

WHAT'S ART GOT TO DO WITH IT?: A REBELLIOUS LAWYER MINDSET IN TRANSACTIONAL PRACTICE

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The geography and demographics of poverty have changed significantly over the last 20 years to trigger a national conversation about race and class and inequality. This conversation compels the need to examine anew the pervasiveness of race and class discrimination—in both traditionally obvious and nonobvious settings. Calling on rebellious lawyering principles, this Article recognizes that the comprehensive examination of questions of inequality requires the consideration and exploration of remedies that extend beyond the realm of litigation to contemplate transactional advocacy in the public interest—and presents a rebellious lawyer mindset in transactional practice.

I. INTRODUCTION

Gerald López's *Rebellious Lawyering* challenges public interest lawyers to investigate not only their modes of practice, but their motives for practice as well. *Rebellious Lawyering* presents a paradigm shift for public interest lawyering, a shift that demands a collaborative relationship between attorneys and their clients that is based on respect for client autonomy and clients' expertise in their own lives. Even more to the point, the principles espoused in the text call for lawyers to be both intentional and nontraditional in practice and the representation of underserved communities, particularly where issues of class and race predominate. As a legal strategy, rebellious lawyering calls for lawyers to recognize the importance of creating dynamic approaches to injustice, approaches that are uniquely tailored to address social harm. The call, however, does not end at known social injustices and obvious discriminatory harms. Rebellious lawyering strategy also demands consideration of *unknown* social injustices and *nonobvious* discriminatory harms. To meet its fullest potential, rebellious lawyering strategy must be not only reactive to

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social harm but proactive—by anticipating and preventing such harms. Furthermore, rebellious lawyering demands that lawyers view social injustice in broader and more comprehensive contexts, which includes designing resolutions to social problems that are not dependent upon litigation strategies. Litigation has been and continues to be an incredibly valuable tool for attacking various forms of discrimination; however, it is not a perfect or permanent cure for discrimination.¹ In response to López’s call, this Article asks whether social justice advocates can use rebellious lawyering principles to properly anticipate and identify nonobvious manifestations of race and class discrimination and create frameworks to guard against them by articulating a rebellious lawyering mindset for use in transactional practice.

These ideas are explored through a striking example of a nonobvious setting for discrimination: the unprecedented bankruptcy proceedings of the City of Detroit, the largest municipal bankruptcy in American history. This inquiry is framed around the debate about whether a portion of the art collection held by the Detroit Institute of Art (“DIA”) could be characterized under federal bankruptcy law² as “non-essential assets”³ that could or should have been sold to satisfy some of Detroit’s institutional creditors.⁴ The argument is not whether pieces in the DIA’s collection are essential assets under bankruptcy law. That is a separate issue concerning the appropriateness of using municipal assets to satisfy creditors in the bankruptcy and is no longer relevant since Detroit exited bankruptcy.⁵ The inquiry here is whether the potential forced sale of Detroit’s cultural assets, and even the consideration of the potential sale, are formal manifestations of informally held biased presumptions about the value of the DIA’s collection to the residents of Detroit, and, therefore, a nonobvious form of discrimination. In other words, did the creditors and others make the argument to sell some of the city’s cultural assets because of biased perceptions about Detroit’s 80% black population

¹ See, e.g., Patience A. Crowder, *Impact Transaction: Lawyering for the Public Good through Collective Impact Agreements*, 49 *INDIANA L. REV.* 621 [hereinafter *Impact Transaction*] (2016); see generally Patience A. Crowder, *Interest Convergence as Transaction?*, 75 *UNIV. PITT. L. REV.* 693 (2014).

² 11 U.S.C. §§ 903, 922(d), 928(b) (2012).

³ See Lee Rosenbaum, *After Detroit’s Close Call*, *WALL ST. J.*, Nov. 20, 2014, at D5, <http://www.wsj.com/articles/after-detroits-close-call-on-the-dia-and-bankruptcy-1416438355>; see also Dale Eisinger, *Detroit Bankruptcy Creditors File Court Motion Pressuring Sale of Collection Held by Detroit Institute of Arts*, *COMPLEX* (Nov. 27, 2013), <http://www.complex.com/style/2013/11/detroit-institute-of-arts-bankruptcy-creditors-court-motion-pressuring-sale-collection>.

⁴ Rosenbaum, *supra* note 3; Eisinger, *supra* note 3.

⁵ See Matthew Dolan, *Detroit Exits Municipal Bankruptcy Case*, *WALL ST. J.*, Dec. 12, 2014, <http://www.wsj.com/articles/detroit-municipal-bankruptcy-case-to-end-1418229066>; see also 11 U.S.C. §§ 903, 922(d), 928(b).

and the fact that Detroit has the highest rate of concentrated poverty among the 25 largest metropolitan areas in the U.S.—deeming Detroit’s residents as either unworthy of the DIA’s collection or unable to appreciate it because so many are both poor and black.⁶ Exploring that possibility in the broader context of economically distressed cities, such as Detroit, this Article links rebellious lawyering principles to transactional law practices and suggests two frameworks for identifying nonobvious manifestations of race and class discrimination to prevent their discriminatory outcome.

Part II tells the unique story of Detroit’s historic bankruptcy as a nonobvious setting for discrimination and explains the tensions between preserving the DIA’s art collection and paying the city’s creditors in the context of race and class discrimination. Expanding the rebellious lawyering toolkit, Part III presents the “rebellious lawyering” mindset in transactional practice in the context of nonobvious settings for discrimination such as Detroit’s bankruptcy. Proposing examples of a rebellious lawyering mindset in transactional practice, Part IV reviews the social justice strategy impact transaction and offers transactional frameworks to act as mechanisms for assessing the consequences of race and class discrimination in nonobvious settings. Part V then concludes the article.

II. “WHAT HAPPENED IN DETROIT MUST NEVER HAPPEN AGAIN.”⁷

Building upon the foundation of *Rebellious Lawyering*, this section presents the story of Detroit’s bankruptcy to explore questions about the consequences of race and class discrimination in nonobvious settings, settings where we are not accustomed to confronting systemic discrimination.

A. *The Not-So-Always-Obvious Intersection Between Race And Class*

The distinction between “obvious” and “nonobvious” settings of discrimination is a matter of history. Systemic racial discrimination has been constant throughout American history, manifested through formal legal structures regulating, for example, slavery, segregation, and immigration. From challenging restrictive racial covenants on property at the beginning of the Civil Rights movement, to calling out

⁶ See Niraj Warikoo, *Detroit Has Highest Concentrated Poverty Rate Among Top 25 Metro Areas*, DETROIT FREE PRESS, Apr. 26, 2016, <http://www.freep.com/story/news/local/michigan/2016/04/26/detroit-has-highest-concentrated-poverty-rate/83395596/>.

⁷ Rosenbaum, *supra* note 3 (quoting Bankruptcy Judge Steven Rhodes who presided over Detroit’s bankruptcy proceedings).

Airbnb, Inc., for fostering discrimination against both landlords and renters of color,⁸ lawyers and community activists have fought for decades for equality and against racial discrimination in numerous arenas, including housing, public education, and employment—and they remain vigilant on these fronts. Zealous legal advocacy, civil disobedience, and community activism have steadily chipped away at formal mechanisms of race discrimination. For example, landmark Supreme Court cases such as *Brown v. Board of Education*⁹ and *Shelley v. Kraemer*¹⁰ prohibit segregation in public education and race discrimination in real estate transactions, respectively. In addition, organized community activism such as the Montgomery Bus Boycotts eradicated segregation in public transportation.¹¹ Despite these historic gains, however, allegations of discrimination still arise in these areas, which have become historically “obvious” arenas for discrimination.

Economic class discrimination is not unfamiliar—although it is not yet a judicially recognized form of discrimination.¹² Race discrimination is more frequently legislated and litigated, and is both similar to, and distinct from, class discrimination. Unlike race, economic class status is neither a constitutionally protected fundamental right, nor a suspect class. Class distinctions, therefore, trigger lesser standards of judicial scrutiny. While there have always been anti-poverty movements, the Great Recession made economic inequality a mainstream political concern. In the midst of massive job losses and the foreclosure crisis of the Great Recession, the Occupy Wall Street Movement popularized the phrase “We are the 99%!”¹³ as a popular shorthand reference to economic inequality in America. The phrase speaks to the range of inequalities magnified by the Great Recession. Economic inequality in America is not simply an economic matter of dif-

⁸ See, e.g., Jamila Jefferson-Jones, *Shut Out of Airbnb: A Proposal for Remedying Housing Discrimination in the Modern Sharing Economy*, FORDHAM URB. L.J.: CITY SQUARE (May 26, 2016), <http://urbanlawjournal.com/shut-out-of-airbnb-a-proposal-for-remedying-housing-discrimination-in-the-modern-sharing-economy/>.

⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495-96 (1954) (holding the “separate but equal” doctrine had no place in public education because separate educational facilities were inherently unequal, and that segregation denied the Fourteenth Amendment guarantee of equal protection of the laws).

¹⁰ *Shelley v. Kraemer*, 334 U.S. 1, 20-23 (1948) (holding Michigan and Missouri’s supreme courts denied petitioners equal protection of the Fourteenth Amendment in granting judicial enforcement of certain restrictive property ownership agreements).

¹¹ *Montgomery Bus Boycott*, HISTORY.COM, <http://www.history.com/topics/black-history/montgomery-bus-boycott> (last visited July 29, 2016).

¹² See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that wealth is not a suspect classification).

