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### Coming to Terms: Using Contract Theory to Understand the Detroit Water Shutoffs

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# COMING TO TERMS: USING CONTRACT THEORY TO UNDERSTAND THE DETROIT WATER SHUTOFFS

MARISSA JACKSON SOW\*

*After the City of Detroit underwent financial takeover and filed the largest municipal bankruptcy in American history in 2013, the city's emergency manager encouraged mass water shutoffs as a way of making the city's water utility a more attractive asset for sale—and for privatization—by ridding the water department of its association with bad debt. The sale never took place, but the water shutoff, too, became the largest ever in American history, with over 141,000 homes subjected to water disconnections over a period of over six years. The governor of the State of Michigan ordered that the shutoffs be temporarily suspended for the duration of the COVID-19 health emergency in March 2020 and that water be restored to homes that had been disconnected from water services.*

*Human and civil rights activists and health officials have long sought the end of the shutoff campaign for several reasons: It disproportionately impacts Black people, subjects residents to subhuman living conditions and serious health risks, and remains ineffective at redressing the underlying problems that prompted the shutoff in the first place. For attorneys and activists advocating on behalf of Detroiters, pleading violations of civil and human rights laws, however, has proven unavailing in the courts, as well as at the seats of local or state government; even condemnations from the United Nations did not convince the City of Detroit or the State of Michigan to put a permanent end to the water shutoffs, their lack of success and high human cost notwithstanding.*

*This Essay articulates a radical theory of contract to clarify the relationships between the people of Detroit and the local, state, and federal governmental bodies exercising*

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\* Copyright © 2021 by Marissa Jackson Sow, Assistant Professor, St. John's University School of Law (in June 2021). Fellow, Office of the United Nations High Commissioner for Human Rights. Leadership in Government Fellow, Open Society Foundations. B.A., Northwestern University; J.D., Columbia Law School; LL.M., with merit, The London School of Economics and Political Science. I would like to thank Eddie Bruce-Jones, Carliss Chatman, Benjamin Edwards, Davina Figeroux, Wendy Greene, Peter Hammer, Brandon Hasbrouck, Olatunde Johnson, Hon. Sterling Johnson, Jr., Cary Martin Shelby, Sarudzayi Matambanadzo, Jeremy Paul, Matthew Shaw, Kendall Thomas, Scott Skinner-Thompson, Etienne Toussaint, Patricia J. Williams, and Kevin Woodson for their comments on this paper in its many iterations, and for their encouragement and suggestions throughout the writing process. Profound appreciation is due to the editors of the *NYU Law Review Online*, who were kind, patient, rigorous, and meticulous as we worked together to edit this paper during a global pandemic. I would also like to thank my mother, Dr. Valeria A. Jackson, for sharing her personal testimony, and the late Lila Cabbil—Detroit's Water Warrior and my beloved mentor—for encouraging me to pursue a career in human rights law before I knew how to read. Finally, I would like to honor the many activists, advocates, researchers, and everyday Detroiters who persist, in the face of tremendous adversity, toward justice. Research for this Essay was supported in part by the Open Society Foundations. The work is the author's own and does not necessarily express the views of the Open Society Foundations.

*jurisdiction over them and to explain why the shutoffs persist. A racial contract exists amongst Michigan's white body politic, which seeks the exploitation of Black people and resources—including Detroit's water. Performance of the contract requires the dehumanization and exclusion of Black Detroiters in order to establish and maintain a rent-seeking order in which Black people effectively subsidize the delivery of water and sewage services to white suburbanites who view Black governance and Black proprietorship as a breach of the social order for which the suburbanites bargained. The City of Detroit has been able to rely on anti-Black narratives and beliefs to create the mirage of a contractual relationship with Detroit residents that Detroiters have breached; in reality, however, because of the racial contract, Black people lack the capacity to enter into bargained-for agreements with their local government; rather, the City of Detroit and the regional water authority have contracted amongst themselves, treating Black people's use of water as an externality resolved through taxation.*

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## INTRODUCTION

Days before law enforcement officers killed George Floyd,<sup>1</sup> writer Adam Serwer linked the murder of Ahmaud Arbery to the U.S. government's response to the COVID-19 pandemic via Charles Mills's theory of the racial contract,<sup>2</sup> which Serwer describes as “a codicil rendered in invisible ink, one stating that the rules as written do not apply to nonwhite people in the same way.”<sup>3</sup> Serwer wrote:

The Declaration of Independence states that all men are created equal; the racial contract limits this to white men with property. The law says murder

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<sup>1</sup> Christine Hauser, Derrick Bryson Taylor & Neil Vigdor, “*I Can't Breathe*”: 4 Minneapolis Officers Fired After Black Man Dies in Custody, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/minneapolis-police-man-died.html>.

<sup>2</sup> See *infra* Section I.B for an analysis of Mills's theory of the racial contract.

<sup>3</sup> Adam Serwer, *The Coronavirus Was an Emergency Until Trump Found Out Who Was Dying*, ATLANTIC (May 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/americas-racial-contract-showing/611389>.

is illegal; the racial contract says it's fine for white people to chase and murder black people if they have decided that those black people scare them.<sup>4</sup>

The systematic over-policing, brutalization, and elimination of Black people in the United States and beyond is far from the only evidence of the existence—and persistence—of the racial contract. Less than three months before George Floyd's death, another stark racial injustice came to a grinding halt: After six years, Detroit's water shutoff program was temporarily suspended, per gubernatorial order, for the duration of the COVID-19 pandemic.<sup>5</sup> The moratorium is only temporary, and water rights advocates have alleged that nearly six months after the order, Detroit has failed to restore running water to an unknown number of homes from which water had been disconnected, leading them to file suit in federal court in July 2020.<sup>6</sup>

Detroit's latest water crisis is remarkable because it has been so resistant to redress and resolution since it began in 2013 and accelerated in earnest in 2014.<sup>7</sup> It is equally remarkable because it is a wholly unnatural disaster. Detroit does not lack access to water; rather, the City of Detroit made a decision, pursuant to its municipal bankruptcy, to disconnect water service to addresses attached to delinquent water bills.<sup>8</sup> The United Nations Special Rapporteurs on the human right to water and sanitation and the right to adequate housing visited Detroit in 2014 after the City instituted what would eventually become the largest water shutoff program in the history of the United States.<sup>9</sup> Immediately after the visit, Catarina de Albuquerque—then-Special Rapporteur—decried the shutoffs as “contrary to human rights” in a press release, noting the disparate impact upon Black, poor, and vulnerable residents; the unaffordability of water in Detroit; the City of Detroit's flawed and arbitrary billing and termination practices; the lack of remedy for those whose water had been terminated wrongfully; and the

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<sup>4</sup> *Id.*

<sup>5</sup> See Mich. Exec. Order No. 2020-28 (Mar. 28, 2020).

<sup>6</sup> See Class Action Complaint, Taylor v. City of Detroit, No. 2:20-cv-11860-SDD-APP (E.D. Mich. July 9, 2020).

<sup>7</sup> See Jessi Quizar, *A Bucket in the River: Race and Public Discourse on Water Shutoffs in Detroit*, 26 SOC. IDENTITIES 429, 429–31 (2020) (charting the timeline of Detroit's bankruptcy and the water shutoffs and identifying the beginning of the post-bankruptcy shutoff campaign in 2013). *But see* Class Action Complaint, *supra* note 6, ¶ 11 (noting that the City of Detroit had begun the practice of disconnecting residents' water in 2001).

<sup>8</sup> See Rose Hackman, *What Happens When Detroit Shuts Off the Water of 100,000 People*, ATLANTIC (July 17, 2014), <https://www.theatlantic.com/business/archive/2014/07/what-happens-when-detroit-shuts-off-the-water-of-100000-people/374548>.

<sup>9</sup> See *In Detroit, City-Backed Water Shut-Offs 'Contrary to Human Rights,' Say UN Experts*, UN NEWS (Oct. 20, 2014), <https://news.un.org/en/story/2014/10/481542-detroit-city-backed-water-shut-offs-contrary-human-rights-say-un-experts>.

dehumanizing impact of the shutoffs on their victims.<sup>10</sup> The City of Detroit rejected the United Nations' visit and findings outright: Mayor Mike Duggan's staffers blasted the United Nations representatives as "misinformed" and accused the Special Rapporteurs of lacking "an interest in information" and of promoting an agenda inconsistent with facts.<sup>11</sup> The shutoff program, which began to impact 3,000 homes per week in late 2014,<sup>12</sup> ultimately impacted over 141,000 homes and persisted for nearly six more years.<sup>13</sup>

Despite the magnitude of the Detroit water crisis, relatively few legal scholars have addressed it. Bernadette Atuahene is one of the few scholars to address Detroit's predation upon its residents. She has written about Detroit's mortgage foreclosure crisis—another orchestrated catastrophe that disproportionately impacted Black Detroiters and undermined their enjoyment of property—which was created by unconstitutional tax assessments<sup>14</sup> and has resulted in thousands of Black Detroiters losing their homes.<sup>15</sup> Atuahene introduces the concept of the predatory city, defining it as the urban area whose public officials systematically take property from their residents, transferring the property to public coffers, "intentionally or unintentionally violating domestic law or basic human rights."<sup>16</sup> Atuahene's scholarship seeks an answer to one question: "Why do some financially desperate cities become predatory?"<sup>17</sup>

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<sup>10</sup> *Id.*; see also Class Action Complaint, *supra* note 6, ¶ 6 (describing some of the hardships and adverse health outcomes resulting from the shutoffs); Claire Sabourin, Note, *Responding to the Detroit Water Crisis: The Great Lakes Water Authority and the City of Detroit*, 51 WASH. U. J.L. & POL'Y 305, 310 (2016) (same).

<sup>11</sup> Joe Guillen, *Duggan Disappointed in UN Experts' Take on Water Shutoffs*, DET. FREE PRESS (Oct. 20, 2014), <https://www.freep.com/story/news/local/michigan/detroit/2014/10/20/duggan-disappointed-unitednations/17632575>.

<sup>12</sup> See *In Detroit, City-Backed Water Shut-Offs 'Contrary to Human Rights,' Say UN Experts*, *supra* note 9.

<sup>13</sup> Class Action Complaint, *supra* note 6, ¶ 4.

<sup>14</sup> Atuahene offers an in-depth discussion of the City of Detroit's systematic practice of illegal property tax overassessments. As she notes, the "Michigan Constitution, supporting legislation, and all case law all state the assessed value of a property divided by its market value cannot exceed 0.5. Between 2009 and 2015, however, the City of Detroit assessed 53 to 84 percent of its residential properties in violation of the Michigan Constitution"—or, in excess of 0.5. Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107, 113 (2020). In 2016, the ACLU of Michigan, NAACP Legal Defense and Education Fund, and the law firm of Covington & Burling LLP brought a class action suit against the City of Detroit and Wayne County on behalf of the Morningside Community because of the illegal property tax assessments. Complaint, *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH (Mich. Cir. Ct. July 13, 2016). The City of Detroit agreed to amend its policy and process and settled with plaintiffs. See Stipulation and Order of Settlement and Dismissal, *Morningside Cmty. Org. v. Sabree*, No. 16-008807-CH (Mich. Cir. Ct. July 3, 2018). The case against Wayne County was unsuccessful, as the Wayne County Circuit Court and Michigan Court of Appeals agreed that venue was improper. See *Morningside Cmty. Org. v. Wayne Cnty. Treasurer*, No. 336430, 2017 WL 4182985, at \*3–4 (Mich. Ct. App. Sept. 21, 2017) (per curiam).

<sup>15</sup> Atuahene, *supra* note 14, at 112–13.

<sup>16</sup> *Id.* at 107.

<sup>17</sup> *Id.* at 109.

Other scholars who have squarely addressed the Detroit water crisis have done so either from the realms of urban policy, sociology, or ethnic studies,<sup>18</sup> while the few legal evaluations of the water shutoff program primarily deal with the crisis through the lens of human rights and American equal protection doctrine and civil rights law.<sup>19</sup> The right to water is clearly established in international law.<sup>20</sup> Equally clear is the fact that Detroit's water shutoff program disproportionately, if not almost exclusively, impacted the city's Black residents, who comprise nearly eighty percent of the city's population.<sup>21</sup> Until now, however, neither international human rights law nor civil rights law has been able to convince or compel any of Detroit's relevant adjudicators or policymakers to declare the shutoff policy unlawful or otherwise permanently halt it. Civil rights law requires plaintiffs to demonstrate proof of discriminatory intent or disparate impact not justified by the City of Detroit's interest in collecting revenue,<sup>22</sup> and thus far, no plaintiffs have been able to meet such a high standard of proof. International human rights laws, for their part, are neither compelling nor instructive in American courts. This Essay departs from both frameworks and adopts an alternative analytical approach to Detroit's grave humanitarian crisis.

If the role of the city in its social contract with its citizens is, as Detroit's charter states, to "provide for the public peace, health and safety of persons and property within its jurisdictional limits" and provide "safe drinking water and a sanitary, environmentally sound city,"<sup>23</sup> then why has it failed to do so for so long, at such high human, social, and environmental costs? Why,

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<sup>18</sup> See, e.g., Quizar, *supra* note 7; ANNA RECCHIE, JOSEPH J. RECCHIE, JOHN A. POWELL, LAUREN LYONS, PONSELLA HARDAWAY & WENDY AKE, HAAS INST. FOR A FAIR AND INCLUSIVE SOC'Y, WATER EQUITY AND SECURITY IN DETROIT'S WATER AND SEWER DISTRICT (2019), [https://belonging.berkeley.edu/sites/default/files/detroit\\_water\\_equity\\_full\\_report\\_jan\\_11\\_2019.pdf](https://belonging.berkeley.edu/sites/default/files/detroit_water_equity_full_report_jan_11_2019.pdf).

<sup>19</sup> See, e.g., Class Action Complaint, *supra* note 6 (pleading violations of the equal protection guarantees of the Fourteenth Amendment to the U.S. Constitution and the Michigan Constitution of 1963, as well as the Fair Housing Act and Michigan's Elliott-Larsen Civil Rights Act based on disparate racial impact); see also JASON AMIRHADJI, TAYLOR ANVID, LEAH BURCAT, SAMUEL HALPERT, NATALIE LAM, DAVID MCALEER, CATHERINE SCHUR, DANIEL SMITH & ERIK SPERLING, GEO. L. HUM. RTS. INST., TAPPED OUT: THREATS TO THE HUMAN RIGHT TO WATER IN THE URBAN UNITED STATES (2013), <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/Tapped-Out.pdf>. But see Sabourin, *supra* note 10, at 316 (applying a policy-based focus on models of government utility provision in financially distressed cities rather than focusing on human or civil rights violations); Anna Rossi, *Regionalizing the Detroit Water and Sewerage Department, the Effects of Privatization on Metro Detroit Residents and the Importance of Community Control*, 17 J.L. SOC'Y 59 (2016) (focusing also on policy recommendations).

