesn't necessarily mean Wikipedia; it does mean peer-reviewed journals, it means understanding how those work. They're not infallible, peer-reviewed journals, but understanding the balance of pros and cons and the balance of research studies with conflicting research – those are difficult things to do. But they're not past what any college student in America can do. I would urge everyone to do that.

*CJLPP: Thank you again for your time and your expertise, Dr. Sabet.*



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