¹³ See OCCUPY WALL STREET, <http://occupywallst.org/> (last visited July 24, 2016); see also WE ARE THE 99 PERCENT, <http://wearethe99percent.tumblr.com/> (last visited July 24, 2016).

ferences in income or savings accounts. It extends to related non-monetary outcomes such as access to affordable housing, healthcare, and education.¹⁴ Although economic inequalities and poverty rates started to rise before the Great Recession,¹⁵ one of its legacies¹⁶ is the deep expansion of poverty beyond the boundaries of urban central cities into suburban communities—deepening the inequality gap to historic widths.¹⁷

Between 2000 and 2010, the number of poor people in America increased from 33.9 million to 46.2 million.¹⁸ Today, the wealth¹⁹ gap between America's highest income families and middle and lower income families is currently at a record high.²⁰ Economic inequalities do not occur in race neutral contexts, and these figures become even starker once race is considered. For example, the gaps in income between the average white household and the average African-American and Hispanic households are 40 percent and 30 percent, respectively.²¹ America's wealth gap (broader in scope than the income gap), however, is the most telling data point for exploring inequality across class and race lines. Data from the Pew Research Center shows that, between 2010 and 2013, the median net worth of African-American and Hispanic households actually dropped by 33.7 percent and 14.3 percent, respectively.²² Moreover, in 2012, "the me-

¹⁴ See, e.g., Richard Fry & Paul Taylor, *The Rise of Residential Segregation by Income*, PEW RES. CTR: SOCIAL & DEMOGRAPHIC TRENDS (Aug. 1, 2012), <http://www.pewsocialtrends.org/2012/08/01/chapter-1-rising-income-and-residential-inequality/>.

¹⁵ See Bill Turque, *In the East, the Least: Affluent Montgomery County Has Some Growing Concentration*, WASH. POST, Sept. 7, 2014, at A1.

¹⁶ See Nat'l Bureau of Econ. Res., Bus. Cycle Dating Committee Rep., Opinion Letter (Sept. 20, 2010) (prominent economists note the Great Recession began in December 2007 and officially ended in June 2009).

¹⁷ See ELIZABETH KNEEBONE & ALAN BERUBE, CONFRONTING SUBURBAN POVERTY IN AMERICA 2-5 (2013); see e.g., Dionne Searcey & Robert Gebeloff, *Middle Class Shrinks Further as More Fall out Instead of Climbing Up*, N.Y. TIMES, Jan. 25, 2015, http://www.nytimes.com/2015/01/26/business/economy/middle-class-shrinks-further-as-more-fall-out-instead-of-climbing-up.html?_r=0.

¹⁸ See *id.*

¹⁹ See Richard Fry & Rakesh Kochhar, *America's Wealth Gap Between Middle-Income and Upper-Income Families Is Widest on Record*, PEW RES. CENTER (Dec. 17, 2014), <http://www.pewresearch.org/fact-tank/2014/12/17/wealth-gap-upper-middle-income/> (noting family wealth is defined as the difference in value between a family's assets (home) and debts (credit cards)).

²⁰ See *id.* In 2013 the median wealth of America's upper-income families was \$639,400 compared to \$96,500 for middle-income families, the widest gap in the thirty years since the Federal Reserve started collecting this information. Similarly, the median net worth of upper-income families is almost seventy times that of low-income families.

²¹ See Joshua Holland, *Smart Chart: The Black-White Wealth Gap Widened During the Great Recession*, MOYERS & CO. (Dec. 15, 2014), <http://billmoyers.com/2014/12/15/black-white-wealth-gap/>.

²² See Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RES. CTR. FACT TANK (Dec. 12, 2014),

dian wage for workers of color was \$5 an hour less than median wages for White workers.”²³

The suburbanization process that facilitated “white flight” from the cities in the 1950s and 60s also facilitated a racialization of poverty that continues to act as a barrier to equality.²⁴ This is exemplified through recent protests in communities such as Ferguson, Missouri, where race and class discrimination worked collaboratively to subordinate the African American community,²⁵ which is 67 percent of the population.²⁶ Understanding the consequences of the intersections between race and class is essential for providing platforms for coalition building among those seeking to challenge inequality because “[d]iscussing race without including class analysis is like watching a bird fly without looking at the sky: it’s possible, but it misses the larger context.”²⁷ The intersectionality between race and class demands innovative approaches to address discrimination.²⁸

While civil rights advocates continue to have success in and out of court, new avenues of discrimination steadily emerge; many are less formal but just as devastating. These “nonobvious” settings for discrimination contemplate policies and practices with seemingly race neutral criteria but whose execution nevertheless results in discrimination on the basis of race, class, or both.²⁹ *Washington v. Davis*³⁰ established both the judicial precedent for nonobvious settings of racism

<http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/>.

²³ See Angela Glover Blackwell, *Building an Inclusive Economy for the 21st Century: A Statement by Angela Glover Blackwell*, POL’Y LINK (Jan. 21, 2015), <http://www.policylink.org/blog/sotu-2015-statement>.

²⁴ *White flight*, MERRIAM-WEBSTER LEARNER’S DICTIONARY, <http://www.merriam-webster.com/dictionary/white%20flight> (last visited July 29, 2016).

²⁵ See generally U.S. DEP’T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEP’T (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf (a recent Department of Justice investigation into Ferguson police practices).

²⁶ See Jordan Weissmann, *Ferguson Is Mostly Black. Why Is Its Government So White?*, SLATE: MONEYBOX (Aug. 14, 2014), http://www.slate.com/blogs/moneybox/2014/08/14/ferguson_missouri_government_why_is_it_so_white.html.

²⁷ Rhonda Soto, *Race & Class: Taking Action at the Intersections*, 11 DIVERSITY & DEMOCRACY, at 12 (2008), <http://www.diversityweb.org/DiversityDemocracy/vol11no3/soto.cfm>.

²⁸ See, e.g., MANUEL PASTOR, JR., CHRIS BENNER & MARTHA MATSUOKA, THIS COULD BE THE START OF SOMETHING BIG 188–89 (2009).

²⁹ For example, the U.S. Supreme Court recently heard arguments in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* See generally Transcript of Oral Argument at 16–22, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015) (No. 13–1371) (in this case, the parties argued whether the 1968 Fair Housing Act only targets intentional discrimination as opposed to both intentional discrimination and policies or practices that have a “disparate impact” on minority communities despite race-neutral parameters).

³⁰ *Washington v. Davis*, 426 U.S. 229, 249–52 (1976).

and illustrates the powerful but frequently limited power of litigation to remedy discrimination. In *Washington*, the United States Supreme Court held that the disparate impact of a “race neutral” test for potential police officers was not sufficient to establish the police department’s intent to discriminate against African American applicants.³¹ In *Washington*, 57 percent of black applicants to the police academy in Washington, D.C., failed the test compared to 13 percent of white applicants. The African American plaintiffs argued that the entrance exam was biased. The Court, however, determined that an unequal outcome was not sufficient to find unconstitutional discrimination without establishing a discriminatory purpose—establishing the disparate impact doctrine.³² Courts continue to apply the doctrine where an action leads to a disparate outcome but there are no race-specific classifications that lead to that disparate outcome. *Washington*, and cases like it, support systemic racism in nonobvious settings by requiring evidence of an intent to discriminate—regardless of any disproportionate outcome.³³ As demonstrated in the next section through the lens of Detroit, left unchecked, discrimination in nonobvious settings can be just as damaging to American society as formalized, legal segregation.

Detroit has been a city of both immeasurable promise and immense peril, unique in American history.³⁴ As detailed below, from Detroit’s rise as one of the most celebrated and culturally relevant cities to its decline to become one of the most devastated cities in the world, Detroit holds a unique status in America’s metropolitan development.

B. The City Of Detroit’s Origin Story

At 139 square miles, Detroit is currently the eighteenth-largest city in the United States,³⁵ and from the beginning, Detroit seemed destined to become one of America’s most influential cities, a place

³¹ *See id.*

³² *See id.* at 238-48.

³³ *See* Osagie K. Obasogie, *The Supreme Court Is Afraid of Racial Justice*, N. Y. TIMES Jun. 7, 2016, <http://www.nytimes.com/2016/06/07/opinion/the-supreme-court-is-afraid-of-racial-justice.html> (noting the 40th anniversary of the landmark Supreme Court decision in *Washington v. Davis*, 426 U.S. 229 (1976)).

³⁴ A detailed history of the city of Detroit is beyond the scope of this essay, but for fascinating discussions about its history, *see generally* Thomas J. Sugrue, *Motor City: The Story of Detroit*, THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, <http://www.gilderlehrman.org/history-by-era/politics-reform/essays/motor-city-story-detroit> (last visited Aug. 31, 2016).