<sup>20</sup> The United Nations General Assembly adopted a resolution recognizing the human right to water and sanitation in 2010. See G.A. Res. 64/292 (Aug. 3, 2010).

<sup>21</sup> Class Action Complaint, *supra* note 6, ¶¶ 9, 21.

<sup>22</sup> See *infra* note 157 and accompanying text (noting Michigan's interest in collecting revenue by carving out exceptions for water cut-off for nonpayment).

<sup>23</sup> DETROIT, MICH., CHARTER DECLARATION OF RIGHTS 12 (2012).

even in the face of the COVID-19 pandemic—which has killed thousands of Black Detroiters and can be combatted via regular hand washing—did the City of Detroit refuse to put a permanent end to the shutoffs and instead maintain that all water bills would be due once Governor Whitmer’s executive order is lifted?

In a free market, a contract transfers resources to efficient use with minimum transaction costs and is subject to open bargaining without disruptions like undue influence and duress.<sup>24</sup> This Essay uses contract theory to bring into focus the reasons *why* Detroit and cities like it expropriate resources and property from their residents—especially their Black residents—and subject them to subhuman living conditions as punishment when extraction is no longer possible, even though such measures exacerbate the cities’ financially desperate states. In the case of Detroit, predatory and extractive commercial contracting of water pricing and supply supports, and is supported by, explicitly race-based social contracting by a white body politic and local and state governments representing its interests.

The scholarship, advocacy, and commentary critical of the water shutoffs has emphasized their cruelty and the incomprehensible harms they have caused Detroiters.<sup>25</sup> However, Detroit’s exacerbated predation of its residents via the water shutoffs is also economically inefficient. Moreover,

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<sup>24</sup> See Steven G. Medema, *Debating Law’s Irrelevance: Legal Scholarship and the Coase Theorem in the 1960s*, 2 TEX. A&M L. REV. 159, 161–62 (2014) (defining the Coase Theorem).

<sup>25</sup> See, e.g., Quizar, *supra* note 7, at 429 (noting the “level of hardship to such a high proportion of city residents, the massive health hazards, and in the face of international condemnation” flowing from the shutoffs); Sabourin, *supra* note 10, at 305–06 (recalling that 19,000 Detroiters were left without “access to water” because of shutoffs in the summer of 2014 and that the shutoffs disproportionately impacted poor people and people of color); Anna Clark, Opinion, *Going Without Water in Detroit*, N.Y. TIMES (July 3, 2014) [hereinafter Clark, *Going Without Water*], <https://www.nytimes.com/2014/07/04/opinion/going-without-water-in-detroit.html> (recounting the travails of “[a] family of five with no water for two weeks who were embarrassed to ask friends if they could bathe at their house” and “[a] 90-year-old woman with bedsores and no water available to clean them”); Cria Kay, Kely Markley, Malavika Sahai, Chris Askew-Merwin & Dahlia Rockowitz, *Water Insecurity in Southeast Michigan: The Impacts of Unaffordability and Shutoffs on Resident Well-Being* (Apr. 2018) (M.S. project, University of Michigan), [https://deepblue.lib.umich.edu/bitstream/handle/2027.42/143169/Roadmap%20to%20Water%20Security\\_320%20%281%29.pdf](https://deepblue.lib.umich.edu/bitstream/handle/2027.42/143169/Roadmap%20to%20Water%20Security_320%20%281%29.pdf) (detailing the extreme financial impact of water unaffordability and disconnections on Detroit residents); Jonathan Silver, *Disconnected in Detroit: Water Shut-Offs Through the Prism of African Cities*, AFR. LSE (July 29, 2014), <https://blogs.lse.ac.uk/africaatlse/2014/07/29/disconnected-in-detroit-water-shut-offs-through-the-prism-of-african-cities/> (“The consequences of these disconnections [in Detroit] are almost unimaginable for residents left without the ability to clean, to cook or to drink . . . .”); *Detroit: Disconnecting Water from People Who Cannot Pay - an Affront to Human Rights*, Say UN Experts, UNITED NATIONS HUM. RTS. OFF. HIGH COMM’R (June 25, 2014), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14777> (quoting UN Rapporteur Catarina de Albuquerque as qualifying the “disconnection of water services because of failure to pay due to lack of means” as “a violation of the human right to water” and Special Rapporteur Leilani Farha as qualifying the shutoffs as “discriminatory” if they disproportionately impact Black Detroiters).

Detroit's water crisis is not only highly detrimental to the city and its population, but it is also a crisis entirely of the government's own creation—one that could be rectified at any time, but which has instead persisted with full-throated defenses from local and state officials, despite its very apparent lack of success. In her work on the shutoffs, sociologist Jessi Quizar asks “how, given the level of hardship to such a high proportion of city residents, the massive health hazards, and in the face of international condemnation, were public officials able to narrate the water shutoffs as necessary, indeed, as a public good?”<sup>26</sup> This Essay seeks to answer her question, and in so doing, seeks also to answer the question of how the economic inefficiencies of the shutoff policy have been narrated, by city officials, as keys to fiscal recovery.

The Detroit water crisis is actually a story of contracts. A set of commercial and legal contracts between the City of Detroit and other governmental and corporate entities facilitates the extraction of resources from Detroit, but the people of Detroit are not party to that contract although they bear the brunt of its terms. An invisible racial, social contract exists among white metro-Detroit suburbanites, which dispossesses Black Detroiters of contractual and proprietorship capacity and allows rent-seeking<sup>27</sup> suburban entities to extract resources from Detroit at Detroiters' real expense. Finally, the City of Detroit and State of Michigan have perpetuated a narrative concerning a supposed commercial contract between Detroit's residential water consumers and the Detroit Water and Sewage Department, and of a social contract between Black Detroiters and the City of Detroit. Both of these latter contracts are fictions that aid the City of Detroit in gaslighting Detroit residents by accusing them of being delinquent scofflaws and concealing the existence of both the aforementioned racial contract and the commercial contracts from which Black Detroiters are excluded.

Classical contract theory requires a bargained-for exchange resulting in mutual benefit to the contracting parties, and it provides for defenses to breaches in performance of the contract. In Detroit, however, the overwhelmingly Black populations harmed by the water shutoffs have neither received the benefits of a bargain with their government, nor have they been able to claim duress as a defense to the expectation that they would pay ever-increasing and extremely unaffordable water bills. Black Detroiters seem to be objects of, rather than parties to, the contracts respected by the city. By contrast, the City of Detroit maintains tangible contracts with predominantly white suburbs for the lease of Detroit's water, which the suburbs enjoy at

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<sup>26</sup> Quizar, *supra* note 7, at 429.

<sup>27</sup> See Robert D. Tollison, *The Economic Theory of Rent Seeking*, 152 PUB. CHOICE 73 (2012) (defining rent-seeking as socially costly, inefficient economic activity in which persons or institutions expend resources to solicit or capture transfers—one-way payments for which the recipients give nothing in exchange).



pricing subsidized by Detroit's predominantly Black, inner-city residents.<sup>28</sup>

Detroit also is a party to an invisible racial contract with the State of Michigan's white body politic, which deems Black proprietorship illegitimate and, indeed, impossible. The federal courts, along with state and local government, assume the existence of a valid and enforceable contract between Black Detroiters and the City of Detroit undergirded and protected by civil rights law; however, this contract is a fiction, impossible under the current socio-legal order. A global racist social contract constructs Blackness such that Black people lack the capacity to contract with the state, and therefore have no claims to property they may possess, or even own, at any given time or place—whether in Detroit or in the halls of the United Nations headquarters. This Essay makes the case that the presentation, by the state and local governments and federal court, of the fictitious contract between Black Detroiters and their governments regarding water delivery as valid and enforceable, serves to conceal the presence of the racial contract in existence between those governmental bodies and the white body politic and to justify the tangible commercial contracts entered into by the City of Detroit, the regional water authority, and Detroit's suburbs, which extract resources and capital from Black Detroiters.

Part I of the Essay establishes my theory of contract: I bring classical private contract theory together with Mills's theory of the racial contract to articulate a theory of governance as sociopolitical contracting. Governments, under this theory, uphold a racial and social contract that is bargained for by a white body politic, and they engage in private commercial contracting in order to meet and avoid public accountability for the predatory and anti-Black terms of the agreement. I then offer my family's personal experience with water disconnection in Detroit as a case study in support of my theory. Part II of the Essay exposes as fictions the narratives advanced by Detroit officials of Detroiters as delinquents in breach of commercial contracts for water and as scofflaws in breach of their social contracts with the city government—a story created to foment longstanding anti-Black sentiments directed at Detroiters and justify the City's egregious human rights violations. In Part III, I discuss the temporary suspension of the water shutoffs in March 2020 as proof of the existence of the racial contract; the unnecessary, brutal, and life-threatening nature of the shutoff program; and the state and local governments' intentionality in perpetuating life-threatening harm to Detroiters. I conclude the Essay by looking at the State of Michigan's

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<sup>28</sup> See RECCHIE ET AL., *supra* note 18, at 9 (describing Detroit's \$50 million annual payments to lease its own water, as a "common-to-all" charge while suburbs enjoy lease terms preventing rate increases of more than four percent per year for ten years—meaning that Detroit is effectively subsidizing suburban water rates per the terms of the lease arrangement with the Great Lakes Water Authority).

decision to acknowledge a sociopolitical contract (and with it, a duty of care) between itself and the people of Flint in the wake of the Flint Water Crisis, as a potential point of departure for reparative justice between the City of Detroit, the State of Michigan, and Black Detroiters.

## I

### RULE: CONTRACT THEORY

#### *A. Coming to Terms with Detroit's Water Contracts*

This Essay challenges the narrative advanced by the City of Detroit that the City is in contract with its Black Detroit residents. The central argument of this Essay is, rather, that due to a racial contract that requires the construction of Black people—and especially Black women—as subhuman, Black people do not possess contractual capacity. Traditional contract theory is a theory of private bargaining, and many contracts scholars bristle at the idea of the social contract, or the law as a contract.<sup>29</sup> However, in an express attempt to decolonize contract theory, this Part articulates a radical theory of contract that includes social and political contracting and considers the tangible private-public commercial contracting around Detroit's water supply and delivery in the context of public *racial* contracting to which the City of Detroit and State of Michigan are parties.

Human and civil rights laws are based on the principle that all humans have certain inalienable rights;<sup>30</sup> accordingly, when considering such rights, who qualifies as “human” is material information. Also important is what, or who, determines which of these rights are inalienable and why. While the rights may spring from the earth as part of nature, the laws codifying them in society do not; laws are not merely human constructions but also fundamentally human contracts.<sup>31</sup>

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<sup>29</sup> See Tom Ginsburg, *Constitutions as Contract, Constitutions as Charter*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 182–83 (Denis J. Galligan & Mila Versteeg eds., 2013) (describing the debate over whether or not constitutions should be understood using contract theory or coordination theory). Ginsburg is more aligned with coordination theory but agrees that contract theory provides valuable tools to help understand how certain constitutions are negotiated and sustained. *Id.* at 182 (“The social contract metaphor criticized by Hardin and others is primarily a normative one.”). Locke wrote about social contracts as the source of sound governance. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 101 (Ian Shapiro ed., Yale Univ. Press 2003) (1689) (“*Political power*, then, I take to be a *right* of making laws . . . for the regulating and preserving of property, and of employing the force of the community, in the execution of such laws, and in the defence of the commonwealth . . . ; and all this only for the public good.” (emphasis added)).

<sup>30</sup> See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 1-2 (Dec. 10, 1948) (“All human beings are born free and equal in dignity and rights. . . . Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind . . .”).

<sup>31</sup> I contend that laws are public contracts because they are legally enforceable agreements,

A contract is a legally enforceable agreement,<sup>32</sup> and its elements include an offer, acceptance, bargained-for consideration, legality, contractual capacity, and contractual intent.<sup>33</sup> Detroit recognizes no right to water; instead, its leadership has made clear that water is a utility that may be enjoyed if paid for.<sup>34</sup> However, an acceptance of law as contract alone does not resolve the quandary as to how Detroiters who paid their bills could also be subjected to the shutoffs or how the City of Detroit could continue to justify the water shutoff program, given its tremendously deleterious human and socioeconomic results.

Adjudicators and executives in Detroit and the State of Michigan have made clear statements regarding a lack of contractual relationship, lack of fiduciary duty, and lack of rights owed to Detroiters by their governments.<sup>35</sup> However, because the racial contract is written in invisible ink and the statements generally appeal to formal, *de jure* racial equality (if only by making no mention of race), the gap between the leadership's decisionmaking and the plight of Detroiters living without water remains difficult to understand or explain. An understanding of where the contractual relationships actually exist is critical if activists and policymakers concerned with ending the shutoffs permanently are to ever achieve success.

The City of Detroit is in contract with the white body politic, which is comprised of individual white persons, the predominantly white and white-led State of Michigan, and the predominantly white suburbs surrounding the city. The racial contract, discussed below, is necessarily a whites-only contract, and personal and real property—land, natural resources, and nonwhite people—are the objects of the contract, as they have always been. A number of tangible contractual agreements exist concerning Detroit's water as well: The City of Detroit is subject to the agreements it made as part of its 2013 bankruptcy and restructuring, which also created Detroit's new contractual

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bargained for by elected officials representing the public. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. L. INST. 1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”). Whether or not constitutions are contracts has long been a matter of debate. *See* Ginsburg, *supra* note 29, at 182–83 (noting that John Locke emphasized contractual theory in considering the social and political foundations of constitutions and agreeing that private contract theory aids in understanding how constitutions are negotiated, operationalized, and sustained).

<sup>32</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. L. INST. 1981).

<sup>33</sup> *See id.*, §§ 332–33.

<sup>34</sup> *See* Quizar, *supra* note 7, at 430; *see also* Matt Helms & Joe Guillen, *Judge Says No to Detroit Water Shutoff Moratorium*, DET. FREE PRESS (Sept. 29, 2014), <https://www.freep.com/story/news/local/detroit-bankruptcy/2014/09/29/water-shutoff-moratorium/16451483>; Michelle Miller, *Detroit Water Shut-Offs Bring U.N. Scrutiny*, CBS NEWS (Oct. 20, 2014), <https://www.cbsnews.com/news/detroit-water-shut-offs-brings-u-n-scrutiny> (quoting Mayor Duggan's Chief of Staff as saying, “At the end of the day, everybody's gotta pay their water bill,” in response to the United Nations' concerns about water affordability and disconnections).

