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Acres of Distrust: Heirs Property, the Law's Role in Sowing Suspicion Among Americans and How Lawyers Can Help Curb Black Land Loss

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In the last century, Black landownership has declined by roughly 90 percent. One agricultural attorney remarked of the phenomenon, "I think the threat to Black-owned land is one of the biggest social issues of our time." The passing observer might hypothesize that the hemorrhaging of Black lands occurred in the distant past because of Jim Crow laws or the Great Migration. However, this notion is mostly false. Rather, the tremendous loss of Black lands occurred in the latter half of the twentieth century and into the current decade. Many such losses can be attributed to the prevalence of "heirs property," or property defined by the existence of a tenancy-in-common form of ownership as a result of intestacy, and speculators, developers, and legal professionals' exploitation of such landowners' tenuous form of ownership through partition sales. Heirs property ownership is particularly widespread in the rural South and in predominately African American communities.

It is the position of this Article that such exploitation has caused many, particularly in the African American community, to view legal professionals with distrust, particularly regarding property matters. In order to illustrate the connection between Black landownership and its past interactions with the legal system, this Article outlines the social and legal history of Black landownership. While scholars debate the impact of mistrust in the legal system and its practitioners on estate planning, this Article contends that past negative interactions with the legal system inhibit the utilization of estate planning services. As a result, this perpetuates a cycle of inheritance through intestacy on a massive scale. Finally, this Article provides proposed solutions for legal professionals to consider when dealing with such legal issues. In particular, courts must adhere to the majority of states' preferences for partitions in kind rather than demonstrating an over-eagerness in ordering partition sales. As such, courts should consider intangible property values when making partition determinations, rather than exclusively considering economic values. In order to accomplish this, the

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development of culturally competent attorneys and judges is paramount. Therefore, this Article argues that law schools and continuing legal education programs must emphasize cultural competence.

I. INTRODUCTION

Melvin Davis worked as a shrimper in the water adjoining his family's land in Carteret County, North Carolina.[1] He also operated a club on the property.[2] His brother, Licurtis Reels, spent years building a house on the land nearby to his mother.[3] Purchased by their grandfather a mere "generation removed from slavery," the family owned the land for a hundred years.[4] The land held special

1. This Article makes liberal use of narrative. Using storytelling within legal scholarship has been debated, with some scholars arguing that its employment is merely a "fringe fad of ephemeral duration." Arthur Austin, *Evaluating Stories as a Type of Nontraditional Scholarship*, 74 NEB. L. REV. 479, 516 (1995). Other scholars argue that by employing narrative in legal articles, authors discourage dissention, lack in normative legal substance, call into question the "reliability" of accounts, and throw doubt on the "typicality" of an experience. *See* Kathryn Abrams, *Hearing the Call of Stories*, 79 U. C. L. REV. 971, 977-980 (1991) (describing the "four 'families' of objections" to narrative in legal scholarship.). On the other hand, one author posited that legal scholarship void of narrative were "bloodless discussions of law" and "undermine[d] effective communication." Richard A. Matasar, *Storytelling and Legal Scholarship*, 68 CHI – KENT L. REV. 353 (1992). Within the context of legal reform advocacy, another author stated that storytelling can "persuade legal decision-makers to act in a particular way by 'creat[ing] and bridge across gaps in experience and thereby elicit empathic understanding.'" *See* Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243 (1993) (quoting Martha Minow, *Words and the Door to the Land of Change: Law Language, and Family Violence*, 43 VAND. L. REV.1665, 1688 (1990).). For example, advocates for domestic violence law reform shared stories from victims in a successful effort in "reversing Maryland's historical pattern of denial and silence in the face of widespread family violence." *Id.* This author agrees with the latter stance.

2. Lizzie Presser, *Their Family Bought Land One Generation After Slavery. The Reels Brothers Spent Eight Years in Jail for Refusing to Leave It.*, PROPUBLICA (July 15, 2019), https://features.propublica.org/black-land-loss/heirs-property-rights-why-black-families-lose-land-south/.

3. *See id.*

4. *See id.*

significance for the local Black[5] community.[6] Tent revivals were held, crops and livestock were farmed, and the shores of its waters served as the only beach in their North Carolina county to allow Black families during the waning years of the Jim Crow era.[7] In the late 1970s, a distant relative of Mr. Davis and Mr. Reels acquired ownership of the most valuable portion of the land using the doctrine of adverse possession[8] and an obscure and controversial law called the Torrens Act.[9] Under North Carolina law, an adverse possessor can claim ownership of a land parcel when one physically "possesse[s] the property under known and visible lines and boundaries adversely to all other persons for 20 years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability." In this case, the Torrens Act allowed a court-appointed lawyer to grant

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5 . This Article uses the words "Black" and "African American," but does not use them interchangeably. Save for instances where the Article quotes another source, the term "Black" is used as an adjective when describing ownership of land, race, historical events, etc., and the term "African American" is employed as a noun when identifying a person, a group, or the like. Although the Article uses the term "African American" it does not seek to overlook the many varied experiences of those who consider themselves "Black" but do not identify their cultural backgrounds as being linked to the African diaspora such as those whose lineage originated in "Caribbean islands, Latin America, . . . or elsewhere." *See Racial and Ethnic Identity*, APA STYLE, https://apastyle.apa.org/style-grammar-guidelines/bias-free-language/racial-ethnic-minorities (last visited May 28, 2021). The word "Black" is capitalized in contravention to some style guides. *See* Mike Laws, *Why We Capitalize 'Black' (and not 'white')*, COLUMBIA JOURNALISM REV. (June 16, 2020), https://www.cjr.org/analysis/capital-b-black-styleguide.php ("Though *Chicago* still generally mandates lowercasing both *black* and *white*, it does include the proviso that the rule can be suspended if 'a particular author or publisher prefers otherwise.'"); *See also Explaining AP Style on Black and white*, ASSOCIATED PRESS (July 20, 2020), https://apnews.com/article/9105661462#:~:text=AP's%20style%20is%20now%20to,African%20diaspora%20and%20within%20Africa. The author agrees with the assertion that the term "Black" should be capitalized as it represents not simply a description of skin color but also reflects a shared culture and experience. Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, ATLANTIC (June 18, 2020), https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159/ ("Black with a capital 'B' refers to a group of people whose ancestors were born in Africa, were brought to the United States against their will, spilled their blood, sweat and tears to build this nation into a world power and along the way managed to create glorious works of art, passionate music, scientific discoveries, a marvelous cuisine, and untold literary masterpieces. When a copyeditor deletes the capital 'B,' they are in effect deleting the history and contributions of my people."). This Article does not capitalize "white." The New York Times guidance on style best describes this decision in stating, "white doesn't represent a shared culture and history in the way Black does, and also has long been capitalized by hate groups." Nancy Coleman, *Why We are Capitalizing Black*, N.Y. TIMES (July 5, 2020), https://www.nytimes.com/2020/07/05/insider/capitalized-black.html.

6. *Brothers Jailed for Eight Years for Refusing to Leave Their Land*, EQUAL JUST. INITIATIVE, https://eji.org/news/brothers-jailed-8-years-for-refusing-to-leave-their-land/ (last visited Nov. 24, 2020).

7. *See id*.

8. *See id*. Under North Carolina law, an adverse possessor can claim ownership of a land parcel when one "has possessed the property under known and visible lines and boundaries adversely to all other persons for 20 years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability." N.C. Gen. Stat. § 1-40 (2019).

9. *See* Equal Just. Initiative, *supra* note 6. According to Lizzie Presser's account of the distant relative, the Torrens Act allowed him to "simply prove adverse possession to a lawyer, whom the court appointed, and whom he paid." Presser, *supra* note 2. She continued, "The Torrens Act has long had a bad reputation, especially in Carteret. 'It's a legal way to steal land,' Theodore Barnes, a land broker there, told me. The law was intended to help clear up muddled titles, but, in 1932, a law professor at the University of North Carolina found that it had been co-opted by big business." *Id*.

the distant relative's adverse possession claim without a traditional judicial proceeding.[10]

The Reels family, unaware that they had lost the land, missed the deadline[11] to appeal the Torrens decision.[12] Later, in 1986, a real estate development company purchased the land in question.[13] By 2011, a state court evicted the family from the land at the request of the real estate company.[14] Citing the injustice of the land sale, the brothers refused to vacate the land and a North Carolina court jailed the men for civil contempt where they remained for eight years.[15] Their defiant stand earned them the dubious distinction of being "two of the longest-serving inmates for civil contempt in U.S. history."[16]

Just over a thousand miles away from Mr. Davis and Mr. Reels, in Lisbon, Louisiana, Gregory Lewis and Michael Cooksey contended with a loss of their own.[17] In 2019, a timber developer purchased their 480 acres of family land and homestead, on which they resided, without their knowledge.[18] The land had been in their family "for at least 125 years."[19] Over the generations, many descendants of the original purchaser staked claim to small shares of the real property.[20] Mr. Cooksey characterized the situation thusly, "There were so many heirs tied into the Lewis properties, it'll make your head spin."[21]

Eventually, distant relatives sold their fractional property interests to a local timber developer.[22] Ultimately, the developer filed a partition by sale lawsuit and purchased the land.[23] In accordance with state law, the developer announced the partition sale in a local newspaper.[24] However, the Lewis family did not subscribe to a newspaper, and therefore did not see the notice.[25]

Furthermore, the family received notice of a "Petition for Partition by Licitation of Immovable Property Held in Common" in the mail.[26] Understandably, the jargon contained in the notice was too specialized and convoluted for the Lewis descendants to comprehend.[27] Ultimately, the family

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10. *See* EQUAL JUST. INITIATIVE, *supra* note 6.

11. The Torrens Act requires that appeals be made within one year of such decisions. *See* Presser, *supra* note 2.

12. *See* EQUAL JUST. INITIATIVE, *supra* note 6.

13. *See id.*

14. *See id.*

15. Jonah Kaplan, *Keeping It Reels: Brothers Out of Jail After 8 Years Vow to Keep Fighting for Family Land*, ABC 11 (Mar. 1, 2019), https://abc11.com/carteret-county-brothers-contempt-of-court-melvin-davis/5163473/.

16. Presser, *supra* note 2.

17. *See How Property Law Is Used to Appropriate Black Land*, VICE NEWS (Aug. 11, 2020), https://www.youtube.com/watch?v=ls3P_FicO7I.

18. *See id.*

19. *Id.*

20. *See id.*

21. *Id.*

22. *See id.* Members of the Lewis family reside throughout the country. *See id*. Cooksey stated that of the relatives who sold their fractional interests, he had only met one a single time. *See id*.

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.*

land was sold at a sheriff's auction.[28] Gregory Lewis's elderly mother vacated the land and moved in with her daughter in Washington, D.C.[29] Shortly after the sale, Mr. Cooksey was evicted from the property.[30] He used the meager $2,800 he received as his share of the sale to move his trailer to a half-acre lot nearby.[31] Without an installed water line, he had to walk across a road to retrieve fresh water for drinking and sanitation.[32]

28. *See id.*

29. *See id*. Speaking of her connection to the land, Stanley said, "It's painful to realize that I don't have it anymore. It's not right. I didn't sell my part of the property. Only someone else came, sold their part, so they affect the whole family. We didn't know the law, so we couldn't protect it. So we lost it, like that. Every year we paid the taxes. We didn't just leave it alone, say, 'Forget it.' We took our resources and made sure we got the taxes paid. That's what we did." *Id.* When asked by an interviewer why she thought her grandfather did not make a will, she replied, "Well, I don't think back then they were thinking about making a will. But my grandad prepared for what he knew at the time. And what he had to do at the time, prepare for my family. I know the difference. A person needs a will." *Id.* Finally, when asked what the land meant to her, she emphatically declared, "Four hundred and twenty acres of land? It means a lot. And to lose it? You have no defense or know what to do. Lost it. That was devastating. Still is. It will ever and forever be that way, *'cause that's the law*." *Id.*

30. *See id.*

31. *See id.*

32. *See id.*

Stories of families, particularly African Americans in the rural South,[33] evicted from their land with little notice and recourse are not uncommon.[34] In fact, one