³⁵ Chad Hughes, *Detroit Is Not Enormous: Size, Revenue, & the City’s Ongoing Crisis*, GEO. PUBLIC POL’Y REV. (Aug. 18, 2014), <http://gppreview.com/2014/08/18/detroit-is-not-enormous-size-revenue-and-the-citys-ongoing-crisis/>.

where the “unique” happens. For example, incorporated in 1815 after being claimed by first the French and then the British, Detroit was home to an unprecedented alliance between all Indian tribes from Lake Superior to the lower Mississippi that formed under the leadership of Ottawa Indian Chief Pontiac to battle the British.³⁶ Detroit was also the last stop in the United States on the Underground Railroad until the Civil War.³⁷ Later, the city became America’s first Silicon Valley as a “global symbol of modernity and of the power of American capitalism and the labor that built it.”³⁸ Nicknamed the Motor City³⁹ for its prowess in the automotive industry, Detroit rose to prominence as a manufacturing powerhouse in the automotive and other industries, including food production, stove manufacturing, cigar making, and pharmaceuticals.⁴⁰ The abundance of industry paved the way for Detroit to become a leader in quality of life concerns for blue-collar workers, not without significant struggles and challenges to union organizing. In its heyday, the city was dubbed the labor movement’s “capital city” and a “haven for the working class.”⁴¹ Not only did the city host a seemingly unlimited number of jobs, but it was also a leader in providing *good* jobs that paid living wages. This was due in large part to trailblazing efforts to court and grow the working and middle classes through policies such as Henry Ford’s \$5 work day and forty-hour work week.⁴² At one time America’s “richest big city,”⁴³ “[b]y the mid-twentieth century, a majority of Detroit residents were homeowners; many autoworkers saved money to send their children to college; and tens of thousands could even afford lakeside summer cottages—leading to the rise of blue-collar resort towns throughout Michigan.”⁴⁴

Innovations in both industry and lifestyle attracted thousands of African Americans who left inhospitable conditions in the South during the Great Migration to Detroit.⁴⁵ The African American popula-

³⁶ See Richard Cavendish, *The Founding of Detroit*, 51 HIST. TODAY, July 2001, at 55, <http://www.historytoday.com/richard-cavendish/founding-detroit>.

³⁷ See *Underground Railroad*, DETROIT HIST. SOC’Y: ENCYCLOPEDIA OF DETROIT, <http://detroithistorical.org/learn/encyclopedia-of-detroit/underground-railroad> (last visited July 24, 2016).

³⁸ Sugrue, *supra* note 34.

³⁹ See *id.* Detroit’s famous nickname reflects the 125 car companies that once called it home.

⁴⁰ See *id.*

⁴¹ See MIKE SMITH & THOMAS FEATHERSTONE, *LABOR IN DETROIT: WORKING IN THE MOTOR CITY* 7 (2001).

⁴² See CHARLIE LEDUFF, *DETROIT: AN AMERICAN AUTOPSY* 6 (2013).

⁴³ See *id.* at 5.

⁴⁴ See Sugrue, *supra* note 34.

⁴⁵ See generally *id.*

tion increased significantly between World War II and the 1960s,⁴⁶ with Detroit's total population peaking in 1950 at 1.8 million people,⁴⁷ and making Detroit one of the most ethnically, racially, and socioeconomically diverse cities of its time.⁴⁸ Despite being one of the most diverse cities in the United States at one time, it was also the site of "one of the worst race riots" in history.⁴⁹ As African Americans arrived, so did "white flight" from Detroit to the suburbs.⁵⁰ And the jobs that lured African Americans to Detroit disappeared as the manufacturing industry was undone.⁵¹

Detroit's economic decline is bookended between decades of disinvestment and political corruption.⁵² The automation, relocation, and globalization of manufacturing jobs, as well as competition from international car makers, gutted Detroit's industrial core. With the globalization of manufacturing jobs came higher rates of unemployment because there was no industry capable of filling the employment gap.⁵³ The loss of manufacturing jobs created an economic avalanche that entangled almost every aspect of life in Detroit. Although Detroit was certainly not the only city to be dramatically transformed by globalization, its decline is both typical and atypical.⁵⁴ "Most Midwest cities had white flight and segregation. But Detroit had it more intensely. Most cities had deindustrialization. Detroit had it more intensely."⁵⁵ The city lost a quarter of a million residents between 2000 and 2010.⁵⁶

In addition, there are some significant challenges to the city's overall health and ability to serve its residents. Today, Detroit is home to approximately 700,000 residents, down 60 percent from its

⁴⁶ See *id.*

⁴⁷ See *id.* at 23.

⁴⁸ See *id.* at 38.

⁴⁹ See *id.*

⁵⁰ See *id.* at 8.

⁵¹ See *id.* at 38.

⁵² See generally Tresa Baldas, *How Corruption Deepened the City's Crisis*, DETROIT FREE PRESS, Oct. 6, 2013, at A1; see also Kate Abbey-Lambertz, *Detroit Corruption Rooted Out as Felony Bribery Charges Filed Against Seven Building Inspectors*, HUFFINGTON POST (Aug. 29, 2013, 12:40 PM), http://www.huffingtonpost.com/2013/08/29/detroit-corruption_n_3837180.html. (It is difficult to quantify the economic harm of political corruption. The conviction and sentencing of former Mayor Kwame Kilpatrick, however, highlighted the exploitation suffered by the city at the hands of its elected officials.)

⁵³ See Amy Padnani, *Anatomy of Detroit's Decline*, N.Y. TIMES, Dec. 8, 2013, <http://www.nytimes.com/interactive/2013/08/17/us/detroit-decline.html>.

⁵⁴ Sharon Cohen, *Detroit's Downfall: Decline of Autos, Troubled Racial History Blamed for City's Decline*, STAR TRIBUNE, July 21, 2013, <http://www.startribune.com/business/216349491.html> ("What happened in Detroit is not particularly distinct." (quoting Northwestern University Professor of History Kevin Boyle)).

⁵⁵ See *id.*

⁵⁶ *Id.*

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peak of 1.8 million during the 1950s.⁵⁷ The city's population is 80 percent African American and less than 10 percent white.⁵⁸ Unemployment is more than twice the national average and has nearly tripled since 2000.⁵⁹ Detroit is perennially on the list of most dangerous cities, and the homicide rate is at the highest level in nearly forty years.⁶⁰ Only 12 percent of residents aged twenty-five or older have bachelor's degrees, which is less than half of the national level.⁶¹ Public schools are under the control of a state-appointed emergency manager, and the daily newspapers cut home delivery to three days per week.⁶² Approximately half of the city's property owners do not pay property taxes,⁶³ and, in the midst of the bankruptcy proceedings, the city enforced mass water shut-offs for nonpayment of water bills—a policy that the United Nations labeled as a human rights violation when applied to poor residents.⁶⁴

Detroit is a “shrinking city”⁶⁵ with approximately 100,000 vacant properties⁶⁶ and forty acres of previously developed infrastructure overgrown and reclaimed by nature.⁶⁷ In a cruel twist of fate given this Article's focus on the DIA's collection, Detroit's overgrown physical infrastructure has spawned a cottage tourism industry of urban voyeurism where people come to Detroit to tour its “urban ruins.”⁶⁸

⁵⁷ *Id.*

⁵⁸ See Sugrue, *supra* note 34.

⁵⁹ See Matthew Dolan, *Record Bankruptcy for Detroit*, WALL ST., J. July 19, 2013, at A1.

⁶⁰ *Id.*

⁶¹ See Chuck Salter, *Detroit: A Love Story*, FAST COMPANY May 2013, at 106.

⁶² See Anick Jesdanun, *Detroit Newspapers Start Reduced Home Delivery*, HUFFINGTON POST (Apr. 30, 2009, 5:12 AM), http://www.huffingtonpost.com/2009/03/30/detroit-newspapers-start_n_180619.html.

⁶³ See Rana Foroohar, *Broken City*, TIME, Aug. 5, 2013, at 22, 26.

⁶⁴ See *In Detroit, City-Backed Water Shut-Offs “Contrary to Human Rights,” Say UN Experts*, UN NEWS CENTRE (Oct. 20, 2014), http://www.un.org/apps/news/story.asp?NewsID=49127#.VLTLYybn_oo. (In a statement on this issue, UN Special Rapporteur Catarina de Albuquerque said, “Disconnections due to non-payment are only permissible if it can be shown that the resident is able to pay but is not paying. In other words, when there is genuine inability to pay, human rights simply forbids disconnections.”); see also *Detroit: Disconnecting Water from People Who Cannot Pay—An Affront to Human Rights, Say UN Experts*, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS (June 25, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14777>.

⁶⁵ See generally *DETROIT FUTURE CITY*, <http://www.detroitfuturecity.com> (last visited July 24, 2016) (noting Detroit's most recent comprehensive plan, *Detroit Future City*, was released by city leaders in January 2013, focusing on accepting the city's population loss and “right-sizing”).

⁶⁶ See Monica Davey, *The Odd Challenge for Detroit Planners*, N.Y. TIMES, Apr. 6, 2011, at A14.

⁶⁷ See Jonathan Oosting, *Detroit Has More Vacant Land Than Any Other City in America Except Post-Katrina New Orleans*, MICH. LIVE (Sept. 29, 2009, 6:17 AM), http://www.mlive.com/news/detroit/index.ssf/2009/09/detroit_has_more_vacant_land_t.html.

⁶⁸ See Greg Newkirk, *Urban Exploration Tours Bringing Drones of Tourists to Detroit*

Detroit has not entirely lost the promise of its origins. For better or for worse, Detroit maintains national attention. It is one of twelve American cities to host professional basketball, hockey, baseball, and football teams.⁶⁹ It is also frequently featured as a city on the brink of rediscovery in the post-recession economy through innovations such as urban agriculture.⁷⁰ And, of course, there is the DIA.