<sup>35</sup> *See infra* note 106 and Part III.

relationship with the Great Lakes Water Authority (GLWA).<sup>36</sup> Detroit’s relationship with the GLWA is an extension of, and the result of a renegotiation of, Detroit’s relationship with the suburban counties to whom Detroit has provided water for decades: the GLWA is a forty-year agreement under which “[the Detroit Water and Sewerage Department] still maintains ownership of the water supply infrastructure within Detroit city, but the GLWA will lease, operate, and make decisions about the entire regional water and sewage system.”<sup>37</sup> Under the contractual agreement approved by the GLWA’s articles of incorporation, Detroit contributes \$17 million annually in rent to the GLWA even though the GLWA services the suburban counties;<sup>38</sup> that is to say, Detroit is literally subsidizing the cost of water to the suburbs. Detroit was and is not in contractual relationship with its residents for any of these transactions; indeed, the financial takeover<sup>39</sup> of Detroit by the State of Michigan—a highly racialized seizure of local Black government leadership by a white-led state body<sup>40</sup>—disenfranchised Detroit residents and removed them from much of the decisionmaking regarding Detroit’s affairs, including the establishment of the GLWA and the implementation of a water disconnection policy.<sup>41</sup> Detroiters are not involved in the pricing of water and sewage, and their water bills are raised without their input or consent.<sup>42</sup> Detroiters do not bargain with their local government for

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<sup>36</sup> See Sabourin, *supra* note 10, at 307, 313.

<sup>37</sup> *Id.* at 313 (also noting that “[t]he GLWA consists of six appointees[.]” with the “Mayor of Detroit appoint[ing] two members, county executives from Oakland, Wayne, and Macomb Counties each appoint[ing] one member, and the Governor of Michigan appoint[ing] the final member”).

<sup>38</sup> *Id.* at 313–14.

<sup>39</sup> Former Michigan governor Rick Snyder engaged in an emergency financial takeover over the city of Detroit in March 2013, suspending local Detroit officials’ decisionmaking powers. Quizar, *supra* note 7, at 430.

<sup>40</sup> See *id.* at 430 (describing emergency financial takeover as “a deeply racialized process” and noting that “[s]ix of the nine Michigan cities that have been placed under emergency management since 2009 have been home to 49.8% of the state’s Black residents”).

<sup>41</sup> See *id.* at 430 (noting that former Michigan governor Rick Snyder appointed an emergency manager pursuant to his financial takeover of Detroit who would have “near-total power over policy decisions in Detroit” because “an outside manager would be able to ‘make tough decisions’ that would be unpopular to the local population without fear of being unseated in the next election”); see also Sabourin, *supra* note 10, at 314 (concluding that the formation of the GLWA is a “move away from representation in municipal government operation” because it “is a system that puts management in the hands of another entity and leases assets rather than focusing on its social mission or its own citizens”).

<sup>42</sup> The Detroit Board of Water Commissioners has voted to increase water on a number of occasions in recent years, over the objections of Detroit residents. See, e.g., *Board Votes To Raise Detroit Water Rates Effective July 1*, WWJ NEWSRADIO 950 (June 20, 2019, 7:56 AM), <https://www.radio.com/wwjnewsradio/articles/board-votes-raise-detroit-water-rates-effective-july-1> (noting a vote by the Board to increase rates by two percent, less than two weeks before the rate increase was to go into effect, over the objection of residents who attended the meeting and as water shutoffs continued across the city); Christine Ferretti, *Detroiters to See ‘Modest’ Increase on Water Rate*, DET. NEWS (Mar. 16, 2016, 4:11 PM),

the rates they pay, nor have they had a say in the shutoff policy; indeed, due to their disenfranchisement, they cannot.<sup>43</sup>

### B. *The Racial Contract*

Contract theory provides a valuable prism of analysis for scholars seeking to understand the predatory city, or how gross human rights violations such as systematically depriving tens of thousands of poor African-Americans of running water for years can take place in a liberal democratic state. Contract theory provides insight into the interests of the bargaining parties, and how they negotiate and maintain sociopolitical orders, as it also reveals the presence of intolerable costs and inefficiencies resulting from the bargained-for agreements. Classical contract theory fails, however, to explain why these intolerable inefficiencies are, in fact, tolerated and even defended in Detroit. In this subsection, I contend that the central reason for the gross costs and inefficiencies in Detroit's contracting with its surrounding suburbs, which have manifested in an egregious humanitarian crisis for Detroiters, is race. To do so, I bring traditional private contract theory together with social contract theory and make the claim that in Detroit, the privatization of water delivery is an intentionally extractive and anti-Black system that operates pursuant to public and private contracting from which Black Detroiters are intentionally excluded. Black proprietorship—over water, and more broadly, over local government—is a threat to this system, which was bargained for by a white body politic in Michigan, amongst itself, for the purpose of maintaining control over Detroit's natural resources and an ability to consume those resources at a low price.

Charles Mills's theory of the racial contract is of a social contract that creates and employs race—and more specifically, white supremacy—to establish and enforce an economic order.<sup>44</sup> While it is not a tangible contract for, say, the sale of goods, it is a real agreement with real consequences for its parties and the objects thereto; importantly, the existence of the racial

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<https://www.detroitnews.com/story/news/local/detroit-city/2016/03/16/water-rate-hike/81874654> (reporting on a decision by the Detroit Board of Water Commissioners to approve a DWSD budget with a proposal for a 3.25% increase for water rates and 3.5% increase for sewerage rates in 2016); see also *infra* Section I.C (describing my mother's personal experience with water disconnection, erroneous billing, and rate increases in the City of Detroit).

<sup>43</sup> See, e.g., Joe Guillen, *Detroit Water Shutoffs to Begin Tuesday*, DET. FREE PRESS (May 24, 2015, 12:11 AM), <https://www.freep.com/story/news/local/michigan/detroit/2015/05/24/detroit-water-shutoffs-poverty-unpaid-bills/27852135> (noting that the Detroit Water and Sewerage Department decided to proceed with shutoffs in 2015 over the formal objection of the Detroit City Council, which passed a resolution for a moratorium on shutoffs).

<sup>44</sup> See CHARLES W. MILLS, *THE RACIAL CONTRACT* 9–11 (1997) (“The Racial Contract is political, moral, and epistemological; the Racial Contract is real; and economically, in determining who gets what, the Racial Contract is an exploitation contract.”).

contract, as a “set of formal or informal agreements or meta-agreements,”<sup>45</sup> undergirds tangible, enforceable contracts—and the *lack* of such contracts—that together perpetuate anti-Black oppression in Detroit. Because the racial contract is an exploitation contract,<sup>46</sup> it necessarily fails to contemplate or engage those it seeks to exploit<sup>47</sup> and instead conscripts them as objects of the contract and of the ensuing exploitation and extraction.<sup>48</sup> Central to the racial contract is the construction of race in a manner that supports economic exploitation and extraction—those raced as white, as human, as political, as citizens, as shareholders, and as contractor-proprietors; those raced as Black and Indigenous, as subhuman, as apolitical, as strangers and trespassers and criminals, as leeches, and as contracted-for property.<sup>49</sup> White signatories to the racial contract require strict adherence to these constructions in order to guarantee contractual performance. Accordingly, the signatories view all Black proprietorship—from Black-led governance of polities, to Black enjoyment of the rights to contract and to real property—as illegitimate breaches of the racial contract and the racial order the contract was meant to establish.<sup>50</sup>

A primary goal of the racial contract is to create a stark economic domination by white people—who are meant to be contractors and property owners—over nonwhite people—who either are subcontractors in the most favorable of circumstances (if they are men, for example), or contracted property under all other conditions (such as nonwhite women).<sup>51</sup> In

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<sup>45</sup> *Id.*

<sup>46</sup> *See id.* at 31 (“The Racial Contract is an exploitation contract that creates global European economic domination and national white racial privilege.”).

<sup>47</sup> *See id.* at 3 (“[T]he peculiar contract to which I am referring . . . is not a contract between everybody (‘we the people’), but between just the people who count, the people who really are people (‘we the white people’).”).

<sup>48</sup> *See id.* at 11–12 (“It will be obvious, therefore, that the Racial Contract is not a contract to which the nonwhite subset of humans can be a genuinely consenting party (though, depending again on the circumstances, it may sometimes be politic to pretend that this is the case).”).

<sup>49</sup> *See id.* at 11 (“The Racial Contract is that set of . . . agreements or meta-agreements . . . between . . . one subset of humans, henceforth designated . . . as ‘white’, and coextensive . . . with the class of full persons, to categorize the remaining subset of humans as ‘nonwhite’ and of a different and inferior moral status.”).

<sup>50</sup> *See generally* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1715–16 (1993) (explaining that the subjugation of Black and Indigenous people, which was accomplished by making Black people property and taking away Indigenous rights to property, helped accomplish the goal of exploiting Black labor and conquering Indigenous lands in the United States).

<sup>51</sup> In his discussion of the intersecting racial and sexual contracts, Mills describes white men as full persons and full contractors, white women as subpersons and subcontractors, nonwhite men as subpersons and subcontractors on a nonequivalent basis with white women, and nonwhite women as nonpersons and noncontractors. CAROLE PATEMAN & CHARLES W. MILLS, *CONTRACT & DOMINATION* 169–99 (2007); *see also* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2158–61 (2013); Quizar, *supra* note 7, at 433 (“In the 1950s, 1960s, and 1970s, white Detroiters left the city by the tens of thousands, moving to suburbs in large part to escape the prospect of integrated neighborhoods and growing Black political power.”).

establishing the concept of racial capitalism, Nancy Leong discusses the value of nonwhiteness in societies “preoccupied with diversity.”<sup>52</sup> Consistent with the theory of whites as holders and contractors of property,<sup>53</sup> the value of nonwhite people and nonwhiteness is not value enjoyed by the nonwhite persons, but instead determined, extracted, and enjoyed by white people and institutions.<sup>54</sup> Within the context of the Western state, nonwhiteness, and especially Blackness, is white property.

Black people are, of course, human beings, but there was a time in American history where it was just as easily understood that Black people were not human, and that lack of personhood was codified in the laws of the land.<sup>55</sup> Frank Wilderson’s theory of Afropessimism sets forth Blackness and Black people as “integral to human society but at all times and in all places excluded from it.”<sup>56</sup> For Wilderson, “the Human is not an organic entity but a construct; a construct that requires its *Other* in order to be legible; and . . . the Human Other is Black.”<sup>57</sup> Atiba Ellis’s theory of tiered personhood is far less bleak, positing Blackness as a form of personhood that was historically subordinated to whiteness in American federal courts.<sup>58</sup> Lolita Buckner Inniss has discussed the private and public person: White people and men are public people who “deploy power both by observing and by being observed” and “dismantle and erect visual barriers by shaping laws, rules and norms,” while nonwhite people and nonmen are private people who “see little and are little seen.”<sup>59</sup>

The right of enjoyment of contract and property has historically been

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<sup>52</sup> Leong, *supra* note 51, at 2153–54 (defining racial capitalism as “deriving social or economic value from the racial identity of another person” and making the claim that nonwhiteness is commoditized in predominantly white societies and organizations where diversity has market value).

<sup>53</sup> *See id.* at 2154.

<sup>54</sup> *See id.* at 2171 (“Because nonwhiteness is valued in terms of what it adds to white people’s experiences or endeavors, white people determine what nonwhiteness is worth.”).

<sup>55</sup> *See* PAUL BUTLER, *CHOKEHOLD* 184 (2017) (claiming that race “informs all areas of the law” and that American legal institutions have not only constructed race and defined racial identities, but have imbued in those constructions and definitions value and privileges through the law); Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 723–24 (2011) (describing the United States Supreme Court’s use of race to shape notions of who was a legal person and, therefore, a citizen as opposed to chattel).

<sup>56</sup> Vinson Cunningham, *The Argument of “Afropessimism,”* NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-argument-of-afropessimism>.

<sup>57</sup> FRANK B. WILDERSON III, *AFROPESSIMISM* ix (2020).

<sup>58</sup> *See* Ellis, *supra* note 55, at 731–33 (discussing the history of the adjudication of political personhood by the United States Supreme Court and the post-slavery subordination of African-American persons to white American persons via *Plessy v. Ferguson*’s “separate but equal” doctrine).

<sup>59</sup> Lolita Buckner Inniss, *Video Surveillance as White Witness*, AIN’T I A FEMINIST LEGAL SCHOLAR TOO? (Sept. 30, 2012, 4:27 PM), <http://innissfls.blogspot.com/2012/09/video-surveillance-as-white-witnesses.html>.

central to whiteness and citizenship in the United States,<sup>60</sup> with whiteness and citizenship as coextensive statuses under federal law prior to Reconstruction.<sup>61</sup> Despite formal changes to the letter of the law, not much has changed and the racial contract endures. Because the racial contract constructs Black people below and outside of personhood, it follows that Black people cannot access the social contract for which the white body politic has bargained, and that they therefore are not in privity with the state. Black people cannot expect the racial state to respect their tangible and commercial contracts for ownership or possession of real or personal property, including their common water supply; in fact, insofar as Black proprietorship breaches the terms of the racial contract, Black people should expect the racial state to seek to remedy the breach.

*C. Still Waters Run Deep: Surviving the Shutoffs and Finally Coming Clean*

Here, I put aside personal pride to offer up my own family's experience with the Detroit Water and Sewerage Department (DWSD), water billing, and the water shutoffs as an application of my theory. I was raised in the City of Detroit, leaving only for university in 2002 after graduating from Detroit's Renaissance High School. I was born on the small island of Bermuda, where my Jamaican father was building and pastoring an African Methodist Episcopal Church, but my parents settled in the Motor City before I was a year old. My mother's grandparents came to Detroit during the Great Migration, and my mother has lived in Detroit for the vast majority of her life.

My father died suddenly in 2012, four months after I had left a white-shoe law firm to begin a federal district court clerkship in Brooklyn, New York. A few weeks before his death, I'd come home to Detroit to interview for an appellate clerkship with Judge Damon Keith and received an offer on the spot, leaving my father so delighted and proud that he could hardly speak

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<sup>60</sup> See generally Nancy Leong, *Enjoyed by White Citizens*, 109 GEO. L.J. (forthcoming 2021) [hereinafter Leong, *Enjoyed by White Citizens*] (discussing the invisibility and centrality of whiteness in the United States, made visible in federal law by 42 U.S.C. § 1981 and § 1982); Harris, *supra* note 50, at 1715–16 (describing the oppression of Black and Indigenous peoples in the United States—“seizure and appropriation” of land and labor (carried forth pursuant to contractual arrangements from which Black and Indigenous peoples were excluded)—as undergirded by the “racialized conception of property implemented by force and ratified by law”).

<sup>61</sup> See Leong, *Enjoyed by White Citizens*, *supra* note 60 (manuscript at 1–2) (on file with author) (describing the invisibility of whiteness undergirding U.S. law until the Reconstruction Amendments); Brief for Plaintiff in Error at 9, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (describing whiteness as the “most valuable sort of property”); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (permanently excluding Black people and their descendants from U.S. citizenship, based on the right of white people of “property in a slave . . . expressly affirmed in the Constitution”).



as he dropped me back off at the airport the next day. Not only was the clerkship a coveted professional opportunity, but it gave me time with my grieving mother and ailing grandfather. I had recently become a newlywed and a new stepmother, and my stepson was a brand-new immigrant from Senegal who spoke very little French and no English upon his arrival. We agreed that my husband would stay in New York, where he could find work easily with the support of the Senegalese community, but my new son would attend the French language immersion school in Detroit under my mother's supervision in her role as a World Languages coach for the public school district.