33. From a geographic standpoint, this Article focuses especially on the Southern United States region known as the Black Belt for two reasons. First, the author is serving as a Fellow with the Borchard Center Foundation on Law and Aging. The aim of the fellowship is to conduct research on the effects of heirs property and "provid[e] legal services to older adults with heirship property issues in Alabama's historic Black Belt." *See William Breland,* BORCHARD FOUND. CTR ON L. & AGING, https://borchardcla.org/fellowships/current-past-fellows/item/243-william-breland (last visited May 5, 2021). Second, the Black Belt South exhibits a greater proportion of poverty than any other region of the nation. *See* Ronald C. Wimberley, *It's Our Most Rural Region; It's the Poorest; It's the Black Belt South; and It Needs Our Attention*, 25 J. OF RURAL SOC. SCI. 175, 176. (2010). The Black Belt is part of a collection of some 600 contiguous counties spanning from Texas to Virginia in which socioeconomic impoverishment in the South is clustered. *See id*. at 177. At 36 percent, the South contains a greater population that any other U.S. Census-designated region. *See id*. at 176. As Wimberley noted, in addition to a greater share of population, "the issues of race, region, and rurality occur in even greater proportions." *Id*. To this point, 46 percent of all rural people in America reside in the South, thus demonstrating that rural populations and rurality are highly concentrated in the region. *See id*. In addition, data demonstrates that 40 percent of the poverty in America is Southern, and an even greater share of poverty is contained in the rural South. *See id.* Further, most of the South's population experiencing the conditions associated with poverty is concentrated in the Black Belt region. *See* Ronald C. Wimberley, *A Federal Commission for the Black Belt South*, 2 PRO. AGRIC. WORKERS J. 1 (2014). Alabama's Black Belt is a region composed of "between 12 and 21 counties in the central part of the state" and "a large proportion of Alabama's African American population." *Black Belt Region in Alabama,* ENCYCLOPEDIA OF ALA., http://encyclopediaofalabama.org/article/h-2458#:~:text=Geographically%2C%20Alabama's%20Black%20Belt%20is,geography%20and%20its%20historical%20development (last visited May 5, 2021). However, this does not discount the other regions of the nation contending with the adverse effects of heirs property ownership. For example, heirs property issues occurs in significant numbers among Latinos in the Southwest, Whites in Appalachia, residents of urban areas, and Native Americans. *See Restoring Hope for Heirs Property Owners: The Uniform Partition of Heirs Property Act*, AM. BAR ASSOC., https://www.americanbar.org/groups/state_local_government/publications/state_local_law_news/2016-17/fall/restoring_hope_heirs_property_owners_uniform_partition_heirs_property_act/#:~:text=The%20Uniform%20Partition%20of%20Heirs%20Property%20Act%20(UPHPA)%2C%20a,led%20to%20significant%20property%20loss [hereinafter *Restoring Hope for Heirs Property Owners*] ("[T]here are some commentators who have estimated that Hispanics in New Mexico alone in the late nineteenth and early twentieth century lost more than 1.6 million acres of property deemed by the federal government to be tenancy-in-common property (though such designation was highly contested) and that partition sales accounted for much of this loss. There is also some compelling evidence that in places like South Texas, a large number of Latino families that have acquired property in more recent times easily could become the owners of heirs property in the not too distant future based upon high intestacy rates for Latinos and that such property ownership for these Latino families could then become insecure as a result of the extant partition law."). *See also* Cassandra Johnson Gaither, *Appalachia's "Big White Ghettos": Exploring the Role of Heirs' Property in the Reproduction of Housing Vulnerability in Eastern Kentucky*, APPALACHIAN STUDIES 50 (2019) ("Heirs' properties are expected to be pervasive in communities with higher-than-average poverty rates and lower educational attainment. While these descriptors characterize many rural, predominantly African-American communities across the Black Belt South . . . . they aptly describe southeastern Kentucky communities as well. The socio-demographics of rural, central Appalachian counties alone compel a closer look at the extent of heirs' properties in Appalachia, yet these communities and social groups are typically left out of heirs' property discourses."). *See also* CASANDRA JOHNSON GAITHER, U.S. DEPT. OF AGRIC., "HAVE NOT OUR WEARY FEET COME TO THE PLACE FOR WHICH OUR FATHERS SIGHED?": HEIRS' PROPERTY IN THE SOUTHERN UNITED STATES 23 (2016) ("In 2012, roughly 150 Native American reservations contained approximately 93,000 fractionated tracts, 2.9 million fractional interests eligible for purchase, and 10.6 million fractional acres. The number of individual owners of these interests was 219,000. These figures include 884,865 acres in the Southern Plains (including Oklahoma) and eastern Oklahoma. . . .").. *See also* Sarah Breitenbach, *Heirs' Property Challenges Families, States*, PEW TRUST (July 15, 2015) https://www.pewtrusts.org/en/research-and-

agricultural attorney stated, "I think the threat to Black-owned land is one of the biggest social issues of our time."[35] Her words are substantiated by fact, as Black land ownership declined from 16 to 19 million acres to a mere 2.5 million acres between 1910 and the present.[36] The impetus behind much of the land loss crisis is the prevalence of "heirs property"[37] in poor and middle-class Black communities.[38] Heirs property is created when landowners die without wills and pass land to family members "through the laws of intestacy."[39]

Real property passed down to multiple heirs through intestacy usually results in the creation of a tenancy in common.[40] This tenuous form of land ownership is defined by numerous property owners holding separate interests in the land while also holding "undivided possession of the entire estate."[41] Due to its precariousness, tenants in common rarely realize the traditional wealth generating benefits of land ownership.[42] For instance, as heirs property owners lack clear title to the land, most banks refuse to provide mortgages against such properties, the properties cannot be used as collateral, and federal and state assistance is usually denied to owners of heirs property.[43] In addition, over time, many of these

analysis/blogs/stateline/2015/07/15/heirs-property-challenges-families-states. ("Such holdings, however, are not always large rural and agricultural land. It is especially difficult to establish a title to heirs' property in cities, where small, single family parcels cannot be physically divided. Urban owners often take a loss because such sales tend to fetch below market value. . . . 'Heirs' property also contributes to the deterioration or abandonment of properties in urban areas,' Mitchell said. 'Without a formal title to their property, families rarely qualify for mortgages or home improvement loans, leaving properties to fall into disrepair.'").

34. *See infra* note 158.

35. Sarah Whites-Koditschek, *Alabama Descendants Look to Reclaim Land Clouded by Legacy of Jim Crow*, AL.COM (Nov. 26, 2019), https://www.al.com/news/2019/11/alabama-descendants-look-to-reclaim-title-to-land-clouded-by-legacy-of-jim-crow.html.

36. Jess Gilbert, Gwen Sharp, & Spencer D. Wood, *Who Owns the Land?: Agricultural Land Ownership by Race/Ethnicity*, 17 RURAL AM. 55 (2002) ("Land ownership by Black farmers peaked in 1910 at 16-19 million acres, according to the Census of Agriculture.").

37. This unique term has also been referred to as "'heirs property,' 'heirs' property,' and 'land in heirs.'" Jesse J. Richardson, Jr., *Land Tenure and Sustainable Agriculture*, 3 TEX. A&M L. REV. 799, 808 (2016).

38. *See* UNIF. PARTITION OF HEIRS PROP. ACT, Prefatory Note at 4-5 (2010) ("Scholars and advocates who have analyzed patterns of landownership within the African-American community agree that partition sales of heirs property have been one of the leading causes of involuntary land loss within the African-American community. A considerable body of legal scholarship has highlighted the fact that partition sales have been a leading cause of African American land loss.").

39. April B. Chandler, "*The Loss in My Bones": Protecting African American Heirs' Property with the Public Use Doctrine*, 14 WM & MARY BILL RTS. J. 387, 389 (2005).

40. *See* B. James Deaton, *Intestate Succession and Heir Property: Implications for Future Research on the Persistence of Poverty in Central Appalachia*, 41 J. OF ECON. 927 (2007).

41. Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 427-428 (2001).

42. *See* J.F. Dyer, *Heir Property: Legal and Cultural Dimensions of Collective Landownership*, 667 BULLETINS OF ALA. AGRIC. EXPERIMENT STATION 3, 4 (2007) ("All decisions regarding use of the land, such as building permanent structures, using the land as collateral for loans, harvesting timber or leasing plots, must be agreed upon by all those entitled to the land. Thus, the economic value of heir property as a source of income or repository of wealth is limited.").

43. *See* Gabriel Kuris, *"A Huge Problem in Plain Sight": Untangling Heirs' Property Rights in the American South, 2001-2017*, INNOVATIONS FOR SUCCESSFUL SOC'YS 1, 1-3 (2018).

descendants also die intestate, further fractionalizing non-recorded title to the land.[44]

A survey of the history of Black landownership supports the proposition that the acquisition of real property among African Americans occurred despite the law rather than because of it. For example, the generations-old economic consequences associated with slavery resulted in a relative few African Americans with the purchasing power to acquire land when juxtaposed against their white counterparts.[45] Further, both the legal system and profession were largely closed to African Americans in the late nineteenth to mid-twentieth centuries.[46] This made protecting land, through legal means, virtually impossible.[47] Thus intestacy emerged as an acceptable alternative for many African American families.[48] This history of intestacy, along with the efforts of speculators, developers, and their attorneys to exploit heirs property law, resulted in a precipitous decline in Black landownership beginning in the latter half of the twentieth century.[49]

Furthermore, the most widely held judicial decision framework within the heirs property context often results in rulings that are injurious to Black landowners, sometimes in contravention to the law itself. For example, the most common legal remedy for resolving legal disputes associated with heirs property issues is a partition action.[50] These actions allow for either partitions in kind, judgments in which land is physically divided among co-tenants, or partition sales, in which a court orders a property to be sold with co-tenants receiving a share of the proceeds based on their ownership interest.[51] When an in-kind partition is "impossible," a court will usually order a partition sale.[52] Over time, courts

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44. *See* Tristeen Bownes & Robert Zabawa, *The Impact of Heirs' Property at the Community Level: The Case Study of the Prairie Farms Resettlement Community in Macon County, AL*, *in* HEIRS PROPERTY & LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS & ABANDONMENT 29, 31 (Cassandra Johnson Gaither, Ann Carpenter, Tracy Lloyd McCurty, and Sara Toering eds., 2019).

45. An historical overview reported that in the post-slavery society, the federal government denied African Americans promised federal land grants; state legislatures passed discriminatory laws that hindered the accumulation of wealth among African Americans; freed slaves and their descendants fell victim to violence in an effort to rob Black property owners of wealth; and early efforts to include freed slaves in the formal economy resulted in property loss through deceit. *See* Trymaine Lee, *How America's Vast Racial Wealth Gap Grew: By Plunder*, N.Y. TIMES (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html ("The Freedmen's Bureau, always meant to be temporary, was dismantled in 1872. More than 60,000 black people deposited more than $1 million into the Freedman's Savings Bank, but its all-white trustees began issuing speculative loans to white investors and corporations, and when it failed in 1874, many black depositors lost much of their savings.").

46. See *infra* note 145.

47. *See id*.

48. *See infra* note *199-200.*

49. *See id.*

50. Lawrence Anderson Moye IV, *Is It All About the Money? Considering a Multi-Factor Test for Determining the Appropriateness of Forced Partition Sales in North Carolina*, 33 CAMPBELL L. REV. 411, 414 (2010).

51. *See id*. at 416.

52. *See id.*; *See also* Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners*, *in* HEIRS PROPERTY & LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS & ABANDONMENT 29, 31 (Cassandra Johnson Gaither, Ann Carpenter, Tracy Lloyd McCurty, and Sara Toering eds., 2019).

demonstrated an over-eagerness to order the latter.[53] The majority of states "statutorily prefer" partitions in kind.[54] This is because partitions by sale are considered "extraordinary" remedies that "undermine[] fundamental property rights."[55] Nonetheless, state courts across the country developed an "actual preference for partition by sale."[56] Scholars attribute this preference to a variety of

53. *See* Rishi Batra*, Improving the Uniform Partition of Heirs Property Act*, 24 GEO. MASON L. REV. 743, 749 ("Most states statutorily prefer partition in kind over partition by sale because the latter is considered an extraordinary remedy that undermines fundamental property rights. Despite the statutory preference for partition in kind," courts still often resolve partition actions by ordering a partition sale.").