C. The Detroit Institute Of Arts

Like its home city, the DIA has a unique history. The DIA opened in 1885 as a privately funded museum. It was rechristened the DIA in 1919, when it became a publicly owned city department.⁷¹ It holds approximately 60,000 works from Egyptian mummies to contemporary art, and one need not be an art expert to understand that its collection is impressive simply from its list of “firsts” and “onlys.” The DIA was one of the first major art museums to have a department of African American art.⁷² It was also the first public museum in the United States to acquire works by van Gogh and Matisse.⁷³ It contains several works of “exceptional significance” by Bellini, Rembrandt, Picasso, Diego Rivera, Andy Warhol, and Pieter Bruegel the Elder.⁷⁴

In addition to its impressive collection, the DIA has state-of-the-

Ruins, ROADTRIPPERS (Jan. 1, 2014), <https://roadtrippers.com/blog/urban-exploration-tours-bringing-droves-of-tourists-to-detroit-ruins>; see also Emma Ockerman, *Picturesque Blight? Photographer Offers Tours of Detroit's Abandoned Buildings*, DETROIT FREE PRESS (Jan. 26, 2014, 10:55 AM), <http://archive.freep.com/article/20140126/NEWS01/301260077/urban-ruin-tours-Detroit> (describing how white photographers visit Detroit as urban explorers to photograph and make art out of Detroit's physical decline).

⁶⁹ See, e.g., Joe Drape, *Bankruptcy for Ailing Detroit, But Prosperity for Its Teams*, N.Y. TIMES, Oct. 14, 2013, at A1; see also Mostafa Heddaya, *Detroit Sports Profit as DIA Collection Considered for Collateral*, HYPERALLERGIC (Oct. 17, 2013) (noting the teams are the Detroit Pistons (although the team plays in the Detroit suburb of Auburn Hills), Red Wings, Tigers, and Lions. Detroit was also home to the WNBA team the Detroit Shock before the team moved to Tulsa. The existence of these teams is both a blessing and a curse. While their existence distinguishes Detroit from other cities, the salaries received by the players and the tax subsidies received by the teams from both the City of Detroit and the State of Michigan are a source of deep resentment in a city where pensioners had to accept cuts to their pensions to facilitate the city's exit from bankruptcy proceedings).

⁷⁰ See Salter, *supra* note 61.

⁷¹ See Mark Stryker, *DIA in Peril*, DETROIT FREE PRESS (Sept. 8, 2013), <http://www.freep.com/graphics/diatimeline/index.html>.

⁷² See *The General Motors Center for African American Art*, DETROIT INST. OF ARTS, <http://www.dia.org/art/african-american.aspx> (last visited July 24, 2016).

⁷³ See Graham W. J. Beal, *Director's Letter*, DIA NEWS (Jan. 2015), <http://archive.constantcontact.com/fs100/1102135368424/archive/1119652087200.html>.

⁷⁴ See Katya Kazakina & Philip Boroff, *Selling Off Detroit's Art Could Depress Global Market*, BLOOMBERG BUS. (July 23, 2013), <http://www.bloomberg.com/news/articles/2013-07-23/selling-off-detroit-s-art-could-depress-global-market> (quoting art valuation specialist Beverly Schreiber).

art features that greatly enhance the public's viewing of its collection and make it one of the top museums in the United States. At more than 600,000 square feet, the DIA houses more than 100 galleries, an 1150-seat auditorium, a 380-seat lecture hall, an art reference library, and a conservation services laboratory.⁷⁵

The origins of the DIA are directly linked to Detroit's prosperity and industrial wealth.⁷⁶ The City of Detroit funded the DIA's acquisitions and operations, making it one of a handful of municipally owned museums in the country. Prior to the bankruptcy, the City of Detroit owned the building and the collections inside the museum, and its daily operations were managed via agreement by a 501(c)(3) non-profit corporation.⁷⁷ It is this relationship that made the DIA a central figure in Detroit's bankruptcy.

D. *The DIA And Detroit's Bankruptcy*

Filed under Chapter 9 of the U.S. Bankruptcy Code, the section applicable to insolvent local governments, municipal bankruptcies are somewhat rare. Since the 1950s there have been about sixty.⁷⁸ Detroit's bankruptcy filing resulted from: (i) a substantial population loss and subsequent decrease in tax revenue without a corresponding reduction in public expenditures; (ii) cuts in state and federal aid; (iii) the effects of political corruption; and (iv) the long-term borrowing necessary to meet the City's operating costs and liabilities.⁷⁹

Most of Detroit's debt is unfunded pension plans and health care obligations owed to approximately 20,000 pensioners.⁸⁰ Detroit filed for federal bankruptcy protection on July 18, 2013, after being unable to reach agreements with enough bondholders and other creditors to restructure Detroit's debt outside of court.⁸¹ Detroit's filing is unprecedented in three significant ways. First, as the "nation's [eighteen]th largest city,"⁸² Detroit filed the largest municipal bankruptcy in

⁷⁵ *About the DIA*, DETROIT INST. OF ARTS, <http://www.dia.org/about/history.aspx> (last visited July 24, 2016).

⁷⁶ *See id.* ("Museum leaders traded financial and managerial independence for the promise of annual funding—except this turned out to be a Faustian bargain that irrevocably linked the DIA to the boom-and-bust cycles of Detroit's economy and ever-shifting political winds.").

⁷⁷ *See id.*

⁷⁸ *See generally* Wayne H. Winegarden, *Going Broke One City at a Time: Municipal Bankruptcies in America*, PACIFIC RESEARCH INSTITUTE (Jan. 2014), https://www.pacificresearch.org/fileadmin/documents/Studies/PDFs/2013-2015/MunicipalBankruptcy2014_F.pdf.

⁷⁹ *See Dolan, supra* note 5.

⁸⁰ *See id.*

⁸¹ *Id.*

⁸² *Id.*

American history.⁸³ Detroit's Chapter 9 filing enters "largely uncharted legal waters because few municipalities—and none of [Detroit's] size—have undergone financial reorganization."⁸⁴ Second, in addition to representing the largest population of a city filing for bankruptcy, Detroit's filing also represents the largest amount of municipal debt—\$18 billion.⁸⁵ Third, because the City of Detroit owns much of the art housed in the DIA's collection, the creditors made unprecedented attempts to force the city to use its cultural assets to satisfy its debts.

Unlike other major U.S. art museums, before Detroit exited bankruptcy, the DIA was a city-owned operation.⁸⁶ As a result of Detroit's early prosperity, the city acquired much of the art that was first shown at the DIA, and owned a significant portion of its current collection at the time of the bankruptcy filing.⁸⁷ Detroit's bankruptcy filing brought one of the nation's finest art collections "front and center in the legal battle over the city's future."⁸⁸ Expecting receipts totaling hundreds of millions of dollars or more, "some of the city's largest creditors [pushed] to sell paintings and sculpture" from the DIA.⁸⁹ Such a sell-off would have been "unprecedented in the U.S. museum world, which operates under a code of ethics that allows the selling of artworks only for the purpose of buying more art."⁹⁰ In municipal bankruptcies, cities are permitted to sell "non-essential" assets that are not necessary for carrying out the city's mission.⁹¹ The presiding bankruptcy judge cautioned that a city "must take extreme care that the asset is truly unnecessary in enhancing its operational reve-

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* Prior to Detroit, Jefferson County, Alabama, held the honor by filing with \$4 million in debt.

⁸⁶ See Karen Pierog, *Detroit Creditors Want More Time to Vet City's Bankruptcy Plan*, REUTERS, Feb. 28, 2014, <http://www.reuters.com/article/2014/03/01/us-usa-detroit-bankruptcy-idUSBREA2001V20140301>. (City-owned pieces in the collection were projected to have a value as high as \$1 billion, but Christie's auction house examined a small portion of the collection and estimated its value between \$450 and \$870 million.)

⁸⁷ See Stryker, *supra* note 71 ("In the end, the deal went through, because the city retained ownership of the art and building and contract details appeased workers' concerns.").

⁸⁸ Randy Kennedy, *Fate of City's Art Hangs in the Balance*, N.Y. TIMES, Dec. 4, 2013, at A20.

⁸⁹ *Id.*

⁹⁰ See Mark Caro, *Should Rembrandt, Van Gogh Help Bail out a Bankrupt Detroit?*, L.A. TIMES, Oct. 18, 2013, <http://articles.latimes.com/2013/oct/18/entertainment/la-et-cm-detroit-institute-art-20131020>.

⁹¹ See Colin Darke, *Why Detroit's Bankruptcy Is Good News for Its Art Museum*, HYPERALLERGIC (Dec. 4, 2013), <http://hyperallergic.com/96667/why-detroits-bankruptcy-is-good-news-for-its-art-museum/>.

nue.”⁹² Unsurprisingly, “[s]ome creditors argue[d] that the art is not necessary for the city’s mission.”⁹³ These creditors argued that:

[g]enerally, a municipal debtor’s most valuable “asset” is its ability to raise taxes, as municipalities rarely own tangible, non-essential assets. [Detroit], however, has the Art, a valuable asset (speculated to be worth billions of dollars) *that is not connected with the delivery of any core services the City provides to ensure the health, safety and welfare of its citizens*. Accordingly, the “best interest of creditors” requirement dictates that the City must demonstrate that its plan maximizes the value of the Art to enhance creditor recoveries.⁹⁴

This perspective raises a question addressed in the next section: “[C]an art’s value be measured in terms of what it can fetch at auction, or does it provide something far greater if less measurable to a community”?⁹⁵ Again, the inquiry here is not whether the DIA’s collection is an essential asset under bankruptcy law. Rather, the inquiry is whether discussing that question is a manifestation of informally held biased presumptions about the perceived value of the DIA’s collection to the residents of Detroit, particularly its poor and black residents.