When water service was disconnected at my mother's home in late June or early July 2014, it came as a total surprise to my mother and me. We assumed that there was repair work being done in our subdivision. In fact, our water had been disconnected not for nonpayment, but due to an error. Though accounts were subjected to disconnection for balances of \$150 or more, per DWSD's March 2014 announcement,<sup>62</sup> my mother apparently had an outstanding balance of \$30, of which she was first informed after she called DWSD. In 2014, it was still impossible to view or pay one's bill online. It was common practice to pay one's water bill quarterly—not only because DWSD billed on a quarterly basis, but also because payment logistics were so burdensome.<sup>63</sup> In contractual terms—assuming a tangible legal contract for delivery of water existed between my mother and the DWSD—my mother had not breached the terms of the contract such that her water should have been disconnected. Yet, it was disconnected anyway. Moreover, even assuming a breach, Detroit made specific performance on the outstanding debt extremely difficult, even in the absence of alternative remedies.<sup>64</sup>

My mother and I were by no means wealthy, but we enjoyed economic and social privilege relative to the average Detroiter, with a combined income in excess of \$150,000 and a home that my mother owned in a very desirable neighborhood. We paid our bills, and on time. Hearing the water

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<sup>62</sup> See John Eligon, *Detroit Threatens to Cut Water Service to Delinquent Customers*, N.Y. TIMES (Mar. 25, 2014), <https://nyti.ms/1fgl1KP> (detailing DWSD's March 2014 announcement that it would begin shutoffs to up to 3,000 homes a week); Ryan Felton, *How Pepsi and Coke Make Millions Bottling Tap Water, As Residents Face Shutoffs*, GUARDIAN (Apr. 23, 2020, 5:30 AM), <https://www.theguardian.com/us-news/2020/apr/23/pepsi-coke-bottled-water-consumer-reports>; Hackman, *supra* note 8 (detailing the policy as expressed by Detroit city officials).

<sup>63</sup> In 2014, customers had to pay their bills in person at one of two bill payment centers in the city. These payment centers were open during business hours only, which meant that in many cases, customers had to take leave from work to pay their bill. Lines were often so long at the bill payment centers that they wrapped around the center and down the city street. Online payment is now possible, and my mother pays her bills on the DWSD website.

<sup>64</sup> My mother took leave from work to pay her outstanding \$30 balance on the Monday after our water was disconnected, and she waited in line for hours to do so. We were without water for a full weekend because even though my mother was able to talk to a customer service representative over the phone to learn that the water had been disconnected because of a \$30 balance, payment online or by phone was not an option and the payment center was closed on the weekends.

utility explain that we had a balance of \$30 and that our service had been disconnected in error was both infuriating and humiliating. It was a weekend, so we would have to wait for reconnection, the account representative explained apologetically. My stepson was completely confused—while he had heard of water outages in certain neighborhoods in Dakar from time to time, he couldn't wrap his eight-year-old mind around the idea that water could be shut off *in America*, and *on purpose*. For him, the shutoffs were a betrayal of promise and, perhaps, the point at which he began to wake up from his American dream.

We showered at my aunt's home for the next three days, but even explaining that our water had been disconnected and that we needed a place to shower was deeply embarrassing. Like many Detroiters, we would not speak publicly about our experience because the public narrative insisted that if your water was shut off, it was because you were proof that Black people were irresponsible, prone to destitution and misfortune, bad citizens, and possibly even criminal. The water was being privatized, but so was the human rights violation we were experiencing because it made more sense to us, as Black women, to keep the matter to ourselves to preserve our social standing and our honor. I never told my new husband about the shutoffs; with his son in my care, the shame would be too great. It didn't matter that we knew the shutoff had occurred in error, nor did it matter that we knew we were hardworking, accomplished, honest people. The shutoff had reminded us that no amount of respectability or meritoriousness made us worthy of dignity in the eyes of the decisionmakers. The actual terms of the shutoff program did not matter; we were at their mercy, and even when they were wrong, they had none for us. As natural, but not political people, per Mills's theory of the racial contract, we were present in, but not part of the state. Despite formal guarantees to the contrary, we had no right to expect due process, responsive or competent government, dignity, decency, or the basic ability to sustain our lives through the consumption of water.<sup>65</sup> And with city officials trafficking in anti-Black stereotypes to justify the shutoffs, it meant that even though public platforming of the shutoffs by survivors would likely have served as an effective counter to the city government's version of events, everyday survivors were more likely to suffer in shame and silence.

There was good reason to be discreet: My stepson's summer camp had been targeted for disconnection as well. The proprietor of his camp, Mama Em,<sup>66</sup> is a prominent local artist and activist who owns a large Victorian

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<sup>65</sup> See MILLS, *supra* note 44, at 50, 53–62 (describing the denial of membership in the political community experienced by Black and Indigenous peoples on the basis of their subpersonhood, which renders them foreigners on their own lands and makes a different, subordinate tier of liberties available to them).

<sup>66</sup> I am not using her real name in order to guard her privacy.

home near the campus of Wayne State University. When I confided in Mama Em that we had suffered water shutoffs and that I feared it would impact my stepson's behavior at camp, she in turn confided in me that she had seen workers from the water utility come out to shut off her water and that she had to plead with them not to do so because she cared for children.<sup>67</sup> She told me that the City was reporting families subjected to the water shutoffs to Child and Family Services for child neglect.<sup>68</sup> She went on to surmise—as has also been suggested by prominent Detroit-based legal scholar Peter Hammer—that we were all being targeted for shutoffs as a part of a necropolitical method of Mayor Duggan's to gentrify the city by pushing Black Detroiters with large homes in nice neighborhoods out of the city to make room for newcomers.<sup>69</sup> This news added a layer of terror onto my rage, frustration, and embarrassment, as I considered what would become of my son if he were taken from us over a disputed \$30 water bill.

The City was requiring residents to come in to the DWSD office with the deed to their property in order to restore their water service; payment of the outstanding balance was not enough. My mother just happened to know where she had stored her deed, and, with \$30, she drove across Detroit's vast and largely blighted expanse to wait in line for hours at one of only two water customer service centers, after taking that Monday afternoon off work. Without my mom's flexible schedule, her cash, or the deed, we would have been without water for much longer. The local news has documented the plight of middle-aged and elderly Detroit women—nonpersons and noncontractors<sup>70</sup>—who were without water for years, collecting rainwater in buckets to

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<sup>67</sup> Many Detroiters would pay bribes to avoid having their water shut off or pay to have water illegally restored. See Hackman, *supra* note 8 (discussing how Detroiters would pay local handymen to illegally restore water after a disconnection in order to survive). I never asked Mama Em how she was able to keep her water on.

<sup>68</sup> See Class Action Complaint, *supra* note 6, ¶ 6; Quizar, *supra* note 7, at 431 (“The Michigan Department of Child Protective Services considers the lack of running water as grounds to remove children from the home. Families that had been shut off faced the threat of losing custody of their children, not because they were abusive, but because they were poor.”).

<sup>69</sup> See Hackman, *supra* note 8 (“[T]he law professor states these measures are just one part of a larger process of moving people out of neighborhoods the city wants to see emptied out. ‘They are also shutting water off not wishing people will pay necessarily, but implicitly hoping people will move,’ he says.”).

<sup>70</sup> See PATEMAN & MILLS, *supra* note 51, at 191–99 (describing nonwhite women, and particularly Black women, as nonpersons and noncontractors, and acknowledging that nonwhite women “fall between theoretical stools” as even the racial and sexual contract metaphors fail to comprehensively account for the multiplicative ways in which nonwhite women are constructed out of personhood and power).

survive,<sup>71</sup> and enduring the humiliation of subhuman living conditions.<sup>72</sup> I suppose we were rather fortunate.

It is worthwhile to note the intersections of race and gender at play, as Mills's and Buckner Inniss's disaggregations of sub-personhood by race and gender have been made visible by the shutoff crisis. Detroit's Black mayors—all of them men—may be regarded as subcontractors, along with Emergency Manager Kevyn Orr,<sup>73</sup> Detroit Water Chief Gary Brown,<sup>74</sup> and former Deputy Water Chief Daryl Latimer.<sup>75</sup> They enjoy a level of public and political personhood, though they merely carry out orders of the white body politic and are subject to the latter's valuations and judgments concerning their usefulness and worth. By contrast are the many stories of women, such as my mother and Mama Em, who suffer in silence and shame as private nonpersons and noncontractors, with absolutely no power over whether or not they will have water, or at what cost.

As I was writing this Article, my mother emailed me a copy of her August 2020 water and sewage bill, which was for more than \$300. Shocked and disgusted, she inquired of DWSD, who informed her that she had been erroneously billed for two months. Pursuant to my own research, I found that rates for water and sewerage did increase in Detroit effective July 1, 2020 (as reflected in the August bills) when I found a notice published to the City of Detroit's website.<sup>76</sup> My mother is unaware of any other announcement

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<sup>71</sup> One woman in her fifties had lived without running water for three years as of August 2019, collecting rainwater from her roof and using bottled water during that time. Joel Kurth, *Detroit Shut Off Water to 11,800 Homes This Year. Most Are Still Off*, BRIDGE MICH. (Aug. 19, 2019), <https://www.bridgemi.com/urban-affairs/detroit-shut-water-11800-homes-year-most-are-still>.

<sup>72</sup> See Joel Kurth, *In Detroit, Surviving Without Running Water Has Become a Way of Life*, BRIDGE MICH. (Oct. 24, 2018) [hereinafter Kurth, *Surviving Without Running Water*], <https://www.bridgemi.com/urban-affairs/detroit-surviving-without-running-water-has-become-way-life> (“On her worst days, Mattie McCorkle admits, she feels ‘less than a person.’ . . . ‘You never get used to it. It’s embarrassing. Here I am, 40 years old, filling buckets to get by.’”).

<sup>73</sup> See *Kevyn D. Orr*, JONES DAY, <https://www.jonesday.com/en/lawyers/o/kevyn-orr?tab=overview> (last visited Jan. 23, 2021) (referencing Orr’s service as Detroit’s Emergency Financial Manager).

<sup>74</sup> See *Water and Sewerage Director*, CITY OF DET., <https://detroitmi.gov/government/mayors-office/water-and-sewerage-director> (last visited Jan. 23, 2021).

<sup>75</sup> See Halston Herrera, *Detroit City Council Grills Water Department Official over Shutoffs, Help for Customers*, CLICKONDETROIT (July 29, 2014), <https://www.clickondetroit.com/news/2014/07/29/detroit-city-council-grills-water-department-official-over-shutoffs-help-for-customers> (noting Latimer’s then-title as Deputy Director of the Detroit Water and Sewerage Department).

<sup>76</sup> For Fiscal Year 2020–21, the water volume rate in the City of Detroit is \$26.08 per 1,000 cubic feet per month. The disposal rate (sewerage) is \$57.06 per 1,000 cubic feet per month. The sewerage service charge is \$6.54 per bill. The drainage charges per month per impervious acre were \$626.00. These rates were effective July 1, 2020. *Notice to Customers*, CITY OF DET. WATER & SEWERAGE DEPT., <https://detroitmi.gov/sites/detroitmi.localhost/files/2020-07/Water%20Rates%202020-2021%20Detroit%20-%20Final%20-%207.14.2020.pdf> (last visited

about these rate increases being made, and she was surprised to learn that the rate increase advisory was posted online. She had no input in the rate increases and would have objected to a rate increase if asked.

#### *D. Not Part of the Agreement*

What status, then, do Black people hold within the City of Detroit? This subsection seeks to clarify that the deprivation of due process and arbitrary treatment that my mother and her neighbors' experience results from Black Detroiters' lack of the requisite personhood/citizenship status for contractual capacity with their local government. The Detroit water crisis underscores that Black people are still chattel, or property, as they have been throughout the course of American history. As chattel, Black people and Black Detroiters are wards of the city and of the state, in much the same way that a family guards a pet cat—caring for it as the family wishes and turning it out of the house when the family pleases; determining what the cat will eat; and if it becomes sick, whether to treat or euthanize it. If the metaphor fails, it is because animal cruelty is not only widely deplored but criminalized.<sup>77</sup> Like pets, Black people are third-party beneficiaries of the contracts between government and its citizens in the best of circumstances. As such, they may be allowed to occupy property, and they are certainly allowed to maintain it and pay for it, as tenants of rent-seeking landlords. That is to say, Detroiters are essentially parties to a month-to-month rental agreement with respect to water service, but without capacity to contract, they may also be characterized as squatters and trespassers and evicted from, or dispossessed of, the enjoyment of the property at any time. Moreover, because Detroiters have no opportunity to bargain for the cost of the water or to ensure reliability in billing and service delivery, and because no one can live without water, the tenuous contractual commercial relationship existing between Detroiters and the DWSD is best characterized as either a contract of adhesion<sup>78</sup> or a contract entered into under duress—necessitating a conversation about whether

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Jan. 23, 2021). For Fiscal Year 2019–20, the water volume rate was \$25.20 per 1,000 cubic feet per month. The disposal rate (sewerage) was \$55.94 per 1,000 cubic feet per month. The sewerage service charge was \$6.41 per bill. The drainage charges per month per impervious acre were \$602.00. These rates were effective as of July 1, 2019. *Notice to Customers*, CITY OF DET. WATER & SEWERAGE DEP'T, <https://detroitmi.gov/sites/detroitmi.localhost/files/2019-07/Water%20Rates%202019-2020%20Detroit%20Final%20for%20web.pdf> (last visited Jan. 23, 2021).

<sup>77</sup> See, e.g., Preventing Animal Cruelty and Torture Act, Pub. L. No. 116-72, 133 Stat. 1151 (2019).