54. *See id*. Batra lists statutes from twenty-five states substantiating this assertion, including: ALA. CODE § 35-6-40 (2014); ALASKA STAT. § 09.45.290 (2016); ARK. CODE ANN. § 18-60-401 (2015); CAL. CIV. PROC. CODE § 872.210 (West 1980); COLO. REV. STAT. § 38-28-101 (2016); CONN. GEN. STAT. ANN. § 52-495 (West 1991); D.C. CODE ANN. § 16-2901 (West 1997); GA. CODE ANN. § 44-6-140 (2016); HAW. REV. STAT. § 668-1 (2016); IOWA CODE § 651.3 (2016); KAN. STAT. ANN. § 60-1003 (2016); KY. REV. STAT. ANN. § 381.120 (West 1998); MD. CODE ANN., REAL PROP. § 14-107 (West 2016); MINN. STAT. § 558.17 (2000); MO. ANN. STAT. § 528.030 (West 2016); MONT. CODE. ANN. § 70-29-101 (2015); NEV. REV. STAT. § 39.010 (2015); N.J. STAT. ANN. § 2A:56-1 (West 2016); N.M. STAT. ANN. § 42-5-1 (2016); N.Y. REAL PROP. ACTS. LAW § 901 (McKinney 1979 & Supp. 2000); N.D. CENT. CODE § 32-16-01 (2016); OR. REV. STAT. § 105.205 (2016); S.D. CODIFIED LAWS § 21-45-1 (2016); UTAH CODE ANN. § 78B-6-1201 (West 2016); WIS. STAT. ANN. § 842.02 (West 2016). *See id.* It should be noted that case law in at least five other states including Louisiana, Mississippi, South Carolina, Texas, and West Virginia either favor partitions in kind over partitions by sale or emphasize weighing non-economic factors such as sentimental value in determining how to partition property. *See* Oliver v. Robinson, 60 So.2d 76 (La. 1952) ("The law favors a partition in kind, but under Article 1339 of the LSA-C.C., when the property is indivisible by its nature or when it cannot be conveniently divided, on proof of these facts the judge shall order the partition by licitation, and under Article 1340 it is said that a thing cannot be conveniently divided when a diminution of its value or loss or inconvenience of one of the owners would be the consequence of dividing it."); *See also* Cathey v. McPhail and Assoc., Inc., 989 So.2d 494 (Miss. 2008) ("A partition in kind, rather than a partition by sale, is the preferred method of dividing property in Mississippi."); *See also* Anderson v. Anderson, 382 S.E.2d 897 (S.C. 1989) ("This Court has previously recognized that partition in kind is favored when it can be fairly made without injury to the parties. . . . This Court's decision in *Few v. Few,* 242 S.C. 433, 131 S.E.2d 248 (1963), which recognized that in kind partitions are appropriate only where they may be made fairly and impartially without injury to any of the parties, does not vary the statutory preference for in kind partition. Thus, the party seeking a partition by sale carries the burden of proof to show that partition in kind is not practicable or expedient."); *See also* Bowman v. Stephens, 569 S.W.3d 210 (Tex. 2018) ("Texas law favors partition in kind over partition by sale."); *See also* Ark Land Co. v. Harper, 599 S.E.2d 754 (W. Va. 2004) ("In view of the prior decisions of this Court, as well as the decisions from other jurisdictions, we now make clear and hold that, in a partition proceeding in which a party opposes the sale of property, the economic value of the property is not the exclusive test for deciding whether to partition in kind or by sale. Evidence of longstanding ownership, coupled with sentimental or emotional interests in the property, may also be considered in deciding whether the interests of the party opposing the sale will be prejudiced by the property's sale. This latter factor should ordinarily control when it is shown that the property can be partitioned in kind, though it may entail some economic inconvenience to the party seeking a sale.").

55. *See* Batra, *supra* note 53, at 749. The weakening of fundamental property rights may be a vehicle for rallying widespread support for law reform. See Greg Barlow, *Defying Great Odds – Mitigating Property Loss Through Historic Partition Law Reform in the U.S.*, L. & SOC'Y ASSOC. (Aug. 26, 2020), https://lawandsociety.site-ym.com/news/523353/Defying-Great-Odds--Mitigating-Property-Loss-Through-Historic-Partition-Law-Reform-in-the-U.S.htm ("In my case, what I realized in many of the states, especially the Southern states, was that framing our bill as solely a racial justice issue was not going to be a winner, so also framing it as private property rights and protecting family real-estate wealth is important."). One can infer that by framing advocacy around protecting private property rights, Thomas Mitchell and other advocates were able to galvanize conservatives around reform.

56. *Restoring Hope for Heirs Property Owners*, *supra* note 33.

motivations, ranging from implicit or explicit racial bias[57] to the application of economic analyses[58] to merely preferring the simplest alternative.[59] Beyond the social effect of partition orders, partition sales have deleterious effects on Black landownership, thereby harming the economic prospects of many.

Most courts exclusively contemplate economic factors when determining whether to order a partition by sale.[60] Such a judicial test weighs "the hypothetical fair market value of the property in its entirety" against "the fair market value of the sub-parcels that would result from a partition in kind."[61] If it is judged that the fair market value of the entire property is greater than the combined fair market value of the sub-parcels, courts will invariably order a partition by sale.[62] Such a test often results in unintended consequences, not the least of which includes economic harm to the heirs property owner.[63] Further, this method goes against an historical understanding of Black landownership and discounts the value of appreciating the potential social harm a decision could have on an individual, a family, and a community.

For instance, legal scholar and former dean of North Carolina Central University School of Law, Phyllis Craig Taylor asserted that, in partition cases, if courts merely determine value through economic terms, thus discounting intangible factors like a family's historical attachment to the place, "violence" is "do[ne]" to the individuals who see the land as a cultural and historical staple to their lives and legacies.[64] The partition by sale remedy is often used by wealthy land speculators in ways that not only "shock the conscience" of the normal observer,[65] but also dispossess many Black families of land and heritage.[66] For some families contending with such effects of heirs property, they perceive their

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57. *See* Richard K. Green, Stephen Malpezzi, & Thomas W. Mitchell, *Forced Sale Risk: Class, Race, and the "Double Discount,"* 37 FLA. ST. U. L. REV. 589, 618 ("It is also possible that of all the property owners who own property under the default rules governing the partition of tenancy in common and joint tenancy property, African Americans and other minorities may be targeted for forced partition sales in one way or another. For example, it is possible judges order partition sales in a higher percentage of partition cases involving African Americans than they do in partition cases involving whites. This would be consistent with the claims that many have made that eminent domain has been utilized more heavily in minority neighborhoods than in white neighborhoods under programs such as urban renewal.").

58. *See* Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 A. L. A. L. REV.1, 12-13 (2014).

59. *See* Batra, *supra* note 53, at 750 ("[j]udges order partition sales because it's easy") (citing *Todd Lewan & Dolores Barclay, Developers and Lawyers Use a Legal Maneuver to Strip Black Families of Land*, ASSOCIATED PRESS (Dec. 30, 2001), http://theauthenticvoice.org/mainstories/tornfrom theland/tompart5/.).

60. *See* UNIF. PARTITION OF HEIRS' PROP. ACT, *supra* note 38 at 6-7.

61. *Id.* at 7.

62. *Id.*

63. *See infra* note 222.

64. Phyllis Craig Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, WASH. U. L. Q. 737, 774 (2000).

65. *See* Batra, *supra* note 53, at 751 ("When auction sales do yield low sales prices, courts rarely overturn such sales as most courts consider challenges under a lax 'shock the conscience' standard to evaluate the sale." Under this lax standard, sales have been upheld even when the property sold for twenty percent or less of its ultimate market value.").

66. *See* Timothy Robustelli and Andrew Hagopian, *Black Land Was Plundered for Decades — This Law Can Thwart More Losses*, HILL (Aug. 12, 2019 7:30 PM), https://thehill.com/opinion/civil-rights/457151-black-land-was-plundered-for-decades-this-law-can-thwart-more-losses.

loss of land as nothing short of theft through legal deception.[67] Given legal yet arguably unprincipled maneuvers at the disposal of attorneys, this sentiment is not necessarily a misapprehension.[68]

As such, widespread recognition of cultural competence standards is vital for building "a more effective and compassionate profession."[69] While definitions vary, cultural competency is essentially the ability to "adapt" based on the "understanding" and "awareness" of a culture different from one's own.[70] From a theoretical standpoint, "culturally competent lawyers are more likely to promote equitable legal policies" and recognize "impacts . . . of modern systemic injustice."[71] This Article maintains that recognition of this history is a critical step in developing culturally competent attorneys. In addition, leaders in other professions recognized the value of cultural competence in daily practice including healthcare providers and social workers.[72] Therefore, cultural competence should be emphasized in legal practice and training.

A survey of the relevant scholarly literature finds that a key contributor to land loss among African Americans is a widespread reticence to seek legal services in property matters and court decisions to sell family land through partition sales. This article argues that only through the recognition of the current trajectory of Black land ownership, the legal community's role in its downward trend, and the steps needed to reconcile the law and Black land loss can legal practitioners effectively work to curb the adverse impact of heirs property ownership. Consequently, Part II of this Article further elucidates the nature of heirs property ownership and its associated problems. Part III delves into the interrelated histories of Black land ownership and the legal profession's historical role, both deliberately and inadvertently, in suppressing and reversing its development. Part IV makes connections between these histories and the hesitancy among African Americans in seeking estate planning services. Finally, Part V proposes a series of potential solutions to both restrain the effects of heirs property ownership and allow for legal practitioners to take the lead in such an effort, including cultural competence training and scrutinizing the prevailing judicial framework in partition actions.

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67. *See* Presser, *supra* note 2 ("David Cecelski, a historian of the North Carolina coast, told me, 'You can't talk to an African-American family who owned land in those counties and *not* find a story where they feel like land was taken from them against their will, through legal trickery.'").

68. *See* Roy W. Copeland, *Heir Property in the African American Community: From Promised Lands to Problem Lands*, 2 PROF. AGRIC. WORKER J. 1, 4 (quoting EMERGENCY LAND FUND, THE IMPACT ON BLACK RURAL LAND TENURE IN THE SOUTHEASTERN REGION OF THE UNITED STATES (1984)) ("an array of persons and entities. . . prey on the heir property situation by practices which are, although technically legal, clearly unscrupulous").

69. *See* Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 3 NYU REV. L. & SOC. CHANGE 367, 370 (2017).

70. *See* Jan L. Jacobowitz, *Lawyers Beware: You are What You Post—The Case for Integrating Cultural Competence, Legal Ethics, and Social Media*, 17 SMU SCI. & TECH. L. REV. 541, 549 (2014).

71. Demetria Frank, *Lawyers Need Cultural Competence*, UNIV. MEMPHIS, CECIL C. HUMPHREYS SCH. L. (Mar. 9, 2021), https://www.memphis.edu/law/about/ml_12_demetriafrank_op-ed.php.

72. *See* Chopp, *supra* note 69, at 369.

II. "THE WORST PROBLEM YOU'VE NEVER HEARD OF"[73]

When "land is passed to successive generations intestate, without clear title," the land is deemed to be heirs property.[74] From a technical standpoint, heirs property is a form of joint ownership termed a "tenancy in common."[75] The tenancy in common is the most widespread form of common ownership of real property in the United States.[76] It is also the form of property ownership most defined by instability.[77] [78]

There are certain hallmarks of the tenancy in common that make land ownership particularly tenuous. For example, tenants in common have certain restrictions on how they can utilize their real property and who they can restrict from making use of the land.[79] Any tenant has the right to utilize and occupy the property as a whole but cannot deny other tenants the right to do the same.[80] However, this does not mean that a co-tenant can take a section of the land for their sole use.[81] For instance, if a co-tenant wishes to use the property for agricultural purposes, the land used cannot exceed his proportionate share.[82] If he wishes to use the entire property for such purposes, he must receive unanimous consent of the other co-tenants.[83] Maintenance obligations may be, and often are, shared unequally.[84] Due to the fractional nature of such ownership and the lack of clear title inherent to heirs property interests, one's ability to "sell, improve, renovate, and repair the property" is highly limited.[85]

Furthermore, if a single tenant in common seeks to borrow against, rent, or sell the entire property, the permission of all other co-tenants must be sought and granted.[86] This stands in stark contrast to any co-tenant's ability to sell their interest to another tenant or third party without the consent of the whole.[87] Additionally, it is not uncommon that some co-tenants may be oblivious to their interest in heirs

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73. Anna Stolley Persky, *In the Crossheirs*, 95 A.B.A. J. 44 (2009) (quoting David Dietrich, a co-chair of the ABA Property Preservation Task Force. He used these words to describe the "mess[iness]" and complex[ity]" of heirs property cases.).

74. SCOTT PIPPEN, SHANA JONES, & CASSANDRA JOHNSON GAITHER, U.S. FOREST SERV., IDENTIFYING POTENTIAL HEIRS PROPERTIES IN THE SOUTHEASTERN UNITED STATES: A NEW GIS METHODOLOGY UTILIZING MASS APPRAISAL DATA, vii (2017) [hereinafter IDENTIFYING POTENTIAL HEIRS].

75. *See* Jesse J. Richardson, 45 REAL EST. L. J. 507, 509-510 (2017).

76. *See* Mitchell, *supra* note 58.

77. *See id.* ("Such ownership under the default rules also represents the most unstable ownership of real property in this country.").

78. *See id.*

79. *See* Richardson, *supra* note 37, at 809-810

80. *See id*. at 810.

81. *See id.*

82. *See id.*

83. *See id.*

84. *See* Joan Flocks, *The Disproportionate Impact of Heirs' Property in Florida's Low-Income Communities of Color*, 92 FLA. B.J. 57 (2018).