While this argument is centered on the idea that the conversation concerning the impact of Detroit’s bankruptcy on the DIA is a mani-

⁹² *In re City of Detroit*, Mich., 504 B.R. 97, 171 (Bankr. E.D. Mich. 2013).

⁹³ Kennedy, *supra* note 88, at A20.

⁹⁴ *In re City of Detroit*, No. 13-53846 (E.D. Mich. Nov. 26, 2013), ECF No. 1833, at 2-3, Motion of Creditors for Entry of an Order Pursuant to Section 105(a) of the Bankruptcy Code Appointing and Directing the Debtor to Cooperate with a Committee of Creditors and Interested Persons to Assess the Art Collection of the Detroit Institute of Arts Based on Arms-Length Market Transactions to Establish a Benchmark Valuation (emphasis added).

⁹⁵ *Id.* Detroit filed for bankruptcy on July 18, 2013, with \$18 billion in debt; *see also* Monica Davey & Mary Williams Walsh, *Plan to Exit Bankruptcy Is Approved for Detroit*, N.Y. TIMES, Nov. 8, 2014, at A11,

- Its restructuring plan was approved in November 2014, and, on December 9, 2014, the city exited federal bankruptcy proceedings as its “Grand Bargain” went into effect. Upon exiting bankruptcy, Detroit shed \$7 billion in debt. The Grand Bargain led to pledges of over \$800 million toward payments of pensions over a twenty-year period; *see also* Lisa Lambert, *Detroit Art Museum Will Sue If City’s Bankruptcy Plan Not Approved*, REUTERS, Sept. 18, 2014, <http://www.reuters.com/article/2014/09/18/us-usa-detroit-bankruptcy-art-idUSKBN0HD2OI20140918>; *see also* Serena Maria Daniels, *Detroit to Exit Historic Bankruptcy Later Wednesday*, REUTERS, Dec. 10, 2014, <http://www.reuters.com/article/2014/12/10/usa-detroit-bankruptcy-idUSL1N0TU1CN20141210>, (stating that in addition, the final Grand Bargain provides: most major creditors will be paid by a combination of new bond issuances, bond reissuances, and money borrowed from Barclays Capital; a collective of private foundations, the State of Michigan, and the DIA will collectively contribute \$816 million over a period of time to temper pension cuts; Detroit will receive \$1.7 billion for the improvement of public services and infrastructure by June 20, 2023; the DIA became completely independent from the city and protects its art collection; and; Detroit will be able to significantly reduce its health care expenses).

festation of nonobvious discrimination, the intent is not to ignore the history of cultural appropriation and elitism with respect to the experience of people of color and other subordinated groups throughout history. The theft and destruction of cultural property has occurred for centuries.⁹⁶ International mechanisms are in place to create codes of conduct during war that protect cultural property, return misappropriated property, and punish those who destroy cultural property. Most recently, Ahmad al-Mahdi became the first defendant to plead guilty in the international criminal court, charged with destroying religious monuments in Timbuktu.⁹⁷ Thus, the ideas that there is a public interest in cultural property and that art is a valuable cultural asset to be protected is well documented.⁹⁸ Given Detroit's origin story, it goes without saying that the DIA contains cultural property that should be protected and preserved; however, the argument here extends beyond the protection of property that is reflective of Detroit's culture to the *protection of Detroit's right to have access to cultural property and art*, regardless of whether it stems from Detroit's own history. While the threatened disposition of the DIA's collection appears to be race and class neutral, it could easily be argued that that perspective is rooted in traditionally classist arguments about who is entitled to enjoy art. Even if the origins of Detroit and the DIA are so unique as to not be repeated and although Detroit is no longer in bankruptcy, these are important questions to ask because "[w]hat is taking place in Detroit is part of a national and international process. . . [c]ultural institutions, and the right of the working class to have access to culture, are under attack everywhere."⁹⁹ "[C]ultural heritage is not a luxury good."¹⁰⁰ Stemming these attacks is beyond the scope of litigation strategy as there is no obvious intent to discriminate based on race, and, even if it were actionable, there is no obvious intent to discriminate based on class. Rebellious lawyering principles demand that public interest lawyers look beyond litigation to other methods of problem-solving in underserved communities.¹⁰¹ As such, the notion of transactional practice in the public interest is, in and of

⁹⁶ See, e.g., See James A. R. Nafziger, *The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property*, 15 N.Y.U. J. INT'L L. & POL. 789 (1983).

⁹⁷ See generally Ruth Maclean, 'I am sorry': Islamist Apologises for Destroying Timbuktu Mausoleums, <https://www.theguardian.com/world/2016/aug/22/islamic-extremist-pleads-guilty-at-icc-to-timbuktu-cultural-destruction> (last visited Sept. 13, 2016).

⁹⁸ See, e.g., John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989).

⁹⁹ Heddaya, *supra* note 69.

¹⁰⁰ See Maclean, *supra* note 97 (quoting the prosecutor).

¹⁰¹ See GERALD P. LÓPEZ, *REBELLIOUS LAWYERING* 23-4 (1992).

itself, rebellious.¹⁰²

III. TRANSACTIONAL LAWYERING AND THE REBELLIOUS LAWYERING MINDSET

There are many similarities between rebellious lawyering and transactional practice. This section identifies these similarities and presents these commonalities as a rebellious lawyering mindset in transactional practice.

On the most essential level, *Rebellious Lawyering* is about strategies for creating effective lawyer-client relationships in the pursuit of social change.¹⁰³ “The fundamental idea [of rebellious lawyering] is for lawyers to attempt to pursue meaningful social change while at the same time employing community activism to empower the subordinated who can serve as their own advocates in future struggles when

¹⁰² Of course, not all transactional lawyers are rebellious, as much of for-profit corporate practice is likely to involve a lawyer’s representing clients who reinforce the hierarchy that many rebellious lawyers work against. But, they certainly could be. The author thanks Professor Carlton M. Waterhouse for his insights on this particular topic.

Each lawyer, regardless of her practice and whether her clients are subordinated, is, “as a member of the legal profession, [. . .] a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” MODEL RULES OF PROF’L CONDUCT pmbl., 1 (AM. BAR ASS’N 2002). The following three quotes are from clients and a student in the author’s Community Economic Development Clinic at Denver Law. It is a transactional law clinic, and these comments reflect the four rebellious lawyering principles that make up the rebellious lawyering mindset and demonstrate the transferability of rebellious lawyering to justice in a corporate practice.

Nonprofit Law Firm interested in pursuing multidisciplinary practice and requiring interdisciplinary research: “We [Client] have been thrilled to work with Charlene. We would not be where we are today if it weren’t for Charlene’s diligent research, guidance, and enthusiastic problem-solving. We gave Charlene a tricky puzzle to solve, and she never flinched, and even seemed to enjoy it.”

Woman Entrepreneur and recognizing the role of the Client: “Micah is a pleasure to work with and really educated me about the choices that were available to me as a client. Micah has been extremely patient and understanding. I enjoyed working with Micah and would certainly hire him as an attorney if the opportunity arose in the future.”

Third-Year law school student transitioning with Preventative Lawyer: “I believe that there is still great value, as you’ve suggested, in the application of rebellious lawyering, even in the most abstract sense, to my client. Why? Put simply, ABC, as a prospective employer, is in a position of great power vis-à-vis subordinated people. Since I’ve been working on a Hiring Guide this semester, I asked myself what the rebellious representation of ABC would like in the context of helping a client to develop Hiring Best Practices. Employers are increasingly using personality type tests and games in their application process that some critics argue disproportionately impact protected classes. I think a rebellious lawyer would encourage their employer-client to thoughtfully consider the questions/games that they use in their hiring practices (not simply because of the possibility of litigation down the road, but because of the disproportionate impact it could have on prospective and underrepresented employees).”

¹⁰³ See generally LÓPEZ, *supra* note 101.

the lawyers are gone.”¹⁰⁴ Crafted in response to López’s frustration with what he termed “regnant lawyering,” *Rebellious Lawyering* is a strategy that has been well received by both legal scholars concerned with the theory and practice of public interest law and practitioners who represent underserved clients.¹⁰⁵ López describes regnant lawyering as an unactualized and isolated form of public interest practice dominated by formality and the pursuit of litigation-based strategies for relief.¹⁰⁶ Achieving social justice through a rebellious lawyering mindset in transactional practice requires a lawyer’s entrenchment in the community in which she works, the education and actualization of and deep engagement with her clients, collaboration with non-lawyers and laypersons, critical and consistent self-reflection of her motives and effectiveness, and a focus on problem-solving as opposed to litigation and just “winning a case.”¹⁰⁷ To that end, as with any lawyering strategy, successful rebellious lawyering is manifested through certain lawyering skill sets and fundamentals of practice—the fundamental principles of rebellious lawyering.

Mindsets are “[h]abits of thought” that “determine or influence our actions.”¹⁰⁸ Traditionally, public interest law practice has had a litigation-centric mindset, meaning relief for subordinated clients and communities was largely secured through litigation strategies. According to López, rebellious lawyers do not automatically assume that litigation is the only or best approach for addressing a problem but, instead, investigate other strategies.¹⁰⁹ Moreover, if litigation is pursued, rebellious lawyers also consider whether a litigation strategy significantly involves enough people in the community and whether litigation is a sufficient enough strategy for “penetrating the economic situation” they hope to change.¹¹⁰ In many respects, litigation in public interest practice can be a form of regnant lawyering. Public interest practice, however, has evolved to encompass both litigation and transactional contexts. Litigation is a system of proceedings and court rules governing dispute resolution between parties where one or more parties is seeking to defend a right or recover damages for a harm. The core of transactional practice, in contrast, “involves value crea-

¹⁰⁴ Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1008 (2010).

