Georgia Law Review

Volume 54 | Number 3 Article 3

2020

Discriminatory Dualism

Sarah L. Swan
Florida State University College of Law

DISCRIMINATORY DUALISM

Sarah L. Swan[*]

This Article identifies and theorizes a significant but previously overlooked feature of structural discrimination: it frequently develops into two seemingly opposing, yet in fact mutually supportive practices. This "discriminatory dualism" occurs in multiple contexts, including policing, housing, and employment. In policing, communities of color experience overpolicing (i.e., the aggressive overenforcement of petty crime) at the same time as they experience underpolicing (i.e., the persistent failure to address violent crime). In housing, redlining (i.e., the denial of credit to aspiring homeowners based on race) combines with reverse redlining (i.e., the over-offering of credit on exploitative terms) to suppress minority homeownership. And in employment, sexual harassment (i.e., unwanted sexual attention) combines with shunning (i.e., the refusal to engage with women workers at all) to deny equal opportunity in the workplace.

While scholars working in these discrete fields have noted each of these individual paradoxes, this Article argues that these paradoxes are iterations of the same broader phenomenon. Three critical insights flow from this recognition. First, understanding discriminatory dualism as a common technology of oppression allows policymakers to better anticipate its movements and identify discriminatory dualism as it arises in other contexts. Second, this frame diagnoses why previous reform mechanisms have failed. Third, it surfaces the

[*] Assistant Professor, Florida State University College of Law. Thanks to Erez Aloni, Anita Bernstein, Michael Boucai, Kevin Collins, Katherine Franke, Suzanne Kim, Wayne Logan, Jonathan Nash, Luke Norris, Wilson Parker, Shalini Ray, Clare Ryan, Gregg Strauss, Allison Tait, the participants of the Columbia Law School Associates and Fellows Workshop, the 2019 Southeastern Junior-Senior Conference, the 2018 and 2019 Family Law Scholars and Teachers Workshop, the 2020 AALS Family and Juvenile Law Section Panel, and the Fifth Annual Michigan Young Scholars Conference.

distinct harms caused by discriminatory dualism. Because each paradox is made up of two co-existing, contradictory strands that simultaneously deny and support each other's existence, discriminatory dualism creates destabilizing systems that confound conceptualization and countermobilization efforts. The conceptualization challenges create hermeneutical injustices, and the countermobilization challenges make discriminatory dualism difficult to combat. Nevertheless, understanding the dynamic and systemic processes of discriminatory dualism offers tools to begin the necessary work of dismantling it.

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I. INTRODUCTION

This Article argues that structural discrimination has a frequent but previously overlooked tendency to develop into two seemingly opposing, yet in fact mutually supportive practices. This "discriminatory dualism" occurs in multiple contexts, including policing, housing, and employment.[1] In the context of policing, communities of color experience overpolicing (i.e., the aggressive overenforcement of minor, petty crime) at the same time as they experience underpolicing (i.e., the persistent failure to address violent crime).[2] Housing discrimination takes a similar form: redlining (i.e., the denial of credit to aspiring homeowners because of race) joins with reverse redlining (i.e., the over-offering of credit on exploitative terms) to suppress minority homeownership.[3] And in the employment context, sexual harassment (i.e., unwanted

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[1] Discriminatory dualism occurs not just in multiple contexts, but in multiple countries. In addition to the United States, underpolicing and overpolicing marginalized groups (including First Nations and LGBTQ+ communities) have been noted in Canada and Australia. *See, e.g.*, Barbara Perry, *Nobody Trusts Them! Under- and Over-policing Native American Communities*, 14 CRITICAL CRIMINOLOGY 411 (2006); Malini Vijaykumar, *A Crisis of Conscience: Miscarriages of Justice and Indigenous Defendants in Canada*, 51 U.B.C. L. REV. 161 (2018); Tom Hooper, Opinion, *The Gay Community Has Long Been Over-Policed and Under-Protected. The Bruce McArthur Case Is the Final Straw*, CBC (Apr. 16, 2018, 4:00 AM), https://www.cbc.ca/news/opinion/pride-police-1.4618663; *see also* Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667 (2017) (noting that LGBT youth are often both under- and overpoliced and exploring the intersectionality of race and sexuality).

Variations of redlining and reverse redlining have been observed in South Africa and New Zealand. *See* Carla A. Houkamau et al., *The Prevalence and Impact of Racism Toward Indigenous Maori in New Zealand*, 6 INT'L PERSP. PSYCHOL. 61 (2017); T.O. Molefe, *South Africa's Subprime Crisis*, N.Y. TIMES (Aug. 26, 2014), https://www.nytimes.com/2014/08/27/opinion/molefe-south-africas-subprime-crisis.html; *see also* Peter Williams, *Building Societies and the Inner City*, 3 TRANSACTIONS INST. BRITISH GEOGRAPHERS 23, 30 (1978). The sexual harassment and shunning phenomenon has been observed in Canada, Australia, the United Kingdom, and South Korea. *See* Erica Alini, *'Me Too' Backlash Has Women Worried About Losing Career Opportunities*, GLOBAL NEWS (Mar. 8, 2018, 1:41 PM), https://globalnews.ca/news/4068700/me-too-backlash-pence-rule-mentoring-canada/; Kasey Edwards, *Has #MeToo Killed the Office Christmas Party?*, SYDNEY MORNING HERALD (Nov. 20, 2017), https://www.smh.com.au/lifestyle/life-and-relationships/has-metoo-killed-the-office-christmas-party-20171119-gzoky4.html; Kim Jae-heun, *More Men Wary of Interacting with Women*, KOREATIMES (Mar. 7, 2018), https://www.koreatimes.co.kr/www/nation/2018/03/356_245275.html; Nicola Smith, *South Korean Women Shunned at Work as Men Fear #MeToo Movement*, TELEGRAPH (Mar. 8, 2018, 5:24 AM), https://www.telegraph.co.uk/news/2018/03/08/south-korean-women-shunned-work-men-fear-metoo-movement/; Misell Parreno Taylor, *A Look at the #MeToo Movement's Impact in the US, Brazil and the UK*, TLNT (Aug. 8, 2018), https://www.tlnt.com/a-look-at-the-metoo-movements-impact-in-the-us-brazil-and-the-uk/.

[2] *See infra* Section II.A.

[3] *See infra* Section II.B.

sexual attention) combines with shunning (i.e., the refusal to engage with women workers at all) to deny equal opportunity in the workplace.[4]

These outwardly distinct examples are actually manifestations of the same broad phenomenon.[5] Each example involves two seemingly contradictory practices which come together to form a remarkably durable system of oppression.[6] Through a dynamic process of rising and receding, the dual practices respond to social and legal pressures by shifting emphasis from one practice to another. Across long historical arcs, multiple oscillations between the twinned practices have fortified discriminatory dualism with strength and longevity.

Backlash and opportunism drive many of these oscillations. Backlash has been a particularly important catalyst in the contexts of employment and policing.[7] For example, male managers and coworkers have responded to the uptick in sexual harassment complaints and enforcement by refusing to work with their female colleagues.[8] Similarly, police departments have responded to growing complaints of overpolicing by explicitly engaging in underpolicing.[9] Redlining and reverse redlining oscillations, on the other hand, are generally pushed not by backlash, but by opportunism and shifting economic circumstances.[10]

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[4] *See infra* Section II.C. Also, virtually every form of discrimination involves intersection and multiple valances, some more obvious than others. *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

[5] Structural discrimination "has been used loosely in the literature, along with concepts such as institutional discrimination . . . to refer to the range of policies and practices that contribute to the systematic disadvantage of certain groups." Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 197 (2008).

[6] In this, each coupling forms part of a general pattern of duality: light and dark, "[d]ay and night . . . heat and cold . . . *yang* and *yin* . . . are all opposites and *each reveals the other*." John Wright Buckham, *Duality and Dialectic*, 46 MONIST 175, 175 (1936) (quoting Tao teh King of Laotze). For philosophical and theoretical discussions of duality, see Aristotle, *Physics, in* THE BASIC WORKS OF ARISTOTLE 218 (Richard McKeon ed., 1941); CARL JUNG, COLLECTED WORKS 6, 708 (1949) (writing about the principle of enantiodromia—an idea developed out of the original writings of Heraclitus); G.E.R. LLOYD, POLARITY AND ANALOGY (1966); Plato, *Phaedo, in* PLATO, COMPLETE WORKS (John M. Cooper ed., 1997).

[7] *See infra* Section III.A (describing the relationship between backlash and policing).

[8] *See infra* Section III.A.

[9] *See infra* Section III.A. In fact, in both contexts, there have been multiple iterations of one practice rising and falling in response to criticism and agitations for social change. *See infra* notes 120–38 and accompanying text.

[10] *See* Manuel B. Aalbers, *Who's Afraid of Red, Yellow and Green?: Redlining in Rotterdam*, 36 GEOFORUM 562, 578 (2005) (noting how "the process of financial restructuring

In all of these manifestations, though, discriminatory dualism is a form of preservation-through-transformation. Preservation-through-transformation focuses mainly on how a discriminatory practice can remain constant over time, because changes in the supporting rhetorical strategies provide new justifications for those practices.[11] The theory of discriminatory dualism, however, focuses on how discriminatory practices themselves shift and swing to preserve and maintain existing inequalities. As the theory of adaptive discrimination explains, discrimination's fluidity and flexibility can ensure its permanence.[12]

Beyond ensuring its own existence, discriminatory dualism's mutability also has other important effects. First, discriminatory dualism pathologizes those it targets. Its oscillations purport to validate and affirm persistent racial and gender stereotypes, while erasing discriminatory dualism's own role in creating and perpetuating those stereotypes. Loan delinquency resulting from the exploitative credit offerings of reverse redlining, for example, serves to "confirm" the stereotype of poor creditworthiness that underwrote the practice of redlining in the first place.[13] Second, discriminatory dualism creates epistemic injustices. The previous lack of a name or frame for this common phenomenon was itself one form of epistemic injustice: the injustice of "having some significant area of one's social experience obscured from collective understanding."[14] While each of the examples of discriminatory dualism had been acknowledged in isolation, the lack of a "collective

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was a response to a downturn in financial markets and growing problems of financial indebtedness").

[11] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2179 (1996) (noting that, in the context of domestic abuse, "[a]s reform of the common law marital status rules illustrates, th[e] process of ceding and defending status privileges will result in changes in the constitutive rules of the regime and in its justificatory rhetoric").

[12] *See* Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1238 (2016) (noting "the fluidity of racial discrimination and the ways it morphs through time across our social, economic, and political landscapes"). In this sense, discriminatory dualism is an example of adaptive discrimination. *See infra* Part III.

[13] Raymond H. Brescia, *Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 ALB. GOV'T L. REV. 164, 172 (2009) ("Because of the history of discrimination in certain communities, there was a lack of viable lending alternatives and less of a familiarity with the mortgage market, which also led otherwise viable borrowers to accept unfavorable mortgage terms." (footnote omitted)).

[14] Laura Beeby, *A Critique of Hermeneutical Injustice*, 111 PROC. ARISTOTELIAN SOC. 479, 479 (2011).

epistemic resource" to explain the machinations of the broader phenomenon is indicative of how intellectual resources get allocated in inequitable ways and how certain social ways of knowing are dismissed.[15]

The conceptualization difficulties associated with discriminatory dualism have also contributed to countermobilization problems.[16] The bifurcation at the core of discriminatory dualism resists standard reform mechanisms by continually demanding that social and legal change agents split their focus and fight a battle on two fronts. Thus, discriminatory dualism presents a "wicked problem"—a dynamic problem "with complex interactions" that defy resolution,[17] in part because attempts to solve one piece of the problem can cause complications related to other aspects of the problem.[18]

Despite these difficulties, recognizing discriminatory dualism assists countermobilization efforts in two ways. First, it alerts policymakers and social change advocates to the possibility that clamping down on one form of discrimination can cause its opposite to be strengthened. Second, understanding discriminatory dualism as a phenomenon writ large pulls into view related and emerging iterations of discriminatory dualism. Identifying discriminatory dualism as a recurring technology of oppression allows its emerging manifestations to be anticipated, predicted, and potentially blocked.[19] Further, its existing manifestations can be better addressed. Discriminatory dualism demonstrates that legal interventions that focus on only one strand of discrimination will frequently fail, since the targeted practice will simply shift and make its opposite form more dominant. Once the dynamic nature of

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[15] MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 59 (2007).

[16] *See* Jerrold D. Green, *Countermobilization as a Revolutionary Form*, 16 COMP. POL. 153, 153 (1984) (explaining that "countermobilization may be simply understood as mass mobilization against a prevailing . . . order").

[17] B. Guy Peters, *What Is So Wicked About Wicked Problems? A Conceptual Analysis and a Research Program*, 36 POL'Y & SOC'Y 385, 386 (2017).

[18] *See id.* ("[D]efining the concept through the mechanisms for solution tends to undervalue the nature of the problems themselves, and begs numerous questions about policy design.").

[19] As Katherine Franke explains, a "'technology' is a manner of accomplishing a task," such that "[s]exual harassment is a technology of sexism," as it "is both the manner of accomplishing sexist goals, and the specialized instantiation of a sexist ideology." Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 693 (1997).

discriminatory dualism is taken into account, two-pronged approaches are both possible and potentially productive.

To that end, this Article proceeds as follows: Part II describes the phenomenon of discriminatory dualism, tracing its operation in policing, housing, and employment. Part III uses the analytical frameworks of backlash, preservation-through-transformation, and adaptive discrimination to theorize and gain insight into the workings of discriminatory dualism. Part IV focuses on the epistemic consequences of discriminatory dualism, including hermeneutical injustices, the pathologization of its subjects, and the ways in which legal frameworks contribute to both of these harms. Part V forecasts the future of discriminatory dualism and provides strategies for beginning the difficult work of dismantling it. Part VI concludes.

II. DESCRIBING DISCRIMINATORY DUALISM

This Part provides a descriptive account of discriminatory dualism. Through the three paradigmatic examples of policing, housing, and employment, this Part demonstrates how these discriminatory dualism systems function, how their internal contradictions sustain and strengthen these systems, and how they harm the populations they target.

A. POLICING: UNDERPOLICING AND OVERPOLICING

One paradigmatic form of discriminatory dualism is under- and overpolicing. Overpolicing and the myriad practices associated with it (such as racial profiling, hawkishly arresting for drugs in urban areas, and engaging in police violence and brutality) has recently received significant criticism both in academia and the popular media.[20] Social activism has highlighted that these practices are not only counterproductive but also a significant source of oppression

[20] *See, e.g.*, Chase Madar, *The Over-Policing of America*, HUFFPOST (Dec. 9, 2013, 9:38 AM), https://www.huffpost.com/entry/over-policing-of-america_b_4412187; Mychal Denzel Smith, *Rough Justice: How America Became Over-Policed*, NEW REPUBLIC (June 5, 2018), https://newrepublic.com/article/148304/rough-justice-america-over-policed; Alex S. Vitale, Opinion, *The Problem Is Overpolicing*, TRUTHOUT (July 9, 2016), https://truthout.org/articles/the-problem-is-overpolicing/; *see also* Alexandra Natapoff, *Underenforcement,* 75 FORDHAM L. REV. 1715, 1716 (2006) (discussing how overpolicing is popularly understood and perceived).

for communities of color.[21] Overpolicing has caused significant social, psychological, and economic damage, including blighted neighborhoods, family instability, and job loss,[22] and "[t]he overcriminalization and mass incarceration of so much of the black male population has created a visible legal underclass."[23]

But while overpolicing has been widely recognized as a pressing and damaging problem, it is not a singular phenomenon.[24] At the same time as black and minority communities are overpoliced for petty crimes, they are grossly underpoliced in regard to major crime.[25] In other words, communities of color experience both "very high rates of arrest for minor offenses white folks routinely get away with, and shockingly low arrest rates for serious violent crime."[26] To illustrate the latter point, in one predominantly black neighborhood in Los Angeles, every square mile housed forty-one unsolved homicides.[27]

Underpolicing, though, is less conspicuous than overpolicing,[28] and the larger public is mostly unaware of "how inadequate or simply nonexistent police protection and service has been for people

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[21] *See* Natapoff, *supra* note 20, at 1716. As Natapoff writes:

> Overenforcement policies are also increasingly challenged as normatively counterproductive; with their draconian overkill and racial skew, they foster resentment and disrespect for the law among otherwise law-abiding members of the community and reduce social incentives to obey the law. For some, the racial inequalities created by overenforcement strike at the heart of the legitimacy of the entire system. In these ways, "overenforcement" has become one of the central lenses through which the racial imbalances, inegalitarianism, and other weaknesses of the criminal justice system are viewed and understood.

Id. (footnotes omitted).