<sup>78</sup> Friedrich Kessler defines the contract of adhesion as those contracts between enterprises with strong bargaining power and a weaker party, who, “in need of the goods or services, is frequently not in a position to shop around for better terms . . . ; they are *à prendre ou à laisser*.” Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

such a contract is a legally enforceable contract at all.<sup>79</sup>

Black Detroiters' use and enjoyment of water can, therefore, be regarded as an externality, or a cost or benefit of the consumption or production of a good or service imposed on a third party not party to the transaction.<sup>80</sup> The Coase theorem posits that when transaction costs are low, private parties can reach efficient outcomes in the presence of externalities, without government intervention.<sup>81</sup> Of course, in Detroit, the government is a party, but insofar as Detroit's water operations are increasingly privatized,<sup>82</sup> they function as the actions of a private entity.<sup>83</sup> A goal of the contracting parties is to seize control of the water supply and make revenue by leasing water at low cost to the suburbs. Detroiters' use of the water therefore becomes an externality—a cost to the contracting parties. The efficient solution? Pass the bulk of the cost off to impoverished Detroiters and convince Detroiters that the cost of the water is their responsibility. Treat the cost of water as a tax upon the third-party beneficiaries, which can be increased or decreased without their direct input or consent.<sup>84</sup>

While my mother, stepson, and I had to endure life without access to water at home for a few days in 2014, other Detroiters have fared far worse. In 2018, after she bought a house for \$3,000 that came with an enormous water bill attached, Mattie McCorckle and her three children lived without water for months, forcing Ms. McCorckle to rely on filling up buckets of water at a local car wash so her family could bathe and cook. In recounting her ordeal, Ms. McCorckle said that on some days, she felt like “less than a person” while her water was disconnected.<sup>85</sup> Fayette Coleman, who died in 2019 at the age of 70, lived without water from 2013 to 2016 and “survived by collecting rainwater in a garbage can placed under the roof of her rented,

<sup>79</sup> Such a contract may be void for unconscionability. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449–50 (D.C. Cir. 1965) (holding that when one party lacks meaningful choice and the terms of the contract are unreasonably favorable to the other party, such a contract may be unconscionable because of extreme inequality in bargaining power, and thus, set aside).

<sup>80</sup> David B. Johnson, *Meade, Bees, and Externalities*, 16 J. L. & ECON. 35, 35–36 (1973).

<sup>81</sup> See R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1–18 (1960) (concluding, based on scenarios involving social cost, that “the problem is one of choosing the appropriate social arrangement for dealing with the harmful effects” and that “[a]ll solutions have costs and there is no reason to suppose that government regulation is called for simply because the problem is not well handled by the market or the firm”).

<sup>82</sup> See *infra* notes 118–123 and accompanying text.

<sup>83</sup> See RECCHIE ET AL., *supra* note 18, at 10 (“We can find results of the valuation of water and sewer systems when it is purchased or acquired by a private corporation. We can then compare DWSD to such a privatized system.”).

<sup>84</sup> See J. R. Gould, *Meade on External Economies: Should the Beneficiaries Be Taxed?*, 16 J. L. & ECON. 53, 53 (1973) (“When property rights are brought to the forefront of the analysis, it can be argued that there is a presumption that the beneficiaries should be taxed.”). See generally J. E. Meade, *External Economies and Diseconomies in a Competitive Situation*, 62 ECON. J. 54 (1952).

<sup>85</sup> Kurth, *Surviving Without Running Water*, *supra* note 72 (reporting on Mattie McCorckle's experience with water disconnection in Detroit in 2018).

tax-foreclosed bungalow” while battling diabetes and high blood pressure.<sup>86</sup> The brutality of the Detroit water shutoffs is a function of the racial contract, which utilizes violence as a method of destabilizing Black and Indigenous people, dispossessing them of their property and power in order to preserve the exclusive white proprietorship for which the state and its signatories bargained.<sup>87</sup> The perpetuation of racist narratives concerning Black Detroiters in order to justify the shutoffs is another enforcement mechanism—ideological conditioning<sup>88</sup>—that reinforces white and nonwhite beliefs in the subhumanity of Black people. It undergirds a larger, longstanding belief that Black people have no capacity to govern themselves or participate in democratic processes (which have contracting at their core), to set the leasing and pricing structures of water, or to otherwise exercise legally enforceable proprietorship of their water, homes, and local governments.<sup>89</sup>

## II

### THE DETROIT WATER CRISIS: FROM FICTION TO FACT

#### A. *Marketing the Water Shutoffs: Black People as Rent-Seeking Scofflaws*

Prevalent narratives concerning predominantly Black or Black-

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<sup>86</sup> Joel Kurth, *She Was Born to Fight – and Did for 3 Years Without Water in Detroit*, BRIDGE MICH. (May 14, 2019), <https://www.bridgemi.com/detroit/she-was-born-fight-and-did-3-years-without-water-detroit>.

<sup>87</sup> See MILLS, *supra* note 44, at 83–89 (discussing ideological conditioning and physical violence as the racial contract’s “two traditional weapons of coercion,” or enforcement mechanisms).

<sup>88</sup> See *id.*

<sup>89</sup> This belief played out very recently in Jackson, Mississippi, a predominantly Black city where the entire population endured weeks without clean drinking water after a cold-weather system destroyed the city’s water system. Mississippi’s white-led state leadership has refused to provide assistance to Jackson and blames Jackson’s Black leadership for the infrastructure failure instead, on the basis of the belief that Jackson has been mismanaged since the last white mayor left office. See Donna Ladd, Opinion, *Jackson, Mississippi Has a Water Crisis Because Our State Legislature Has a Race Problem*, NBC NEWS: THINK (March 6, 2021, 11:58 AM), <https://www.nbcnews.com/think/opinion/jackson-mississippi-has-water-crisis-because-our-state-legislature-has-ncna1259819> (“[W]hite state leadership . . . have [sic] typically responded to the city’s Black leaders with contempt, blank stares or condescension. . . . [State officials’] words augured back to a long-held talking point and belief among many white Mississippians: Black leaders just aren’t competent. And the people who elect them deserve what they get.”). Cf. Serwer, *supra* note 3 (discussing American society’s “underlying assumptions of white innocence and black guilt” and its “codicil . . . stating that the rules as written do not apply to nonwhite people in the same way”). For an example of the assumption Serwer discusses, see Isaac Chotiner, *How a Historian Uncovered Ronald Reagan’s Racist Remarks to Richard Nixon*, NEW YORKER (Aug. 2, 2019), <https://www.newyorker.com/news/q-and-a/how-a-historian-uncovered-ronald-reagans-racist-remarks-to-richard-nixon> (recounting comments by Richard Nixon that “‘blacks’ just had a hell of a time governing” and describing an October 1971 call between Nixon and Ronald Reagan in which Reagan described members of African diplomatic delegations as “monkeys” and made connections between race and I.Q. with which Nixon agreed).

governed cities—such as those regularly advanced by President Donald Trump during his sole term—portray them and their officials as lawless, violent, dangerous, corrupt, derelict, incompetent, fiscally irresponsible, lazy, dirty, infested, and above all else, *guilty*.<sup>90</sup> The racist, anti-Black messaging undergirding this narrative ranges from subtle to explicit, depending upon the messenger, who may or may not be white.<sup>91</sup> In July 2020, President Donald Trump associated urbanity and poverty with Black and Brown people—whom he implicitly contrasted to white people living the “Suburban Lifestyle Dream”—by claiming that he would keep the suburbs free of “low income housing” to signify his intent to minimize the concentration of nonwhite people in suburbia.<sup>92</sup> This subsection details the history of white resistance to Black proprietorship in Detroit as a breach of its racial contract. It discusses the City of Detroit’s attempts to repair the breach via investment in anti-Black narratives that justify the erosion of democratic governance in Detroit; facilitate suburban rent-seeking; and immunize the City of Detroit from critique for its widespread human rights and civil rights violations stemming from the water shutoffs—against Black Detroiters.

An effort by the white body politic to repair breaches to the racial contract plunged Detroit into financial despair in the first instance: White flight from Detroit was resistance to Black proprietorship—most notably, Black leadership and Black possession of housing in previously segregated white neighborhoods.<sup>93</sup> The population decline translated into water and sewage costs divided between hundreds of thousands fewer people—meaning higher

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<sup>90</sup> See, e.g., Dana Kornberg, *The Structural Origins of Territorial Stigma: Water and Racial Politics in Metropolitan Detroit, 1950s–2010s*, 40 INT’L J. OF URB. & REG’L RSCH. 263 (2016) (describing how after the election of Detroit’s first Black mayor in 1974, white suburbanites used coded racist stereotypes to levy unsubstantiated allegations that water rate increases were illegitimate products of predation and corruption); Quizar, *supra* note 7, at 434–37 (detailing the reliance on anti-Black stereotypes by Detroit officials to advance a narrative that Detroiters were able to pay their water bills but chose not to do so).

<sup>91</sup> See Quizar, *supra* note 7, at 436–37 (noting that the Deputy Director of the Detroit Water and Sewerage Department, who is Black, often alluded to, or relied upon, anti-Black stereotypes—but in language that could be cast as race-neutral); see also Kornberg, *supra* note 90, at 264–75 (describing how “suburban charges against the Detroit water department since the 1970s have served to reinscribe racial biases through an outwardly ‘color-blind’ and laissez-faire language that nevertheless drew on racialized tropes in order to perpetuate stigma”).

<sup>92</sup> See TRUMP TWITTER ARCHIVE (July 29, 2020, 12:19 PM), <https://www.thetrumparchive.com> (search in search bar for “I am happy to inform”; then click on “Show” link (“I am happy to inform all of the people living their Suburban Lifestyle Dream that you will no longer be bothered or financially hurt by having low income housing built in your neighborhood...”).

<sup>93</sup> See Class Action Complaint, *supra* note 6, ¶ 39; Quizar, *supra* note 7, at 433–34 (“In the 1950s, 1960s, and 1970s, white Detroiters left the city by the tens of thousands, moving to suburbs in large part to escape the prospect of integrated neighborhoods and growing Black political power.”).



individual bills for those Detroiters who remained in the city.<sup>94</sup> White suburbia has indulged in derogatory narratives about Detroiters and their leadership ever since the city became predominantly Black and Black-led.<sup>95</sup>

These narratives have contributed to the ability of officials to extract resources from urban areas while blaming the dispossessed for their dispossessed state. In Detroit, the election of a white mayor, Mike Duggan, in 2013, after forty years of Black governance, was welcomed as a promise that the city would be cleaned up and brought into order—contributing to a racialized narrative of corrupt and inept leadership by Detroit’s Black mayors<sup>96</sup> that wrongly assumes that Duggan’s “law and order”<sup>97</sup> leadership would be competent and transparent because it is white.<sup>98</sup> Mayor Duggan has systematically subjected hundreds of thousands of Black people to inhumane living conditions while extracting precious financial resources from them without the resistance or scrutiny he would have had to contend with if Detroit were

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<sup>94</sup> See Anna Clark, Opinion, *Clean, Affordable Drinking Water Is a Racial Issue*, WASH. POST (Sept. 23, 2019, 2:27 PM), <https://www.washingtonpost.com/opinions/2019/09/23/clean-affordable-drinking-water-is-racial-issue> (explaining that desegregation led to white flight from American cities, Detroit among them, and that “[s]hrinking cities have fewer ratepayers to maintain water systems designed to serve populations up to twice their current size”).

<sup>95</sup> See Quizar, *supra* note 7, at 434 (quoting former Oakland County Chief Executive L. Brooks Patterson, who was widely known for his hatred of Detroit and of former Detroit Mayor Coleman A. Young). See generally Lee DeVito, *R.I.P. L. Brooks Patterson, a Racist*, DET. METRO TIMES (Aug. 3, 2019, 10:29 AM), <https://www.metrotimes.com/news-hits/archives/2019/08/03/rip-l-brooks-patterson-a-racist> (contextualizing selected remarks made by the late former county executive that reflected both his racism and his hostility towards Detroit, including that he’d “rather join the Klan” than a group of regional business leaders working to help the city); Paige Williams, *Drop Dead, Detroit!*, NEW YORKER (Jan. 20, 2014), <https://www.newyorker.com/magazine/2014/01/27/drop-dead-detroit> (recalling Patterson’s hatred of Young and his remarks of a Black city councilwoman that he would “rather own a 1947 Buick than own [her],” and quoting Patterson as saying, “Anytime I talk about Detroit, it will not be positive. Therefore, I’m called a Detroit basher. The truth hurts, you know? Tough shit.”).

<sup>96</sup> Former Detroit Mayor Kwame Kilpatrick was infamously convicted of felony corruption in federal court in 2013. Steven Yaccino, *Kwame M. Kilpatrick, Former Detroit Mayor, Sentenced to 28 Years in Corruption Case*, N.Y. TIMES (Oct. 10, 2013), <https://www.nytimes.com/2013/10/11/us/former-detroit-mayor-kwame-kilpatrick-sentencing.html>. By contrast, the mayoralties of Dennis Archer and Dave Bing were relatively scandal free, and the controversial first Black mayor, Coleman A. Young, is actually known for his financial aptitude and competent management of the city’s affairs, despite racialized resentment of him. See Bill McGraw, *Coleman Young: The 10 Greatest Myths*, DET. FREE PRESS (May 28, 2018, 9:06 AM), <https://www.freep.com/story/opinion/2018/05/26/coleman-young-myths/638105002> (“If all mayors had shown Young’s fiscal discipline, Detroit likely could have avoided bankruptcy.”).

<sup>97</sup> “Law and order” narratives are widely understood to be anti-Black dog whistles. See, e.g., Ayesha Rascoe, *How Trump’s ‘Law and Order’ Message Has Shifted as He Seeks a 2nd Term*, NPR (Aug. 27, 2020, 8:01 AM), <https://www.npr.org/2020/08/27/905916276/how-trumps-law-and-order-message-has-shifted-as-he-seeks-a-second-term>.

<sup>98</sup> In fact, some of Detroit’s most corrupt and incompetent mayors have been white. See, e.g., Dan Austin, *Meet the 5 Worst Mayors in Detroit History*, DET. FREE PRESS (Aug. 29, 2014, 12:00 PM), <https://www.freep.com/story/news/local/2014/08/29/5-worst-mayors-in-detroit-history/14799541>.

predominantly white.<sup>99</sup>

The Detroit water shutoffs persisted in earnest from 2013 through March 2020 because the City marketed the shutoff program as a public good—despite the widespread and severe impact upon quality of life for residents who had to live without water service; the arbitrary nature of DWSD’s billing flaws and shutoff execution; the undue difficulty involved in restoring water service even if it had been wrongfully terminated; and the fact that the City targeted poor and Black residents instead of large corporations with large outstanding water bills.<sup>100</sup> Sociologist Jessi Quizar found that by catering to implicitly racist narratives about Black Detroiters through official statements, city officials were able to garner public support—which manifested online in explicit informal statements celebrating the shutoff program specifically and austerity measures more broadly.<sup>101</sup>

In an interview with the Wall Street Journal, Detroit’s Emergency Financial Manager, Kevyn Orr, described the City of Detroit as “dumb, lazy, happy and rich.”<sup>102</sup> In response to the United Nations’ condemnation of the shutoffs, Mayor Duggan’s administration countered with the casual declaration that “everybody’s gotta pay their water bill.”<sup>103</sup> This statement was bereft of material context: Detroit’s water bills are extremely high compared to other localities in the country.<sup>104</sup> However, in perpetuating a characterization of Black Detroiters as fiscally reckless, willful scofflaws<sup>105</sup> and rent-seekers who harbor a sense of entitlement to government handouts, the City of Detroit advanced the idea that it was involved in a contractual relationship with Detroiters, tens of thousands of whom were in breach. The City of Detroit pretends to be in a race-neutral, fully inclusive sociopolitical contract with Black Detroiters while continuing to exclude them, despite decades of formal desegregation. In fact, the City was in privity with other parties, including suburban municipalities, creditors, and the bankruptcy court,<sup>106</sup>

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<sup>99</sup> See Hackman, *supra* note 8 (quoting law professor Peter Hammer as saying of the Detroit water shutoffs, “If this was not an impoverished African-American community that was getting the brunt of this, people would be up in arms.”).