¹⁰⁵ LÓPEZ, *supra* note 101, at 11-23.

¹⁰⁶ *Id.* at 23-24.

¹⁰⁷ *Id.* at 38.

¹⁰⁸ Caroline Turner, *Mindsets and Diversity: We All Have Mindsets!*, HUFFINGTON POST: THE BLOG (Nov. 17, 2014, 8:49 PM), http://www.huffingtonpost.com/entry/mindsets-and-diversity-we_b_5831342.

¹⁰⁹ See LÓPEZ, *supra* note 101.

¹¹⁰ *Id.*

tion”¹¹¹ among the parties through the exchange of goods or services (or both). Transactional practice in the public interest context has historically been transacted in the context of community economic development (“CED”). Increasing avenues of advocacy beyond litigation techniques, the advancement of CED practice has largely brought relief to underserved communities through transactional practice:

There is no standard definition of community economic development []. It has been described as a strategy that includes a wide range of economic activities and programs for developing low-income communities such as affordable housing and small business development—from creation and expansion of neighborhood businesses to larger commercial and retail services—and job creation, some of which has been accomplished by financing and operating shopping centers, industrial parks, retail franchises, and other small businesses. CED also includes many other initiatives and services to fight homelessness, lack of jobs, drug abuse, violence and crime, and to provide quality child care and medical care as well as homeownership opportunities.¹¹²

CED practice has made remarkable impacts in underserved communities. Transactional practice in the public interest, however, is not limited to CED practice, as demonstrated by the rise in popularity of a relatively new form of business structure called a social enterprise. This Article defines social enterprises as both for-profit entities that “fuse social mission[s] with revenue-producing commercial activities”¹¹³ to achieve both profit and a public good and nonprofit entities that participate in revenue-generating commercial activities that are fundamentally linked to the social mission they seek to advance.¹¹⁴ In addition to the remarkable successes of CED and social enterprise, transactional practice has more to offer the public interest. As a strategy of client representation, rebellious lawyering is largely focused on lawyer-client relationships. In contrast, this Article is not centered on specific lawyer-client relationships, but, instead, is centered on the idea that there are social, legal, and political outcomes that might be achieved through strategies that deploy a rebellious lawyering mindset in transactional practice—where the client is, in essence, the public interest.

Much of the scholarship exploring *Rebellious Lawyering* concerns

¹¹¹ See ALICIA ALVAREZ & PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL PRACTICE 1 (2013).

¹¹² Roger A. Clay, Jr. & Susan R. Jones, *A Brief History of Community Economic Development*, 18 J. AFFORDABLE HOUS. & CMTY. DEV. L. 257, 257 (2009).

¹¹³ Alicia E. Plerhopes, *Social Enterprise as Commitment: A Roadmap*, 48 WASH. UNIV. J.L. & POL'Y 89 (2015).

¹¹⁴ See, e.g., Esha Chhabra, *A Social Entrepreneur's Quandary: Nonprofit or For-Profit?*, N.Y. TIMES, July 11, 2013, at B4.

the relationship between lawyers and clients, and, more specifically, the proper way to structure those relationships under the theory that the representation will be more comprehensive where a lawyer does not merely know *what* outcome her client wants, but *why* her client wants or needs that outcome. Here, rebellious lawyering is much like transactional practice. Furthermore, there are certain fundamental principles that rebellious lawyering and transactional practice have in common, namely: (i) critical thinking, (ii) problem-solving through interdisciplinary advocacy, (iii) understanding the role and value of the client's contribution to the representation, and (iv) preventative lawyering.¹¹⁵ While each of these principles is, individually, important to the success of most forms of law practice, these principles collectively represent fundamentals of transactional practice. Stated another way, in some fashion or another these principles have been identified as rebellious lawyering traits¹¹⁶ and a transactional lawyer must, at a minimum, engage in each of these same principles to represent her clients adequately.

Critical thinking is a skill demanded of all lawyers to represent their clients zealously, but may manifest differently in different practice areas. "Critical thinking is, in short, self-directed, self-disciplined, self-monitored, and self-corrective thinking."¹¹⁷ Problem-solving functions uniquely in transactional practice where understanding the interdisciplinary aspects of the practice is essential to competently represent clients.¹¹⁸ Many transactional matters require the expertise of other professionals, such as an accountant to assist with choice of entity options for small business owners. A lawyer must also understand the substance of a client's business before drafting a contract that will adequately protect the client's interests as well as respect that client's knowledge and understanding of the standards and practices of its industry. For example, in addition to a host of other facts, a lawyer representing a restaurant owner during the negotiation and execution of a commercial lease for a restaurant should discuss with her client how many meals her client intends to sell and at what price points to help determine the maximum amount of rent the client is willing and able to pay for the lease.¹¹⁹ Finally, preventative lawyering demands

¹¹⁵ See ALVAREZ & TREMBLAY, *supra* note 111 and accompanying text at *infra* note 120.

¹¹⁶ See, e.g., Rebellious Lawyering Institute, What is "Rebellious Lawyering"?, <https://rebelliouslawyeringinstitute.org/what-is-rebellious-lawyering/> (last visited Aug. 28, 2016).

¹¹⁷ RICHARD PAUL & LINDA ELDER, *THE MINIATURE GUIDE TO CRITICAL THINKING* 4 (2006).

¹¹⁸ See, e.g., Gerald P. López, *Economic Development in the "Murder Capital of the Nation,"* 60 TENN. L. REV. 685, 697–98 (1993).

¹¹⁹ This example comes from a very helpful simulation exercise for counseling "deals"

hyper vigilance, forethought, and creative planning—not solely to address a client’s identified problems, but also to prevent future problems by anticipating potential problems and crafting solutions and drafting documents to avoid those problems and finalize a deal.¹²⁰ These four principles represent an intersection between rebellious lawyering and transactional practice—the rebellious lawyering mindset in transactional practice.

IV. REBELLIOUSLY PURSUING SOCIAL JUSTICE THROUGH IMPACT TRANSACTION

While a seemingly isolated event in history, the story of Detroit’s bankruptcy remains instructive for many distressed legacy cities struggling in the post-recession economy. Legacy cities “are older, industrial urban areas that have experienced significant population and job loss, resulting in high residential vacancy and diminished service capacity and resources.”¹²¹ These are the cities where the intersection between race and class and the racialization of poverty were born, and this intersection remains at the heart of conversations concerning the design of inner-city spaces. Like Detroit, Washington, D.C., New Orleans, Cleveland, and other legacy cities are being reimaged in the post-recession economy through twenty-first century urban renewal of their inner-city communities facilitated largely through economic development programs.¹²² As legacy cities navigate gentrifying neighborhoods, rebellious lawyers must ask who gets to participate in the process and how to assess whether these processes are inclusive, particularly where the potential for race and class discrimination is not obvious. A rebellious lawyering mindset in transactional practice encourages the creation of alternative, non-judicial approaches for pursuing equity throughout these processes, such as impact transaction. Impact transaction is “a strategy of transactional advocacy in the public interest.”¹²³ As previously explained, litigation is an effective tool but has inherent limitations on its ability to advance equity and large-scale social change. An alternative to impact litigation, impact transaction is a transactional strategy for advancing large-scale social change.¹²⁴ Calling on the social justice strategy of impact transaction,

clients called “Should Josef Enter into the Lease?: ‘Go/No Go’” in DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS* 489–96 (2012).

¹²⁰ See ALVAREZ & TREMBLAY, *supra* note 111, at 5.

¹²¹ LEGACY CITIES PARTNERSHIP, <http://www.legacycities.org/> (last visited July 24, 2016).

¹²² See, e.g., Hannah Seligson, *Six-Figure Salary? They’d Rather Make a Difference*, N.Y. TIMES, July 14, 2013, at BU1.

¹²³ See Crowder, *Impact Transaction*, *supra* note 1, at 621.

¹²⁴ See *id.*

this Article presents two proposals to guard against the perpetuation of nonobvious settings for discrimination, such as the debate surrounding the DIA's art collection: (i) modifying the operation of cultural advisory councils¹²⁵ to incorporate a racial and economic impact statement, and (ii) creating and using of equity audits to assess the potential for race and class discrimination in arts-related economic development matters. The impact of Detroit's bankruptcy on the DIA represents a confluence of art, culture, and economic development. Each of these realms has the potential to foster nonobvious settings for discrimination, and, as such, efforts to challenge discrimination in the nonobvious settings, must be designed through values that reflect both antidiscrimination principles and principles fundamental to the core of art, culture, or economic development.