[22] Alexi Nunn Freeman & Jim Freeman, *It's About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 CLINICAL L. REV. 147, 153–55 (2016).

[23] Natapoff, *supra* note 20, at 1716.

[24] *Id.* at 1716–20.

[25] *Id.* at 1724–28.

[26] David Kennedy, Opinion, *Reading Los Angeles: Black Communities: Overpoliced for Petty Crimes, Ignored for Major Ones*, L.A. TIMES (Apr. 10, 2015, 6:36 PM), https://www.latimes.com/opinion/bookclub/la-reading-los-angeles-kennedy-ghettoside-20150404-story.html.

[27] Jill Leovy, *The Underpolicing of Black America*, WALL ST. J. (Jan. 23, 2015, 4:38 PM), https://www.wsj.com/articles/the-underpolicing-of-black-america-1422049080. Similarly, in 2016, four out of five shootings in a predominantly black South Bronx neighborhood went unsolved. *See* Benjamin Mueller & Al Baker, *Murder in the 4-0: Rift Between Officers and Residents as Killings Persist in the South Bronx*, N.Y. TIMES (Dec. 31, 2016), https://www.nytimes.com/2016/12/31/nyregion/bronx-murder-40th-precinct-police-residents.html.

[28] Natapoff, *supra* note 20, at 1716.

of color in the United States."[29] But even though it is less well-known, underpolicing also profoundly harms communities of color.[30] Like overpolicing, underpolicing expressively "devalues the lives" of people of color, destabilizes families, erodes communities, and causes deep psychic harms.[31] As "waves of killings . . . go unsolved, unpunished, and ultimately undeterred, decade after decade," families and communities are undone.[32]

In fact, some scholars and activists argue that underpolicing is actually *worse* than overpolicing. Legal scholar Randall Kennedy, for example, has argued that "the principal injury" impacting African Americans from policing was "not overenforcement but underenforcement."[33] In his words, "[d]eliberately withholding protection against criminality . . . is one of the most destructive forms of oppression that has been visited upon African-Americans."[34] Journalist Jill Leovy, who authored a detailed study of underpolicing in Los Angeles, agreed, arguing that underpolicing has received short shrift, and is actually a more pressing problem than overpolicing.[35]

Discriminatory dualism suggests that a focus on one or the other is misplaced, and that while both under- and overpolicing are independently destructive, it is their operation in tandem which should give the most cause for concern.[36] Under- and overpolicing function as one potent form of interlocking discriminatory practices;[37] they are not alternatives, but "corollar[ies],"[38] "a cycle [or] continuum of targeted police underservice and blindness to

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[29] DAVID E. BARLOW & MELISSA HICKMAN BARLOW, POLICE IN A MULTICULTURAL SOCIETY: AN AMERICAN STORY 100 (2018).

[30] *Id.*

[31] *Id.*

[32] Jen Graves, *Why Aren't We Talking About Ghettoside?*, STRANGER (July 19, 2016, 9:44 AM), https://www.thestranger.com/slog/2016/07/19/24357415/why-arent-we-talking-about-ghettoside. Children who witness crime and violence experience negative impacts from that exposure. *See, e.g.*, Steven L. Berman et al., *The Impact of Exposure to Crime and Violence on Urban Youth*, 66 AM. J. ORTHOPSYCHIATRY 329, 329 (1996); Natasha K. Bowen & Gary L. Bowen, *Effects of Crime and Violence in Neighborhoods and Schools on the School Behavior and Performance of Adolescents*, 14 J. ADOLESCENT RES. 319, 336–67 (1999); David Finkelhor et al., *Violence, Abuse, and Crime Exposure in a National Sample of Children and Youth*, 124 PEDIATRICS 1411, 1412 (2009).

[33] RANDALL KENNEDY, RACE, CRIME, AND THE LAW 19 (1997).

[34] *Id.*

[35] *See* Leovy, *supra* note 27.

[36] Natapoff, *supra* note 20, at 1718.

[37] Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2117 (2017).

[38] Natapoff, *supra* note 20, at 1719.

crime that eventually serves as its own rationale for over-policing and pursuing more aggressive tactics."[39]

Underpolicing and overpolicing justify and reinforce each other, and together function as a disturbingly efficient discriminatory system.[40] Underpolicing underdeters and contributes to an unwillingness in the community to cooperate with investigating officers, out of either fear of unchecked retribution or sheer frustration at the known futility of doing so.[41] This increases the rates of serious crime, and these high crime rates are then used to justify overpolicing and hammering down hard on petty crimes.[42] Additionally, the financial expense of overpolicing is then used to justify refusing to expend any resources to remedy underpolicing,[43] and the repeating oppressive cycle continues. Indeed, this under- and overpolicing circuit is now "a central paradox of the African American experience."[44]

B. HOUSING: REDLINING AND REVERSE REDLINING

Redlining and reverse redlining constitute another example of discriminatory dualism. Redlining refers to the refusal to provide credit or mortgages in African American or minority neighborhoods.[45] The term comes from the Home Owners Loan Corporation's color-coding classification system created in the 1940s to convey credit ratings.[46] Green neighborhoods were the safest

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[39] Vann R. Newkirk II, *What We Are Getting Wrong About Police Reform*, GAWKER (Nov. 9, 2015, 12:50 PM), https://gawker.com/what-we-are-getting-wrong-about-police-reform-1740865621.

[40] *Id.*

[41] *See* Natapoff, *supra* note 20, at 1727 ("Law enforcement unresponsiveness creates a vicious cycle: Criminals grow bold, while residents grow reluctant to cooperate with police, making serious crimes such as drug dealing and homicide harder to solve, and police more reluctant to work on them.").

[42] *Id.*

[43] *Id.* at 1717 ("Conceived of as a form of public policy, underenforcement is a crucial distribution mechanism whereby the social good of lawfulness can be withheld.").

[44] JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 35 (2017).

[45] *See* Brescia, *supra* note 13, at 179 ("The term 'redlining' derives its origins from lending practices where bankers would literally draw a red line on maps, identifying the communities—typically communities of color—where the bank would not extend credit.").

[46] Ira Rheingold et al., *From Redlining to Reverse Redlining: A History of Obstacles for Minority Homeownership in America,* 34 CLEARINGHOUSE REV. 642, 643 (2001) (describing the categorization of neighborhood rankings by the Home Owners Loan Corporation (HOLC) "to determine whether a given neighborhood was a good risk for mortgage loans, irrespective of the qualifications of the individual applicant for a mortgage loan").

investments; blue neighborhoods were less secure but "still desirable"; yellow neighborhoods were "definitely declining" but could possibly obtain financing;[47] and red neighborhoods were "hazardous" communities where banks simply would not lend.[48] Neighborhoods with even just one black family were automatically redlined and thus excluded from these credit and investment processes.[49]

Until 1968, redlining was the government-supported status quo of lending throughout the country.[50] In that year, though, a series of legislative acts, including the Fair Housing Act, rendered redlining an unlawful form of discrimination.[51] Nevertheless, redlining persisted and has, throughout the ensuing decades, "funneled billions of dollars away from black neighborhoods," contributing to both "segregation patterns and the racial wealth gap."[52] Indeed, in 1988, a series of investigative reports (which would later earn the Pulitzer Prize) showed "a lending gap so pervasive and so wide that in much of the country high-income

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[47] *See* BRUCE MITCHELL & JUAN FRANCO, NAT'L COMMUNITY REINVESTMENT COALITION, HOLC "REDLINING" MAPS: THE PERSISTENT STRUCTURE OF SEGREGATION AND ECONOMIC INEQUALITY 5 (Mar. 20, 2018); *see also* Rheingold et al., *supra* note 46, at 643–44 (noting that "Jewish areas, if they were working class or located near an African American community, were placed in the second lowest category and virtually never received HOLC loans," and that even neighborhoods "that contained very small percentages of blacks" were redlined).

[48] *See* MITCHELL & FRANCO, *supra* note 47, at 4; *see also* Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 276 (2012) (discussing the impact of new pleading standards on housing discrimination cases); Tracy Jan, *Redlining Was Banned 50 Years Ago. It's Still Hurting Minorities Today*, WASH. POST (Mar. 28, 2018, 6:00 AM), https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/ (discussing the lingering effects of redlining).

[49] Rheingold et al., *supra* note 46, at 643.

[50] Richard C. Schragger, *The Political Economy of City Power*, 44 FORDHAM URB. L.J. 91, 108 (2017) (noting that redlining was "an explicit federal policy").

[51] Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601–19 (2012). Additionally, in the 1970s, a series of subsequent legislative acts, including the Truth in Lending Act, 15 U.S.C. §§ 1601–15 (2018), the Home Ownership and Equity Protection Act, *id.* §§ 1639, 1648, and the Equal Credit Opportunity Act, *id.* § 1691(a)–(f), supplemented this purpose and further tried to "address the issue of extension of credit on unfavorable terms." Brescia, *supra* note 13, at 180. In another ironic flip, the Home Ownership and Equity Protection Act, which was intended to help minorities enter the housing market, now causes gentrification in historically black neighborhoods. *See How a Law Against Redlining Is Spurring White Gentrification*, CBSNEWS (Feb. 16, 2018, 9:24 AM), https://www.cbsnews.com/news/how-a-law-against-redlining-is-spurring-white-gentrification/.

[52] JACOB W. FABER, REDLINED YESTERDAY AND REDLINED TODAY: THE HOME OWNERS LOAN CORPORATION'S LONG SHADOW 2 (2017).

blacks [were] rejected at the same rate as low-income whites."[53] In the 1990s, the Boston Federal Reserve Bank engaged in a large-scale study which determined that, after controlling for other variables, "black and Hispanic clients were 82 percent more likely to be turned down for a loan" than their white counterparts.[54] A 2012 study yielded similar results, and dozens of successful state and federal lawsuits brought in the last few decades have also confirmed redlining's continued relevance.[55]

Like overpolicing, redlining is also not an isolated practice. It is accompanied by *reverse* redlining.[56] As the name suggests, reverse redlining involves not the denial of credit, but the exploitative over-offering of it.[57] Reverse redlining's high-interest, high-default loans were particularly rampant in the 1990s, when lenders capitalized on historical patterns of segregation by targeting minorities for subprime loans.[58] As "the same neighborhoods that were once sites of exclusion under redlining policies . . . turned into sites of exploitation under reverse redlining policies,"[59] the national

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[53] Bill Dedman, *Blacks Turned Down for Home Loans from S&Ls Twice as Often as Whites*, ATLANTA J. CONST., Jan. 22, 1989, at A1.

[54] Devah Pager, *The Dynamics of Discrimination, in* THE COLORS OF POVERTY: WHY RACIAL AND ETHNIC DISPARITIES PERSIST 21, 26 (David Harris & Ann Lin eds., 2008).

[55] *See* Binyamin Appelbaum, *Are Subprime Mortgages Coming Back?*, N.Y. TIMES MAG. (Sept. 9, 2014), https://www.nytimes.com/2014/09/14/magazine/are-subprime-mortgages-coming-back.html (finding "that those excluded from credit in 2012 were disproportionately African-American and Hispanic households"). In 2014, the New York Attorney General filed a redlining suit against a Buffalo bank, alleging it redlined an east Buffalo neighborhood, where over seventy-five percent of the city's African Americans resided. *See id.* And in recent years, Los Angeles officials have filed redlining lawsuits for problematic lending. *See* Brentin Mock, *Redlining Is Alive and Well—and Evolving*, CITYLAB (Sept. 28, 2015), https://www.citylab.com/equity/2015/09/redlining-is-alive-and-welland-evolving/407497/. Finally, in 2015, two financial institutions agreed to significant monetary pay-outs to settle allegations of redlining. *Id.* Hudson City Savings Bank and the Associated Bank agreed to pay $33 million and $200 million, respectively, for denying mortgages to African American and Latino applicants. *Id.* Both banks also agreed to open branches in predominately minority communities. *Id.*

[56] Asma Husain, *Reverse Redlining and the Destruction of Minority Wealth*, MICH. J. RACE & L. (Nov. 2, 2016), https://mjrl.org/2016/11/02/reverse-redlining-and-the-destruction-of-minority-wealth/. For a discussion of "predatory inclusion," see generally KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019).

[57] Brescia, *supra* note 13, at 167.

[58] *Id.*

[59] Hila Keren, *Law and Economic Exploitation in an Anti-Classification Age*, 42 FLA. ST. U. L. REV. 313, 322–23 (2015).

subprime loan market exponentially expanded from close to $100 billion to $640 billion.[60]

As with redlining, the discrimination in the subprime lending market was not subtle. Both the number of subprime loans and the terms of those loans evidenced discrimination. One study found that in 2006, at the height of the subprime boom, black families making over $200,000 a year "were more likely on average to be given a subprime loan than a white family making $30,000 a year."[61] Indeed, almost forty percent of refinance loans in upper-income black neighborhoods were subprime, compared to five percent in upper-income white neighborhoods.[62] Overall, across all income levels, "[b]lack borrowers were nearly twice as likely, and Latino borrowers were 50% more likely, than white borrowers to have a subprime loan."[63] Gender offered an additional confounding variable: "African American women in particular are 256 percent more likely to have a subprime mortgage than a white man with the

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[60] DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, LOST GROUND, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES 8 (2011), https://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf.

[61] Troy McMullen, *The 'Heartbreaking' Decrease in Black Homeownership*, WASH. POST (Feb. 28, 2019), https://www.washingtonpost.com/news/business/wp/2019/02/28/feature/the-heartbreaking-decrease-in-black-homeownership/.

[62] *See* Charles L. Nier III & Maureen R. St. Cyr, *A Racial Financial Crisis: Rethinking the Theory of Reverse Redlining to Combat Predatory Lending Under the Fair Housing Act*, 83 TEMP. L. REV. 941, 948 (2011).

[63] Charles Falck, Note, *Equitable Access: Examining Information Asymmetry in Reverse Redlining Claims Through Critical Race Theory*, 18 TEX. J. ON C.L. & C.R. 101, 103 (2012). Other studies suggest that "[e]ven after controlling for underwriting variables" and factors that impact pricing like income, African American borrowers were up to "'34.3% more likely than whites to receive a higher rate subprime mortgage' during the subprime boom." Nier & Cyr, *supra* note 62, at 947 (quoting Alan M. White, *Borrowing While Black: Applying Fair Lending Laws to Risk-Based Mortgage Pricing*, 60 S.C. L. REV. 677, 684 (2009)). This disparity existed when looking across neighborhoods as well. *Id.* at 947–48. A Department of Housing and Urban Development investigation illustrated the contrast; in black neighborhoods, fifty-one percent of refinances were subprime, whereas in white neighborhoods, that number was nine percent. *Id.* at 948.

Following the crash of the subprime mortgage crisis, as the impact and extent of reverse redlining came to light, some attempts at accountability were made. The Department of Justice accused Countrywide and Wells Fargo of widespread reverse redlining, alleging that the banks discriminatorily issued subprime loans to more than ten thousand Hispanic and black borrowers, "while otherwise similarly situated white borrowers received less expensive prime loans." *See* Alex Gano, Comment, *Disparate Impact and Mortgage Lending: A Beginner's Guide*, 88 U. COLO. L. REV. 1109, 1142 (2017). The Department of Justice further alleged that Countrywide and Wells Fargo "established systems for pricing their loans that had the effect of charging more than 100,000 minority borrowers higher fees than white borrowers with similar credit characteristics," thereby supplementing their illegal business practices with a practice of "illegal 'discriminatory pricing.'" *Id.* at 1141–42.

same financial profile."[64] The terms of the loans were equally troubling: reverse redlining loans often offered credit at rates that were three times higher for black borrowers, and two-and-a-half times higher for Latinx borrowers than for white borrowers.[65]

Reverse redlining was possible in part because of the preparatory work of redlining.[66] First, redlining had allowed banks to gather "reliable data on the most economically vulnerable households."[67] That data then became the basis for "flood[ing] minority neighborhoods with high-cost subprime loan offers."[68] Second, redlining had made certain neighborhoods economically vulnerable, and thus particularly susceptible to predatory loans.[69] Having previously been deprived of access to mortgage markets, these households were generally unfamiliar with lending products and were unaware of potential alternatives for comparison.[70] Redlining thus created the conditions that largely caused "otherwise viable borrowers to accept [the] unfavorable mortgage terms" offered in reverse redlining.[71] Ultimately, "[l]ured by the temptation of credit, an economic necessity all-too-often denied such communities in the past, many found themselves saddled with unaffordable loans and backbreaking debt."[72]

Institutionally, banks and other financial actors engage in both redlining and reverse redlining, which together work to suppress minority homeownership. One commentator aptly remarked on this paradox and irony:

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[64] Amy C. Baker, *Eroding the Wealth of Women: Gender and Subprime Foreclosure Crisis*, 88 SOC. SERV. R. 59, 62 (2014).