85. *Id.*

86. *See id.*

87. *See id.*

property.[88] This can especially complicate other heirs' efforts to seek consent in exercising certain property interests.[89]

In addition, there are limits on how a share of heirs property can be assigned. The tenancy in common form of ownership does not allow for rights of survivorship.[90] Therefore, when a co-tenant dies, that person's share of the property passes to her heirs.[91]

Due to the unstable and restrictive nature of this form of ownership, there are certain limits on how one can leverage their real property.[92] While land ownership serves as the single "greatest source of wealth" and the "most important bulwark against poverty" for many Americans, tenants in common are often denied the associated advantages of land.[93] For instance, banks will not allow borrowers to use "fractional interests of tenancies in common as collateral to secure a loan or mortgage."[94]

One of the only ways disagreements among co-tenants can be resolved is through partition actions.[95] Specifically, through such actions, property can either be sold, in a partition by sale, or physically divided, in a partition in kind.[96] Most concerning to advocates of equitable solutions with regard to heirs property, any co-tenant can order the partition of a property no matter how small their share.[97] This legal fact can be especially attractive for monied land speculators.[98] Many of the instances found to be appalling by commentators involve such individuals purchasing small parcels of land from a few heirs, forcing a partition action, and purchasing the remaining property for less than market value.[99] Typically, the "land rich but cash poor" heirs cannot withstand the financial wherewithal of a highly capitalized third party.[100] These actions are particularly adverse to owners of heirs property as courts rarely take into account non-economic interests like: sentimental value; cash on hand is usually required to succeed in such actions; land is often sold at far below market price in partitions by sale; and if a party opposes

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88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *See* IDENTIFYING POTENTIAL HEIRS, *supra* note 74.

93. *Id.*

94. *See* Flocks, *supra* note 84, at 58.

95. *See* Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 154 (2010).

96. *See id.* at 155.

97. *See id.*

98. *See* Conner Bailey, Janice F. Dyer, and Nhoung Van Tran, *Ownership Characteristics of Heir Property in a Black Belt County: A Quantitative Approach*, 24 J. RURAL SOC. SCI. 192, 195-196 (2009) (Bailey, Dyer, and Van Tran recount a process employed by land speculators that was alluded to earlier in this article. The simplicity and relative low cost associated with this process have enticed a number of unscrupulous investors over the years. First, "[d]evelopers or real estate speculators may purchase a distant relative's share, then petition the court to have this share sold – forcing the whole tract of land to be sold. . . . Family members who live on the land are often unable to outbid others. . . . Proceeds are distributed among the co-owners according to their fractional interests, but only after the costs of conducting the sale and attorney fees are deducted. . . . Frequently it is the case that the land is sold for far less than its true value." Therefore, this process usually provides for the purchase of land at far below market value and a reimbursement of attorneys' fees.).

99. *See id.*

100. J. Blanding Holman, IV., *Time to Move Forward on Heirs' Property*, 18 S.C. LAW.19, 22 (2006).

a partition action, he is often liable for paying at least a portion of the attorneys' fees of the side that sought the action.[101]

Furthermore, if a tenant in common fails to properly plan for the disposition of his estate upon his death, these problems are simply compounded with the passage of time as heirs pass on their interest to their own heirs.[102] With each new heir, the property is further fractionalized and the quantity of tenants in common increase.[103]

Finally, while heirs property exists in all corners of the country,[104] some populations are more susceptible to the ill effects of such ownership. For example, disputes involving heirs property happen with greater frequency among those living below the poverty line.[105] In part, this is because there are especially divergent interests among those with limited resources.[106] Is the land being used as a homeplace by some while depleting the funds of other non-resident family members due to tax payments or maintenance costs? Do some family members wish for swift compensation for their share while others seek to maintain the land for sentimental purposes? Sometimes insuperable costs are associated with consolidating interests in heirs property such as the time and financial costs associated with locating fellow co-tenants; hiring legal assistance; and buying the interests of other co-tenants.[107] Such expenditures can often deter even the most resolute families from pursuing clear title and consolidation of ownership.[108] Additionally, rural Black landowners are, possibly, the most vulnerable to the legal pitfalls associated with heirs property ownership.[109] Despite the absence of a definitive sum of lands deemed heirs property in the U.S., "roughly a third of all Black-owned land in the [S]outh is heirs[] property. . . some 3.5 million acres, worth roughly $28 billion."[110]

III. A DUAL HISTORY: BLACK LANDOWNERSHIP AND THE LAW

The history of Black land ownership is long, tortured, and, at times, triumphant. After all, African Americans overcame long odds to acquire millions

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101. *See* Bailey, *supra* note 98. *See also* Way, *supra* note 95, at 155.

102. *See* Flocks, *supra* note 84, at 57.

103. *See id.*

104. *Heirs' Property*, CTR. FOR AGRIC. & FOOD SYS., https://farmlandaccess.org/heirs-property/ (last visited May 25, 2021).

105. *See id.*

106. *See id.*

107. *See id.*

108. *See* Michelle Chen, *Black Lands Matter: The Movement to Transform Heirs' Property Laws*, NATION (Sep. 25, 2019), https://www.thenation.com/article/archive/heirs-property-reform/ (This article reports on a family devoted to its ancestral land, "a 4.3 acre parcel in rural Leon County in northern Florida," purchased with the earnings a family member "sent home while he was fighting in the Korean War." The family had "built five houses on the land." After the family matriarch's death, it was discovered that her will had not been written in accordance with state law, thus causing the property to fall into "the legal category [of] heirs' property." Chen wrote, "Although [the family members] were all committed to keeping the property, the arduous legal process of clearing their title to the land cost about $10,000—more than the original purchase price.").

109. *See* Craig Taylor, *supra* note 64, at 773.

110. *See* Chen, *supra* note 108 (citing Presser, *supra* note 2).

of acres of land amidst Jim Crow, only to see much of the land taken over time. And while forced departures from family lands are devastating for any class of persons, historical research and sociological data show that this process is particularly damaging for African Americans.[111] For many African Americans, land ownership is considered to be tantamount to "a sacred phenomenon."[112] This point is evidenced by an oft-cited quote from the American historian, Loren Schweninger, "perhaps no Americans can better understand the meaning of owning property than those who had been considered a 'species of property' themselves."[113] However, it is impossible to separate the saga of Black land acquisition from the formal avenues used to usurp that land from the same families that toiled for generations. Therefore, this section summarizes the historical trajectory that led African Americans to acquire as much as nineteen million acres of agricultural lands[114] and the social, legal, and extra-judicial occurrences that led to the precipitous decline in Black land ownership.

Much of the scholarship concerning Black landownership in the American South either begins with or makes special mention of General William Tecumseh Sherman's 1865 issuance of Field Order No. 15.[115] Until that point, African Americans in the South were prohibited from owning real property.[116] The order allowed for 40,000 freedmen to settle on 40-acre plots[117] along coastal Georgia and South Carolina.[118] This measure becameone of the proposed or enacted policies aimed at increasing Black land ownership.[119] Soon after the order, Congress established the Bureau of Refugees, Freedmen, and Abandoned Lands under the auspices of providing "every male citizen, whether refugee or freedman, forty acres of land at rental for three years with an option to buy."[120] Furthermore, in 1866, Congress passed the Southern Homestead Act.[121] For this purpose, the

111. *See id.*

112. *Id.*

113. *Id.*

114. *See* Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557, 563 (2005) ("Agricultural census records reveal that by 1910, African American farm families had acquired between sixteen and nineteen million acres of agricultural land in rural America, with the ownership heavily concentrated in the South.").

115. *See* Gaither, *supra* note 33, at 13-14.

116. *See* Holman, *supra* note 100, at 21.

117. *See id.*

118. *See* Gaither, *supra* note 33, at 13-14.

119. One enacted state program included the formation of a South Carolina land commission "with the power to purchase real estate and resell it on long-term credit." *See* ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION, 1863-1877 160-161 (1990). While the program was "[i]nitially plagued by mismanagement and corruption" and early ineffectiveness, it eventually provided "some 14,000 [B]lack families, about one-seventh of the state's [B]lack population" with homesteads. *See id*. at 161. At various state constitutional conventions during Reconstruction, discussions were had on "the need to provide freedmen with land and encourage the breakup of the plantation system." *See id.* at 141. Additionally, "[a] few constitutions took modest steps toward meeting this demand." *Id.* For instance, "Texas offered free homesteads to settlers on the state's vast public domain, and Mississippi provided that land seized by the state to satisfy tax claims would be sold in tracts of no more than 160 acres." *Id.* However, aside from the policy enacted by South Carolina, levels of inaction by other states can best be described as "remarkable" for such an important issue. *See id.* at 160.

120. *See* Holman, *supra* note 100, at 21.

121. *See* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 525 (2001).

federal government set aside forty-six million public acres for homesteaders.[122] The 1866 Homestead Act differed from an 1862 homesteading law that only permitted participation by "non-Confederate whites."[123]

However, all this progress was short-lived. By just the end of 1865, President Andrew Johnson rescinded Sherman's order.[124] Additionally, although the law establishing the Freedmen's Bureau barred discrimination in the distribution of lands, by 1866, half of the land under the jurisdiction of the Bureau was eventually returned to their former white owners.[125] Thomas Mitchell, legal scholar and expert on heirs property issues, wrote that the Southern Homestead Act was a "dismal failure."[126] The Act accepted land applications from anyone "who claimed that he had not supported the confederacy."[127] As such, "seventy-seven percent of the applicants under the Southern Homestead Act were white," and African American applicants "faced . . . discrimination in their efforts" to acquire and maintain homesteads from the government.[128]

Despite contending with discrimination by governmental actors in the allocation of lands, freed slaves sought to purchase real property as a means of unshackling themselves from an economic system defined by subservience to other monied landowners.[129] For many African Americans in the post-Civil War period, it became evident that land ownership was the cultural and economic hallmark of American society and provided self-sustaining resources.[130] "One author stressed the existential importance of land acquisition to freed slaves, noting that land ownership was the singular answer to achieving freedom from bondage, isolation, and abject impoverishment."[131]

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122. *See id.*

123. *Id.*

124. *See* Gaither, *supra* note 33, at 14.

125. *See* Holman, *supra* note 100, at 21.

126. *See* Mitchell, *supra* note 121, at 525.

127. *Id.* at 526.

128. *Id.*

129. John Hope Franklin and Alfred A. Moss, Jr. noted that after slavery many African Americans "had no other choice but to cast their lot with their former masters and assist them in restoring economic stability to the rural South." JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS, 259 (2000). The authors describe a short trajectory in which white Southern landowners began 1870 with a cotton crop not as profitable as it was "just before the war." *See id*. "[B]y 1875 the white South had come to realize that cheap labor could be the basis for a profitable agricultural system." *Id.* Finally, "by 1880 the South was producing more cotton than ever." *Id.* The economic revivification of sugar crops was also "marked." *See id.* Therefore, according to Franklin and Moss, "Black farm workers contributed greatly to the economic recovery of the South. As free workers, however, they gained but little. The wages paid them in 1867 were lower than those that had been paid to hired slaves." *Id.* In fact, most Black sharecroppers were straddled with exorbitant agricultural operating costs such that by year's-end, "ex-slaves were indebted to their employers for most of what they had made and sometimes more than they had made." *See id.* Therefore, "[the] white South generally recovered much more rapidly than the former slaves did." *Id.* Understandably, such economic dependence on former slaveowners led to widespread discontent and the desire for the independence landownership would bring. *See* FONER, *supra* note 119 at 128 ("Drawing on widespread dissatisfaction with a contract system that appeared to consign them permanently to poverty and dependence, rural [B]lacks raised, once again, the demand for land.")

130. *See* Gaither, *supra* note 33, at 1.

131. *See id.* at 14.

One scholar noted that the "the interplay between land and kinship" was a "defining feature" of post-Civil War African-Americans' views toward land.[132] For freed slaves, the term "kinship" referred to more than just blood relation.[133] Instead, kinship referred to other freed slaves from the same plantation or those who sought refuge in the same post-emancipation refugee camps.[134] In time, "slaves 'began to think of themselves more and more as individuals bound together by the exploitative system of human bondage' and less as culturally united by distinct African cultures."[135] In order to purchase land despite great economic disadvantages, many freed slaves pooled resources with other freedmen.[136] Ultimately, in part because of the sharing of resources, African Americans acquired fifteen million acres of land from the end of the Civil War until the dawning of the twentieth century.[137] This amount of land likely swelled to nineteen million acres of rural agricultural land by 1910, most of which was located in the South.[138]

Additionally, in seeking to protect their lands, African Americans faced difficulties in accessing quality and willing legal assistance. In the words of Thomas W. Mitchell: "the original sin is many of these families, when they first got the property in the late 1800s, tried to get a lawyer, but no lawyer would represent them."[139] Much of this difficulty could have stemmed from the scarcity of Black lawyers in the South during this critical period of Black land acquisition.

Take, for example, the composition of South Carolina's[140] legal community through the years. Legal scholar Faith Rivers noted that although South Carolina's

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132. *See id.* (citing DYLAN C. PENNINGROTH, THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH 158-161 (2003)).

133. *See id.*

134. *See id.*

135. Mitchell, *supra* note 121, at 523-524.

136. *See id.* See also Dylan C. Penningroth, *The Claims of Slaves and Ex-Slaves to Family and Property: A Transatlantic Comparison*, 112 AM. HISTORICAL REV. 1039, 1063 (2009) ("Statistics are difficult to come by, but by the early 1900s it is likely that a substantial proportion of [B]lack owned land and houses was classified—in the eyes of [B]lacks, but perhaps not by law—as 'heir property.' These were things that were owned corporately by a large and complicated network of kin, not by any single person; rights to the old 'home place' were founded on descent from what one man called the "old Founders," and keeping "All of the land . . . in the family" was a point of pride. Likely nurtured by southern courts' halting treatment of [B]lack estates, heir property (or 'family land') became a source of strength for [B]lacks—enabling them to pool resources and protect themselves from outside pressures.").