Before exploring these proposals, it is important to consider a possible counterargument to the idea that selling a portion of the DIA's collection to satisfy Detroit's bankruptcy creditors was rooted in racial and class discrimination. A specific counterargument to this Article's suggestion that the idea to force the sale of a portion of the DIA's collection was a manifestation of race and class discrimination in a nonobvious setting is that the discussion was not a matter of discrimination but a matter of economics. While the unique circumstances of Detroit's bankruptcy may never again be duplicated, other horrific occurrences in the state of Michigan support this Article's thesis. The callously deliberate actions that caused the lead poisoning of the water system in Flint, Michigan, which is located approximately one hour from Detroit, underscore how decision-making surrounding public resources can be influenced by the prejudices of those decision makers. Officials in Flint decided that the economically distressed city could save money by changing its water supply from the Lake Huron water it was purchasing from Detroit to water from the Flint River. Detroit's recent financial struggles and bankruptcy filing had caused it to steadily increase its fees for its water services. This seemingly economical decision cost the residents of Flint their health in the form of "burning skin, hand tremors, hair loss, and even seizures" and caused one of the worst crises of lead poisoning in children in American history.¹²⁶ These are some of the known health problems, while the total health costs may not be understood for years. The resulting health

¹²⁵ See, e.g., *Mayor Emanuel's First Appointees to Cultural Advisory Council Approved by City Council*, DEP'T OF CULTURAL AFFAIRS & SPECIAL EVENTS, CITY OF CHICAGO (Oct. 5, 2011), http://www.cityofchicago.org/city/en/depts/dca/provdrs/attractions_eventsandexhibitions/news/2011/oct/mayor_emanuel_s_firstappointeestoculturaladvisorycouncilapproved.html.

¹²⁶ Josh Sanburn, *The Toxic Trap*, TIME, Feb. 1, 2016, at 34.

crisis made Flint the subject of national news for weeks, with criminal charges being filed against city and state officials.¹²⁷ Located approximately 66 miles northwest of Detroit, there are strong similarities between the origin stories of Flint and Detroit. Like Detroit, Flint became an economic powerhouse through car manufacturing.¹²⁸ Also like Detroit, Flint suffered dramatic population loss facilitated by job losses from the decline in local car manufacturing and plant closings, going from its peak of 200,000 people in the 1960s to approximately 100,000 today.¹²⁹ The demographics of the residents of Flint also mirror Detroit. Flint's population is largely African American with a median income of \$25,000—less than half the median income of the state's residents overall.¹³⁰ The Final Report from the Flint Water Advisory Task Force faulted the Michigan Department of Environmental Quality for its failure to properly manage Flint's contaminated water, stating that the agency "suffers from cultural shortcomings that prevent it from adequately serving and protecting the public health of Michigan residents."¹³¹ Again, the question has to be asked whether the same decisions would have been made if the majority of the residents of Flint were not poor and black. "We've had a city in the United States of America where the population, which is poor in many ways and majority African American, has been drinking and bathing in lead-contaminated water. . . I'll tell you what—if the kids in a rich suburb of Detroit had been drinking contaminated water and being bathed in it there would've been action."¹³²

The story of Flint's lead poisoning may seem unconnected to the tensions between Detroit's bankruptcy and the DIA, but these situations reflect a common perspective of those with various levels of power against those who are poor, black, and, seemingly, powerless. When faced with unjust realities "[a] rebellious practice puts into issue what it means to understand a situation, frame a problem, devise strategies, monitor efforts, and evaluate performance."¹³³ Reflective of the rebellious lawyering mindset in transactional practice, the proposed frameworks presented below are transactional mechanisms designed to thwart (i) racial and class discrimination in matters

¹²⁷ See Monica Davey & Richard Pérez-Peña, *Flint Water Crisis Yields First Criminal Charges*, N.Y. TIMES, Apr. 21, 2016, at A1.

¹²⁸ Tim Carmody, *How the Flint River Got So Toxic*, TVERGE, Feb. 26, 2016, <http://www.theverge.com/2016/2/26/11117022/flint-michigan-water-crisis-lead-pollution-history>.

¹²⁹ See *id.*

¹³⁰ See Sanburn, *supra* note 126 and accompanying text at 35.

¹³¹ FLINT WATER ADVISORY TASK FORCE, FINAL REPORT, Mar. 2016, at 6.

¹³² See *id.* at 34 (quoting Democratic presidential nominee Hillary Clinton).

¹³³ Gerald P. López, *Economic Development in the "Murder Capital of the Nation,"* 60 TENN. L. REV. 685, 698 (1993).

concerning art, culture, or the public's access to art and culture, and (ii) discrimination in arts-related economic development matters. Both frameworks reflect the four principles of a rebellious lawyering mindset in transactional practice—critical thinking, problem-solving through interdisciplinary advocacy, understanding the role and value of the client's contribution to the representation, and preventative lawyering. If successful, these frameworks would limit disparate outcomes stemming from discrimination in nonobvious settings, achieving a form of impact transaction.

A. *Cultural Advisory Councils And Racial And Economic Impact Statements*

This proposed framework modifies an existing municipal mechanism by modifying it to require consideration of race and class implications in matters concerning art, culture, and the public's access to art and culture. To promote civic engagement and maximize the effectiveness of municipal resources, most municipalities host a system of advisory boards and commissions on which members of the public voluntarily serve by applying or being appointed by an elected official.¹³⁴ The scope of these “public commissions” is broad and their missions range from art to zoos, including diverse topics such as early childhood, crime prevention, public health, and parks and recreation.¹³⁵ Public art commissions operate under a variety of names,¹³⁶ but the label “cultural advisory councils” encompasses all types. During the last fifteen to twenty years, these bodies have been particularly focused on making art the center of a city's creative economy.¹³⁷ A typical task for a city's cultural advisory council is to create a broad cultural plan that seeks to incorporate “arts, culture and the creative economy into the core of the [c]ity's economic development, tourism, promotional and community revitalization strategies.”¹³⁸ Such a cul-

¹³⁴ Terms typically range from one to three years.

¹³⁵ See *Boards and Commissions*, DENVER MAYOR'S OFFICE, <https://www.denvergov.org/mayorhancock/MayorsOffice/AbouttheOfficeoftheMayor/BoardsCommissions/tabid/442243/Default.aspx> (last visited July 24, 2016).

¹³⁶ See *Arts, Education, and Tourism Advisory Council, Advisory Councils*, LOWER MANHATTAN DEV. CORP., <http://www.renewnyc.com/AboutUs/Advisory/index.asp#aet> (last visited July 24, 2016); *Boards & Commissions*, DENVERGOV.ORG, *supra* note 135; *Arts Council*, BALTIMORE OFFICE OF PROMOTION & THE ARTS, <http://www.promotionandarts.org/arts-council> (last visited July 24, 2016).

¹³⁷ See generally *The State of Colorado's Creative Economy*, ALLIANCE FOR CREATIVE ADVANTAGE (Dec. 2008), http://www.coloradocreativeindustries.org/sites/default/files/media/media/the_state_of_colorados_creative_economy_-_full_study.pdf.

¹³⁸ See *Mayor's Cultural Advisory Council Presents Vision Plan for Arts, Culture and the Creative Economy*, CITY OF PHILADELPHIA (Dec. 8, 2011), <https://cityofphiladelphia.wordpress.com/2011/12/08/mayors-cultural-advisory-council-presents-vision-plan-for-arts-culture-and-the-creative-economy/>.

tural plan may or may not become part of the city's comprehensive plan, which governs land use and development.¹³⁹ At a minimum, however, the goal is to catalog arts-related resources and identify a city's cultural assets.

As typically constituted, cultural advisory councils are not perfect instruments of inclusivity because these bodies are not mandated forms of government, and, where these councils do operate, the consideration of matters such as race and class discrimination is discretionary. While some cultural advisory councils may be charged with promoting diversity of the arts by supporting programs or artists from diverse backgrounds, diversity and culture are not synonymous terms and a focus on culture does not necessarily reflect racially and ethnically diverse perspectives. Moreover, class discrimination is rarely considered in the context of cultural advisory councils.¹⁴⁰ These bodies, however, do have the potential for use as anti-discriminatory agents through the incorporation of joint race and economic impact statements.

Impact statements are mechanisms used in many fields to analyze the potential harms of a specific action or project. Environmental impact statements are the most common and there are existing models of racial impact statements as well. "The premise behind racial impact statements is that policies often have unintended consequences that would be best addressed prior to adoption of new initiatives."¹⁴¹ A key to the effectiveness of impact statements is the clear articulation of what triggers their use. Pursuant to legislation in many states, policymakers are required to prepare racial impact statements when proposed legislation will affect "sentencing, probation, or parole policies."¹⁴² States that have enacted racial impact statement legislation have also indicated the circumstances that trigger the production of the statement. In Connecticut, for example, racial impact statements are required "for bills and amendments that would increase or decrease the pretrial or sentenced populations of state corrections facilities."¹⁴³ Here, it would be best to avoid establishing minimum

¹³⁹ See EDWARD J. BLAKELY & TED K. BRADSHAW, *PLANNING LOCAL ECONOMIC DEVELOPMENT: THEORY & PRACTICE* 220-21 (3d ed. 2002).

¹⁴⁰ See, e.g., *Diversity Programs Funding*, SAN MARCOS ARTS COMM'N, available at <http://www.ci.san-marcos.tx.us/modules/showdocument.aspx?documentid=11377>.

¹⁴¹ See Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 CRIM. JUST. 16, 16 (2009).

¹⁴² See *id.* at 17.