<sup>100</sup> See Quizar, *supra* note 7.

<sup>101</sup> *Id.* at 429–30.

<sup>102</sup> Allysia Finley, *Kevyn Orr: How Detroit Can Rise Again*, WALL ST. J. (Aug. 2, 2013, 7:12 PM), <https://www.wsj.com/articles/SB10001424127887324635904578642140694511474>.

<sup>103</sup> Miller, *supra* note 34.

<sup>104</sup> Clark, *Going Without Water*, *supra* note 25.

<sup>105</sup> A leading local paper in Detroit described victims and survivors of the water shutoffs as “water scofflaws” in a 2014 editorial endorsing the shutoff program. See Thomas Gaist, *The Detroit News Endorses Mass Water Shutoffs*, WORLD SOCIALIST WEB SITE (Mar. 27, 2014), <https://www.wsws.org/en/articles/2014/03/27/shut-m27.html>.

<sup>106</sup> Judge Rhodes determined that Detroit recognized no constitutional right to water in 2014. Matt Helms, *Judge Rules He Can’t Stop Detroit Water Shutoffs*, DET. FREE PRESS (Sept. 29, 2014, 12:00 AM), <https://www.freep.com/story/news/local/michigan/detroit/2014/09/29/detroit->

instituting structures, systems, and pricing that disenfranchised Black Detroiters while extracting resources from them at a rate that they could neither consent to nor sustain.<sup>107</sup> Pretending that Detroiters are fully consenting parties to an existing contract has been the only way to justify operations that are extreme both in their inefficiency and injustice.<sup>108</sup> The City has thereby marketed the shutoff program as a reasonable and justifiable means of remedying a contract that Detroiters—Black Detroiters in particular—have failed to respect.

*B. Muddying the Waters: Countering the Anti-Black Narrative  
Undergirding the Water Shutoffs*

Despite the claim that the water shutoffs were a necessary negative incentive to force residents to pay their bills, the internal records of the Detroit Water and Sewage Department reveal instead the department's sloppy, irregular billing practices and the City's failure to bill many residents for years before suddenly demanding lump sum payments in 2014.<sup>109</sup> The City frequently and erroneously billed customers for previous tenants' charges, disconnecting their water service thereafter and alleging delinquency on the part of the current tenant.<sup>110</sup> Residential tenants lost water service due to no fault of their own if their landlords had outstanding balances.<sup>111</sup> These facts reiterate that the City of Detroit was not, and could not have been, involved in a bargained-for agreement with individual customers at any time; Detroiters remain third-party beneficiaries of the city's agreements with other parties.

The City of Detroit claims that it was in desperate need of the revenue from the outstanding water bills;<sup>112</sup> as such, it has pursued payment of the \$90 million shortfall from poor residents—shutting off water for falling

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bankruptcy-resumes/16393381. He oversaw the creation of the Great Lakes Water Authority pursuant to the terms of the bankruptcy, which privatized water and sewer services throughout Southeastern Michigan. Lisa Lambert, *Detroit, Counties Reach Deal Over Water, Sewer Authority*, REUTERS (Sept. 9, 2014, 11:45 AM), <https://www.reuters.com/article/us-usa-detroit-bankruptcy-water/detroit-counties-reach-deal-over-water-sewer-authority-idUSKBN0H41Q420140909>. His rulings and decisionmaking reveal that Detroiters do not enjoy a contractual relationship with the City of Detroit, and are at best, third parties, or externalities, to the contractual relationships he was instrumental in constructing concerning Detroit's water.

<sup>107</sup> See Hackman, *supra* note 8 (describing how the water shutoff policy has failed to address, and has instead exacerbated, the core problem of water unaffordability among Detroiters, and how Detroit's public officials nonetheless view the policy as effective in extracting money from residents they viewed as scofflaws).

<sup>108</sup> See *supra* note 48.

<sup>109</sup> *Water Shutoffs in Detroit*, ACLU MICH., <https://www.aclumich.org/en/cases/water-shutoffs-detroit> (last visited Jan. 23, 2021).

<sup>110</sup> See *id.*

<sup>111</sup> See *id.*

<sup>112</sup> See Helms & Guillen, *supra* note 34 (quoting Bankruptcy Judge Rhodes as saying of a moratorium, "[T]he last thing [Detroit] needs is this hit to its revenues.").

behind in payments by only two months—even though a single month’s bill is out of financial reach for the average Detroit resident. In 2014, the average monthly water bill for a Detroit family of four was \$75—nearly twice the American average—and the City of Detroit raised the rates by almost 9% as it shut off water in tens of thousands of homes that year.<sup>113</sup>

However, Detroit has not pursued commercial tenants,<sup>114</sup> many under white ownership, for their very large outstanding unpaid water balances. As of July 2014, according to news reports, Detroit’s elite Detroit Golf Club owed DWSD \$200,000 while Joe Louis Arena owed over \$80,000 and Ford Field owed \$55,000.<sup>115</sup> These white-owned and operated entities were not subjected to water disconnections. The State of Michigan itself owed the largest bill to the City of Detroit, in the amount of \$5 million.<sup>116</sup> Contrary to the prevailing narrative, the commercial tenants are those actually engaged in rent-seeking behavior, as they can afford to pay their bills and simply choose not to, unlike the Detroit residents whose bills far outstrip their earnings. Data also indicates that Detroit targeted Black residents for disconnection, even within the already predominantly Black city. According to civil

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<sup>113</sup> Clark, *Going Without Water*, *supra* note 25.

<sup>114</sup> See Class Action Complaint, *supra* note 6, ¶ 66.

<sup>115</sup> Rick Cohen, *Water Crisis in Detroit: Who’s Being Shut Off and Who’s Not?*, NONPROFIT QUARTERLY (June 30, 2014), <https://nonprofitquarterly.org/water-crisis-in-detroit-who-s-being-shut-off-and-who-s-not>. Ford Field is operated by the Ford Family, the white descendants of Henry Ford. See Michael David Smith, *Goodell: NFL Is Pleased the Ford Family Will Continue to Own the Lions*, NBC SPORTS: PRO FOOTBALL TALK (June 23, 2020, 10:56 AM), <https://profootballtalk.nbcsports.com/2020/06/23/goodell-nfl-is-pleased-the-ford-family-will-continue-to-own-the-lions> (detailing the Ford Family’s longtime ownership of the Detroit Lions, who play at Ford Field); *Ford Field*, STADIUMS OF PRO FOOTBALL, <https://www.stadiumsofprofootball.com/stadiums/ford-field> (last visited Apr. 3, 2021) (detailing the Ford Motor Company’s ownership over the stadium’s naming rights and financial investment in building the stadium). The Joe Louis Arena is operated by the Ilitch Family, who are also white. See JC Reindl, *Demolition Countdown Begins for Detroit’s Joe Louis Arena*, DET. FREE PRESS (Feb. 3, 2018, 6:01 AM), <https://www.freep.com/story/money/business/2018/02/03/demolition-detroit-joe-louis-arena/1088694001>; *Detroit Red Wings*, DET. HISTORICAL SOCIETY, <https://detroithistorical.org/learn/encyclopedia-of-detroit/detroit-red-wings> (last visited Mar. 18, 2021) (detailing Ilitch’s ownership of the Detroit Red Wings, who play at Joe Louis Arena under Ilitch Holdings management and operation). The Palmer Park Golf Club is an elite, predominantly white private club founded in 1899 that remained all white until it granted its first honorary social membership to a Black person in 1986. That membership was granted to Mayor Coleman Young. See Carlos Monarrez, *Meet Mark Douglas, Detroit Golf Club’s Third Black President in 121 Years*, DET. FREE PRESS (July 4, 2020, 5:11 PM), <https://www.freep.com/story/sports/golf/2020/07/04/rocket-mortgage-classic-2020-mark-douglas-detroit-golf-club/5377074002>. The Detroit Golf Club remains predominantly white today, with predominantly white staff, see *Our Staff*, DET. GOLF CLUB, <https://www.detroitgolfclub.org/Default.aspx?p=DynamicModule&pageid=400927&ssid=324351&vnf=1> (last visited Mar. 18, 2021), and predominantly white membership, see *Photo Gallery*, DET. GOLF CLUB, <https://www.detroitgolfclub.org/Default.aspx?p=DynamicModule&pageid=400928&ssid=324352&vnf=1> (last visited Mar. 18, 2021).

<sup>116</sup> Clark, *Going Without Water*, *supra* note 25. The State of Michigan disputes the bill, arguing that it is not responsible for infrastructure leaks. *Id.*

rights organizations that filed a class action lawsuit in July 2020 seeking a permanent end to the shutoffs:

The same population hardest hit by the COVID-19 pandemic is disproportionately affected by the city's water shutoff policy. From January 2017 to July 2018, 95% of water shutoffs occurred in Census tracts with a majority-Black population, and only 5% occurred in tracts that had a population that was less than 50% Black. Detroit Census tracts with a less than 50% Black population had, on average, 64% fewer shutoffs per 1,000 people than tracts with a majority-Black population. These disparities are statistically significant and persist even when controlling for differences in income and the number of unoccupied homes in Detroit. These disparities also persist when comparing majority-Black tracts to majority-white tracts. Water shutoff data reviewed for the period between January 2019 and January 2020 had the same level of disparities.<sup>117</sup>

In his comparison of the Detroit water crisis to the utility disconnection programs impacting millions of people in African cities, Jonathan Silver identified a common rationale across the Atlantic for subjecting the urban poor to a humanitarian crisis belied by other motives:

[S]uch programmes of large-scale disconnection have been predicated on the narrative of cost-recovery and the need to sustain utility companies and essential services for the metro region as authorities struggle to balance budgets and the needs of the poor. Yet behind such claims, both in cities such as Johannesburg and Detroit, lies a more complex web of profit and usage that implicates industrial and high wealth users, racialised provision of services, privatised or privatising utility companies driven not by concern for everyday survival but how to generate profit and municipalities that have tended to toe the neoliberal line.<sup>118</sup>

The desire to enter into commercial contracts motivated and accelerated the shutoff program in Detroit. After Detroit was subjected to financial takeover,<sup>119</sup> Emergency Financial Manager Kevyn Orr regarded the shutoff program as a way to make the water authority a more attractive asset for sale to a private company.<sup>120</sup> By targeting tens of thousands of households, even for relatively small outstanding balances, the City could reduce the number of delinquent accounts, thereby making the City's water operations more

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<sup>117</sup> Press Release, ACLU Mich., Civil Rights Coalition Files Class Action Lawsuit Challenging Detroit Water Shutoff Policy (July 9, 2020), <https://www.aclumich.org/en/press-releases/civil-rights-coalition-files-class-action-lawsuit-challenging-detroit-water-shutoff>.

<sup>118</sup> Silver, *supra* note 25.

<sup>119</sup> See Class Action Complaint, *supra* note 6, ¶ 41.

<sup>120</sup> *Id.* ¶ 42. Orr formally solicited private investors to buy Detroit's water system outright but was ultimately unsuccessful. Quizar, *supra* note 7, at 430.

palatable to potential buyers.<sup>121</sup>

The sale did not ultimately occur, due to Detroit's bankruptcy; instead the bankruptcy court created the "public body corporate" Great Lakes Water Authority.<sup>122</sup> The formation of the GLWA privatized water and sewerage service provision and further stripped control of Detroit's water from Detroiters by giving more decisionmaking power to the suburbs.<sup>123</sup> The authority leases water from Detroit and services the entire region.<sup>124</sup> Detroit is situated on the world's largest freshwater reservoir;<sup>125</sup> still, its impoverished, predominantly Black residents pay 83% of the costs of sewage overflow maintenance for the entire regional water and sewage system while the predominantly white suburban/regional customers only cover 17% of the costs.<sup>126</sup> Detroit contributes \$13.6 million to the lease of its own system out of a total \$50 million lease expense for the constituent region.<sup>127</sup> Researchers have questioned the very low lease valuation and found the cost allocation to be "unfairly burdensome for Detroit" and to "perpetuate regional inequities and endanger the sustainability of the portion of the infrastructure that is within the city's borders."<sup>128</sup> Scholars and advocates have repeatedly called for water policies that center the decisionmaking of Detroiters, as the current policymaking process excludes ordinary residents from participation.<sup>129</sup> What they have recognized, but not articulated, is that Detroiters are being contracted *about*, and not *with*, pertaining to water

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<sup>121</sup> See Hackman, *supra* note 8 ("The campaign to crack down on overdue bills . . . has been described by activists and scholars alike as an effort, pushed by the city's emergency manager, Kevyn Orr, to get rid of the bad debt associated with the water department and prep the public entity for privatization.").

<sup>122</sup> Class Action Complaint, *supra* note 6, ¶ 43.

<sup>123</sup> See Sabourin, *supra* note 10, at 307, 313, 320–22 ("The GLWA, with a majority of the representation delegated to representatives from outside of Detroit, fails to address many of the issues that go along with water service in Detroit, such as the rate of poverty paired with the high price of water . . ."); Quizar, *supra* note 7, at 430 ("In 2016, the Detroit Water and Sewer Department was subsumed into this regional water authority, largely made up of suburban cities. . . . [As a result,] control of Detroit's water system shifted away from local concerns and toward suburban interests.").

<sup>124</sup> Sabourin, *supra* note 10, at 313.

<sup>125</sup> The Great Lakes are the world's largest freshwater system and over twenty percent of the world's freshwater is located therein. See *10 Great Lakes Fun Facts You May Not Know*, PURE MICH., <https://www.michigan.org/article/trip-idea/great-lakes-fun-facts> (last visited Feb. 28, 2021); see also *Great Lakes Ecoregion*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://www.noaa.gov/education/resource-collections/freshwater/great-lakes-ecoregion> (last updated Feb. 2019) (describing the lake system as the largest supply of freshwater in the world and twenty percent of the world's freshwater supply).

<sup>126</sup> RECCHIE ET AL., *supra* note 18, at 12.

<sup>127</sup> *Id.* at 9.

<sup>128</sup> *Id.* at 11.

<sup>129</sup> See Sabourin, *supra* note 10, at 321 ("Because there is no specific measure put in place for community involvement in the GLWA's decision-making process, it is unlikely that community concerns will be considered . . .").

service provision.