[65] *See* David D. Troutt, *Disappearing Neighbors*, 123 HARV. L. REV. F. 21, 24 (2009) ("Nationally, black and Hispanic borrowers received subprime loans at a rate that was three times and two-and-ahalf times more than whites, respectively, in 2006.").

[66] *See* Kathleen S. Morris, *Cities Seeking Justice: Local Government Litigation in the Public Interest*, *in* HOW CITIES WILL SAVE THE WORLD 195 (Ray Brescia & John Travis Marshall eds., 2016).

[67] *Id.*

[68] *Id.* (citation omitted); *see also* Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1241 (2018).

[69] *See* Morris, *supra* note 66, at 195 ("This 'renewed redlining' practice meant that majority-minority neighborhoods saw more foreclosures than majority-Caucasian neighborhoods.").

[70] *Id.* at 196; *see also* Justin P. Steil, *Innovative Responses to Foreclosures: Paths to Neighborhood Stability and Housing Opportunity*, 1 COLUM. J. RACE & L. 63, 76 (2011) ("In communities of color, the history of redlining and the lack of experience with mainstream banks often limited consumers' abilities to shop for and find the best products in the marketplace.").

[71] Brescia, *supra* note 13, at 172.

[72] *Id.* at 166.

> Redlining is the practice of either denying services outright, or making services more difficult to acquire[] because of race or ethnicity. . . .
>
> Reverse redlining, on the other hand, is targeting people of color for bad deals—giving them access in order to charge much more in interest and fees than they could get away with charging a white customer. Oh—the banks are doing that too. It's fascinating (and enraging) to see how they work both sides like that.[73]

In tandem, then, redlining and reverse redlining operate together to deny minority access to homeownership and its attendant accumulation of wealth.[74] The redlining and reverse redlining cycle targeting minority communities has had drastic consequences. It has caused massive debt, frequent foreclosures, and significant neighborhood devaluations.[75] Moreover, although the Fair Housing Act, despite its flaws, helped raise the rate of minority homeownership, the subprime mortgage crisis has now essentially erased those initial gains.[76]

C. EMPLOYMENT: SEXUAL HARASSMENT AND SHUNNING

A third example of discriminatory dualism is the phenomenon of sexual harassment and shunning in the context of employment. Sexual harassment is, at its core, "unwanted sexual attention."[77] It consists of various forms of communication and conduct that

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[73] *And Now, Reverse Redlining by Banks,* PUB. BANKING INST. (July 30, 2016), https://www.publicbankinginstitute.org/2018/10/23/and-now-reverse-redlining-by-banks/.

[74] *See id.*; *see also* CAL. REINVESTMENT COALITION, FROM FORECLOSURE TO RE-REDLINING: HOW AMERICA'S LARGEST FINANCIAL INSTITUTIONS DEVASTATED CALIFORNIA COMMUNITIES 8 (2010) (noting how financial predation effects generational wealth in neighborhoods in California).

[75] Nier & Cyr, *supra* note 62, at 948.

[76] McMullen, *supra* note 61.

[77] Sandy Lim & Lilia M. Cortina, *Interpersonal Mistreatment in the Workplace: The Interface and Impact of General Incivility and Sexual Harassment*, 90 J. APPLIED PSYCH. 483, 483 (2005). Other forms include gender harassment—"crude, verbal, physical, and symbolic behaviors that convey hostile and offensive attitudes about members of one gender"—and sexual coercion—"subtle or explicit bribes or threats to make job conditions contingent on sexual behavior," both of which involve unwanted attention related to sex. *Id.* In *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986), the U.S. Supreme Court "accepted the EEOC definition of sexual harassment as 'unwelcome' sexual attention." Christine A. Littleton, *Dispelling Myths About Sexual Harassment: How the Senate Failed Twice*, 65 S. CAL. L. REV. 1419, 1421 (1992); *see also* Phyllis L. Crocker*, An Analysis of University Definitions of Sexual Harassment*, 8 SIGNS 696, 696 (1983).

highlight some aspect of the harassed person's sexual or gender identity in a way that disparages or diminishes that person's humanity and dignity.[78] Although it was once assumed that sexual harassment stemmed from unreciprocated sexual desire, harassment is most often rooted in the hierarchies of gender and power.[79] Sexual harassment is less about "securing sexual gratification" and more about "putting women (and men who are 'not man enough') down, reinforcing the existing gender order, and reaffirming threatened social identities."[80] Functionally, it is a "means of protecting hegemonic masculine work status and identity."[81]

Sexual harassment is "startlingly common," with an estimated one-half of working American women experiencing sexual harassment at some point.[82] Its impacts are crippling. Sexual harassment limits the careers of the harassed and maintains a gendered hierarchy that functions to keep women from reaching the highest rungs of power.[83] Women who experience sexual harassment frequently change jobs, thereby foregoing significant earned intellectual and professional capital.[84] Additionally, victims, as well as witnesses, frequently experience emotional and physical health problems.[85]

The prevalence and injurious impact of sexual harassment reached a tipping point in 2017, when the #MeToo social media movement invited every woman who had experienced sexual

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[78] *See* Louise Marie Roth, *The Right to Privacy Is Political: Power, the Boundary Between Public and Private, and Sexual Harassment*, 24 LAW & SOC. INQUIRY 45, 47 (1999) (describing the importance of different definitions of sexual harassment).

[79] Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. F. 22, 46 (2018).

[80] *Id.* at 45 (noting that these two motivations are not mutually exclusive).

[81] *Id.* at 46; *see also* Reva B. Siegel, *Introduction: A Short History of Sexual Harassment* (noting that sexual harassment is "part of the larger political economy of heterosexuality, a social order that situates sexual relations between men and women in relations of economic dependency between men and women"), *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 9 (Catharine A. MacKinnon & Reva B. Seigel eds., 2003).

[82] *See* J.M.F., *What Is Sexual Harassment and How Prevalent Is It?*, ECONOMIST (Nov. 24, 2017), https://www.economist.com/the-economist-explains/2017/11/24/what-is-sexual-harassment-and-how-prevalent-is-it; *see also* Jane Fonda et al., *6 Perspectives on the Future of #MeToo*, NATION (Dec. 13, 2017), https://www.thenation.com/article/archive/6-perspectives-on-the-future-of-metoo/ ("Forty percent [of women] say they've experienced unwanted sexual attention or coercion at work.").

[83] *See* Fonda et al., *supra* note 82.

[84] *See* Hanna Barczyk, *Sexual Harassment at Work: An Open Secret*, ECONOMIST (Oct. 21, 2017), https://www.economist.com/international/2017/10/21/sexual-harassment-at-work.

[85] Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975, 1015–16 (2015).

harassment or assault to tweet #MeToo.[86] The avalanche of tweets that followed shocked the public consciousness and resulted in many high-profile job terminations.[87] Movie producer Harvey Weinstein and famed newscaster Matt Lauer, for instance, both lost their jobs and were publicly shamed after the movement exposed their misconduct.[88]

But in the wake of #MeToo activism, an opposing discriminatory practice is becoming more popular. Harassment is pairing with its opposite, shunning, as sexual harassment's unwanted attention because of sex or gender is combining with *no* attention because of sex or gender. Many male workers are now simply refusing to engage or work closely with their female colleagues,[89] and encouraging others to do the same.[90] Commonly called "the Pence rule" after U.S. Vice President Mike Pence publicly declared that he will not dine alone with female colleagues, an increasing number of male workers have followed suit.[91]

Anecdotal evidence of shunning abounds, as multiple writers report they are personally aware of male workers who acknowledge engaging in the practice.[92] Academic studies and surveys confirm

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[86] Joanna L. Grossman, *The Aftermath of the #MeToo Movement*, VERDICT (June 26, 2018), https://verdict.justia.com/2018/06/26/the-aftermath-of-the-metoo-movement.

[87] The movement originated in 2006, with activist Tarana Burke, who used the phrase "as a tool for women and girls of color who had survived sexual harassment or assault." *Id.*

[88] *Id.* Harvey Weinstein was also criminally convicted for rape. *See* Laura Newberry, *Harvey Weinstein Conviction Could Pave the Way for More Sexual Assault Prosecutions*, L.A. TIMES (Feb. 28, 2020, 5:00 AM), https://www.latimes.com/california/story/2020-02-28/harvey-weinstein-conviction-could-pave-the-way-for-more-sexual-assault-cases.

[89] Katherine Tarbox, *Is #MeToo Backlash Hurting Women's Opportunities in Finance?*, HARV. BUS. REV. (Mar. 12, 2018), https://hbr.org/2018/03/is-metoo-backlash-hurting-womens-opportunities-in-finance.

[90] Casey Quinlan, *Conservatives Will Not Stop Pushing the 'Pence Rule' as a Solution to Sexual Harassment*, THINKPROGRESS (Nov. 18, 2017, 2:04 PM), https://thinkprogress.org/conservatives-pence-rule-sexual-harassment-9da198df4e3a/.

[91] *Id.*

[92] Tarbox, *supra* note 89. One writer from the finance industry reports that "several men" she knows now deliberately refuse to hire women and will decline to manage women if possible. *Id.* The writer "heard men say that they're less likely to fire or associate with women as a result of the intensity of MeToo," and has "heard directly from male executives at two prominent Wall Street firms that they are moving their female direct reports to report to female bosses." *Id.*; *see also* Kim Elsesser, *Are Attractive Women Being Shunning by Employers? Tony Robbins Says Yes*, FORBES (Apr. 12, 2018, 3:15 PM), https://www.forbes.com/sites/kimelsesser/2018/04/12/are-attractive-women-being-shunned-by-employers-tony-robbins-says-yes/#62c867c3e854.

this anecdotal data.[93] The World Economic Forum reports that in the post-#MeToo world, men are not "comfortable taking female protégés under their wings" and "the number of male managers who are uncomfortable mentoring women has tripled."[94] According to a recent study, "27% of men avoid one-on-one meetings with female co-workers," "21% of men said they would be reluctant to hire women for a job that would require close interaction (such as business travel)," and "19% of men would be reluctant to hire an attractive woman."[95]

Shunning is, in and of itself, a deeply discriminatory practice. Refusing to professionally interact with women or denying them access to work opportunities on the basis of sex is actionable in its own right. But though "these practices are pervasive," they are "hard to prove."[96] They are also deeply damaging, professionally and psychologically.[97] Shunning can torpedo a woman's career, "especially when her success depends on networking, mentoring, or business-building."[98] A growing number of studies suggest that mentoring women is one of the most effective ways to promote equality in the workplace, while denying mentorship drastically diminishes potential career prospects.[99]

The combination of shunning and harassment creates a double bind in which the two simultaneous threats, both of which can derail women's work aspirations, function to oppress and continually signal that women are in a hostile environment in which they do not belong and are not welcome.[100] Like with under- and overpolicing,

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[93] Kim Elsesser, *The Latest Consequence of #MeToo: Not Hiring Women*, FORBES (Sept. 5, 2019, 3:30 PM), https://www.forbes.com/sites/kimelsesser/2019/09/05/the-latest-consequence-of-metoo-not-hiring-women/#54c425c280b0.

[94] Stéphanie Thomson, *#MeToo Is Having Unexpected Consequences for Women at Work*, WORLD ECON. F. (Mar. 7, 2018), https://www.weforum.org/agenda/2018/03/metoo-campaign-women-isolated-at-work/.

[95] *See* Arwa Mahdawi, *Men Now Avoid Women at Work—Another Sign We're Being Punished for #MeToo*, GUARDIAN (Aug. 29, 2019), https://www.theguardian.com/lifeandstyle/2019/aug/29/men-women-workplace-study-harassment-harvard-metoo.

[96] Grossman, *supra* note 86.

[97] *Id.*

[98] *Id.*

[99] *See* Bell Rose Ragins & Terri A. Scandura, *Gender Differences in Expected Outcomes of Mentoring Relationships*, 37 ACAD. MGMT. J. 957, 959–60 (1994) (stating that mentoring relationships are particularly important for female success in the workplace).

[100] *See* Joanna L. Grossman, *Vice President Pence's "Never Dine Alone with a Woman" Rule Isn't Honorable. It's Probably Illegal*, VOX, https://www.vox.com/the-big-idea/2017/3/31/15132730/pence-women-alone-rule-graham-discrimination (last updated Dec.

discriminatory dualism in the sexual harassment context is rooted in the perilous state of being simultaneously "harassed and ignored."[101] Professor Joanna Grossman memorably illustrates the point: "We have a president who brags about grabbing women by the pussy—and a vice president who won't even have dinner with them. These are two sides of the same coin, both reflecting the fundamentally unequal sphere working women inhabit because of male behavior."[102] Shunning and harassment together function to perpetuate workplace inequality.

III. DISCRIMINATORY DUALISM AS ADAPTIVE DISCRIMINATION

Importantly, discriminatory dualism is a deeply dynamic process. It is not just the existence of polarity in discriminatory practices, but the perpetual movement between the two poles which lends discriminatory dualism its remarkable durability.[103] Historically, within each example of discriminatory dualism, there have been multiple cycles of the opposing practices rising and falling. Sometimes as a form of backlash against social or political pressure, and sometimes as a result of changing circumstances, discriminatory dualism deftly oscillates and pivots, disorienting agitations for social chance and deflecting many criticisms. Whenever one of the paired practices is threatened, discriminatory dualism simply reemphasizes its opposing mode, perpetually evading capture and redress.

This relentless dynamism is a form of "adaptive discrimination"[104]—discrimination that adapts "to the needs and constraints of the time."[105] Adaptive discrimination highlights that "discrimination is systemic, dynamic, and intergenerational,"[106] and "morphs through time across our social, economic, and political

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4, 2017, 10:32 AM) (noting that women "pay a heavy price" from shunning, including exclusions from meetings and even loss of employment from "jealous wives").

101 Jenée Desmond-Harris, *Are Black Communities Overpoliced or Underpoliced? Both.*, VOX (Apr. 14, 2015, 1:30 PM), https://www.vox.com/2015/4/14/8411733/black-community-policing-crime.

102 Grossman, *supra* note 100.

103 *See* Boddie, *supra* note 12, at 1239 (discussing idea that "racial discrimination adapts to the legal and social environment by mutating to evade prohibitions against intentional discrimination" (emphasis omitted)).

104 *Id.* at 1237.

105 Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 10 (2011).

106 Boddie, *supra* note 12, at 1235.

landscapes."[107] For example, "formal bans on intentional discrimination" tend to be "followed by episodic retrenchment" in the form of more facially-neutral practices, a pattern which has appeared in in various contexts, including racial school segregation, employment discrimination, and racialized zoning.[108]

Discriminatory dualism adds to this theory of adaptive discrimination by demonstrating another distinct way that discrimination often adapts. Baked into many discriminatory forms is the ever-present possibility of their opposite. And if social circumstances shift to make one form of discrimination more difficult, discrimination will often shift and emphasize that opposing practice instead. Under- and overpolicing, redlining and reverse redlining, and sexual harassment and shunning all involve a dynamic and flexible cycling between the two poles, sometimes fueled by explicit backlash and sometimes created by changing circumstances.

A. BACKLASH

Backlash has been a significant catalyst for discriminatory dualism in the contexts of policing and employment. Loosely defined as "[a] strong and negative reaction by a large number of people, especially to a social or political development,"[109] backlash is a collective response that seeks to maintain a threatened status quo.[110] It often takes the form of trying to roll back new rights (as occurred after the U.S. Supreme Court's decision in *Roe v. Wade*), or refusing to implement a new legal ruling (as in the aftermath of *Brown v. Board of Education*, when many Southern states refused to desegregate their schools).[111] Discriminatory dualism suggests

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[107] *Id.* at 1238.

[108] *Id.* at 1248.

[109] *Backlash*, LEXICO, https://www.lexico.com/definition/backlash (last visited Mar. 19, 2020).

[110] Julie E. Maybee, *Politicizing the Personal*, *in* THEORIZING BACKLASH: PHILOSOPHICAL REFLECTIONS ON THE RESISTANCE TO FEMINISM 135 (Anita M. Superson et al. eds., 2002); *see also* SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN *xxi* (2006) (noting that backlash "is not a conspiracy, with a council dispatching agents from some central control room," but is nevertheless a collective action).

[111] For a discussion of the backlash that followed *Roe v. Wade*, see generally Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028 (2011). And for a discussion of the backlash that followed *Brown v. Board of Education*, see generally Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 1994 J. AM. HIST. 81 (1994).

that backlash can also take another form, and trigger a discriminatory practice to switch into its opposite mode.