137. *See* Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 25 (2007).

138. *See* Mitchell, *supra* note 114 at 563.

139. Matt Reynolds, *How Jim Crow-Era Laws Still Tear Families from Their Homes*, ABA J. (Feb. 1, 2021), https://www.abajournal.com/magazine/article/how-jim-crow-era-laws-still-tear-families-from-their-homes.

140. With regard to heirs property and its effects, a great deal of research has been conducted and scholarship authored focusing on the South Carolina Lowcountry. Historically, this area has been home to the state's largest proportion of African Americans. *See* Holman *supra* note 100 at 21. The state's highest concentration of Black-owned heirs property is also contained there. *See id*. This is in no small part because Charleston served as the point of entry for 40 percent of all slaves in pre-emancipation America. *See id*. This heirs property is particularly at risk because the population of the South Carolina coast has increased by over thirty percent over the last couple of decades. *See id*. Projections show that that number will swell by a million residents in the next decade. *See id*. As a result of this population explosion, and the resulting demand for real property, investment activity has risen steeply throughout the area. *See id*. As such, land prices have increased dramatically. *See id*. The demand for these lands has also put significant cultures at

Black citizens began to acquire land beginning in 1863, Black lawyers were not admitted to the state bar until 1868.[141] Even then, the bar only admitted three Black lawyers.[142] From the end of the Civil War until 1890, only sixty-one Black lawyers gained admission to practice in the state.[143] The pace of these admissions was gradual, as the state "average[ed] two to three admissions [of Black lawyers] per year."[144] For the fifty years after emancipation, only twenty-eight Black lawyers practiced in the Lowcountry, the area of the state with the highest concentration of African Americans.[145] As South Carolina's Black population constituted a healthy majority of the state's overall populace from the 1770s to the 1920s,[146] the lion's share of South Carolina residents were presented with "woefully inadequate" numbers of Black lawyers to consult.[147]

South Carolina's historical data regarding legal access for Blacks was not distinctive in the context of the greater South. For instance, before 1964 the Alabama State Bar admitted "only 19 African Americans."[148] From the end of the Civil War until around the conclusion of the nineteenth century, only 30 Black lawyers practiced in Arkansas.[149] In Georgia, 17 Black lawyers gained admission

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risk including the Gullah-Geechee people. Audrey Anne Butkus, The Worst Problem No One Has Ever Heard Of": Heirs' Property and its Cultural Significance to Gullah-Geechee Residents of the South Carolina Lowcountry (Aug. 2012) (unpublished M.S. thesis, University of Texas), https://repositories.lib.utexas.edu/bitstream/handle/2152/ETD-UT-2012-08-6086/BUTKUS-MASTERS-REPORT.pdf?sequence=1&isAllowed=y). One author wrote, "As this area is engulfed by high-income resort development, the Gullah-Geechee population is pushed further away from the land directly tying them to their heritage. The loss of land to the Gullah-Geechee community equates to a loss of their community's culture and way of life. This same way of life is an integral part of the Lowcountry's identity, and without it the coastlands of South Carolina are at risk of becoming sterilized communities for a homogeneous population." *Id*.

141. *See* Rivers, *supra* note 137 at 26.

142. *See id*.

143. *See id*.

144. *Id.*

145. *See id.* at 27

146. *See id.* at 26 ("During this period, African-Americans constituted the majority of the state's population, remaining around sixty percent from 1775 to 1880, when South Carolina had the highest percentage of [B]lack citizens of any state."). *See also African Americans*, SOUTH CAROLINA ENCYCLOPEDIA, https://www.scencyclopedia.org/sce/entries/african-americans/ (last visited May 25, 2021). (During the four decades after the Civil War, the state's African American population continued to hover right around 60 percent. Then, beginning in the 1920s, thousands of [B]lack Carolinians left the state because of Jim Crow and a lack of economic opportunity. In 1930 the state had a white majority for the first time in 120 years. There would be another major [B]lack out-migration the years after World War II, but by the last decades of the twentieth century more African Americans were moving to South Carolina than were leaving the state.").

147. Rivers, *supra* note 137 at 26.

148. Kent Faulk, *Before the Civil Rights Movement Alabama Blacks Faced Discrimination on Their Way to Getting Law Degrees and Licenses to Practice*, AL (Mar 06, 2019), https://www.al.com/spotnews/2013/05/before_the_civil_rights_moveme.html#:~:text=As%20of%20April%2C%20there%20were,members%20of%20the%20state%20bar.

149. *See Pioneers of the Civil Rights Movement: African American Lawyers in Arkansas Before 1950*, U. OF ARK. (Feb. 13, 2001), https://news.uark.edu/articles/10904/pioneers-of-the-civil-rights-movement-african-american-lawyers-in-arkansas-before-1950 ("From Reconstruction to the start of 'Jim Crow' laws, about 1865-1891, 30 African-American lawyers practiced in Arkansas. Little is known about their daily practices, and their client base was likely to be small. 'Most black people were poor, and the lawyers weren't getting any white clients,' Kilpatrick said. However, several black attorneys served in the state legislature during that time.").

to practice by 1890, "a figure that decreased to 8 by 1940 and rose to just 54 in 1970."[150] In 1933, nine Black lawyers formed the first Black legal professionals' organization in Tennessee.[151] These lawyers constituted roughly "one-third of the total number of black lawyers counted in the state in the 1930 census."[152]

Furthermore, amidst a burgeoning of Black land acquisition, a separate struggle persisted as African Americans attempted to make use of and peacefully live upon their newfound property. For instance, the economic structures in place were still heavily discriminatory toward African Americans and, in the aftermath of the Civil War, banks refused to lend to African Americans.[153] As such, many African Americans sought loans "from local merchants at high interest rates."[154] Many of these lenders in turn required African Americans to only farm the safest cash crop at the time, cotton, thus barring them from crop rotation.[155]

The stifling effect of Jim Crow laws on Black commerce, and the mass departure of African Americans from ancestral lands during the Great Migration, brought about Black land loss after the Great Depression.[156] However, despite the forced or voluntary retreats from family lands, the real property acquired by African Americans during the post-Civil War era was often still "in the family name."[157] As such, these collective events did not give rise to the *tremendous* loss of Black land that would be witnessed later in the twentieth century.

Accordingly, there are many misguided assumptions about Black land loss.[158] A common, yet mistaken, hypothesis is that the vast proportion of Black land loss occurred as a result of social and economic suppression during the Jim Crow era.[159] However, this claim is mostly incorrect.[160] Much of the land loss occurred in the latter part of the twentieth century and the first part of this century as a result of "land speculators. . . initiating various legal actions with the sole purpose of

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150. James L. Hunt, *Legal Profession*, NEW GA. ENCYCLOPEDIA (Aug. 11, 2020), https://www.georgiaencyclopedia.org/articles/government-politics/legal-profession.

151. *See Tennessee's Historically African American Bar Associations Boast Rich History, Broad Influence*, TENN. STATE CTS. (Feb. 27, 2020), https://www.tncourts.gov/news/2020/02/27/tennessee-historically-african-american-bar-associations-boast-rich-history-broad.

152. *Id.*

153. *See* Chandler, *supra* note 39, at 393.

154. *Id.*

155. *See id.*

156. *See* William Y. Chin, *Legal Inequality: Law, the Legal System, and the Lessons of the Black Experience in America*, 16 HASTINGS RACE & POVERTY L. J. 109, 129 (2019) (During the Jim Crow era, "[s]tate and local laws were passed to re-subjugate Blacks including restricting their right to sign contracts, buy or sell property, and access local courts."). In addition, the Jim Crow era ushered in a period of intimidation and violence aimed at deterring Black landownership. *See infra* note 158. *See also* Brian Barth, *How Did African American Farmers Lose 90 Percent of Their Land?*, MODERN FARMER (Aug. 19, 2019), https://modernfarmer.com/2019/08/how-did-african-american-farmers-lose-90-percent-of-their-land/ ("[B]y the turn of the 21st century, 90 percent of that land was lost. Some of that can be chalked up to the Great Migration, when southern blacks fled to northern cities to escape the racist violence and systemic oppression of the South.").

157. *See* Holman, *supra* note 100, at 21.

158. *See* Mitchell, *supra* note 114, at 566.

159. *See id.*

160. *See id.* See also Todd Lewan and Dolores Barclay, *Developers and Lawyers Use a Legal Maneuver to Strip Black Families of Land*, ASSOCIATED PRESS (Dec. 16, 2001 12:00AM), https://www.latimes.com/archives/la-xpm-2001-dec-16-mn-15476-story.html ("By the end of the 1960s, civil rights legislation and social change had curbed the intimidation and violence that had driven many [B]lacks from their land over the previous 100 years. Nevertheless, [B]lack land loss did not stop.").

acquiring Black-owned property against the wishes of the Black landowners."[161] Oftentimes, these legal actions included claims of adverse possession or petitions for "partition sales, tax sales, or foreclosure."[162] Further, landowners frequently reported that these forced relinquishments of land result in property being transferred from African Americans to whites.[163]

The data substantiates these claims. The pronounced hemorrhaging of Black lands began in the latter quarter of the twentieth century and onward. Between 1978 and 1987, the number of African American-owned farms declined by 23 percent.[164] During this same period, white-owned farms declined at a rate of only 6.6 percent.[165] By 1990, African American-owned farms shuttered at "three times that of white farms."[166] At the close of the twentieth century, the number of Black agricultural landowners "dwindled" as over 90% of the land owned by their forebearers ninety years earlier was lost.[167] No doubt, some of the factors that adversely affected Black landownership throughout the trajectory of the last two centuries include the forced abandonment of land through violence and coercion and the consolidation of the agricultural industry.[168] However, legal professionals and the court system hold immense responsibility for this societal problem.

From Civil War to Civil Rights, wielders of power in state and local governments implemented and enforced laws that subverted Black land acquisition and ownership. However, the unscrupulous practices of some modern-day legal professionals and the inequitable nature of the prevailing judicial tests used in heirs property cases have not been fully recognized or critiqued by the legal academy.[169] In contrast to the relative dearth of legal scholarship on the subject, independent journalists and news organizations developed a rich body of work examining this

161. *See* Mitchell, *supra* note 114, at 566.

162. *Id.*

163. *See id.*

164. *See* Chandler, *supra* note 39, at 394.

165. *See id.*

166. *Id.*

167. Mitchell, *supra* note 114, at 563-564.

168. Thomas W. Mitchell argued that the consolidation of the agricultural industry had the effect of "forc[ing] out of business" small farm owners at a greater rate than large operators. As small farm owners have historically been disproportionately [B]lack, this "squeezing out" has greatly "contributed to the trend of [B]lack land loss." *Id.*

169. *See id*. at 569 ("Some anthropologists, sociologists, economists, historians, and other nonlegal scholars have published articles and books addressing issues pertaining to [B]lack rural property ownership; however, there has been little systematic, empirical study of the topic." Given the number of legal issues involved in many [B]lack land loss cases, one could reasonably expect that more than a handful of legal scholars would have published articles addressing any number of the legal topics that are implicated."). Mitchell's article was published in 2005. It is the view of this author that, while not a central focus of legal researchers and practitioners, considerably more legal scholarship has been published in the last fifteen years. Perhaps this is due to the American Bar Association's Section of Real Property, Trust and Estate Law's endorsement of heirs property reforms to the Uniform Law Commission or a rise in journalistic reporting on the issue in recent years. *See Restoring Hope for Heirs Property Owners*, *supra* note 33. Additionally, Mitchell's recent award of a MacArthur Fellowship assisted in increasing awareness for this once obscure issue. *See Thomas Wilson Mitchell,* MACARTHUR FOUND., https://www.macfound.org/fellows/1065/ (last visited May 25, 2021).

societal problem.[170] As such, this Article seeks to include many of the findings from these investigative pieces within the pages of legal scholarship.[171]

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170. In his article, Mitchell contrasted the work of journalists in shedding light on this important legal issue. *See id.* ("In contrast to the AP investigative series on [B]lack land loss (picked up by newspapers all across the country and often on the front page), and reports produced by some community-based organizations that have addressed legal proceedings of one kind or another that have been used to force sales of [B]lack-owned property, few legal scholars have considered the 'legal dispossession' of [B]lack-owned property holdings to be an area worthy of independent study. This fits a general pattern in which there has been a lack of mainstream interest within legal academia with respect to issues addressing the dispossession of property from people of color, more broadly, within the United States.").

171. This footnote seeks to provide the reader with a partial bibliography that details some of the most significant journalism produced on the topic of heirs property and Black land loss. The author referenced liberally from a comprehensive list of such articles compiled by the Heirs Property Retention Coalition. *See Media,* HEIRS' PROP. RETENTION COAL., http://hprc.southerncoalition.org/?q=node/7 (last visited May 25, 2021). Sections of articles detailing events that are germane to the perceived futility of seeking legal recourse regarding property issues among African Americans are noted.