In perpetuating the narrative of a reasonable, cash-strapped government negotiating with delinquent, scofflaw residents, the City of Detroit has made much to-do about its payment plans for poor Detroiters. These plans all require Detroiters to make payments towards arrears in addition to paying their monthly bills in full and, with reconnection fees applied, actually increase the financial outlays of impoverished Detroiters who cannot afford to pay their monthly bills in the first place.<sup>130</sup>

The plans' exacerbation of the central problem of unaffordable water rates has caused the shutoff program to fail; unless and until the price of water becomes affordable, Detroit will simply never recover the money it seeks from its residents. The payment plan instituted pursuant to the suspension of the shutoff program in March 2020 placed the burden on residents to contact the City to avoid shutoffs or to have water service restored, offering them monthly water service for \$25 for the duration of the COVID-19 health crisis.<sup>131</sup> The median household income for Detroiters in 2019 was \$30,894, per the U.S. Census Bureau.<sup>132</sup> In 2018, the average monthly water bill for low-income residents of Wayne County (which includes Detroit) and the surrounding counties of Oakland and Macomb was close to \$100<sup>133</sup>—meaning low-income Detroiters paid much more than the EPA recommendation of 2–2.5% of income toward their water bills.<sup>134</sup>

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<sup>130</sup> See Quizar, *supra* note 7, at 432.

<sup>131</sup> See M. L. Elrick, *City of Detroit to Restore Water for \$25 Per Month During Coronavirus Outbreak*, DET. FREE PRESS (Mar. 11, 2020, 6:03 PM), <https://www.freep.com/story/news/local/michigan/detroit/2020/03/11/detroit-water-services-coronavirus-outbreak/5023680002>.

<sup>132</sup> Median individual income in Detroit was \$18,621. *Quick Facts: Detroit City, Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/detroitcitymichigan,MI/PST045219> (last visited Mar. 1, 2021). In 2018, the *Detroit Free Press* recorded median household income in Detroit at \$26,249. See Brian Manzullo, *If You Make at Least \$52,498 in Detroit, You're Considered Rich*, DET. FREE PRESS (May 18, 2018), <https://www.freep.com/story/news/local/michigan/detroit/2018/05/18/detroit-median-household-income/622687002>.

<sup>133</sup> See DAHLIA ROCKOWITZ, CHRIS ASKEW-MERWIN, MALAVIKA SAHAI, KELLY MARKLEY, CRIA KAY & TONY REAMES, UNIV. OF MICH. POVERTY SOLS., HOUSEHOLD WATER SECURITY IN METROPOLITAN DETROIT: MEASURING THE AFFORDABILITY GAP 1–3 (2018), <https://poverty.umich.edu/10/files/2018/08/PovertySolutions-PolicyBrief-0818-r2.pdf> (citing average water bills of nearly \$100 per month and a 2002 EPA recommendation of 4.5% of income for combined water and wastewater bills).

<sup>134</sup> See Class Action Complaint, *supra* note 6, ¶ 2; Quizar, *supra* note 7, at 431; see also ROCKOWITZ ET AL., *supra* note 133, at 1–3; U.S. CONF. OF MAYORS, AM. WATER WORKS ASS'N & WATER ENV'T FED'N, AFFORDABILITY ASSESSMENT TOOL FOR FEDERAL WATER MANDATES 4 (2013), <https://www.awwa.org/Portals/0/AWWA/ETS/Resources/AffordabilityAssessmentTool.pdf> (citing the EPA's suggestion that a combined annual water and wastewater bill of less than 4.5% of monthly household income would be affordable—2.5% of income for water and 2% for wastewater services).

The extreme prices of water delivery in Detroit date back nearly two decades.<sup>135</sup> The high price that Detroiters pay for water is rooted in white resistance to Black proprietorship—Black governance of the city, as well as Black possession of real property and natural resources. After Detroit’s water authority became Black-led in the 1970s,<sup>136</sup> the surrounding suburbs became increasingly populated due to white flight<sup>137</sup> and adopted an oppositional stance to the water authority that has persisted over time.<sup>138</sup> Detroit’s control over the regional water supply was resented by white suburbia, which quickly began to propagate a highly racialized narrative concerning Detroit leadership and governance as corrupt, inept, and exploitative of the suburban residents whose water Detroit was actually subsidizing.<sup>139</sup> Prior to Detroit’s racial desegregation and the rise of Black political power in the City, Detroit’s white leadership planned for white suburban expansion and decided to supply those suburbs with Detroit’s water at rates even cheaper than those paid by Detroiters.

The Detroit water shutoffs began at the same time as the Flint water crisis was unfolding. The two crises are not disconnected, as the Flint water crisis was caused when Flint officials decided to change the City’s water source from DWSD in 2013 to the Karegnondi Water Authority (KWA), despite the fact that the water supplied by DWSD was treated (and therefore safer) and significantly less expensive than the water provided by KWA.<sup>140</sup> Flint officials—using such deceptive means as ignoring reports concluding that water from KWA was far more expensive than blending DWSD water from the Flint River and commissioning reports concluding that KWA’s water was cheapest even though the KWA pipeline was not yet built and was sure to be costly<sup>141</sup>—intentionally perpetuated the anti-Black narrative that

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<sup>135</sup> Class Action Complaint, *supra* note 6, ¶ 2; AMIRHADJI ET AL., *supra* note 19, at 24.

<sup>136</sup> See Kornberg, *supra* note 90, at 273 (referring to former Mayor Coleman Young—Detroit’s first Black mayor—as “ultimate authority over the water board” in his capacity as mayor).

<sup>137</sup> Class Action Complaint, *supra* note 6, ¶ 39; Quizar, *supra* note 7, at 433–34.

<sup>138</sup> See, e.g., Kornberg, *supra* note 90, at 269–71 (analyzing Detroit’s regional water department and administration as a site of anti-Black organizing by white suburban politicians who resented and resisted Detroit’s desegregation and Black Detroiters’ eventual governance of the city, its natural resources, and its water-related infrastructure); see also Quizar, *supra* note 7, at 433–34 (discussing Detroit’s white flight and the resulting creation of a highly racialized “[w]hite imaginary” Detroit premised on anti-Black bigotry and resistance to desegregation and Black proprietorship).

<sup>139</sup> Kornberg, *supra* note 90, at 267 (finding that with respect to Detroit and its water supply, “suburban leaders focused on stereotypical ideas of administrative (in)competence and unsubstantiated charges of corruption, which allowed them to deflect critical questions of costs and resources”).

<sup>140</sup> See Peter J. Hammer, *The Flint Water Crisis, the Karegnondi Water Authority and Strategic-Structural Racism*, 45 CRITICAL SOCIO. 103, 111–12 (2019).

<sup>141</sup> *Id.* (detailing Flint’s decision to ignore independent reports concluding that its cheapest option for water involved blending DWSD water with water from the Flint River and to instead “strategically remove options from the table to influence the outcome”); see also Quizar, *supra* note 7,



Detroit, which provided some of the best quality water in the United States, was cheating them in order to justify building its own pipeline to the KWA.<sup>142</sup> Doing so caused rate increases in Detroit, which in turn, left Detroiters unable to pay their already steadily increasing water bills: The loss of Flint's custom by the DWSD was devastating, costing the City of Detroit a major source of revenue at a time when it was already preparing to declare bankruptcy.<sup>143</sup> As was the case with Flint, Detroit's water infrastructure was built for more people than it hosted, meaning that "fewer ratepayers had to carry a heavier burden."<sup>144</sup> Flint's population is much more racially mixed than Detroit's; however, because of the public perception that those impacted by the crisis are predominantly Black, that crisis has also persisted for a number of years, with Flint officials continuing to bill Flint residents for dirty water and also terminating water service for nonpayment.<sup>145</sup> In August 2020, the State of Michigan announced that it would pay \$600 million to the victims of the Flint water crisis, with individual settlement amounts to be allocated to tens of thousands of Flint residents based on their respective degrees of suffering and damage from having drunk the poisoned Flint water.<sup>146</sup>

Remarkably, even though Governor Whitmer suspended the shutoffs in March 2020 and ordered that water be restored in homes that were previously disconnected, some families in Detroit lacked water services at the time they filed their complaint in July 2020.<sup>147</sup> The City of Detroit placed the burden on Detroit residents to contact DWSD—whose office buildings had been

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at 430–31 (noting that the Flint water crisis resulted from emergency management and the emergency manager's cost-saving measures).

<sup>142</sup> See ANNA CLARK, *THE POISONED CITY: FLINT'S WATER AND THE AMERICAN URBAN TRAGEDY* 15 (2018) (noting, of Flint's water affordability crisis, that "[e]fforts to negotiate a better wholesale deal with the DWSD didn't go far, either. . . . It seemed to Mayor Walling that the DWSD was taking Flint, its second-largest customer, for granted"); see also Quizar, *supra* note 7, at 429–31 (discussing anti-Black discourse as a method for justifying austerity measures implemented by emergency managers in Detroit and Flint); Kornberg, *supra* note 90, at 270–71 (detailing the historical campaigns by white politicians in Detroit's suburbs to keep paying extremely low rates for Detroit water by accusing Detroit's Black-led governance of dishonesty, incompetence, corruption, and attempting to cheat the suburbs by raising water rates).

<sup>143</sup> CLARK, *supra* note 142, at 17.

<sup>144</sup> *Id.* at 15; see also Sabourin, *supra* note 10, at 309–10 (noting that "[t]he breakages and inefficiency of [Detroit's water] system lead to exceptionally high water bills").

<sup>145</sup> See Anthony Baxter, *Flint Residents Are Being Punished for Not Paying for Poisoned Water*, *GUARDIAN* (Apr. 4, 2018, 10:28 AM), <https://www.theguardian.com/commentisfree/2018/apr/04/flint-residents-punished-poisoned-water>.

<sup>146</sup> Julie Bosman, *Michigan to Pay \$600 Million to Victims of Flint Water Crisis*, *N.Y. TIMES* (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/us/flint-water-crisis-settlement.html>.

<sup>147</sup> See Class Action Complaint, *supra* note 6, ¶ 16 (claiming that "[u]pon information and belief, some families in Detroit still lack water services"); Poppy Noor, *Detroit Families Still Without Clean Water Despite Shutoffs Being Lifted*, *GUARDIAN* (May 20, 2020, 6:30 AM), <https://www.theguardian.com/us-news/2020/may/20/detroit-water-shutoffs-covid-coronavirus> (reporting that a number of families in Detroit remained without water, in May 2020, despite the Governor's March 2020 shutoff suspension order).

closed for months at the time of the ACLU’s suit, due to the COVID-19 pandemic<sup>148</sup>—to make payment and have service restored. Notably, when disconnecting Detroiters’ water, DWSD took the extra measure of having taps painted a bright blue after disconnection.<sup>149</sup> While such a measure theoretically could be necessary to maintain a record of all households subjected to water disconnection, Detroit necessarily has those records because the City was able to locate accounts for disconnection in the first instance—meaning the only purpose of maintaining the taps blue was to cause impacted Detroiters insult as well as injury.<sup>150</sup>

### III

#### LET IT FLOW: SUSPENDING THE WATER SHUTOFFS

This Section discusses how the onset of the COVID-19 pandemic exposed the existence of the racial contract by laying bare the radically disparate treatment of Detroiters relative to other Michiganders by the State of Michigan. The COVID-19 crisis forced American lawmakers and their constituents to reconsider and renegotiate the fiduciary and contractual duties owed by the State to its citizens and residents. However, not only did the City of Detroit make no attempt to assist Detroiters in keeping their water on prior to the onset of the pandemic, but it was the City that was responsible for implementing the shutoffs in the first instance.<sup>151</sup> Moreover, the City was also responsible for the improper assessments of Detroiters’ property taxes during the same time period.<sup>152</sup> This is not merely an unhappy coincidence; rather, because water bills are tied to addresses—to real property—in Detroit, delinquent water bills were added to homeowners’ tax bills.<sup>153</sup> As such, the water crisis actually contributed to the mortgage foreclosure crisis,<sup>154</sup> and Detroit had, in effect, perfected a system of extraction and expropriation of Black property that redistributed the resources to white-led

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<sup>148</sup> See Class Action Complaint, *supra* note 6, ¶ 61 (explaining that customers often “must wait an inordinate amount of time before talking with a [DWSD] customer representative . . . or are disconnected from their phone call before being able to do so” and that long wait times can place a financial burden on low-income residents, many of whom have limited prepaid cell phone minutes).

<sup>149</sup> *Id.* ¶ 64.

<sup>150</sup> *Id.* (describing the spray paint as “a source of humiliation and embarrassment for affected residents and their neighbors, as it serves no discernable purpose other than to constantly remind the community that the residents do not have water”).

<sup>151</sup> See *generally id.* (contextualizing the water affordability crisis and shutoff program in Detroit and its disproportionate targeting of and harm to Black residents).

<sup>152</sup> Atuahene, *supra* note 14, at 109–10 (explaining that after declaring bankruptcy, Detroit “devolved into a predatory city,” as evidenced by its improper assessment of more than fifty percent of homes between 2009 to 2015, which violated the Michigan Constitution, and that many affected residents were improperly charged despite their qualification for the federal Poverty Tax Exemption).

<sup>153</sup> Quizar, *supra* note 7, at 432.

<sup>154</sup> *Id.*

governments and their constituents.

Detroit's water shutoff program was challenged by water rights activists, healthcare officials, and civil rights attorneys from the outset.<sup>155</sup> Advocates asked the City of Detroit and the State of Michigan to halt the water shutoff program on numerous occasions, even demanding relief from the federal judge overseeing Detroit's bankruptcy.<sup>156</sup> Judge Rhodes acknowledged the water shutoffs are a human rights crisis that cast a shadow on Detroit's global reputation, but he defended the shutoffs as necessary to collect revenue before determining that he had no jurisdiction over the matter.<sup>157</sup> In 2017, health officials, lawyers, and activists urged the City to consider studies pointing to upticks in waterborne illness on city blocks where water had been shut off.<sup>158</sup> A coalition of civil rights lawyers sought a moratorium via an administrative complaint with the Michigan Department of Health and Human Services in July 2019.<sup>159</sup> The Department denied the requested relief, citing a purported lack of causal relation between lack of running water and water-borne disease despite evidence to the contrary.<sup>160</sup> None of the efforts to end the shutoffs were availing.

Even as flawed policies came into sharper focus as the novel coronavirus began to threaten the United States, the City of Detroit remained resolute in its insistence upon the shutoff program. In late February 2020, Governor Whitmer declined to institute a shutoff moratorium, citing a purported lack of data pointing to increased risks of COVID-19 propagating from a lack of running water, despite scientific studies indicating the contrary.<sup>161</sup> Regular handwashing, of course, was recommended as a primary

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<sup>155</sup> See Sabourin, *supra* note 10, at 310 (noting that the civil rights coalition began its advocacy to combat the shutoffs in 2014).

<sup>156</sup> *Id.* at 312.