The history of sexual harassment and shunning contains multiple cycles of oscillations fueled by backlash. In the 1990s, after laws prohibiting sexual harassment had gained traction and the Anita Hill revelations regarding Justice Clarence Thomas furthered a surge in complaints, shunning arose as part of a broad backlash movement.[112] This pattern repeated after the successes of the recent #MeToo movement in the 2010s.[113] Framed in this historical perspective, the newest iteration of shunning appears less like an unexpected or "unintended consequence" of #MeToo.[114] Instead, shunning appears as a predictable, familiar response to pressures placed on sexual harassment practices. While the #MeToo movement has been blamed for triggering the shunning backlash, as though there were something inherently wrong with the movement itself,[115] in fact shunning "existed long before the [MeToo] hashtag," and tends to rise as a popular practice any time legal or social pressure comes down on sexual harassment.[116]

Toggling back and forth between shunning and sexual harassment has a significant consequence. It ensures that the menu of options presented to those seeking social change consists of only two possible options—either they can have sexual harassment, or they can have shunning.[117] Either (1) "sexual harassment rules are underenforced but men are less fearful of interacting with women," or (2) "sexual harassment is strictly enforced and men hide from

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[112] *See* Justine H. Brousseau et al., *Litigating Sexual Harassment Claims: A Plaintiff's Perspective* ("In the 1990s, claims of sexual harassment rose dramatically. This was fueled in large part by Anita Hill's testimony during the 1991 Clarence Thomas Supreme Court confirmation hearings and the subsequent passage of the Civil Rights Act of 1991, which added emotional distress and punitive damages to Title VII."), *in* MASSACHUSETTS EMPLOYMENT LAW § 11.1 (4th ed. 2015); Tami Forman, *How to Find Mentors in the #MeToo Era*, FORBES (Jan. 29, 2019, 6:42 PM), https://www.forbes.com/sites/tamiforman/2019/01/29/how-to-find-mentors-in-the-metoo-era/#373caa9b4495 ("[T]he idea of a relationship being misconstrued or a man being falsely accused of harassment has been around since the Anita Hill hearings back in the early 90s.").

[113] *See* Smith, *supra* note 1. ("But according to the conservative Chosun Ilbo, some women are now feeling a backlash in the male-dominated business world, where they are being deliberately excluded from office gatherings and business trips.").

[114] *Cf.* Claire Cain Miller, *Unintended Consequences of Sexual Harassment Scandals*, N.Y. TIMES (Oct. 9, 2017), https://www.nytimes.com/2017/10/09/upshot/as-sexual-harassment-scandals-spook-men-it-can-backfire-for-women.html.

[115] *Id.*

[116] Thomson, *supra* note 94; *see also* Grossman, *supra* note 86.

[117] Grossman, *supra* note 86.

women."[118] This polarity elides the possibility of a middle ground, and attempts to suggest that the possibility of a workplace that incorporates all genders in a non-discriminatory way is simply impossible.[119]

Backlash has spurred similar cycles in the under- and overpolicing context. The historical perspective here, too, is revealing. Underpolicing was one of the many problems that precipitated the civil rights movement,[120] and contemporary overpolicing practices can be traced in part to a "backlash against [this] movement."[121] By 1967, as the civil rights movement started to wind down, overpolicing had surged, and "stopping and frisking blacks" was so pervasive that the President's Commission on Law Enforcement and the Administration of Justice "publicly warned about the consequences of these 'aggressive' patrol tactics."[122] These warnings went unheeded, as even more "heavy-handed policing strategies emerged,"[123] which particularly targeted black inner-city

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[118] Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 291 (2018).

[119] *Id.*

[120] *See* Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1026 (2010). David and Melissa Barlow reported that a police officer in a major South Carolina city recounted the following:

> [R]ecords personnel were cleaning out their files and disposing of old police reports when they came across an Incident Report on a murder that had occurred in the 1930s. According to the officer, the entire contents of the murder report and investigation stated: "[N*] A stabbed and killed [N*] B."

BARLOW & BARLOW, *supra* note 29, at 99–100. The civil rights movement unfortunately did not remedy the problem of underpolicing: in 1968, "the President's Commission on Civil Disorders found that "underenforcement remained a critical problem in disadvantaged neighborhoods." *Id.* at 101 ("The commission concluded that ghetto neighborhoods received inadequate police protection, and the police held people to much lower standards of proper conduct in African American communities than in white ones."); *see also* Jeff Guo, *America's Tough Approach to Policing Black Communities Began as a Liberal Idea*, WASH. POST (May 2, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/05/02/americas-tough-approach-to-policing-black-communities-began-as-a-liberal-idea/ (discussing the commission's conclusion).

[121] Haney López, *supra* note 120, at 1026. Interestingly, this backlash actually ended up strengthening the civil rights movement since

> the very directness of some of these forms [of backlash] made the issues visible. As Martin Luther King well knew, the image of Bull Connor's police force using fire hoses and dogs against civil rights marchers in Birmingham was a major turning point in enlisting the sympathy of northern liberals for the civil rights fighters.

Jane Mansbridge & Shauna L. Shames, *Toward a Theory of Backlash: Dynamic Resistance and the Central Role of Power*, 4 POL. & GENDER 623, 629 (2008).

[122] Boddie, *supra* note 12, at 1255–56.

[123] *Id.* at 1255 n.110.

residents.[124] Political factors[125]—like President Johnson's War on Crime, which offered federal funding for beefing up "patrols in urban areas"[126]—enhanced the reach of these overpolicing practices, and began the "long saga of escalating surveillance and control in urban areas."[127]

Recently, as concerns about overpolicing have become more widespread, another cycle has emerged: criticism of overpolicing has been met with increased underpolicing. As the Black Lives Matter movement continues to expose the epidemic of blue-on-black killings and police violence against minorities,[128] police departments have responded by deliberately underpolicing predominately black communities.[129] This dynamic has been noted in New York City, New York;[130] Chicago, Illinois;[131] and Ferguson, Missouri.[132] In Baltimore, after the police were criticized and officers were criminally charged for the death of Freddie Gray in the back of a

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[124] *Id.*

[125] Bell, *supra* note 37, at 2117.

[126] Guo, *supra* note 120.

[127] *Id.*

[128] German Lopez, *There Are Huge Racial Disparities in How US Police Use Force*, VOX, https://www.vox.com/identities/2016/8/13/17938186/police-shootings-killings-racism-racial-disparities (last updated Nov. 14, 2018, 4:12 PM) ("An analysis of the available FBI data . . . found that [U.S.] police kill black people at disproportionate rates: Black people accounted for 31 percent of police killing victims in 2012, even though they made up just 13 percent of the [U.S.] population.").

[129] *See* Newkirk, *supra* note 39 (noting that some police departments are responding by "using hypothetical or actual under-policing—a specific denial of a public service—as a veiled threat").

[130] In 2015, after criticism of overpolicing practices, the New York Police Department initiated a "slowdown." *See* Dara Lind, *The 'Ferguson Effect,' A Theory That's Warping the American Crime Debate, Explained*, VOX (May 18, 2016, 9:40 AM), https://www.vox.com/2016/5/18/11683594/ferguson-effect-crime-police.

[131] In response to criticism over the police shooting and killing 17-year-old Laquan McDonald, the Fraternal Order of Police suggested that officers should not volunteer to work on the Labor Day Holiday weekend in 2016. *See* Jeremy Gorner, *Chicago Police Union Calls for Officers Not to Work Overtime on Labor Day Weekend*, CHI. TRIB. (Aug. 31, 2016, 8:48 PM), https://www.chicagotribune.com/news/breaking/ct-chicago-police-labor-day-overtime-fop-met-20160831-story.html.

[132] Brad Heath, *Baltimore Police Stopped Noticing Crime After Freddie Gray's Death. A Wave of Killings Followed*, USA TODAY (July 12, 2018, 5:49 AM), https://www.usatoday.com/story/news/nation/2018/07/12/baltimore-police-not-noticing-crime-after-freddie-gray-wave-killings-followed/744741002/. Attorney General William Barr also suggested that underpolicing was an appropriate response to criticisms of the police, stating that "if communities don't give . . . support and respect, they might find themselves without the police protection they need." *See* Sean Collins, *William Barr Said Certain 'Communities' Should Show Police More Respect, Ignoring the Reasons Why They Don't*, VOX (Dec. 4, 2019, 2:20 PM), https://www.vox.com/policy-and-politics/2019/12/4/20995074/william-barr-police-protest-shootings-consent-decree.

police van in 2015, the Baltimore police department "stop[ped] noticing crime."[133] Two years later, in 2017, Baltimore's "murder rate reached an all-time high," and "[t]he number of shootings in some neighborhoods . . . more than tripled."[134] When asked about the increasing crime rate, acting Baltimore Police Commissioner Gary Tuggle responded: "In all candor, officers are not as aggressive as they once were [prior to the death of Freddie Gray]. It's just that fact."[135]

This shrug from the Baltimore Police Department conveys that "if you complain about the way the police do [their] job, maybe [they]'ll just lay back and not do it as hard."[136] In other words, underpolicing represents a continued and pointed backlash against attempts at police reform. It is a transition from, "You want policing? We'll give you policing!" to its opposite: "You want less policing? We'll give you less policing!"[137] In both cases, the requested reforms are twisted and subverted, and the continual oscillation between the extremes of under- and overpolicing thwart attempts to end racialized police violence and receive appropriate police protection.[138]

These oscillations cast the recipient of oppressive treatment as the author of his or her own oppression.[139] When the response to criticism of one discriminatory practice is to instead deliver its opposite, the complainant looks like they should not have made the

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[133] Heath, *supra* note 132 ("In the space of just a few days in spring 2015 . . . officers in nearly every part of the city appeared to turn a blind eye to everyday violations. They still answered call for help. But the number of potential violations they reported seeing themselves dropped by nearly half.").

[134] *Id.* In 2017, 342 people were killed in Baltimore. *Id.* A causal relationship is difficult to prove, however. Natapoff, *supra* note 20, at 1723–24 ("The relationship between policing and crime is complex. Some police failures exacerbate crime, others may have no direct impact on criminality at all, and crime rates rise and fall for many reasons having nothing to do with policing. Indeed, there is substantial scholarly skepticism about the impact that policing is capable of having on crime rates, particularly the reactive policing of the inner-city beat." (footnotes omitted)).

[135] Heath, *supra* note 132 ("Tuggle blames a shortage of patrol officers and the fallout from a blistering 2016 Justice Department investigation that found the city's police regularly violated residents' constitutional rights and prompted new limits on how officers there carry out what had once been routine parts of their job.").

[136] *Id.*

[137] This phrasing borrows from KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 1730 (2015) ("You want marriage? We'll give you marriage!").

[138] *Cf.* BARLOW & BARLOW, *supra* note 29, at 68 ("Although police actions did not create the social, economic, and racial inequalities of U.S. society, they have the effect of magnifying and sustaining these cleavages.").

[139] FALUDI, *supra* note 110, at 110–11.

complaint in the first place.[140] Returning to the employment context, responding to complaints of sexual harassment by shunning operates to punish the victims of sexual harassment and communicates that if women had not complained, then male workers would not be forced to respond in this way.[141]

Indeed, a dominant stream of backlash theory argues that backlash results from progressive change "going too far, too fast," often using the wrong medium, the courts.[142] This view suggests that fault lies with the reformer for not adhering to an appropriate mechanism and schedule for social change, rather than with the oppressive system itself.[143] The most commonly held up examples of social progressives bringing about their own demise are the U.S. Supreme Court decisions in *Brown v. Board of Education*[144] and *Roe v. Wade*,[145] which are derided for triggering backlash because they were "Supreme Court decisions, not change that came about through legislative action or state by state."[146] Discriminatory dualism, however, suggests that the medium of change is largely irrelevant to whether or not backlash occurs.[147] Switches in polarity are not limited to judicial decisions: they occur following all forms of contestation, including social movement advocacy and legislative enactments, or whenever an oscillation can reinforce the stability of the social hierarchy.

B. OPPORTUNISM AND CHANGING SOCIAL CIRCUMSTANCES

Unlike discriminatory dualism in policing and employment, backlash has not had a major role in the cycles of redlining and

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[140] *Id.* at 2 ("The women's movement, as we are told time and time again, has proved women's own worst enemy.").

[141] *Id.*

[142] Mansbridge & Shames, *supra* note 121, at 628.

[143] *Id.*

[144] Brown v. Bd. of Educ., 347 U.S. 483 (1954) (desegregating public schools and abandoning the "separate but equal" doctrine).

[145] Roe v. Wade, 410 U.S. 113 (1973) (protecting a woman's right to have an abortion).

[146] *See* Mansbridge & Shames, *supra* note 121, at 628 (noting that these cases were "widely perceived" as going "too far, too fast"); *see also* Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and* Roe v. Wade, 71 WASH. & LEE L. REV. 969, 969 (2014) (arguing that "the ideological entrenchment we associate with *Roe* came later than we have thought and emerged for reasons beyond the Court's decision").

[147] *See generally* FALUDI, *supra* note 110 (analyzing backlash against the broader feminist social movement).

reverse redlining. Rather, the oscillations in this area have been rooted in changing circumstances and opportunism.

As noted earlier, redlining began in earnest in the 1940s. By the 1950s, an early form of reverse redlining had emerged: the exploitative private selling of properties "on contract."[148] Because black families and individuals had been shut out of the standard credit market, unscrupulous lenders saw an opportunity.[149] They offered to sell black purchasers homes "on contract."[150] In this form of transaction, a white owner would buy a home and subsequently offer a "rent to own" scheme to a black prospective home owner, on onerous and exploitative terms.[151] These "on contract" agreements "combined all the responsibilities of homeownership with all the disadvantages of renting—while offering the benefits of neither."[152] Under the terms of these agreements, the seller retained the deed until all payments were made, and "unlike with a normal mortgage, [the purchaser] would acquire no equity in the meantime."[153] Thus, if a purchaser "missed a single payment, he would immediately forfeit" not only all payments already made, but, most importantly, "the property itself."[154] The "seller could repossess the house as easily as a used car salesman repossessed a delinquent automobile," and a system of escalating and inflated scheduled payments ensured such repossession happened frequently.[155]

Estimates indicate that in the 1950s, "on contract" sales accounted for almost eighty-five percent of the properties sold to black Chicagoans.[156] According to one calculation, white speculators made roughly one million dollars a day from these deals which left prospective buyers with no actual property to show for the money

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[148] *See* Keeanga-Yamahtta Taylor, *Back Story to the Neoliberal Moment: Race Taxes and the Political Economy of Black Urban Housing in the 1960s*, 14 SOULS 185, 193 (2012) (explaining that African Americans forced to purchase homes "on contract" were charged over double the standard interest rate).

[149] *See id.* (identifying Chicago's Savings and Loan Associations as particularly egregious examples).

[150] BERYL SATTER, FAMILY PROPERTIES: HOW THE STRUGGLE OVER RACE AND REAL ESTATE TRANSFORMED CHICAGO AND URBAN AMERICA 4 (2010).

[151] *Id.* at 4–5.

[152] Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/.

[153] *Id.*

[154] *Id.*

[155] SATTER, *supra* note 150, at 4 ("If the contract seller happened to be a speculator who charged a wildly inflated price for the building, then a missed payment—and subsequent quick eviction and resale for profit—was practically guaranteed.").

[156] *Id.*

they expended.[157] These on-contract agreements "stripped black migrants of their savings during the very years when whites of similar class background were getting an immense economic boost through FHA-backed mortgages that enabled them to purchase new homes for little money down."[158] This, in turn, contributed to the racial wealth gap that still exists today.[159]

Eventually, on-contract selling became untenable, as lawsuits brought significant attention to the practice. Though generally unsuccessful,[160] this litigation exposed the practice and made on-contract selling more difficult.[161] This early form of reverse redlining faded, to be replaced decades later with a new form of reverse redlining, the predatory lending that led to the recent subprime mortgage crisis.[162] The rise of reverse redlining in both instances was fueled not by backlash, but by changing circumstances and opportunism.

IV. THE HARMS OF DISCRIMINATORY DUALISM

Regardless of its trigger, though, discriminatory dualism in all of its forms is a manifestation of preservation-through-transformation. Preservation-through-transformation posits that discriminatory practices can hold steady over time, because the rhetorical justifications and rationales underlying them change and modernize.[163] Discriminatory dualism also participates in preserving social hierarchies through change, but here the change

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[157] *Id.* at 5.

[158] *Id.*

[159] Brian Thompson, *The Racial Wealth Gap: Addressing America's Most Pressing Epidemic*, FORBES (Feb. 18, 2018, 12:15 PM), https://www.forbes.com/sites/brianthompson1/2018/02/18/the-racial-wealth-gap-addressing-americas-most-pressing-epidemic/#607530f47a48.