First, and of particular note, the Associated Press published a series of "award-winning" articles on Black land loss. *See* Mitchell *supra* note 114 at 567. The year and a half-long investigation, conducted by the AP, "documented a pattern in which [B]lack Americans were cheated out of their land or driven from it through intimidation, violence, and even murder." In the first installment, the reporters provided an outline of their comprehensive examination of the issue:

> The AP—in an investigation that included interviews with more than 1,000 people and the examination of tens of thousands of public records—documented 107 land-takings in 13 Southern and border states. In those cases alone, 406 [B]lack landowners lost more than 24,000 acres of farm and timber land plus 85 smaller properties, including stores and city lots. Today, virtually all of this property, valued at tens of millions of dollars, is owned by whites or corporations. Properties taken from [B]lacks were often small—a 40-acre farm, a general store, [or] a modest house. But the losses were devastating to families struggling to overcome the legacy of slavery. In the agrarian South, landownership was the ladder to respect and prosperity—the means to build economic security and pass wealth on to the next generation. Todd Lewan and Delores Barclay, '*When They Steal Your Land, They Steal Your Future*,' L.A. TIMES, (Dec. 2, 2001, 12:00AM), https://www.latimes.com/archives/la-xpm-2001-dec-02-mn-10514-story.html.

In the article, the AP reported that, in 1942, a Black minister hired an attorney when his 141-acre farm in Mississippi "was sold for non-payment of taxes." See id. Despite having paid "$302 in 1887" for the property, it was sold to "a white man for $180." *Id.* After his hiring of a lawyer, "a group of whites paid [him] a visit." *See id.* The mob proceeded to beat the minister's two children and shot the minister in the back three times, killing him. *See id*. According to the minister's son, "They kept telling me that my father and I were [acting too smart] for going to see a lawyer." *Id.* Disturbingly, the "tattered" and incomplete tax records available in that Mississippi county's courthouse indicate "that tax payments on at least part of the property were current when the land was taken. *Id.* Another Black family, in Vero Beach, FL, lost their land in the early 1940s when it was taken through eminent domain to build an airfield. *See id*. Despite managing a "30-acre fruit grove, two houses, and forty house lots" on the land, an all-white jury only awarded the family $13,000 for the land. *Id.* This was only about 17% of "the price per acre that the Navy paid white neighbors for similar land with fewer improvements, records show." *See id*. Despite pleas from the family to buy the land back after the Navy gave the airfield to the city of Vero Beach, the municipality sold part of the land to the Los Angeles Dodgers "as a Spring training facility." *See id.* The Dodgers sold the land in 2001 for $10 million. See id. Of particular note, the AP reported that determining the full extent of Black landownership beginning with Reconstruction is a virtual impossibility. *See id*. This is because "about a third of the county courthouses in Southern and border states have burned—some more than once—since the Civil War. Some of the fires were deliberately set." *See id*. One such fire started when "15 whites torched the courthouse in Paulding, [MS]" in 1932. *See id.* At the time, property records for the "predominately black" "eastern half" of the county were contained there. *See id.* As a result of the lack of property records, a major corporation bought thousands of acres in the county "[a] few years after the fire." *See id.* That acreage "yielded millions of dollars in natural gas, timber, and oil." *See id.*

In the second installment of the AP's series, the journalists focused on the linkages between violence, Black landownership, and local legal systems. To illustrate the numerous injustices faced by Black landowners, particularly in the early twentieth century, the account of Anthony P. Crawford was related. *See* Dolores Barclay, Allen G. Breed, and Todd Lewan, *Prosperity Made Blacks a Target for Land Grabs*, L.A. TIMES (Dec. 9, 2001), https://www.latimes.com/archives/la-xpm-2001-dec-09-mn-13043-story.html. A Black cotton farmer, Crawford owned "427 acres of prime cotton land." *See id.* Of the 107 land takings documented in the AP's series, 57 of them were violent. *See id.* "Sometimes, [B]lack landowners were attacked by whites who just wanted to drive them from their property. In other cases, the attackers wanted land for themselves." *Id.* Crawford's case brought to life both nefarious desires. Crawford's fateful story began when Crawford attempted to sell cotton to a white merchant. *See id.* When the two men disagreed on a price for the crop, the merchant called Crawford "a liar" and Crawford called the other "a cheat." *See id.* Crawford was summarily arrested for "cursing a white man." *See id.* "A few hours later, a deputy gave [a] mob the keys to Crawford's cell." *Id.* That night, he was hanged from "a solitary Southern pine." *Id.* Upon Crawford's death, a court appointed "two whites" as executors of his estate, including a "cousin of two of the mob's ringleaders." *See id.* Although "Crawford's children inherited the farm," one of the executors sold most of the rest of the property, keeping $5,438 for himself and "gave Crawford's children just $200 each." *See id.* The family struggled to maintain the farm, eventually succumbing to foreclosure. *See id.* The $20,000 farm was sold to a white man for $504. *See id.* It was noted that "many of those lynched" during the Jim Crow era were property owners. *See id.* One researcher noted, "If you are looking for stolen [B]lack land, just follow the lynching trail." *Id.*

Part III of the AP's *Torn from the Land* series explicitly addresses the unscrupulous, albeit legal, practices of attorneys in modern partition actions. For instance, in the case of Turf Smith, a man who served as "caretaker" for his family's land, he wished to "carve out [two] acres for himself to build a new house." Todd Lewan, *With Help From Their White Lawyer, a Black Mississippi Family Loses a Farm*, AUTHENTIC VOICE, https://theauthenticvoice.org/mainstories/tornfromtheland/torn_part6/ (last visited May 25, 2021). However, "one of his relatives [(a fellow tenet-in-common)] would not agree." *See id.* A local white lawyer offered assistance in filing a partition action. *See id.* "However, the petition the lawyer filed on Turf Smith's behalf asked the court to sell the entire estate at auction if it could not be divided fairly among the heirs." *Id.* According to Smith's children, this was not an outcome Smith desired or contemplated. *See id.* By in large, the family "didn't understand what was happening or have the money to hire a lawyer to fight it." *See id.* A special commission was appointed by a local judge to determine how the land should be partitioned. *See id.* Eventually, "[t]he panel recommended a partition sale." *See id.* The land was eventually sold to a real estate speculator who had done extensive business with a panel member. See id. While Smith was afforded two acres, the proceeds of the remaining 156 acres were distributed to the other family members. *See id.* Some "received as little as $245 to as much as $8000." *See id.*

In another case, a timber speculator sought to buy family land from a Black family in Pickens County, Alabama. *See* Dolores Barclay & Todd Lewan, *Developers and Lawyers Use a Legal Maneuver to Strip Black Families of Land*, AUTHENTIC VOICE, https://theauthenticvoice.org/mainstories/tornfromtheland/torn_part5/#:~:text=Lawyers%20and%20real%20estate%20traders,are%20especially%20vulnerable%20to%20it. (last visited May 25, 2021). However, when the speculator "learned that buying the land would require reaching agreement with about 100 heirs, he backed away from the deal." *Id.* Some weeks later, the attorney that represented the speculator filed a partition action on behalf of 35 heirs against the other heirs. *See id.* There were "only two family members" that "signed the complaint seeking the sale." *See id.* Both were senior citizens, one only had a third-grade education, and both later insisted "they did not understand what they were signing." *See id.* In addition, "[s]everal family members [the attorney] listed as plaintiffs turned out not to own shares. All but five of the plaintiffs who did own shares joined [the two aforementioned family members] in filing papers stating that they had not authorized [the attorney] to pursue the partition action." *Id.* Eventually, "the number of family members being sued to force the sale reached 78." *Id.* The AP reported that among those "who took a position on the sale," both plaintiffs and defendants, there was overwhelming disapproval toward selling the land. *See id.* Despite the family's clear wish, the court ordered an auction. *See id.* In the end, the attorney received 20 percent of the proceeds. *See id.* Furthermore, "[a]fter court costs were deducted, $389,170 remained the be divided among 96 heirs, some of whom incurred thousands of dollars in legal fees fighting the sale". *Id.*

In a 2007 article, *Mother Jones* profiled a man who, along with family, co-owned 23 acres along the South Carolina coast. Randall Paterson, *For Sale By Owners*, MOTHER JONES (March/April 2007), https://www.motherjones.com/politics/2007/03/sale-owners-0/. The man, Roges Brown, initially sought

assistance in determining whether to sell the land. *See id.* However, once local businessmen and attorneys were notified of his interest in selling, a series of events unforeseen to the heir-owners ensued. *See id.* Brown's nephew, a family member "not in line to inherit" offered to assist. *See id.* Eventually, the heirs received a $550,000 offer from a real estate firm,but lacked clear title. *See id.* In order to achieve such a status, the heirs agreed to file a partition action. *See id.* Upon reappraisal, the heirs realized the land was worth some $2 million. *See id*. At that point, the court "nullified" the original deal. *See id.* However, when "the property failed to sell" after six months, the court ordered it auctioned. *See id.* At auction, the nephew not in line for inheritance of the property "won the land for $500,000, a quarter of its appraised worth". *Id.* Brown received a mere "$3,272.97, not much more than he had paid in legal fees." *Id.* Responding to his former client's confusion as to the perceived injustice, his attorney was quoted as saying, "A lot of people . . . just don't understand how the law works." *Id.* For Brown, "[h]e knew there were no taxes owed on the land, nor any liens against it, and so he couldn't understand why, at the Charleston County Courthouse, the land was being auctioned off like an abandoned car." *Id.*

In a BBC report, a journalist surveyed the heir property issue, while detailing the experiences of one man, a partial owner of heir property who moved to his ancestral South Carolina from New York. *See* Franz Stasser, *Cherished Land Lost in the South*, BBC (Apr. 15, 2011), https://www.bbc.com/news/world-us-canada-13073905. Although his story did not include hostile interactions with the legal establishment, the article does provide readers with insight into cultural stances regarding family land, a theme that will be revisited later in this article. *See id.* His family's land, a 250-acre tract outside Charleston, served as both a homeplace and a collective "economic base." *See id.* The owner said, "[Family members] could buy a second-hand mobile home in cash, live in that for a few years, save all their money, and eventually buy a house . . . Everything starts here." *Id.* Ironically, the owner hopes for an eventual depreciation in value for the land. *See id.* With depreciation, tax burdens remain lower and demand does not skyrocket, both potentially devastating eventualities in the popular Charleston real estate market. *See id.*

In December of 2015, The Jackson Advocate reported on the trials of the Freeman family of Virginia. The article provided a bit of history:

> Five generations ago, Emmanuel Freeman, Sr., bought 1000 acres of land in Halifax County, Virginia. Having fought off a late-night assault by the Ku Klux Klan with deadly force to protect his property in the early 1900s, Freeman then crafted a legacy of hard work and land stewardship that would make real for him and his offspring the post-slavery Freedmen's dream of 40 acres and a mule, some 25 times over. Earnest McBride, *Virginia Family in Century-Long Battle to Hold on to Farm*, JACKSON ADVOCATE (Dec. 3-9, 2015), https://media.law.wisc.edu/s/c_742/mtfmf/mitchell_jacksonadvocate.pdf.

The dream of long-term landownership devolved on account of conflict between "his offspring from his second marriage . . . [came] into conflict with the children of the first wife . . . because there were too few wills . . . stating which survivors should get what parts of the estate." *See id.* In the last few decades, two cousins, descendants of Freeman and his first wife, took on the burden of paying taxes on the family land. *See id.* Due to the highly complex nature of "put[ting] the estate in order," the cousins decided to hire legal counsel, paying for such a service through the sale of timber on the family land. *See id.* However, the attorney for the "opposing cousins" sought to bar the sale despite having sold timber from the property decades before allegedly with "signatures that had nothing to do with [the descendants of Freeman and his first wife]." *See id.* "That's something I could never understand," said one descendant of Freeman, "We never agreed for him to be our attorney." *See id.* In fact, upon research, the descendants of Freeman and his first wife allegedly "discovered [at least many] had been written off as deceased on the heir's list" and one of the sons of an opposing attorney "wound up owning a sizable chunk of the Freeman estate." *See id.* Such alleged facts caused one heir to note, "The judicial system is not supporting what we're doing because there's a bigger political picture—and we're aware of it." *Id.*

In a 2017 article by The Nation, the ordeal of the Allen family's land is detailed. *See* Leah Douglas, *African Americans Have Lost Untold Acres of Land Over the Last Century*, NATION (June 26, 2017), https://www.thenation.com/article/archive/african-americans-have-lost-acres/. The family, composed of several heirs, co-owned a 38-acre plot of land in Hilton Head, SC, that was purchased by Dennis Allen, the patriarch, over 120 years ago. *See id.* The land held potential real estate value, evidenced by a $4.5 million offer made by a development firm. *See id.* Issues with the future of the family's ownership of the land began with the hiring of a local attorney who "many members of the Allen family [said] they never wanted to get involved with." *See id.* Eventually, the attorney filed a partition suit to sell the land despite reportedly not having the consent of the family. *See id.* In fact, many members of the family allege "in affidavits submitted to the court . . . that [the attorney] forged their signatures." *See id.* Later, it was revealed that his

Of note, The Associated Press's landmark series, *Torn From the Land*, detailed individual stories within the Black land loss crisis.[172] One article described how a Black woman, Ablow Weddington Stewart, "lost 35 acres" in North Carolina when "[a] white lawyer foreclosed on [her land] in 1942 after he refused to allow her to finish paying off a $540 debt, witnesses told the AP."[173] Another narrative in the series shed light on a 1960s lawsuit filed by the state of Alabama against two cousins "contending [they] had no right to two 40-acre farms their family had worked in Sweet Water, [AL], for nearly a century."[174] The state of Alabama argued that the land on which the farm was situated belonged to the state.[175] Even after the circuit judge overseeing the case "urged the state to drop its suit, declaring it would result in 'a severe injustice[,]'. . . the state refused [and] the judge ordered the family off the land."[176] Disturbingly, "[t]he state's internal memos and letters on the case are peppered with references to the family's race."[177] Additionally, "deeds and tax records" clearly showed "that the family had owned the land since an ancestor bought it" in 1874.[178]

The narratives detailed above are not merely anecdotal but illustrative of widespread occurrences.[179] The type of legal "hustling" profiled in such pieces has two particular consequences for poor African American heirs property owners.