<sup>157</sup> See Quizar, *supra* note 7, at 430 (describing Judge Rhodes's order); Helms & Guillen, *supra* note 34 ("While Rhodes' ruling made it clear he understood the scope of the problem of water shutoffs in a city with deep poverty, he said the plaintiffs . . . did not make the case that a six-month moratorium was necessary or within his powers.").

<sup>158</sup> Jennifer Chambers, *Experts: Water Shutoffs Causing Public Health Emergency*, DET. NEWS (July 26, 2017), <https://www.detroitnews.com/story/news/local/detroit-city/2017/07/26/detroit-water-shutoffs-health-study/104016812>.

<sup>159</sup> Class Action Complaint, *supra* note 6, ¶ 68.

<sup>160</sup> *Id.* ¶ 69.

<sup>161</sup> See *id.* ¶¶ 71–74 (alleging that Governor Whitmer's decision not to institute a shutoff moratorium "did not acknowledge the multiple scientific studies establishing a correlation between the lack of access to water and the spread of disease"); Christine Ferretti, *State: 'Insufficient' Data to Support Ban on Water Shutoffs in Detroit*, DET. NEWS (Feb. 26, 2020, 6:33 PM), <https://www.detroitnews.com/story/news/local/detroit-city/2020/02/26/stateinsufficient-data-support-moratorium-detroit-shutoffs/4881623002>; Caroline Llanes, *Whitmer Will Not Use Executive Powers to End Detroit Water Shutoffs*, MICH. RADIO (Feb. 27, 2020), <https://www.michiganradio.org/post/whitmer-will-not-use-executive-powers-end-detroit-water-shutoffs>.

defense against communal spread of the virus.<sup>162</sup> No argument was strong enough to convince the City of Detroit or the State of Michigan that depriving Detroiters of running water was unjustifiably harmful.

Shortly thereafter, on March 28, 2020, Governor Whitmer issued an executive order temporarily suspending disconnection of water service and requiring restoration of water to homes from which water had already been disconnected.<sup>163</sup> The relevant language of the order, EO 28, is as follows:

To mitigate the spread of COVID-19, protect the public health, and avoid needless deaths, it is crucial that all Michiganders remain in their homes or residences to the greatest extent possible and wash their hands thoroughly and regularly. Now more than ever, the provision of clean water to residences is essential to human health and hygiene, and to the public health and safety of this state. Correspondingly, many water utilities have already suspended water shutoffs during this difficult time. Due to the vital need to ensure that Michigan residents have access to clean water at home during the COVID-19 pandemic, it is reasonable and necessary to require the restoration of clean water to residences across the State of Michigan throughout this state of emergency.<sup>164</sup>

Governor Whitmer's apparent about-face on the relationship between water and health was welcome, but strange. Nothing had changed in that brief period aside from who might be impacted by Detroiters' lack of running water. She made a distinction between human health and hygiene and public health and safety. She noted that clean water was essential to both, without ordering a permanent end to the shutoffs—underscoring the painful reality that Detroit's water shutoff crisis is an unnatural disaster, intentionally designed and executed to cause burden and suffering to people—relying upon anti-Black narratives and stereotypes to justify the policy and garner public support.<sup>165</sup> In an op-ed in *Slate* entitled *America is a Sham*, the author says the following of the shutoffs:

The city shutting off your water, or your power, as punishment for hardship? During this public health emergency, plenty of cities and companies have suddenly found a way to keep service turned on. “As long as COVID-19 remains a health concern,” said Detroit Mayor Mike

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<sup>162</sup> Class Action Complaint, *supra* note 6, ¶ 11 (“Since the COVID-19 crisis began, Defendants and other government officials have admonished members of the public to engage in regular handwashing to prevent infection and the spread of disease. Yet, through its water shutoff policy, Detroit has made handwashing a practical impossibility for thousands of families in the city . . .”).

<sup>163</sup> Mich. Exec. Order No. 2020-28 (Mar. 28, 2020).

<sup>164</sup> *Id.* This order was rescinded on July 8, 2020 and replaced with Executive Order 2020-144, which specifies that it does not “abrogate[] the obligation of a customer to pay for water, prevent[] a public water supply from charging any customer for water service, or reduce[] the amount a resident may owe to a public water supply.” Mich. Exec. Order No. 2020-144 (July 8, 2020).

<sup>165</sup> See Quizar, *supra* note 7, at 435–36 (describing the formal commentary by public officials and the informal online commentary by members of the public as reliant upon “a sense that Detroiters in general and Black Detroiters, in particular, deserved to have their water turned off”).

Duggan, “no Detroit resident should have concerns about whether their water service will be interrupted.” Why in the hell should any Detroit resident have concerns about their water service being interrupted, ever? Shouldn’t clean water be the absolute base level of service delivered by a city to its residents?<sup>166</sup>

Executive Order 28 is remarkable because it unveils the racial contract to which the State of Michigan is party and of which the Black people of the City of Detroit are objects. Human health and hygiene of Black Detroiters is separate from the public health and safety of the state’s white body politic in the language of the order, and in reality. Governor Whitmer was explicit in recognizing her power and duties vis-à-vis the public.<sup>167</sup> That public is comprised of the body politic, from which Black human beings are necessarily excluded;<sup>168</sup> for this reason, “public” health and safety require the suspension of the water shutoffs during the pandemic, while the health and safety of Black Detroiters, in ordinary times, somehow does not. Buckner Inniss’s theory of the private versus public person is clearly expressed in Governor Whitmer’s executive order, which contrasts the health and wellbeing of Black Detroiters—a private matter of no concern to the State of Michigan—with the public health and wellbeing of white people placed at risk by Black people’s lack of running water.<sup>169</sup>

The way in which Detroiters now benefit from the temporary suspension of shutoffs is not as citizens negotiating their rights with the government, but as contractual third parties; they have neither an interest, nor a say, in whether, or when, shutoffs will recommence. The health of Black Detroiters matters to the State of Michigan insofar as it impacts the health of white people because white people have an expectation that the state will protect them. This remains true despite the enormous, disproportionate financial cost that Black Detroiters pay for white suburbanites’ water and

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<sup>166</sup> Dan Kois, *America is a Sham*, SLATE (Mar. 14, 2020, 7:16 PM), <https://slate.com/news-and-politics/2020/03/coronavirus-tsa-liquid-purell-paid-leave-rules.html>.

<sup>167</sup> See Mich. Exec. Order No. 2020-28 (Mar. 28, 2020) (“The Emergency Management Act vests the governor with broad powers and duties to ‘cop[e] with dangers to this state or the people of this state presented by a disaster or emergency,’ which the governor may implement through ‘executive orders . . . having the force and effect of law.’” (alteration in original) (quoting MICH. COMP. LAWS § 30.403)).

<sup>168</sup> See MILLS, *supra* note 44, at 9–12 (describing the racial contract as a sociopolitical contract “to which the nonwhite subset of humans [cannot] be a genuinely consenting party” and instead as “a contract between . . . white[s] over the nonwhites, who are thus the objects rather than the subjects of the agreement”).

<sup>169</sup> See Mich. Exec. Order No. 2020-28 (Mar. 28, 2020) (distinguishing human health and hygiene from public health and safety and ordering temporary restoration of water in Detroit in order to protect the public health of Michiganders); Buckner Inniss, *supra* note 59 (describing public people as “those with power and authority” who “deploy power” and “shap[e] laws, rules and norms” and private people as “those possessing little power or authority” whose exclusion from public life and sight deprives them of “much needed valorization”).

sewage in the first instance, due to the rent-seeking to which the white body politic and the racial state have agreed. Rent-seeking by the racial state—Michigan, the City of Detroit, and Detroit’s surrounding suburbs—is what makes financially desperate cities like Detroit predatory. Rent-seeking, along with a complete and entrenched resistance to, and sabotage of, Black proprietorship of government and real property also contribute to the city’s financial desperation. Finally, enforcement of the racial contract legitimizes a degree of structural violence, human devastation, public apathy, and economic inefficiency that would be impossible were the impacted people in privity with the state. In sum, Black Detroiters have no contract with the government concerning property and utilities that the government would be bound to respect.<sup>170</sup>

#### CONCLUSION

On August 20, 2020, the State of Michigan announced that it had reached a settlement agreement in the amount of \$600 million for the survivors of the Flint water crisis.<sup>171</sup> Divided amongst the tens of thousands of victims likely eligible to receive awards, the individual awards will likely only amount to a few thousand dollars each. Private claims will continue against private companies involved in the debacle and against public officials, including former Michigan Governor Rick Snyder. In January 2021, the state’s attorney general, Dana Nessel, indicted Snyder and several other former state officials on a number of charges relating to the officials’ management of the water crisis—including willful neglect of duty and involuntary manslaughter.<sup>172</sup>

Despite an arguably paltry settlement amount, the fact that a settlement has been reached and a criminal investigation into the water crisis and subsequent cover-up is taking place draws a stark contrast to the governmental responses to the Detroit water crisis. The criminal investigation and the civil settlement acknowledge a fiduciary duty of care owed by the government to Flint residents as well as a contractual relationship between Flint residents

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<sup>170</sup> This is a play on the infamous words of Supreme Court Justice Roger Taney declaring that Black people in the United States were not, and could never be, United States citizens and could not sue as citizens in federal court. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (“They had for more than a century before been regarded as beings of an inferior order . . . ; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.”).

<sup>171</sup> Kathleen Gray, *Most of \$600 Million Settlement in Flint Water Crisis Will Go to Children*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/us/flint-water-crisis-settlement-children.html>.

<sup>172</sup> See Joe Guillen, *State Prosecutors Lay Out New Detail from Indictments in Flint Water Crisis*, DET. FREE PRESS, (Jan. 14, 2021), <https://www.freep.com/story/news/local/michigan/2021/01/14/nessel-charges-flint-water-case/4158850001>.

and the City of Flint and the State of Michigan. The settlement amount functions as a remedy for a contractual breach. That the Detroit water crisis, like the mortgage foreclosure crisis, is not merely avoidable, but entirely government-initiated, contributes to the outrage of the shutoff program's opponents. From a human rights and international law perspective, the violation is so severe and so brazen that it is reasonable to ask if the City of Detroit and the State of Michigan would not also be exposed to criminal liability under the Rome Statute if the United States submitted to its jurisdiction.<sup>173</sup> However, such liability is preempted by the racial contract that is in effect within the international juridical sphere as well as by the failure of the United Nations and the international human rights framework to reach Detroit or any other American jurisdiction.<sup>174</sup>

Anti-discrimination law also fails to reach the Detroit water shutoffs in the ways necessary to trigger policy change because, under the law, disparate impact on Black people—empirical proof of harm—is worth less than explicit proof of racist discriminatory intent.<sup>175</sup> Future work will discuss the ways in which the racial contract exposes the inadequacy of U.S. antidiscrimination law to reach complex issues of structural racism or racist, neopolitical schemes of governments sophisticated enough to avoid explicitly racist discourse. This Essay offers a radical, decolonized theory of contract as a helpful prism through which scholars can evaluate the gaps between the standards of care that American government at the federal, state, and local levels owes the American citizenry and the lack of care that it actually delivers to Black people. This theory, of governance and policymaking

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<sup>173</sup> The Rome Statute includes as crimes against humanity “[p]ersecution against any identifiable group or collectivity on political, racial, . . . or other [impermissible] grounds . . . in connection with” certain enumerated acts, among them apartheid, enslavement, torture, and “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” Rome Statute of the International Criminal Court art. 7, ¶ 1, Nov. 10, 1998–Jan. 16, 2002, 2187 U.N.T.S. 90.

<sup>174</sup> The United States does not submit to the jurisdiction of the International Criminal Court, as it is not a State Party to the Court’s Rome Statute. See Press Statement, Michael R. Pompeo, Secretary of State, U.S. Dep’t of State, U.S. Policy on the International Criminal Court Remains Unchanged (Oct. 9, 2019), <https://www.state.gov/u-s-policy-on-the-international-criminal-court-remains-unchanged> (“The United States respects the decision of those nations that have chosen to join the ICC, and in turn, we expect that our decision not to join and not to place our people under the court’s jurisdiction will also be respected.”).

<sup>175</sup> See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (establishing that laws having disparate racial impact are constitutionally valid if not adopted for racially discriminatory purposes). The United States Supreme Court fully embraced this principle following *Davis*. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 66–67 (1980) (plurality opinion) (holding that the disparate racial impact of an at-large electoral system in Mobile, Alabama did not establish a constitutional claim for racial discrimination absent evidence of purposeful discrimination); *McCleskey v. Kemp*, 481 U.S. 279, 297–98 (1987) (holding that evidence of disparate racial impact in capital punishment determinations would not mitigate those death sentences without evidence of purposeful racial discrimination).

as contractual performance, is more helpful still in locating the motivations of government to prey on Black and Indigenous people, extracting resources they enjoy, possess, and manage, and expropriating them for the benefit of white individuals, the state, and corporations—all of whom form, together, the racial state.<sup>176</sup>

Until the state, and in this case, the State of Michigan, recognizes Black contractual capacity—that is to say, until governments abandon the racial contract and begin to treat Black people like people—outrages such as the Detroit water crisis that have come sharply into focus since the debut of the COVID-19 pandemic will continue to occur. As a practical matter, the City of Detroit would need to recognize its water as the legitimate property of Detroit’s residents, just as it needs to recognize the legitimacy of Black proprietorship over homes and Black interest in fair property tax assessments. This would require that the government recognize a contractual interest possessed by Detroit residents in the Detroit Water and Sewage Department’s leasing and billing structure and rates. It would require that the government give Detroiters the opportunity to bargain for the price of the water they consume, as well as for the price at which they lease water to the surrounding suburbs. Alternatively, Detroiters should have the opportunity to negotiate—at the polls or through legislation—with their local and state government for the universal provision of water, the cost of which would be met through taxation.

By allowing Detroiters to contract a price, if any, that they should pay for their own water, the relationship between the local government and its residents would become less extractive and, therefore, less predatory. This, however, would be only a first step toward dismantling an oppressive order under which Black people exist as permanent third-party beneficiaries of a whites-only sociopolitical contract at best and as the objects of the contract at worst. Ultimately, Detroit’s water crisis is the manifestation of contractual performance, bargained for by a white body politic reliant upon the exploitation and extraction of the resources of Black Detroiters for its own financial solvency. The State of Michigan and the City of Detroit must revoke this racial contract and instead recognize Black Detroiters as people and as citizens to whom they have contractual and fiduciary duties.

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<sup>176</sup> While this Essay focuses upon the impact of the Detroit water shutoffs upon Detroiters of African (and especially African-American) descent, referred to as “Black Detroiters,” the broader theoretical claims herein may also be extended broadly to Indigenous peoples, as well as to Latinx people of African and Indigenous descent, and to other communities of color that are highly racialized, including because of their proximity to or association with Black American communities.