¹⁴³ See *id.* at 18 (quoting language from the Minnesota Sentencing Guidelines Commission, which discusses policy goals for racial impact legislation:

If a significant racial disparity can be predicted before a bill is passed, it may be possible to consider alternatives that enhance public safety without creating additional disparity in Minnesota's criminal justice system. Just as with the Commission's

requirements to trigger the applicability of a race and economic impact statement. Instead, race and economic impact statements should simply be required for any consideration undertaken by a cultural advisory council to ensure that nonobvious settings for discrimination do not yield disparate impacts upon people of color or poor people. In other words, as a function of their charters, cultural advisory councils should consider whether *any* contemplated act could have any particular effect on people of color or poor people. The criteria of a race and impact statement would mirror the criteria found in other types of impact statements and could include: (i) a description of the cultural advisory council's proposed action, (ii) a description of the population and/or geographic location to be impacted by the proposed action, (iii) identification of whether race distinctions, class distinctions, or both are implicated by the proposed action, (iv) a history of the cultural advisory council's previous interactions or non-interactions with that population or in that geographic location, (v) a list of supporters and opponents of the proposed action as well as evidence of meaningful outreach to each group, and (vi) a statement articulating how the cultural advisory council reached its conclusion. Modifying the structure of cultural advisory councils by adopting these criteria in race and economic impact statements would help ensure that race and class considerations are not merely discretionary concerns—reflective of a rebellious lawyering mindset in transactional practice. Admittedly, as any rebellious lawyer would recognize, to truly enhance the effectiveness of cultural advisory councils, the councils have to become embedded in the local government structure but that strategy is beyond the scope of this framework.

B. Equity Audit In Arts-Related Economic Development

A second framework with the potential to curb discrimination in nonobvious settings of arts-related economic development is the equity audit framework. An audit is an examination of an organization's records. An equity audit is an impact transaction tool for assessing racial and class dimensions of any potential arts-related economic development initiative to minimize disparate outcomes against people of color or the poor.

Art is a powerful motivator of economic development, and the

fiscal impact notes, the agency does not intend to comment on whether or not a particular bill should be enacted. Rather, it is setting out facts that may be useful to the Legislature, whose members frequently express concerns about the disparity between the number of minorities in our population and the number in our prisons). (quoting Racial Impact for H.F. 2949, Minnesota Sentencing Guidelines Commission, Feb. 27, 2008).

nexus between art and economic development is revenue generation. The function of art in economic development has been debated for decades with the pendulum swinging toward acceptance of art as economic development where cultural assets can serve as engines of economic development. “The economic transactions that take place in the deepest heart of culture generate positive economic effects such as learning and knowledge.”¹⁴⁴ “In one word, culture is, besides an indispensable element for social cohesion and the reconstruction of an identity, an economic sector equally important as other productive sectors.”¹⁴⁵ Art and culture assist with economic growth by “(1) [p]rovid[ing] a fast-growth, dynamic industry cluster; (2) [h]elp[ing] mature industries become more competitive; (3) [p]rovid[ing] the critical ingredients for innovative places; (4) [c]atalyz[ing] community revitalization; and (5) [d]eliver[ing] a better-prepared workforce.”¹⁴⁶

Loosely defined, economic development speaks to a collection of policies and practices sponsored by state, local, or federal government programs that are designed to increase the economic health and tax base of a geographic place through real estate development, business recruitment, workforce development, and community determined processes.¹⁴⁷ While economic development is largely facilitated by federal funding or state or local government tax subsidies for private industry, such as tax increment financing and tax credit programs, economic development programs can still be significant line items in municipal budgets due to costs associated with staff training, salaries, marketing, and promotional expenses related to recruitment, and oversight. During the Great Recession many local governments significantly reduced their economic development budgets along with a host of other public services. Although they have yet to declare bankruptcy like Detroit, these cities are in severe economic distress. This distress largely stems from the most recent recession, persistent population losses (and concomitant shrinkage of municipal tax bases) that predated the recession, and amplified need for social services to meet the growing demand of an increasingly poorer populace and deepening economic inequalities. These and other factors are exacerbating inequality throughout metropolitan regions. To manage widening budget deficits, many local governments are turning to austerity in

¹⁴⁴ *Id.*

¹⁴⁵ ORG. OF AM. STATES, INTER-AM. COUNCIL FOR INTEGRAL DEV., STUDY FOR THEME 1: “CULTURE AS AN ENGINE FOR ECONOMIC GROWTH, EMPLOYMENT AND DEVELOPMENT” 2 (2004).

¹⁴⁶ ERIN SPARKS & MARY JO WAITS, NAT’L GOVERNORS ASSOC., NEW ENGINES OF GROWTH: FIVE ROLES FOR ARTS, CULTURE, AND DESIGN 1 (2012), <http://www.nga.org/files/live/sites/NGA/files/pdf/1204NEWENGINESOFGROWTH.PDF>.

¹⁴⁷ See BLAKELY & BRADSHAW, *supra* note 139, at xvi–xvii.

their economic development programs.

Although not succinctly defined, austerity measures speak to “[d]ifficult economic conditions created by government measures to reduce public expenditures.”¹⁴⁸ A framework for an equity audit would assess for negative externalities from the austerity experiment on poor communities and communities of color.¹⁴⁹ Racialization of poverty is compounded by austerity programs because austerity is in the eye of the beholder.

The current post-recession economy is marked by increasing inequalities that impact the financial health of cities and entire metropolitan regions. While these inequalities make the need for economic development more acute,¹⁵⁰ the weakened financial condition of many municipalities means that economic development is not always a viable option—particularly for cities in the midst of implementing austerity programs designed to reorient and severely limit spending on public services. Michelle Wilde Anderson’s article titled *The New Minimal Cities* examines the plight of legacy cities in financial distress and explores the “minimum standards in the system of law governing cities in crisis.”¹⁵¹ Anderson’s austerity analysis helps crystallize cities’ obligations to their residents by exploring distressed cities’ experiments with shrinking their public sectors to save costs and stave off bankruptcy.¹⁵² Austerity is effected by three municipal actions: (i) shedding social services, (ii) selling government assets, and (iii) deregulation. Each city will have to investigate the extent to which it takes these three municipal actions. Each of these actions has the potential for a disparate impact on poor people and people of color. Social services are heavily relied on by low-income families and individuals. The potential sale of government assets runs the gamut from the DIA’s art inventory previously discussed to the management of public lands in urban communities. Finally, deregulation and reliance on the private market tends to obscure accountability, which disadvantages subordinated groups – including people of color and the

¹⁴⁸ Buttonwood, *What is Austerity?*, THE ECONOMIST (May 25, 2015), <http://www.economist.com/blogs/buttonwood/2015/05/fiscal-policy>.

¹⁴⁹ See generally Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118 (2014).

¹⁵⁰ It is beyond the scope of this Article to debate the effectiveness of the various types of economic development programs. This Article is based on the premise that, regardless of proven effectiveness, economic development will be an ongoing policy concern for state and local governments.

¹⁵¹ See Anderson, *supra* note 149, at 1129 (explaining that the purpose of the article is to provide “sources of guidance to help fiscal overseers determine the point beyond which it should be legally, or at least politically, unacceptable to cut local public services and sell assets” as a function of municipal austerity).

¹⁵² See *id.*

poor.

A framework for an equity audit is timely to assess austerity measures in arts-related economic development because austerity, in cities such as Detroit, creates a need for “assessment and more data on the philanthropic commitment to Detroit’s neighborhoods” as “investment in Detroit lacks economic inclusion and the participation of minority-owned businesses.”¹⁵³ “If social decisionmaking [is] inevitably moral choice, policymakers need[] some ethical basis upon which to make their choices.”¹⁵⁴ An equity audit would be that ethical basis. Versions of equity audits are being used in some parts of the country.¹⁵⁵ While the specifics of localities may dictate the substance and framework of any particular equity audit, there are certain key elements that will be important to each audit’s success. These include: (i) a statement of the purpose of the audit, including that it must be based on a racial and economic justice approach, (ii) an agreed-upon definition of equity and equity indicators,¹⁵⁶ (iii) the development of policy that mandates when the use of the audit is required, (iv) understanding and agreement that the results are not merely advisory but that local policies must be based on the results of the audit, and (v) the creation of mechanisms to ensure meaningful community participation at the earliest possibility and a commitment (both legislatively and economically) to long-term ongoing community monitoring. The establishment of an equity audit process to assess potential arts-related economic development programs for both inclusivity and possible disparate outcomes in nonobvious settings for discrimination would exemplify rebellious lawyering principles in a transactional mindset.

V. CONCLUSION

The legacy of *Washington v. Davis* tells us that discriminatory intent is more important than disparate outcomes. This is counter to a legacy of *Rebellious Lawyering*: that rebellious lawyers create outcomes that are culturally respectful. This Article suggests that those

¹⁵³ Zenobia Jeffries, *Race and Opportunity in Detroit: Black, Neighborhood Businesses Lose*, BLACK PRESS USA (Nov. 13, 2014), <http://www.blackpressusa.com/race-and-opportunity-in-detroit-black-neighborhood-businesses-lose/>.

¹⁵⁴ See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 367 (1992).

¹⁵⁵ See *The Equity Baseline Report: A Framework for Regional Equity*, METRO COUNCIL (Jan. 2015), http://www.oregonmetro.gov/sites/default/files/Equity%20Framework%20Report_final%20012715small.pdf. (In Portland, Oregon, for example, the Metro Equity Strategy Program recently published an Equity Baseline Report to advance a regional equity framework.)

¹⁵⁶ *Id.* Examples include housing equity, transportation equity, cultural equity, environmental equity, health equity, economic equity, food equity, and educational equity.

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who work to advance social justice must be vigilant in monitoring for both the customary consequences of the racialization of poverty as well as for nonobvious manifestations. The two frameworks presented above are what outcomes of rebellious lawyering mindset in transactional practice should look like, countering nonobvious settings of discrimination with frameworks designed to make race and class considerations obvious. The implementation of these frameworks would, as *Rebellious Lawyering* demands, demonstrate that lawyers understand the relationship between “what they do and what they hoped to change.”¹⁵⁷

¹⁵⁷ See LÓPEZ, *supra* note 101, at 5.