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attorney was indicted on charges claiming he stole roughly $750,000 from clients. *See id.* However, at the time of the article's writing, as "the title ha[d] yet to be cleared, the judge could rule at any time simply to auction off the land." *See id.* Much of the family were opposed to the sale and were especially concerned "over the fate of elderly relatives still living on the property should the auction proceed." *See id.* The article noted that their "attempt to overcome a stacked legal system—exacerbated by corrupt lawyers and predatory developers" is all too common. *See id.*

A report by NY1 proved that heir property issues do not only plague rural and Southern communities. Detailed in the report was a property investment firm targeting real estate owned by tenants-in-common. Lydia Hu, *Going, Going, Gone: New Tactic by Real Estate Investors Forcing Some New Yorkers from Their Homes*, NY1 (Mar. 19, 2019, 7:00AM), https://www.ny1.com/nyc/all-boroughs/news/2019/03/19/going--going--gone--new-tactic-by-real-estate-investors-forcing-some-new-yorkers-from-their-homes-ny1-investigation. In one case, a man who owned a home with other family members was essentially forced to vacate the property after his two siblings sold their shares to the investment firm. *See id.* Although the Corona, Queens property "had been in his family since 1952," the firm threatened to file a partition action thus leaving the resident with little to no recourse. *See id.* The same firm also forced a woman living in a Queens home "purchased in 1945" by "her grandmother and aunts." *See id.* Her eight percent share of the property held little weight against the 92 percent stake purchased by the firm from the other heirs. *See id.* In the case of the former homeowner in Corona, Queens, he, and his siblings, sold for a total of $525,000. *See id*. Although "public records show no permits were issued for any improvements" on the house, it was resold by the investors for $900,000 only five months later. *See id.* A director a housing nonprofit said, "If [residents don't] have sufficient money to find a new home, then [they are] going to have to leave New York City entirely. And that just furthers this gentrification process that we're experiencing. *Id.*

Of course, the many journalistic works cited before this footnote, both in the body of this article and the footnotes, are worthy of being added to this list.

172. Lewan and Barclay, *supra* note 171.

173. *Id.*

174. *See id.*

175. *See id.*

176. *See id.*

177. *See id.*

178. *Id.*

179. *See* UNIF. PARTITION OF HEIRS' PROP. ACT., *supra* note 38, at 4 ("A considerable body of legal scholarship has highlighted the fact that partition sales have been a leading cause of African American land loss.").

First, there is a loss of any legal claim to land, some of which likely holds historical familial significance to the heirs property owner. Second, the partition sale invariably punishes, albeit legally and through legal means, people who have historically been underserved in the legal context by depriving them of land and the opportunity to reap economic benefit from it.

IV. NEGATIVE EXPERIENCES WITH THE LEGAL SYSTEM MAY LEAD TO HESITANCY IN ESTATE PLANNING

The last will and testament is among the most effective tools for curbing Black land loss.[180] Although will writing cannot reverse the consequences of land fractionation over many years, the practice can still assist in the retention of family land.[181] In an article, Raphael Bostic, the President and CEO of the Federal Reserve Bank in Atlanta, referred to the practice of estate planning as the "prevention" mechanism against the creation of heirs property.[182] Estate planning is not a "silver bullet" and can "only marginally impact ownership interests that already are fractionated."[183] However, an executed will can work to prevent further fractionation of family estates over successive generations.[184] In addition, estate planning offers heirs a number of legal protections that are not afforded to heirs who inherit property through intestacy.[185] Therefore, effective estate planning can potentially allow first-generation Black landowners to bypass the dangers of handing down heirs property to future generations.

However, studies indicate that African Americans write wills at a lower rate than their white counterparts—"32% of [w]hites versus 16.4% of non-[w]hites in one survey."[186] A 1984 study revealed that 41 percent of the land owned by African Americans in the Southeast was heirs property.[187] Additional studies of smaller swaths of Southern land showed that more than half of Black landowners

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180. *See* Carey L. Biron, *Will Power: Could Property Inheritance Help Close U.S. 'Wealth Gap'?*, THOMSON REUTERS FOUND. NEWS (Nov. 12, 2019, 10:00AM), https://news.trust.org/item/20191112093057-co19c ("Financial experts warn that the lack of estate planning among U.S. low-income and minority communities leaves families at risk of losing what is often their largest single asset, potentially propagating longstanding racial inequalities. . . . 'A will is the least expensive thing you can do to leave intergenerational wealth . . . [t]he importance of estate planning is critical.'").

181. *See* Janice Frew Dyer, *Heir Property: Legal and Cultural Dimensions of Collective Landownership in Alabama's Black Belt* 59 (May 10, 2007) (unpublished M.S. thesis, Auburn University), https://etd.auburn.edu/bitstream/handle/10415/92/DYER_JANICE_41.pdf?sequence=1&isAllowed= (citing M. N. THOMAS ET AL., LAND LOSS PREVENTION MANUAL (2005)).

182. *See* Raphael Bostic, *Heirs' Property in the Southeast: A Community Development Perspective*, *in* HEIRS PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 29, 31 (Cassandra Johnson Gaither, Ann Carpenter, Tracy Lloyd McCurty, and Sara Toering eds., 2019) ("The first challenge [in addressing heirs property] is prevention, or estate planning that provides a stable path for succession and transfer of wealth.").

183. *See* Mitchell, *supra* note 121, at 510.

184. *See* Dyer, *supra* note 181.

185. *See* Flocks, *supra* note 84, at 57.

186. Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 492 (2010).

187. *See* Holman, *supra* note 100, at 21.

in the South had no wills.[188] As such, the land belonging to African Americans is more likely to be "owned under the co-ownership forms that are subject to partition."[189]

Given the interrelationship of the histories of Black landownership and racial discrimination in the law, is there a connection between this history and hesitancy in estate planning amongst African Americans? Some scholars argue that there is no definitive evidence to show that the low rate of estate planning among African Americans is a result of distrust in the legal system or racial factors.[190] However, one scholar argued that African Americans are less likely to engage in estate planning practices, in part, due to widespread histories of negative interactions with the legal system.[191]

Black landowners have reason to exhibit wariness. Past attempts by African Americans to protect property through the courts deterred future generations from seeking formal legal assistance with regard to property matters.[192] For instance, given the state of the courts during the time African Americans began accumulating land, individuals saw intestate succession was a "safer alternative" in their efforts to maintain property ownership within their families.[193] This was a direct consequence of the low rates of success among African Americans in legal proceedings against white opponents.[194] The infrequency of success was likely a result of the insularity of municipal and county courts and the resulting "harsh repercussions" that would befall whites who aided Blacks in acquiring and retaining property.[195] As such, the likelihood of loss in such legal actions was great given the racially biased laws that did not contemplate fairness to African Americans.[196]

Contemporary research also confirms that negative interactions with the legal system impacts one's likelihood to seek out civil legal assistance in the future. Law professor Sara Sternberg Greene studied why many low-income individuals choose not to seek free civil legal assistance.[197] She found that past negative experiences with the courts, even if the encounters involved the criminal justice rather than civil court system, contributed to perceptions of "futil[ity]" and injustice.[198] Respondents cited feeling shame, "inadequa[cy], degrad[ation], and confus[ion]" in court. For African Americans, impressions of pointlessness in seeking civil legal aid were significantly greater than their white counterparts.[199] Among Greene's respondent group, 75% of whites replied that they trusted

188. *See id*.

189. *Id.*

190. *See* Holman, *supr*a note 100, at 22. *See also* Mitchell, *supra* note 121 at 519 ("Although one study ascribes the failure of many rural black landowners to make wills to a legal system that African Americans had come to mistrust because their property interests were often not protected by it, there does not appear to be any empirical evidence to support this assertion.").

191. *See* Craig Taylor, *supra* note 64, at 772.

192. *See generally id*. at 771-780

193. *Id.*

194. *See id.* at 775.

195. *Id.*

196. *See id.*

197. Sara Sternberg Greene, Race, Class, and Access to Civil Justice, 101 IOWA L. REV. 1234, 1263 (2016).

198. *See id*. at 1266-1267.

199. *Id*. at 1295.

courts.[200] However, only 22% of African American respondents stated that they trusted the legal system.[201] Despite the reasons for distrust, ultimately, legal professionals can take the lead in confronting this distrust through reform.

V. PROPOSED SOLUTIONS

In recent years, heirs property issues garnered public attention and served as a source for reform by policymakers. Legal practitioners are responsible for understanding the history of Black landownership and the legal profession's role in diminishing the value of family land within Black culture. Only then can lawyers aptly represent clients dealing with heirs property issues. As such, this section argues that lawyers must exercise cultural competence when representing such clients. Second, judges should also understand historical and cultural attitudes toward land when determining property values, and thus take sentimental attachment into account to equitably carry out justice on such matters.

A. Cultural Competency Within the Legal Profession

In order to deliver just outcomes, it is critical for attorneys and judges to understand and acknowledge dissimilar cultures and traditions. As such, legal professionals should strive to exercise cultural competence in her interactions with clients. Cultural competence is "a set of cultural behaviors, skills, and attitudes integrated into a system, agency, or its professionals, enabling them to work effectively in cross-cultural situations."[202] Culturally competent attorneys advocate based on "client preferred choices" as opposed to "culturally blind or culturally free interventions."[203] As such, an attorney must understand the wishes of her client and how those wishes "are informed by the client's culture."[204] Legal scholars offer a variety of methods and practices for realizing cultural competence in the legal context.[205] If implemented effectively, cultural competency skills

200. *Id*. at 1301.

201. *Id*. at 1302.

202. Mona Tawatao & Mayia Thao, *Developing Cultural Competence in Legal Services Practice*, 38 CLEARINGHOUSE REV. 244, 245 (2004).

203. Aastha Madaan, *Cultural Competency and the Practice of Law in the 21st Century*, AM. BAR ASSOC. (Mar. 1, 2017), https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2016/march_april_2016/2016_aba_rpte_pp_v30_2_article_madaan_cultural_competency_and_the_practice_of_law_in_the_21st_century/.