[160] The outcomes of the trial, however, reflected racial biases. For example, one juror, who acquitted the defendants who had quite clearly engaged in discriminatory practices, stated afterwards that "[h]is goal as a juror . . . had been to ensure that the court's decision would help overturn 'the mess Earl Warren made with *Brown v. Board of Education* and all that nonsense.'" SATTER, *supra* note 150, at 368.

[161] *Id.* at 369 ("It turned out that the key to challenging the nationwide denial of credit based on race lay not in the CBL attorneys' courtroom debates but in something far more prosaic—namely, the detailed financial information that had been provided . . . .").

[162] *See, e.g.*, Steve Denning, *Lest We Forget: Why We Had a Financial Crisis*, FORBES (Nov. 22, 2011, 11:28 AM), https://www.forbes.com/sites/stevedenning/2011/11/22/5086/#3f26a147f92f; John V. Duca, *Subprime Mortgage Crisis*, FED. RES. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/subprime_mortgage_crisis.

[163] *See generally* Siegel, *supra* note 11.

comes less in the underlying rhetoric, and more in the shifts and swings in the discriminatory practices themselves. The oscillating nature of discriminatory dualism sustains its own survival. Thus, one unique harm of discriminatory dualism is its longevity: it allows discriminatory systems to persist longer than they otherwise would.

But discriminatory dualism also inflicts two additional harms. The first is an epistemic injustice. This epistemic injustice flows from the fact that discriminatory dualism has existed for so long without a name or conceptual frame.[164] The second is a pathologization harm: discriminatory dualism pathologizes and seemingly reinforces pernicious stereotypes about its subjects.

A. HERMENEUTICAL INJUSTICE

Discriminatory dualism inflicts epistemic injustices on those subject to it. Epistemic injustices are "wrong[s] done to someone specifically in their capacity as a knower."[165] A common form is testimonial injustice, which occurs when a hearer denies the credibility of a speaker because of race, gender, or some other aspect of that speaker's identity.[166] A lesser-known form is hermeneutical injustice, which occurs "when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their social experiences."[167] In other words, hermeneutical injustice occurs when there are "blanks where there should be a name for an experience."[168]

Hermeneutical injustice captures the concept that structural and social disadvantage produce epistemic disadvantage as well.[169] Members of disadvantaged groups are accorded only unequal participation in the "practices through which social meanings are generated,"[170] and thus the "experiences of members of hermeneutically marginalized groups" are left out of dominant discourses.[171] So, while many critical race theorists have shown that "subordinated groups in any social system have knowledge that the

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[164] *See* Rachel McKinnon, *Allies Behaving Badly: Gaslighting as Epistemic Injustice*, *in* ROUTLEDGE HANDBOOK TO EPISTEMIC INJUSTICE 1 (Gaile Pohlaus, Jr. et al., eds., 2018).
[165] FRICKER, *supra* note 15, at 44.
[166] *Id.* at 4.
[167] *Id.* at 1.
[168] *Id.* at 160.
[169] *Id.* at 1.
[170] *Id.* at 6.
[171] *Id.*

privileged lack,"[172] that knowledge does not become part of "dominant hermeneutical resources."[173] Because of unequal power relations, hermeneutical resources are unequally created.[174] Those with power "tend to have appropriate understandings of their experiences ready to draw on as they make sense of their social experiences," but the experiences of others are excluded from this broader lexicon.[175]

An example of hermeneutical injustice arose in the period before sexual harassment was named and framed as a legal wrong.[176] Without this conceptual tool, victims of sexual harassment were aware of their experiences, but lacked the language that would allow them to analyze those experiences and communicate them easily to others.[177] Until the hermeneutical resources were created to express this kind of harm, "the knowledge of oppression remain[ed] mute"[178] and mostly unshareable.[179] Important political effects flow from such a lack of shared knowledge: when a person is unable to clearly communicate a problem, that person is "prevent[ed] . . . from protesting it, let alone securing effective measures to stop it."[180]

Discriminatory dualism is by no means a new phenomenon, and those impacted by it have long known that they were experiencing it. But without a collective interpretive resource to validate, confirm or convey this experience, the lived experiences of those most impacted were subtly invalidated. The political ramification of this lack of a conceptual resource is that without a name or frame, the very *existence* of the phenomenon can be more easily denied. "Members of more powerful groups" can sometimes engage in "defective knowledge practices" that "produce and maintain distorted understandings of the social experiences of marginalized

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172 Angela P. Harris, *Critical Race Theory*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 266 (2d ed. 2015).

173 Rebecca Mason, *Two Kinds of Unknowing*, 26 HYPATIA 294, 294 (2011).

174 *Id.*

175 FRICKER, *supra* note 15, at 151.

176 *Id.*

177 SUSAN BROWNMILLER, IN OUR TIME: A MEMOIR OF A REVOLUTION 280–81 (1990) (describing a group of women who discuss their experiences of sexual harassment before there was a name for it, when "[t]he 'this' they were going to break the silence about had no name").

178 FALUDI, *supra* note 110, at 111 (quoting Susan Griffin); *see also* FRICKER, *supra* note 15, at 4 (noting that a person who lacks hermeneutical resources is less able to render intelligible "something which it is particularly in his or her interests" to share).

179 FRICKER, *supra* note 15, at 4.

180 *Id.* at 160.

groups"[181] in ways that further their own interests. In other words, for those in power, there is an upside for failing to see phenomena like discriminatory dualism. Sometimes conceptual gaps are part of an "epistemically culpable and morally noxious *mis*cognition that facilitates the maintenance of the status quo"[182] and perpetuates existing social hierarchies.[183]

The embedded contradictions in discriminatory dualism amplify the hermeneutical injustices associated with it. Because discriminatory dualism involves two seemingly opposing practices, the notion that both practices might coexist is inherently befuddling. The opposing forms seem like they should cancel each other out, and could not be both be true at the same time. "[U]nclear and incongruent messages" are distressing and "personally problematic" for those receiving them,[184] and people in those scenarios may "conclude that [they] must be overlooking vital clues" that would explain their situation.[185] They can begin to doubt their own understanding of truth.[186] Discriminatory dualism thus participates in making "members of vulnerable groups . . . impossible witnesses to their own victimization and" denies them "the social standing and credibility to articulate it."[187]

Those who study the individual paradoxes of discriminatory dualism often speak to the difficulties in making sense of these contradictions.[188] As one reporter queried, after examining under- and overpolicing:

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[181] Mason, *supra* note 173, at 300.

[182] *Id.* (citing CHARLES MILLS, THE RACIAL CONTRACT (1998)).

[183] FRICKER, *supra* note 15, at 4. Hermeneutical injustices thus can function as a form of gaslighting, making the perceiver question their own perceptions. Gaslighting is a tactic that became part of the cultural lexicon in the 1930s and 1940s following a stage play and film of that title. Kate Abramson, *Turning Up the Lights on Gaslighting*, 28 PHIL. PERSP. 1, 2 (2014). In the play (and film), a woman's new husband introduces subtle changes to her environment, while simultaneously denying that he is doing so or that they are happening, with the intent of making her distrust herself and her perception of reality and to make her (and others) unsure of her sanity. *See* McKinnon, *supra* note 164.

[184] Sarah J. Tracy, *Dialectic, Contradiction, or Double Bind? Analyzing and Theorizing Employee Reactions to Organizational Tension*, 32 J. APPLIED COMM. RES. 119, 120 (2004).

[185] *Id.* at 122 (quoting PAUL WATZLAWICK ET AL., PRAGMATICS OF HUMAN COMMUNICATION: A STUDY OF INTERACTIONAL PATTERNS, PATHOLOGIES AND PARADOXES 217 (1967)).

[186] *Id.* Another response is to "comply with any and all injunctions with complete literalness and to abstain overtly from any independent thinking." *Id.* (quoting WATZLAWICK ET AL., *supra* note 185, at 218).

[187] Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1498 (2016).

[188] For example, scholars struggling to make sense of the under and overpolicing paradox have tried to draw distinctions like underpolicing affects victims, while overpolicing affects

> [One writer] says high-crime black communities are underpoliced. Isn't the problem in fact that they're overpoliced? The community is up in arms over mass incarceration, zero tolerance, stop and frisk, and all the rest. How can it be sensible for anybody to ask for more of the same?[189]

Or as other scholars ask: "How can a community be simultaneously over-policed *and* under-policed?"[190] and "Are there too many police or are there too few?"[191]

These comments highlight the conceptual trap of discriminatory dualism, and its potent discursive power.[192] Those who aim to maintain current power structures can argue that problems with policing should be answerable through the simple question of whether there should be more police or fewer police.[193] This binary inquiry "reduce[s] arguments about police legitimacy to the point of nothingness"[194] because it renders anything outside of its tight polarities an absurdity. It sets up a conceptual false dichotomy that politically and socially functions to "repress aspirations for alternative political arrangements," mainly "by predisposing us to regard comprehensive alternatives to the established [binary] order as absurd."[195]

In this dichotomy, each strand in a discriminatory dualism paradox positions itself as its opposite's solution. For example, in policing, "[t]he conventional story tells [us] that the remedy for too much policing is always less policing,"[196] and vice versa.[197]

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perpetrators, or young people feel overpoliced while older folks feel underprotected. *See* Natapoff, *supra* note 20, at 1731. As Monica Bell writes, the situation is more complex: "Many young men, too, would ideally want the police to protect them and their communities." Bell, *supra* note 36, at 2118. Bell describes a "conflicted desire for police protection." *Id.* at 2119.

189 Kennedy, *supra* note 26.

190 Natapoff, *supra* note 20, at 1718 (emphasis added).

191 Newkirk, *supra* note 39.

192 *Id.*

193 *Id.*

194 *Id.*

195 Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1361 (1982).

196 Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1289 (2016).

197 Natapoff, *supra* note 20, at 1773. When communities "ask for *better* policing, legislators [give them] *more* instead." Elizabeth Hinton, Julilly Kohler-Hausmann & Vesla M. Weaver, Opinion, *Did Blacks Really Endorse the 1994 Crime Bill?*, N.Y. TIMES (Apr. 13, 2016), https://www.nytimes.com/2016/04/13/opinion/did-blacks-really-endorse-the-1994-crime-

Similarly, in housing, reverse redlining's deluge of exploitative credit purported to be the answer to redlining's denial of credit, and was often couched in the rhetorical language of offering paths to ownership that would not otherwise be available.[198] Shunning, too, purports to ensure non-harassment.[199] By "solving" one discriminatory practice through supplementing it with another, discriminatory dualism creates a double bind that eclipses any potential options that lie outside its own reality.

B. PATHOLOGIZATIONS AND STEREOTYPE AFFIRMATIONS

In addition to epistemic and hermeneutical injustice, discriminatory dualism often pathologizes its subjects and seemingly confirms the "correctness" of various stereotypes. Much like backlash, discriminatory dualism's pathologizations and stereotype affirmations place fault on those who experience and complain about discrimination, rather than with the discriminatory systems themselves.[200]

For example, "[t]he enduring view of African Americans in this country is as a race of people who are prone to criminality."[201] This view serves as an underlying premise for overpolicing, that "people of color commit more crime and therefore must be subjected to harsher police tactics."[202] And once overpolicing is in place, it finds the crime it is looking for, and "reveals" a high level of criminal activity.[203] Therefore, despite social realities like the oft-cited statistic that white people possess and use drugs at similar rates to people of color, overpolicing renders crime visible only in certain

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bill.html. By reinterpreting complaints of underpolicing as simply "too little policing," institutions place communities in the "no win situation" of either accepting underenforcement, or trading it for overenforcement.

198 *See generally* SATTER, *supra* note 150.

199 *See supra* Section II.C.

200 Discriminatory dualism is arguably part of a "political, social, economic[,] and cultural process that perpetuates and normalizes a white [and heterosexual and male] supremacist reality through pathologizing those who resist." Angelique M. Davis & Rose Ernst, *Racial Gaslighting*, 7 POL., GROUPS & IDENTITIES 761, 761 (2017).

201 Ta-Nehisi Coates & Jackie Lay, *The Enduring Myth of Black Criminality*, ATLANTIC (Sept. 10, 2015), https://www.theatlantic.com/video/index/404674/enduring-myth-of-black-criminality/ (exploring how mass incarceration has affected African American families).

202 ALEX S. VITALE, THE END OF POLICING 2 (2017).

203 *Id.*

communities.[204] Overpolicing "exposes" more criminality, confirming the stereotype underlying it and the need for the practice of overpolicing to continue.

As the stereotype suggests, overpolicing paints crime as a problem of individual and group pathology rather than a function of socio-structural causes.[205] In fact, in addition to affirming the stereotypes that people of color are inherently criminal, the broken-windows theory informing overpolicing "magically reverses the well-understood causal relationship between crime and poverty."[206] Vast reams of social science data demonstrate that "poverty and social disorganization" contribute to crime, but overpolicing suggests the opposite, that "poverty and social disorganization" are not a cause of crime, but a *result*.[207]

Moreover, overpolicing masks the ways in which the "black criminal" stereotype is itself underwritten by underpolicing.[208] Underpolicing does not deter crime, but it does deter victims and bystanders from assisting with the minimal law enforcement efforts that are made, thereby perpetuating the problem of unsolved violent crime and purportedly validating the stereotype that people of color are prone to criminality.[209] Overpolicing thus appears like a needed disciplinary mechanism, which in turn serves as a justification for refusing to devote resources to remedy underpolicing.[210]

The discriminatory dualism of redlining and reverse redlining also confirms a stereotype—that African Americans in particular, and people of color in general, are high credit risks[211] and their

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[204] Saki Knafo, *When It Comes to Illegal Drug Use, White America Does the Crime, Black America Gets the Time*, HUFFPOST (Sept. 17, 2013, 2:26 PM), https://www.huffpost.com/entry/racial-disparity-drug-use_n_3941346.

[205] VITALE, *supra* note 202, at 7.

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *See* Natapoff, *supra* note 20, at 1772. According to a 2013 study, most mid-sized cities in America are underpoliced in the sense that more investment would yield less violent crime, such that a dollar invested in police would ultimately result in a benefit of a $1.63. *See* Aaron Chalfin & Justin McCrary, *Are U.S. Cities Underpoliced? Theory and Evidence*, 100 REV. ECON. & STAT. 167, 168 (2018).

[210] Newkirk, *supra* note 39. Institutional factors like productivity quotas and overtime also contribute to overpolicing. *See* Shaun Ossei-Owusu, *Race and the Tragedy of Quota-Based Policing*, AM. PROSPECT (Fall 2016), https://prospect.org/justice/race-tragedy-quota-based-policing/.

[211] Indeed, the idea that African Americans were uncreditworthy was so entrenched in the 1940s and 1950s that "on the rare occasions that private bankers and savings and loan

presence in neighborhoods leads to declining property values.[212] In fact, redlining caused the very neighborhood decline it purported to fear: "Small businesses and large developers alike steered money" away from redlined neighborhoods, decreasing property values and increasing neighborhood blight.[213] And the notion of credit unworthiness inherent in redlining was "confirmed" by the massive defaults brought about by reverse redlining. In truth, "although minority borrowers were targeted for subprime loans at disproportionate rates," simple population demographics meant that "they did not receive the majority of these loans, nor have they been more prone to foreclosure than white homeowners. In other words . . . minority borrowers are emphatically *not* 'to blame' for the foreclosure crisis, and arguments that suggest otherwise distort the data."[214]

Similarly, arguments are sometimes made that the 1977 Community Reinvestment Act (CRA)—a law passed to combat redlining—actually helped to cause the financial crisis, because it forced banks "to lend to unqualified minorities."[215] Thus, according to this argument, it was the attempt to fix redlining that caused reverse redlining and the ensuing subprime mortgage crisis. This theory "has been disproved, with the vast majority of subprime loans having no connection to the CRA,"[216] but it continues to circulate nonetheless.[217]

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officials were presented with evidence of black creditworthiness, they rejected the information." SATTER, *supra* note 150, at 368.

[212] *Id.*

[213] J. Brian Charles, *Federal Housing Discrimination Still Hurts Home Values in Black Neighborhoods*, GOVERNING (Apr. 30, 2018), https://governing.com/topics/transportation-infrastructure/gov-redlining-race-real-estate-values-lc.html.

[214] Nier & Cyr, *supra* note 62, at 950–51 (emphasis added) (footnotes omitted).

[215] Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 902 (2011); *see also id.* at 903 (noting that "Blacks were sought out as borrowers for hard business reasons rather than coercion in service of social policy. There was huge profit to be made from expensive subprime loans." (footnote omitted)).

[216] Nier & Cyr, *supra* note 62, at 951 (footnote omitted).

[217] *See* Mark Thoma, *Here's What Really Caused the Housing Crisis*, CBS NEWS (Jan. 10, 2017, 5:30 AM), https://www.cbsnews.com/news/heres-what-really-caused-housing-crisis/ (discussing and refuting the argument that this governmental policy caused the housing crisis). In 2008, Mike Bloomberg, former mayor of New York City, declared at an event at Georgetown University that the housing market crisis was the result of redlining being prohibited. *See* Kriston Capps, *What Mike Bloomberg Got Wrong About Redlining and the Financial Crisis*, CITYLAB (Feb. 13, 2020), https://www.citylab.com/equity/2020/02/bloomberg-redlining-financial-crisis-housing-discrimination/606526/.

Notably, the first round of reverse redlining, lending "on contract," also pathologized and blamed aspiring minority homeowners.[218] Once potential homeowners entered into such contracts and the ballooning payments began, it became obvious "how easily they could lose their homes."[219] To fight against this eventuality, purchasers "struggled to make their inflated monthly payments," taking on additional jobs and shifts and cutting necessary expenses like "basic maintenance."[220] They "subdivided their apartments, crammed in extra tenants, and, when possible, charged their tenants hefty rents" in order to try to keep up with the payments.[221] These actions all worked to the detriment of the community:

> [T]he genius of this system was that it forced black contract buyers to be their own exploiters. . . . [T]he black contract buyer was forced to "defraud his own people in order to feed the hungry mouth of the speculator."[222]

Not surprisingly given these conditions, neighborhoods where houses were bought and sold "on contract" quickly declined.[223] While black residents tried to save their homes, their white neighbors saw not the underlying exploitation, but

> population densities doubling, while garbage collection and other municipal services stayed the same or declined. They saw unsupervised children flooding the neighborhood. They noted that buildings bought by African Americans rapidly decayed. Small wonder that whites blamed their black neighbors for the chaos they observed.[224]

Sexual harassment and shunning also affirm specific stereotypes. Here, the stereotype at work is that women's

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[218] SATTER, *supra* note 150, at 4; *see also supra* Section II.B.
[219] SATTER, *supra* note 150, at 5.
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*

complaints are not reliable, and women often complain about nothing. Shunning advances this stereotype: "When men say that they're afraid of being alone with women, what they're actually saying is that there is a high likelihood that all women are crazy and will read something into a situation that isn't intended."[225] When women complain about both sexual harassment and shunning simultaneously, this stereotype looks true: women complain when male workers give them too much attention, so now they are given less attention, and then they complain about that too. Thus, it appears none of their complaints make sense, and the fear of unjust accusations is well-founded.

C. LEGAL EXACERBATIONS

Law has often participated in exacerbating the epistemic injustice and pathologizing effects of discriminatory dualism. By denying testimonial credibility to certain groups; discounting statistics,[226] history, and lived experience as modes of knowledge; and disavowing the occurrence of discriminatory wrongs, law has typically faltered in addressing either strand of a discriminatory dualism paradox, let alone the dual apparatus. Thus, much like their epistemic experiences, the lived experiences of people in systems of discriminatory dualism are mostly "neglected, ignored, or distorted" by the legal order.[227]

In the epistemic register, parties who claim race or gender discrimination often face suspicion and begin on a different foundational level of credibility than members of more dominant groups.[228] The slogan #BelieveHer, which has become a major (and controversial) part of the #MeToo movement, evinces the concern that women's testimony regarding sexual harms historically has been discounted and dismissed.[229] Consider, for example, the

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[225] Tarbox, *supra* note 89 (quoting Bethany McLean, a Vanity Fair contributing editor).

[226] Tuerkheimer, *supra* note 196, at 1297 (noting police efforts to discount rape statistics). For example, cases like *McClesky v. Kemp*, 481 U.S. 279 (1987), deny the significance of hard statistical evidence of racial disparities and instead construct a test for racial bias that is impossible to satisfy, thereby ignoring datasets that speak to how race functions in the criminal justice system. *See* Alexander, *supra* note 105, at 19 (discussing the strict racial bias test articulated by the U.S. Supreme Court).

[227] Mason, *supra* note 173, at 299.

[228] *Id.* (explaining the operation of identity power in epistemic contexts).

[229] *See generally* Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399 (2019).

following excerpt from a 1970 University of Pennsylvania Law Review article:

> Women often falsely accuse men of sexual attacks to extort money, to force marriage, to satisfy a childish desire for notoriety, or to attain personal revenge. Their motives include hatred, a sense of shame after consenting to illicit intercourse, especially when pregnancy results, and delusion. In cases of delusion, the woman may describe the attack in remarkably convincing detail, for she herself believes her story but fails to appreciate the significance and consequences of the accusation. "Most women," according to a prominent psychiatrist, "entertain more or less consciously at one time or another fleeting fantasies or fears that they are being or will be attacked by a man. Of course, the normal woman who has such a fantasy does not confuse it with reality, but it is . . . easy for . . . neurotic individuals to translate their fantasies into actual beliefs and memory falsifications . . . ." These neurotic individuals can often deceive the most astute judges and jurors into believing that the imagined attack actually occurred. [230]

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[230] *The Corroboration Rule and Crimes Accompanying a Rape*, 118 U. PA. L. REV. 458, 460 (1970). The author quotes Matthew Hale's infamous statement that rape is a claim "easily . . . made and hard to be proved, and harder to . . . defend[]," and notes that in response to this concern, "many states have adopted a rule that a rape conviction cannot be sustained solely upon the testimony of the complaining witness without some extrinsic corroborating evidence." *Id.* at 458 (footnotes omitted). The Model Penal Code Proposed Official Draft of 1962 offers a legislative template as follows:

> No person shall be convicted of any felony under this Article [including rape and other sex offenses] upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.

Id. at 458 n.4.

Legacies of this line of thinking continue to circulate in the areas of sexual harms and harassment,[231] and contribute to the remarkably low rate of successful claims.[232] Further, the requirement that harassment meet a threshold of "severe or pervasive" to be actionable dismisses huge swaths of harmful conduct.[233]

Claims based on shunning are unlikely to fare much better. There is widespread agreement that shunning is an actionable form of sexual harassment under Title VII of the Civil Rights Act,[234] as it contributes to hostile work environments by perpetuating "sex-segregated patterns of employment"[235] and it "denies equal benefits based on gender," including the "opportunities, training[,] and mentoring" that male workers can still receive.[236]

But despite the consensus that Title VII incorporates shunning in a theoretical sense, courts have offered "little more than cold comfort" when shunning claims are actually litigated.[237] In fact, courts generally have been unreceptive to "plaintiffs' claims of discrimination based on exclusion from informal work groups, trainings, social opportunities, and the like,"[238] often because such claims fail to show the adverse employment action necessary under

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[231] *See, e.g.*, *Teen Accused of Rape Deserves Leniency Because of His 'Good Family,' Judge Says*, GUARDIAN (July 3, 2019, 11:51 AM), https://www.theguardian.com/us-news/2019/jul/03/new-jersey-teen-judge-court-good-family.

[232] Title VII plaintiffs "fare worse than in almost any other category of civil case": From 1979–2000, the typical win rate for plaintiffs was fifteen percent for jobs cases, as compared to fifty-one percent for non-jobs cases. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 113, 127 (2009). This is partly because, under Title VII, vicarious liability for employers has been doctrinally "quite hostile to the interests of women who have been sexually harassed and quite favorable to the interests of employers whose supervisory employees have been accused of sexual harassment." L. Camille Hebert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 715 (2007).

[233] *See* John C. Ayres, Note, *Is It Sexual Harassment or Not? The Single Incident Exception*, 71 MO. L. REV. 205, 208 (2006).

[234] Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§2000e, 2000e-1 to -16, 2000e-17 (2018)).

[235] Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN L. REV. ONLINE 17, 35 (2018).

[236] J. Randolph Evans & Shari L. Klevens, *'Billy Graham Rule' No Longer Suits Modern-Day Law Firms*, DAILY REP. (Oct. 22, 2013, 12:00 AM), https://www.law.com/dailyreportonline/almID/1202624472959/?slreturn=20200111174238.

[237] *See* Anthony Michael Kreis, *Defensive Glass Ceilings*, 88 GEO. WASH. L. REV. (forthcoming 2020).

[238] Susan D. Carle, *Acting Differently: How Science on the Social Brain Can Inform Antidiscrimination Law*, 73 U. MIAMI L. REV. 655, 711 (2019).

a disparate impact approach.[239] By failing to recognize and redress sexual harassment and shunning, doctrinal frameworks contribute to and affirm the stereotype that the complaints of women are often unfounded.

Complaints related to under- and overpolicing often receive similarly inhospitable treatment from the law. For example, despite near unanimous agreement from scholars of all political stripes that the Fourteenth Amendment was enacted specifically to address underpolicing,[240] subsequent judicial interpretations have essentially eliminated the Fourteenth Amendment as a pathway for remedying underpolicing.[241] In doing so, courts have diminished the characterization of underpolicing as an important problem:[242] the lack of a remedy implies that there is no real harm to be redressed.[243] Although at times the Department of Justice has made small gestures towards holding police departments "accountable for providing unequal protection,"[244] that promise ultimately has gone unfulfilled. As it currently stands, underpolicing is a non-starter, "neither judicially reviewable nor actionable."[245]

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239 Kreis, *supra* note 237.

240 Tuerkheimer, *supra* note 196, at 1300; *see also id.* at 1299 (noting that the clause was "chiefly intended . . . to protect those most vulnerable to police inaction").

241 *Id.* at 1299; *see also id.* at 1303 ("Soon after the Supreme Court began hearing cases involving the Equal Protection Clause, without fanfare, it displaced the protection model with the familiar anti-classification approach that today remains the animating feature of equal protection jurisprudence. According to the Court, the Equal Protection Clause is essentially meant to prohibit legislative and administrative distinctions that rest on an improper basis." (footnotes omitted)).

242 *Id.* at 1306 ("Even in cases alleging paradigmatic failure to protect violations, the Court's demand for a showing of intentional discrimination has often proved to be an insurmountable barrier. . . . By requiring proof of intentional discrimination, the Court has largely immunized the underenforcement of laws against private violence—a problem that the Equal Protection Clause was specifically designed to redress." (footnotes omitted)).

243 *See* Samuel L. Bray, *Announcing Remedies*, 97 CORNELL L. REV. 753, 764 (2012).

244 Tuerkheimer, *supra* note 196, at 1292.

245 Natapoff, *supra* note 20, at 1720. In *Armstrong v. United States*, 517 U.S. 456 (1996), the U.S. Supreme Court held that to show racial discrimination related to over-prosecution and punishment for offenses involving crack cocaine, the petitioner must show that non-group members also engaged in the offense but were not prosecuted.

Overpolicing, on the other hand, attracts more litigation,[246] but is also rarely remedied by the courts.[247] Criminal and civil claims see "only limited success in curbing governmental misconduct,"[248] in part because doctrinal immunities and oddities transform police violence into "justifiable force."[249] Further, "the individual-specific and incident-specific nature of civil rights litigation . . . limits its ability to address institutional causes."[250] And while litigation sometimes has halted unconstitutional practices, like the racialized stop-and-frisks that occurred in New York City, discriminatory policing in general is an area with "a lot of law and little remedy."[251] This failure to remedy signals to police, and citizens, "a message of non-accountability:" that there usually will be "no legal or financial consequences" for violent or unconstitutional police actions.[252] This defanging of legal process confirms the double bind of discriminatory dualism in policing: the options are restricted to under or overpolicing, and the law will provide no relief from either.[253]

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[246] Natapoff, *supra* note 20, at 1720 (explaining that overpolicing "is more easily documented and litigated"). For cases that successfully challenged widespread unconstitutional practices, see, for example, *Ligon v. City of New York*, 736 F.3d 118, 122 (2d Cir. 2013) (demonstrating a successful challenge to widespread unconstitutional practices of "trespass stops") and *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013) (demonstrating a successful challenge to the City's widespread unconstitutional practices of "unlawful stops and conducting lawful frisks").

[247] *See* Carbado, *supra* note 187, at 1517 (discussing "how police violence interacts with the legal system in ways that make it difficult to hold police officers accountable for their acts of violence").

[248] Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 465 (2003).

[249] Carbado, *supra* note 187, at 1524 (discussing doctrinal immunities and oddities, such as "the qualified immunity barrier to suing police officers, and the frequency with which cities and municipalities indemnify police officers").

[250] Armacost, *supra* note 248, at 465; *see also id.* at 464 (noting that the primary legal tools for police violence are section 1983, which "provides a federal civil cause of action for damages or equitable relief in circumstances where state or local governmental officials have deprived citizens of rights secured by the United States Constitution or federal law," and section 242, which "authorizes criminal prosecutions against government officials under similar circumstances").

[251] Rachel A. Harmon, *Legal Remedies for Police Misconduct*, *in* ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 27, 28 (Erik Luna ed., 2017). Overpolicing suits also often encounter a credibility problem. Traditionally, "people with criminal records," which constitute the vast majority of the harmed individuals bringing claims related to police brutality or overpolicing, are labeled "unworthy of belief." Taylor Dolven, *Shot By Cops, Smeared in Court: Why It's So Hard for Victims of Police Abuse to Sue and Win*, VICE NEWS (Oct. 30, 2017), https://news.vice.com/en_us/article/pazq57/police-shootings-rule-609.

[252] Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 546 (2017).

[253] *Id.*

Reverse redlining claims also have been largely unsuccessful.[254] Although reverse redlining is actionable under the Fair Housing Act, the Equal Credit Opportunity Act, and numerous other federal and local anti-discrimination laws,[255] reverse redlining claims have experienced mostly "repeated failure," at least for individual plaintiffs.[256] A number of problems have contributed to this low success rate.[257] First, many plaintiffs lack the financial resources to pursue litigation and experience "grave problems of information asymmetry"—often because of the very reverse redlining at issue.[258] Second, claimants often find themselves caught between two conflicting, yet equally confounding, framings.[259] Borrowers alleging reverse redlining "get caught between a rock and a hard place: between a 'private' contractual analysis that ignores the background of reverse redlining, on the one hand" or a "public" analysis that acknowledges the background of redlining but then (ironically) fails on that basis.[260] The contractual framing erases the social and structural dimensions of reverse redlining; it views any problems as simply resulting from "the borrower's private choice to agree to a bad contract."[261] This framing enables courts to reinforce quietly the stereotype that it is really a failing on the part of the

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[254] *See* Keren, *supra* note 59, at 317 (noting the frequent failures of reverse redlining claims).

[255] *Id.* at 326. Courts tend to use what is called the *Hargraves* test, which has four elements:

> First, borrowers must prove they are members of a protected class. Second, borrowers need to prove that they applied for and were qualified for a housing loan. Third, borrowers must show that their loan agreement includes grossly unfavorable terms. And fourth, borrowers must prove that the lender(s) they were dealing with intentionally discriminated against them or intentionally targeted them.

Id. at 327; *see also* Hargraves v. Capital City Mortg. Corp., 140 F. Supp. 2d 7, 20–21 (D.D.C. 2000).

[256] Keren, *supra* note 59, at 317.

[257] *Id.*

[258] *Id.*

[259] *Id.* at 325.

[260] *Id.* at 325–26.

[261] *Id.* at 318. This is not to deny the reality that in some cases,

> borrowers are not completely blameless. There are those who took on loans they knew they could not afford once the interest rates reset to higher levels, believing that ever-increasing home values would allow them to refinance their way out of their mortgage and enter into a new one by tapping into the increased equity in their homes.

Brescia, *supra* note 13, at 172.

individual who entered into a predatory loan, rather than a case of structural discrimination.[262]

The public framing is equally, but differently, problematic. When borrowers tie reverse redlining to redlining and describe the whole discriminatory picture, they typically find their claims rejected, as courts are generally reluctant to find that borrowers were targeted because of race.[263] As the court in *White* noted, "[a] jury might well conclude that [the borrowers] were targeted not on the basis of being African-Americans, but because they were vulnerable, low-income, unsophisticated, first-time home buyers who *happened* to be African-American."[264] In other words, "[b]orrowers relying on a cause of action that emphasizes racial discrimination by reference to the historical problem of 'redlining[]'" have often failed because they could not prove that they were targeted intentionally based on race, rather than other factors.[265]

Nevertheless, at least one reverse redlining claim has been successful under the "intentionally targeted" paradigm. In 2016, a federal jury awarded six plaintiffs just under one million dollars after finding that the defendant bank reverse redlined "by intentionally marketing to African-American and Hispanic homeowners predatory loans with default interest rates of 18 percent."[266] Additionally, a number of cities have sued banks for reverse redlining—in some cases successfully.[267] The Department of Justice has also extracted settlements from banks for reverse

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[262] Brescia, *supra* note 13, at 187 (noting that some cases "impose a higher burden on a reverse redlining plaintiff above that which is well established in the anti-discrimination jurisprudence").

[263] *Id.* at 181–87 (detailing cases where facts of discrimination did not alter the courts conclusion about the outcome of the case). For an argument that the intentional targeting test is a better standard, see Pouya Bavafa, Note, *The Intentional Targeting Test: A Necessary Alternative to the Disparate Treatment and Disparate Impact Analyses in Property Rentals Discrimination*, 43 COLUM. J. L. & SOC. PROBS 491 (2009).

[264] M & T Mortg. Corp. v. White, 736 F. Supp. 2d 538, 576 (E.D.N.Y. 2010).

[265] Keren, *supra* note 59, at 330.

[266] Melanie H. Brody & Elyse S. Moyer, *Federal Jury Finds Bank Liable for Reverse Redlining,* MAYER BROWN (July 18, 2016), https://www.cfsreview.com/2016/07/federal-jury-finds-bank-liable-for-reverse-redlining/; *see also* Horne v. Harbour Portfolio VI, LP, 304 F. Supp. 3d 1332, 1342 (N.D. Ga. 2018) (requiring only that plaintiffs show intentional targeting—not "that they were treated differently than white applicants"—to bring a claim based on reverse redlining).

[267] *See, e.g.*, Caitlin McCabe, *Wells Fargo to Pay Philly $10 Million to Resolve Lawsuit Alleging Lending Discrimination Against Minorities*, PHIL. INQUIRER (Dec. 16, 2019) https://www.inquirer.com/real-estate/housing/philadelphia-settles-lawsuit-wells-fargo-allegations-discriminatory-mortgage-lending-minorities-20191216.html.

redlining.[268] These settlements, though, have been criticized as woefully insufficient, and most people that were foreclosed upon as a result of reverse redlining practices have seen neither legal remedy nor redress.[269]

V. DISMANTLING DISCRIMINATORY DUALISM

Recognizing the recurring nature of discriminatory dualism helps reveals its distinct harms and the law's role in perpetuating and exacerbating them. Importantly, though, these harms also contain the starting point for beginning the project of dismantling discriminatory dualism. One of discriminatory dualism's conceptual traps is that the opposing practice claims to be an answer or solution to the first practice.[270] Of course, this opposing practice is *not* a solution,[271] but—just as the best lies always contain some truth—they do contain the blueprints for breaking out of systems of discriminatory dualism. Shunning, for example, *is* actually part of eliminating sexual harassment, but it needs to be directed at perpetrators rather than victims.[272] And investment *is* part of eliminating redlining, but it needs to occur at a more collective level,

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[268] The Department of Justice entered into a consent decree with a number of major banks in 2011, which settled the suits brought by Baltimore, Memphis, and Chicago, but many municipal suits began after that settlement and remain pending. *See* Saba Bireda, *Supreme Court Rules Cities Can Sue Banks Over Racially Discriminatory Lending Practices*, SANFORD HEISLER SHARP, LLP (May 19, 2017), https://sanfordheisler.com/cities-can-sue-banks-racially-discriminatory-lending-practices/. In 2011, "Bank of America agreed to settle with the Justice Department for $335 million over allegations of reverse redlining." *Do Banks Discriminate? More Often Than You Think*, MORGAN & MORGAN (Jan. 24, 2017), https://www.forthepeople.com/blog/banks-discriminate-more-often-than-you-think/. And Wells Fargo entered into a similar agreement one year later when it "agreed to pay $175 million in order to avoid a lawsuit, over allegations that it engaged in reverse redlining from 2004 to 2009." *Id.* Miami dropped its reverse redlining lawsuit in early 2020 for unspecified reasons. *See* Dan Ennis, *Miami Drops Reverse Redlining Claims Against Top 4 Banks*, BANKINGDIVE (Feb. 4, 2020), https://www.bankingdive.com/news/miami-drops-reverse-redlining-claims-wells-fargo-citi-JPMorgan-Bank-of-America/571673/.

[269] One analyst estimated that this settlement "set a price for forgeries and fabricating documents" of approximately "$2000 per loan"—"the equivalent of a 'rounding error' to the banks." Michael Hiltzik, *City Attorney Takes Aim at Big Banks*, L.A. TIMES (June 6, 2014), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-20140608-column.html.

[270] *See supra* Section IV.A.

[271] *See supra* Section IV.A.

[272] *See* Catherine A. MacKinnon, *Where #MeToo Came From, and Where It's Going*, ATLANTIC (Mar. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/.

not at the level of individually credit-financed homes.[273] And less policing *is* part of eliminating overpolicing, but it needs to be community-controlled and directed.[274]

It is clear that shunning directed at *victims* amplifies harassment and gender inequality.[275] The Pence rule of limiting contact "encourage[s] even *more* sex segregation, casting all male-female interactions as inherently sexual and denying women the same informal access to powerful sponsors and social networks afforded to their male peers."[276] However, an experiment in doing the opposite and establishing an environment demanding close connections between all workers found drastic reductions in harassment. In Norway, rampant sexual harassment in the military caused Norway to try instituting unisex dorms.[277] These dorms, which house two women and four men, helped military members "enter a common mode where gender stereotypes had disappeared, or at least . . . were less obvious."[278]

Eliminating the shunning of sexual harassment victims, and instead directing it at sexual harassment *perpetrators*, could have significant power to stop sexual harassment.[279] This redirection could shift the sticky social norms that uphold gender- and sexuality-based inequities:

> Sincere revulsion against sexually harassing behavior, as opposed to revulsion at reports of it, could change workplaces and schools, even streets. It could restrain repeat predators as well as the occasional and causal exploiters, as the law so far has not.[280]

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[273] *See* Brett Theodos & Brady Meixell, *Preventing Unequal Investment in U.S. Cities*, U.S. NEWS (Feb. 26, 2019), https://www.usnews.com/news/cities/articles/2019-02-26/its-time-to-end-unequal-access-to-capital-in-us-neighborhoods.

[274] *See* Amna Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 406 (2018).

[275] Schultz, *supra* note 79, at 48 (explaining that sex segregation occurs when "mostly men hold leadership positions and favored jobs, while women are greatly outnumbered or are concentrated in less highly-regarded roles").

[276] *Id.* at 60.

[277] *See* Emily Lodish, *Norway's Military Cut Down on Sexual Harassment in the Most Remarkable Way,* PUB. RADIO INT'L (Mar. 26, 2014, 4:24 PM), https://www.pri.org/stories/2014-03-26/norways-military-cut-down-sexual-harassment-most-remarkable-way.

[278] *Id.* (internal quotations omitted).

[279] *See* MacKinnon, *supra* note 272.

[280] *Id.*

In fact, according to renowned feminist theorist Catherine MacKinnon, shunning perpetrators could fundamentally "transform societies," setting new social norms and disrupting the shunning and sexual harassment cycle.[281]

A particular kind of shunning, disinvestment, could also be helpful in the context of redlining and reverse redlining. Both individual and state consumers continue to financially support institutions that engage in discriminatory dualism.[282] But they instead could choose to shun such institutions through acts of disinvestment, which could have important expressive and practical results. This is particularly true of states, which are both financial clients with significant assets and banking needs, and public institutions with important expressive capacities.[283] A state's decisive disinvestment from banks that have engaged in discriminatory practices could have important ripple effects, as Pennsylvania State Senator Vincent Hughes explained when he encouraged both Pennsylvania and its constituents to address the racism and discrimination of banks that deny home loans to people of color by disinvesting their money.[284] Senator Hughes's statements followed an investigation that found that in Philadelphia, "African-American mortgage applicants in Phil[adelphia were] almost three times as likely to be denied a conventional mortgage as white applicants."[285] Senator Hughes commented:

> If we're successful in saying, "You know what? State tax dollars should not go to banks that are racially discriminating, they should go to banks that are supporting and engaged in diverse communities, in African-American and Latino communities. Let's move our state dollars into those institutions," then maybe we can drive more activity, more mortgage lending, more

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[281] *Id.*

[282] *Let's Move Our Money: Penn. Lawmaker Demands Action Against Banks Practicing Racist Redlining*, DEMOCRACY NOW! (Feb. 27, 2018), https://www.democracynow.org/2018/2/27/lets_move_our_money_penn_lawmaker.

[283] *Id.*

[284] *Id.* ("And because of the federal government walking away from its oversight responsibilities, it really is going to require cities, local communities, [and] states to initiate their own action to try to address this racist, discriminatory behavior.").

[285] *Id.*

> favorable mortgage lending, into African-American and Latino communities, and the banks have got to pay.[286]

Disinvestment also can help align incentives in ways that make redlining and reverse redlining less likely to occur. As Robert Schwemm and Jeffrey Taren noted:

> So long as our home-finance system relies primarily on profit-seeking lenders, it is naïve to believe that these firms will voluntarily put a high value on conforming with civil rights laws if discrimination appears to offer the prospect of more profits.[287]

Along with disinvestment from historically discriminatory financial institutions, neighborhood reinvestment is also needed.[288] But unlike the individual, credit-funded investment exploited in reverse redlining and at the heart of the subprime mortgage crisis, these investments should be publicly and collectively funded. Cities have begun exploring these options: Detroit recently developed a Strategic Neighborhood Fund, which invested $172 million to

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[286] *Id.*

[287] Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375, 432 (2010).

[288] In addition to disinvesting from these traditional financial institutions, new financial institutions could be created. For instance, one "possible solution to widespread predatory lending is the creation of a public bank or financial branch that provides loans at low credit and that can be held accountable by public scrutiny." Husain, *supra* note 56. Some "nonprofit lenders and micro-financers have already implemented these types of lending practices on a small scale, but the Bank of North Dakota remains the only state-owned bank in the country." *Id.* A new public financial institution may be particularly important, given that private banks that have attempted similar feats have not fared well. For example, ShoreBank, a community redevelopment bank in the Chicago neighborhood of South Shore, was once called "the most important bank in America" by Bill Clinton. *Richard Douthwaite, How A Bank Can Transform A Neighborhood*, SHORT CIRCUIT, http://www.feasta.org/documents/shortcircuit/index.html?sc4/shorebank.html (last visited Apr. 11, 2020). It fought racist lending practices that targeted Chicago's African American community by ensuring accessible financial services, like mortgages, to local citizens. *Id.* In August 2010, however, ShoreBank failed and was acquired by Urban Partnership Bank. Becky Yerak, *Chicago's ShoreBank Fails, Is Bought by Investors*, CHI. TRIB. (Aug. 20, 2010), https://www.chicagotribune.com/business/ct-xpm-2010-08-20-ct-biz-0821-shorebank-20100820-story.html. A public institution may be able to avail itself of additional safeguards to help avoid such a fate.

improve ten neighborhoods,[289] and Baltimore recently created a $52 million Neighborhood Impact Investment Fund.[290]

Finally, for policing, "breaking the [underpolicing and overpolicing] cycle is one of the most important things we can do for violence prevention,"[291] and less policing is an important part of any solution. But unlike underpolicing, which has been the traditional form that "less" policing has taken, a reformed version of less policing needs to "shift[] power into Black and other marginalized communities; shrink[] the space of governance now reserved for policing, surveillance, and mass incarceration; and fundamentally transform[] the relationship among state, market, and society."[292] Reform initiatives should "focus not on building the power of law and the police, but on building the power of marginalized communities and transforming the state."[293] Along this path, new policing initiatives that focus on "enhancing safety while making as few arrests as possible" are promising.[294] In Los Angeles, for example, a new police project that adopts a strategy of increasing safety while decreasing arrests in one of the city's most notoriously dangerous housing projects has "cut violent crime by 70% and arrests by 50%."[295] Such policing, which applies a two-prong approach of addressing violent crime while simultaneously trying to "curtail the collateral damage of rampant low-level arrests," offers a marked departure from previous practices and seems to be yielding promising results.[296]

These answers are only a starting point. Additional wide-scale and massive changes will be necessary to eradicate the practices of discriminatory dualism. Sexual harassment and shunning, for example, will likely not dissipate without significant social change. So far, the #MeToo movement has spurred a variety of proposed legal responses, including enacting legislation prohibiting

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289 Theodos & Meixell, *supra* note 273.

290 Jared Brey, *Balancing the Scales of Investment in Baltimore*, NEXT CITY (Jan. 3, 2019), https://nextcity.org/daily/entry/balancing-the-scales-of-investment-in-baltimore.

291 Kennedy, *supra* note 26.

292 Akbar, *supra* note 274, at 408 (footnotes omitted).

293 *Id.* at 405.

294 Kennedy, *supra* note 26.

295 *Id.*

296 *Id.* Further, one preliminary study found that increased investments in policing need not necessarily result in more arrests. Instead, the preliminary study found "that investments in law enforcement are unlikely to increase state prison populations markedly and may even lead to a modest decrease in the number of state prisoners." *See* Jacob Kaplan & Aaron Chaflin, *More Cops, Fewer Prisoners?*, 18 CRIMINOLOGY & PUB. POL'Y 171, 171 (2019).

nondisclosure agreements in instances of sexual misconduct, limiting the use of arbitration for harassment allegations, and requiring employers to disclose sexual harassment settlements.[297] These are laudable initiatives. But resolving the sexual harassment-shunning dyad will require more[298]—it requires stopping sex segregation, promoting women into positions of power, and creating "more inclusive, open, and accountable organizations."[299]

In fact, some, like Sheryl Sandberg, believe that "having more women with more power" is "the [one] thing that will bring the most . . . change [to] our culture."[300] However, Sandberg herself may portend how simply placing women into power positions within the current hierarchy is inadequate. Since advocating for her now-famous "Lean-In" manifesto, mounting evidence suggests that Sandberg, as Facebook's Chief Operating Officer, "put profits before ethics, allowing Facebook to be used to disrupt elections, promote fake news[,] and ignite hate around the world" and "hir[ed] a Republican operative to spread lies about [billionaire philanthropist] George Soros."[301]

Sandberg's recent vilification as someone for whom "the demands of capitalism overtook that of feminism"[302] and as a "gender traitor"[303] suggest a fulfillment of Professor Vicki Schultz's concern that "unless the hierarchy itself is restructured, women will simply join the ranks of the overly powerful and will inevitably succumb to the temptations to abuse others that these positions induce in the people that hold them."[304] What is needed, then, is "fundamental

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297 *See* Tippett, *supra* note 118, at 1131.

298 *See* Schultz, *supra* note 79, at 59 (noting that ending sexual harassment "requires large-scale changes, not individualized solutions").

299 *Id.*

300 Emily Peck, *Sheryl Sandberg Warns of #MeToo Backlash Against Women*, HUFFPOST (Dec. 3, 2017, 9:35 AM), https://www.huffpost.com/entry/sheryl-sandberg-sexual-harassment-backlash_n_5a22c2a5e4b03350e0b710eb.

301 Vivia Chen, *Why Do Women Love to Hate Sheryl Sandberg?*, AM. LAWYER (Nov. 30, 2018, 12:31 PM), https://www.law.com/americanlawyer/2018/11/30/why-do-women-love-to-hate-sheryl-sandberg/.

302 *Id.*

303 *Id.*

304 Schultz, *supra* note 79, at 63.

change . . . a more equitable management division [between men and women], and cultural changes."[305]

Eradication of redlining and reverse redlining also requires significant cultural changes. The particular post-subprime crisis moment might provide a space to explore the potential of using "shared-equity forms of tenure to deliver the benefits of homeownership, such as security of tenure, while also creating durable affordability."[306] These shared-equity structures not only

> help people move up through the market system, but also . . . counter the tendency of the market to generate, through the combination of employment instability, neighborhood instability, and the various forms of race and class discrimination, an endlessly renewed sector of urban misery.[307]

When the idea of homeownership moves away from being "primarily a speculative profit-making venture" and is instead viewed as "a safe investment in a personal and social good consumed over a long period of time, such alternative tenures can deliver both greater affordability and security for owners, as well as increased race and class diversity in neighborhoods."[308] Community land trusts offer "robust support systems for first-time homeowners" and "build household assets by working with homebuyers to secure the financial resources necessary to afford and maintain homeownership."[309] At the same time, they also "foster community engagement by creating forums through which land trust homeowners can participate in the governance of the trust and the development of the broader community."[310]

As the foregoing suggests, the durability of discriminatory dualism can, perhaps ironically, trigger a radical reconceptualization of whether continued reliance on the institutions that perpetuate these discriminatory forms is necessary

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[305] Christine Pazzanese & Colleen Walsh, *The Women's Revolt: Why Now and Where To?*, HARV. GAZETTE (Dec. 21, 2017), https://news.harvard.edu/gazette/story/2017/12/metoo-surge-could-change-society-in-pivotal-ways-harvard-analysts-say/ (quoting Ann Marie Lipinski).

[306] Steil, *supra* note 70, at 111.

[307] Duncan Kennedy, *The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 HOW. L.J. 85, 91 (2002).

[308] Steil, *supra* note 70, at 111.

[309] *Id.* at 112.

[310] *Id.*

or warranted at all.[311] For example, it is possible that "policing as we now know it cannot be fixed."[312] While "everyone wants to live in safe communities," empowering the police to perform this role is perhaps conceding too much to the institution.[313] Rather than remaining locked in the swinging binary of under- and overpolicing, it may be necessary to "reconceptualize safety" entirely.[314] As one commentator writes:

> Unless Americans can reconceptualize safety, taking away its racist connotations and recognizing that we are safer not with more guns and violence but with adequate food, clothing, housing, education, health care, jobs, and income for all, we are doomed to continue calling the police for rescue from every conceivable threat, real or imagined.[315]

Equating safety solely with police means that situations where "millions of students are in schools with law enforcement but no" counselors, nurses, psychologists, or social workers seem normal.[316] A deeper conception of safety as built on a foundation of social provision, rather than on a strong institution of police, may be necessary.[317]

At the very least, any solution to discriminatory dualism must take into account its double strands. This is obvious from the historical failures of one-prong answers, which have not accounted for the possibility of a rise in one form of discrimination when pressure is applied to its opposite. For instance, the overpolicing that followed the Civil Rights Act and the shunning that followed the rise of sexual harassment law demonstrate that a one-prong legal intervention often precipitates a switch in discriminatory practices. The legal intervention makes the original mode of

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311 *See generally* Akbar, *supra* note 274.

312 *Id.* at 406.

313 VITALE, *supra* note 202, at 53.

314 *Id.*

315 *Id.*; *see also* DANIEL J. LOSEN & AMIR WHITAKER, AM. CIVIL LIBERTIES UNION, 11 MILLION DAYS LOST: RACE, DISCIPLINE, AND SAFETY AT U.S. PUBLIC SCHOOLS 10 (2018) (reporting a nationwide student-to-counselor ratio of 444-to-1 in the 2015–16 academic year).

316 AM. CIVIL LIBERTIES UNION, COPS AND NO COUNSELORS: HOW THE LACK OF SCHOOL MENTAL HEALTH STAFF IS HARMING STUDENTS 4 (2019), https://www.aclu.org.issues/juvenile-justice/school-prison-pipeline/cops-and-no-counselors.

317 Akbar, *supra* note 274, at 406.

discrimination less readily available, and the discriminatory practice manifests as its opposite in response.

Further, although one-prong legal interventions may often temporarily decrease the initial form of discrimination, they have never completely ended it. The Fourteenth Amendment did not stop underpolicing, the Fair Housing Act did not stop redlining, and Title VII did not stop sexual harassment. These were all significant pieces of federal legislation (or, in the case of underpolicing, no less than an amendment to the U.S. Constitution), yet they did not eliminate their targeted practices nor "eradicate[] [the] foundational status structures and systems" that underpin these forms of discrimination.[318]

To be sure, these legislative legal reforms were unsuccessful partially because they were inadequately enforced. The Fourteenth Amendment received a flurry of enforcement activity immediately after its enactment, but shortly thereafter was largely relegated to dormancy.[319] And there have been significant enforcement difficulties related to the Fair Housing Act and redlining.[320] Indeed, the Department of Justice "did not file a single mortgage discrimination case until the late 1990s," and private litigants only infrequently brought claims—a fact likely related to the reality that most of these claims were unsuccessful.[321]

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[318] John O. Calmore, "*Chasing the Wind": Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization*, 37 LOY. L.A. L. REV. 1167, 1198 (2004). A common argument for the lack of efficient legislative remedy is that the reforms have simply "not gone far enough" and therefore "have not been sustainable enough to resist backlash and retrenchment." *Id.*

[319] BARLOW & BARLOW, *supra* note 29, at 78.

[320] *See* Steil, *supra* note 70, at 86. Other reasons why the FHA has not been successful include "a combination of lack of awareness by victims of discrimination, low levels of enforcement by the government agencies empowered to implement it, and weak penalties for law-breakers." *Id.*

[321] *See* NAT'L COMM'N ON FAIR HOUSING & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 22–25 (2008) (noting that the lack of enforcement activity continued in the 2000s); Schwemm & Taren, *supra* note 287 (discussing the background of home-loan discrimination in the twentieth century); *see also* Gano, *supra* note 63, at 1112 (discussing the Great Recession leading to the end of the era of underenforcement). There are still significant complaints about enforcement levels. Such institutional creations could be complemented by a more robust legal regime, particularly with increased punishments for predatory and discriminatory lending. Currently, most of these wrongs are remedied through settlements in amounts that equate to a mere "rounding error." Hiltzik, *supra* note 269. The push for reparations "in the form of affordable loans and down-payment assistance grants, for black and brown communities that have been subject to decades of red-lining and other racist policies" should be championed, too. Jimmy Tobias, *Meet the Rising New Housing Movement That Wants to Create Homes for All*, NATION (May 23, 2018), https://www.thenation.com/article/the-way-home/?print=1. Most importantly, however, it

But discriminatory dualism suggests an additional explanation for why these reforms were unsuccessful: they failed to anticipate the eventuality that the discrimination would simply morph into its opposite form. By focusing on just one piece of a discriminatory dualism pair, the legislation was unable to bring down the system. Discriminatory dualism suggests that more fundamental changes are needed to break these binaries. Reform measures that only target one strand of the double-helix of discriminatory dualism are doomed to virtually always fail.

Reform efforts are also further complicated by the fact that none of these examples of discriminatory dualism constitute the sole form of discrimination in any of these contexts. Housing discrimination is not limited to redlining and reverse redlining; it also has taken the form of race-based zoning,[322] restrictive covenants,[323] realtor steering and blockbusting,[324] race-based appraisals,[325] and discriminatory maintenance following foreclosure.[326] Discrimination in policing and employment, too, take a variety of forms.[327] These intersecting webs of discriminatory forms further speak to the multi-faceted challenges of creating social and legal change.

Moreover, the dismantling process itself can unintentionally breathe new life into discriminatory practices, as "the status

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may be time to challenge the entire private market housing model itself. New kinds of ownership, including "cooperatives, mutual-housing associations, and other nonmarket ownerships models" like land trusts should be explored as a means of accumulating wealth. *Id.*

[322] *See* Michelle Y. Ewert, *Things Fall Apart (Next Door): Discriminatory Maintenance and Decreased Home Values As the Next Fair Housing Battleground*, 84 BROOK. L. REV. 1141, 1146 (2019).

[323] *See generally* Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540 (2012).

[324] *See* Mary Szto, *Real Estate Agents as Agents of Social Change: Redlining, Reverse Redlining, and Greenlining*, 11 SEATTLE J. SOC. JUST. 1 (2013).

[325] *See* Junia Howell & Elizabeth Korver-Glenn, *Neighborhoods, Race, and the Twenty-First-Century Housing Appraisal Industry*, 4 SOC. RACE & ETHNICITY 473 (2018).

[326] As the disinvestment/exploitation cycle continues, the properties abandoned as a result of the exploitation phase of the cycle are circulated back through the disinvestment phase. In *National Fair Housing Alliance v. Bank of America, N.A.*, 401 F. Supp. 3d 619, 623 (D. Md. 2019), the court considered the claim that Bank of America and Safeguard "disproportionately neglect[ed] their home-maintenance duties [on foreclosed properties it owned] in communities of color, while tending more closely to foreclosed properties in white neighborhoods." Noting the "copious" data collection amassed by the plaintiffs and that the "regression analyses controlled for myriad factors," the court held that "[t]he facts pled raise a reasonable inference that the defendants violated anti-discrimination provisions of the Fair Housing Act." *Id.* at 623–24.

[327] Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 826 (2002).

hierarchy mutates to ensure a longevity that would not have been possible if it had remained static."[328] Preservation-through-transformation and adaptive discrimination do not suggest that significant change is impossible, but they do "caution that progress narratives about status hierarchies should be approached with intense skepticism."[329]

That said, these broad insights and general approaches to potential partial remedies offer a starting point that may apply to not only the three main examples of discriminatory dualism explored in this Article, but to others as well.[330] Discriminatory dualism exists in additional forms and other contexts beyond those explored here. For example, another current form of discriminatory dualism occurs in higher education. Like in redlining and reserve redlining, the same pattern of denial, followed by exploitative over-access can be found within higher education.[331] Initially, institutions of higher education lay mainly in the refusal to admit minority students.[332] The Civil Rights Act and affirmative action programs, however, helped crack open those previously shut institutional doors.[333] Now, though, discrimination is newly manifested in a deluge of acceptances to subpar, for-profit institutions with accompanying predatory loans.[334] Under the guise of "offering opportunity"—the same rhetoric used in the reverse

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[328] *Id.*

[329] *Id.*

[330] For instance, discriminatory dualism also occurs in the adjudication of campus sexual assault complaints under Title IX, where the historical weighting of the process against complainants is now joined by the practice in some universities of weighting the process against defendants. Both forms perpetuate the same underlying gendered inequities and reify existing gender stereotypes. *See* Sarah L. Swan, *Procedural Discriminatory Dualism: Title IX and Campus Sexual Assault*, 72 OKLA. L. REV. (forthcoming 2020).

[331] *See Reverse Redlining, Discrimination, and For-Profit Education*, STUDENT LOAN BORROWER ASSISTANCE (Aug. 19, 2011), https://www.studentloanborrowerassistance.org/reverse-redlining-discrimination-and-for-profit-education/ (noting that a recent lawsuit challenging these exploitative practices "brings the reverse redlining legal claims to the for-profit higher education industry").

[332] *See* Sherrilyn A. Ifill, *Racial Justice Demands Affirmative Action*, N.Y. TIMES (Aug. 2, 2017), https://www.nytimes.com/2017/08/02/opinion/college-discrimination-whites-donald-trump-.html (discussing the Department of Justice's efforts to attack affirmative action).

[333] Erin Fuchs, *JFK Wrote a Memo in 1961 That Still Has a Huge Impact on College Admissions in America*, BUS. INSIDER (Dec. 8, 2015), https://www.businessinsider.com/where-did-affirmative-action-come-from-2015-12/.

[334] Jillian Berman, *All the Ways Student Debt Exacerbates Racial Inequality—'It's Like Landing in Quick Sand,'* MARKETWATCH (July 27, 2019, 4:36 PM), https://marketwatch.com/story/all-the-ways-student-debt-is-exacerbating-racial-inequality-its-like-landing-in-quick-sand-one-black-student-says-2019-07-18.

redlining context[335]—these institutions charge exorbitant fees and saddle students with massive debt in exchange for next-to-useless degrees.[336] They aggressively "target[] poor and minority students with an inferior education product,"[337] "pushing risky private loans on the low-income, minority students they recruit."[338] In a further dark twist of irony (and an example of the intersecting nature of these forms of oppression),[339] many such students need significant loans in the first place exactly because one key means of funding college—home equity—has been rendered unavailable by redlining and reverse redlining.[340]

Another discriminatory dualism example lies in practices of containment and exclusion. One major school of thought has posited that modernist institutions in the past were focused on *containing* undesirable peoples, and sought to "enclose, capture, and contain" them.[341] For example, prostitution was approached with tools like "zoning law and/or the selective application of criminal law," which "attempted to contain prostitution in particular sections of the city."[342] Now, though, the tide has turned, and postmodern institutions tend to favor *exclusion* as the preferred means of social

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[335] *See, e.g.*, Matthews v. New Century Mortg. Corp., 185 F. Supp. 2d. 874, 886 (S.D. Ohio 2002) (explaining reverse redlining "is the situation in which a lender unlawfully discriminates by extending credit to a neighborhood or class of people . . . on terms less favorable than would have been extended to people outside the particular class at issue"); *see also* Gregory D. Squires, *Predatory Lending: Redlining in Reverse,* SHELTERFORCE (Jan. 1, 2005), https://shelterforce.org/2005/01/01/predatory-lending-redlining-in-reverse/ ("After decades of redlining practices that starved many urban communities for credit and denied loans to racial minorities, today a growing number of financial institutions are flooding these same markets with exploitative loan products that drain residents of their wealth.").

[336] *See Reverse Redlining, Discrimination, and For-Profit Education*, *supra* note 331.

[337] *Id.*

[338] Casey Quinlan, *For Profit Colleges, Students of Color and the Debt Crisis No One Really Talks About*, THINKPROGRESS (Aug. 31, 2015, 12:00 PM), https://thinkprogress.org/for-profit-colleges-students-of-color-and-the-debt-crisis-no-one-really-talks-about-48742c0e1fa/.

[339] *See generally, e.g.*, Dorothy Roberts, *Prison, Foster Care, and the Systematic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012). Another example of these discriminatory forms interacting is how "[w]hite mob violence against integrated neighborhoods in the late 1890's and early 1900's drove African Americans from their homes." Steil, *supra* note 70, at 67–68.

[340] Joseph Williams, *Going to College Isn't Paying Off for Students of Color*, TAKEPART (Aug. 21, 2015), http://www.takepart.com/article/2015/08/21/going-college-isnt-paying-students-color (noting that "discrimination and subprime loans in the housing market" have prevented the accrual of home equity and wealth in one's home, "which many families use to finance college tuition").

[341] Katharine Beckett & Steve Herbert, *Dealing with Disorder: Social Control in the Post-Industrial City*, 12 THEORETICAL CRIMINOLOGY 5, 19 (2008).

[342] *Id.*

control.[343] Whereas prostitutes were once contained within specific zones, popular legal mechanisms—like "Stay Out of Areas of Prostitution" ordinances—now exclude and disperse them.[344]

But like the other instances of discriminatory dualism, one discriminatory practice has not simply flipped into its opposite form. Rather, one practice has risen to dominance as the other has receded. Both techniques are always in play; one just tends to be more obvious.[345] Both containment and exclusion have long been used together, trading off as social conditions make one mode more or less available.[346] While containment often is associated with an older approach to social control, exclusion in fact did occur—just more subtly.[347] These twinned practices are particularly salient at the local level, where cities and municipalities

> have long used criminal law to relocate and concentrate prostitution and other urban ills—and continue to do so today. In the late 19th century, for example, mass arrests and anti-loitering ordinances were used by urban officials to relocate and concentrate the sex trade to the periphery of the city. Later in the 20th century, criminal law enforcement was used once again to move sex workers from white areas to black neighborhoods where red-light districts were tolerated. Similarly, many "postmodern" cities also seek to contain marginalized populations in abandoned sections of the city. [Thus, c]ontainment and exclusion were, and remain, inseparable.[348]

Indeed, a discriminatory practice's opposite may always be potentially lurking.[349] And some currently latent opposite forms likely have not yet even begun their processes. But because of this

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343 *Id.*
344 *Id.*
345 *Id.*
346 *Id.* at 20.
347 *Id.*
348 *Id.* (internal citations omitted).
349 Discriminatory dualism has played a significant role in perpetuating gender, sexuality, race, and class-based harms in the context of marriage. In the martial context, one discriminatory practice which was rooted in a subordinate legal status is often eradicated, but the opposing practice rises in its place. *See generally* Sarah L. Swan, *Marrying Discriminatory Dualism* (May 2020) (unpublished manuscript) (on file with author).

perpetual possibility, legal reforms and calls for social change should account for the possibility that the opposite discriminatory practice arising, when they consider strategies for addressing current oppressive practices.

Ultimately, accomplishing the significant social change necessary to decrease and eliminate discriminatory dualism will be an arduous process. Like discrimination in general, discriminatory dualism's shifting complexity "requires systemic, dynamic, and strategic responses and, just as importantly, indefinite vigilance."[350] Discriminatory dualism has developed over long historical arcs; its dismantling will likely follow the same path.

VI. CONCLUSION

Discriminatory dualism presents a difficult challenge for social justice advocates. Its contradictory, coexisting strands and its use of opposite practices to achieve the same discriminatory ends defy easy conceptualization. An old Buddhist parable suggests the spirit in which we might proceed:

> A Zen master says to his pupils: "If you say this stick is real, I will beat you. If you say this stick is not real, I will beat you. If you say nothing, I will beat you." There seems to be no way out. One pupil, however, found a solution by changing the level of communication. [The pupil] walked up to the teacher, grabbed the stick, and broke it.[351]

The implication, of course, is that "we must break out of the level of consciousness that contains th[e] contradiction."[352] The double bind of discriminatory dualism requires similar, radical solutions. It demands that we rethink our relationships with the institutions that directly perpetuate discriminatory dualism, with the underlying status hierarchies that discriminatory dualism maintains, and with the legal and social edifices that are complicit with such processes.

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[350] Boddie, *supra* note 12, at 1304.

[351] Marilyn Wedge, *The Double Binds of Everyday Life*, PSYCHOL. TODAY (Oct. 13, 2011), https://www.psychologytoday.com/us/blog/suffer-the-children/201110/the-double-binds-everyday-life.

[352] *Id.*