204. *Id.*

205. For instance, Adams argued that cultural competency can best be measured on a spectrum ranging from "a monocultural mindset on one end to an intercultural or global mindset on the other." Travis Adams, *Cultural Competency: A Necessary Skill for the 21st Century Attorney*, 4 LAW RAZA 2, 6 (2012). The ethnocentric outlook understands "cultural differences and commonalities based on one's own cultural values and practices." *Id*. at 7. On the other hand, ethorelative outlooks understand "cultural differences and commonalities based on one's own *and* other cultures' values and practices." *Id*. The spectrum ranges from "denial," "defense (or reversal)," "minimization," "acceptance," and "adaptation." *See id.* at 8. Denial is achieved when "one's own culture is experienced as the only real one and other cultures are ignored or vaguely defined." *Id.* at 9. When "other cultures are recognized yet viewed negatively and the person's own culture us perceived as being the only one that is 'normal,'" defense is realized. *See id*. In minimization, similarities are emphasized, and while "a person. . . may recognize superficial cultural realities such as food, language, or clothing" they "still utilize[] [their] own cultural patterns as central to

convey an appreciation of people and their cultural backgrounds and can foster trust between lawyer and client.[206]

For example, law professor and noted clinical educator Susan Bryant argued in her influential article that five "Habits" allow lawyers to "avoid cultural blinders and recover from cultural blunders when they occur."[207] Bryant creatively termed these Habits: (1)"Degrees of Separation and Connection;" (2) "The Three Rings;" (3) "Parallel Universes;" (4) "Pitfalls, Red Flags, and Remedies;" and (5) "The Camel's Back."[208] The first Habit provides a "framework" in which lawyers identify and evaluate the similarities and differences between lawyers and clients and determine their effects on lawyer-client communications.[209] This Habit encourages lawyers to explicitly list similarities and differences between lawyers and clients.[210] In probing for dissimilarities, lawyers are forced to recognize those differences that may be "overlook[ed]" as "misunderstanding may flow from an assumption of precise congruence."[211] Likewise, by recognizing many similarities, lawyers are less likely to view clients as "outsiders."[212] Finally, "Habit One allows students to examine ways in which these factors affect clients' senses of closeness and distance to their lawyers."[213]

The second Habit asks lawyers to integrate the role of the legal system into the Habit One analysis.[214] After similarities and differences between lawyer and client are identified, the lawyer should then recognize the similarities and differences between the lawyer and the legal system, and the client and the legal system.[215] As a part of this process, lawyers "identify the cultural differences that may lead to different values or biases, causing legal decision-makers to negatively judge the client."[216] Bryant notes that this analysis fosters understanding as to "why clients are prone to view the lawyer as part of a hostile legal system" when there are noted similarities "between the lawyer and the legal system but only a small degree of overlap between the client and the legal system."[217]

Next, Habit Three asks lawyers to think of potential explanations for a client's actions that may be contrary to the lawyer's preconceptions.[218] Bryant provides the following example: when a client repeatedly "fails to keep appointments," a lawyer can imagine any number of potential explanations for the tardiness that can assuage

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an assumed universal reality." *See id*. at 10. In acceptance, one adopts a "more globalized or ethnorelative perspective and one's own culture is experienced as just one of a number of equally complex worldviews." *Id*. at 11. Finally, in adaptation one "empathize[s]" with another culture "to the extent that he or she yields culturally appropriate perceptions and behaviors." *See id*. at 12.

206. *See* Tawatao & Thao, *supra* note 202 at 245.

207. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 35 (2001).

208. *Id*. at 64-78.

209. *See id*. at 64.

210. *See id.*

211. *See id.* at 66.

212. *See id.*

213. *Id.*

214. *See id*. at 68.

215. *See id.*

216. *Id.*

217. *See id.* at 70.

218. *See id.* at 70-71.

judgment.[219] For example, "did the client lack [] carfare, fail[] to receive the letter scheduling the appointment, or lose[] her way to the office?"[220] Ultimately this form of thinking allows attorneys to halt assumption-making regarding clients on the basis of limited information.[221]

In addition, Habit Four asks lawyers to adequately contemplate client communications before, during, and after they occur, with a focus on ways in which the "normal attorney-client interaction . . . may be particularly problematic in cross-cultural encounters as well [as recognition of] signs of communication problems."[222] Finally, Habit Five asks lawyers to recognize and confront their own implicit biases in an effort to both allow lawyers "to create settings in which bias and stereotype are less likely to govern," and foster "reflection and change of perspectives with a goal of eliminating bias." [223]

Cultural competency is a key factor in building trust between the legal profession and persons contending with the effects of heirs property. The upbringings, cultures, and experiences of legal professionals and their clients can further shape their respective degrees of trust.[224] However, it can be argued that a fundamental lack of widespread cultural competency is one of the reasons that African Americans distrust the legal profession. The demographic landscape of the legal profession demonstrates the necessity for cultural competence. In 2000, 89% of attorneys were "[w]hite, not Hispanic."[225] Less than 11% of attorneys reported being non-white.[226] By 2014, this percentage had only crept up marginally to 12%. [227] Studies demonstrated that "whites generally have more positive constructions of their own racial group and fewer positive constructions of other racial groups."[228] Further, law professor Marjorie A. Silver argued that "many lawyers are oblivious to the impact of race in the practice of law."[229] Often, lawyers contend with the issue only when it presents "strategic advantage," such as with voir dire.[230] However, an attorney's own "racial and cultural background" is seldom contemplated relative to those of the client.[231] Lack of mindfulness regarding a client's cultural background can result in an attorney "deny[ing] the existence of differences in culture or. . . assum[ing] that differences are insignificant or that mainstream commonality transcends any differences."[232]

Cultural competence can be fostered in the legal community by undertaking a number of measures including: adopting cultural competence training standards

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219. *See id.* at 71.

220. *See id.*

221. *See id*. at 71-72.

222. *See id*. at 72.

223. *See id*. at 77.

224. *See* Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World*, 62 U.C. L.A. L. REV. DISC. 140, 142 (2014).

225. *See* Madaan, *supra* note 203.

226. *Id.*

227. *Id.*

228. Carolyn Copps Hartley, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH U. J. L & POL'Y 133, 162-163 (2004).

229. *Id.* at 165 (citing Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering, and Race*, 3 FLA. COASTAL L. J. 219, 220 (2002)).

230. *Id.*

231. *See id.*

232. *See* Tawatao & Thao, *supra* note 202, at 246.

within the law school setting at least proportionate to that of medical schools[233] and providing basic cultural competence training for all legal aid attorneys.[234] A variety of professions require training in cultural competence, including medical vocations, social workers, missionaries, and educators.[235] This is distinguishable from the legal profession in that there is "no formal equivalent" to such training.[236] Despite this fact, the American Bar Association encouraged the development of cultural competence.[237] In 2008, the organization adopted Goal III.[238] This measure works toward "eliminat[ing] bias and enhanc[ing] diversity" within the profession.[239] Law schools should heed the example of the leading legal professional organization and formalize curricula geared toward recognizing cultural differences and eliminating bias within the practice of law.

In the absence of widespread cultural competence training within the legal profession, an additional burden exists for legal aid organizations. As "persons of color and limited English proficiency" disproportionately experience the effects of poverty, cultural competence is a critical skill for legal aid attorneys.[240] In fact, the absence of such skills could result in further institutionalization of discrimination and ineffectiveness in the delivery of services.[241] When working with a community of clients, the legal aid attorney should develop an awareness of the community, identify cultural differences between attorney and client, and determine how legal service should then be affected.[242] Legal advocacy that is culturally competent requires research of academic sources and other reliable materials on a client's specific culture.[243] In short, legal aid attorneys should foster cultural competence skills commensurate to "other essential advocacy skills."[244]

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233. Davidson argued that "[o]ne reason African Americans resist professional medical assistance is because of the lack of culturally competent care by medical professionals." Camille M. Davidson, *My Aging Minority Rural Grandparents: Disparities in the Health and Health Care of the Rural Elderly Minority Population and the Need for Culturally Competent Health Care Providers*, 21 AM. UNIV. J. OF GENDER SOC. POL'Y AND L. 57, 68 (2012). Both historical and sociological research demonstrate that widespread distrust of the medical establishment among African Americans. *See id*. ("African Americans are more skeptical than other social groups, due to a history of experimentation and medical developments based on entrenched racial stereotypes." Such instances included: "the Sickle Cell Screening Initiative, involuntary sterilization in the name of family planning, racism and stereotyping within the medical system, and experimentation [such as the Tuskegee Syphilis Experiment]."). To that point, Davidson cited a study that reported nearly "two-thirds of African Americans are convinced that physicians are experimenting with new prescription drugs on people without approval." *Id.* at 67. Among the recommendations put forth by the Institute of Medicine to address issues of both distrust and disparate delivery of care was "cross-cultural education of medical professionals." *Id.* at 68 (quoting INST. OF MED. OF THE NAT'L ACADS., UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE 5 (Brian D. Smedley et al. eds., 2003). The author argues that much of the argument propounded by Davidson can be analogized to the legal profession.

234. *See id.* at 247-248.

235. *See* Patel, *supra* note 224, at 142 (quoting Nelson P. Miller, *Beyond Bias—Cultural Competence as a Lawyer Skill*, MICH. BAR J. 38, 39 (2008)).

236. *Id.*

237. *See* Madaan, *supra* note 203.

238. *See id.*

239. *Id.*

240. *See* Tawatao & Thao, *supra* note 202, at 245.

241. *See id.*

242. *See id*. at 245-246

243. *See id*. at 246.

244. *Id.* at 244.

B. Courts Must Seek More Equitable Outcomes Despite Their Economic Ramifications

State courts receive much criticism for their insistence on resolving heirs property issues through ordering partitions by sale orders rather than partitions in kind.[245] As such, state courts should emphasize more holistic judicial approaches that include historical analyses, the weighing of potential adverse social consequences,[246] and the scrutinization of economic factors. While not the most accepted practice, courts have adopted such decision-making processes in the past. For example, in Gibbs v. Kashak, two siblings inherited approximately 40 acres of farmland from their parents.[247] The siblings were tenants in common.[248] A developer sought to purchase the land to connect its other parcels.[249] One sibling wished to sell the property in order to pay for her child's medical procedure.[250] The other sibling did not want to sell as "he lived on the property most of his life and claim[ed] to be living there [at that time]."[251] A sibling asked a judge to "order the property sold" as the developer "want[ed] the entire forty acres or none at all."[252]

Among a series of legal holdings that followed, the trial court ordered that a partition in kind would not do damage "to the property, except for the possible value per acre."[253] In upholding the trial court's decision, the Court of Appeals of Indiana cited the brother's inhabitation of the property and his sentimental attachment to the land.[254] Furthermore, the court held that the "sister could get fair market value for 20 acres, even if sale of the land as a whole would maximize the value.[255]

Similarly, in Eli v. Eli, three family members co-owned, as tenants in common, 112.5 acres of family property.[256] One family member requested that a trial court partition the property and sell all but "her one-third undivided interest."[257] Instead,

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245. *See* Lawrence Anderson Moye IV, *Is It All About the Money? Considering a Multi-Factor Test for Determining the Appropriateness of Forced Partition Sales in North Carolina*, 33 CAMPBELL L. REV. 411, 441-443 (2010).

246. For example, Craig Taylor described one such unintended consequence pertaining the partition in kind of a property containing a dwelling. *See* Craig Taylor, *supra* note 64, at 756-757. She wrote, "At first blush, the existence of a dwelling on the property seems to be a compelling reason to order sale. In some cases, strict application of the common law right to partition in-kind would require the court to divide the house into pieces, forcing cotenants to jointly retain and use the property permanently." *Id*. She continued to write that such an order may be devastating for the tenants in common, as it might render them homeless. *See id*. at 757.

247. *See* Gibbs v. Kashak, 883 N.E.2d 825, 827 (2008).

248. *See id.*

249. *See id.*

250. *See id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id*. at 825.

255. *Id*.

256. Eli v. Eli, 557 N.W.2d 405, 407 (1997).

257. *Id.* at 408.

the trial court ordered the entire property sold at a public auction.[258] On appeal, the Supreme Court of South Dakota cited the North Dakota case, Schnell v. Schnell:

> Given the duration of [one party's] involvement with the ranch and her sentimental attachment to the land, her resistance to a partition and sale is logical. In this respect we note that the sale of real property against the wishes of a joint owner can be likened to a forced sale. Forced sales seldom produce the highest return on property. In *Vesper v. Farnsworth,* the court said that the power to convert real estate into money against the will of an owner 'is an extraordinary and dangerous power, and ought never to be exercised unless the necessity therefor is clearly established.' Similarly, in *Haggerty v. Nobles,* . . . the court observed that although a court must occasionally order a sale in an appropriate case, 'it is obnoxious to compel a person to sell his property.'[259]

The court noted that one of the factors the North Dakota court recognized in deciding Schnell was the "sentimental value attached to the parcel."[260] Using Schnell as a guide, the court overruled the lower court holding that it "placed too little emphasis on all of the other factors save the monetary difference."[261]

Finally, in Ark Land Co. v. Harper, a mining company purchased a 67.5 percent undivided interest in land from members of a West Virginia family.[262] The family owned the land for nearly 100 years.[263] When the remaining heirs refused to sell their fractional interests, the company sought a court-ordered partition sale of the remaining land.[264] The court ordered a partition by sale, and stated that a partition in kind would not be "convenient."[265]

In overturning the partition by sale order, the Supreme Court of Appeals of West Virginia held that the "heirs were not concerned with the monetary value of the property. Their exclusive interest was grounded in the longstanding family ownership of the property and their emotional desire to keep their ancestral family home within the family."[266] As such, the court concluded that a partition sale would "prejudice" the family's overriding "emotional interests," and thus reversed the lower court's ruling.[267] Judges that weigh a land's history and sentimental attachment not only provide respondents with a sense of "being heard" but also better adhere to the majority of state laws on the matter. Therefore, only by focusing on and respecting history can judges provide more equitable rulings in heirs property cases.

VI. CONCLUSION

This Article argues for recognition of the history of Black landownership and its role in Black culture within the legal profession. To this end, this Article

258. *See id.* at 409.
259. *Id.* at 410.
260. *See id.*
261. *See id.* at 411.
262. Ark Land Co., 599 S.E.2d 754, 757 (2004).
263. *Id.*
264. *See id.*
265. *See id.*
266. *Id.* at 761-762.
267. *See id.* at 762-763.

detailed the trajectory of Black landownership in America and the challenges presented by the tenuousness of the tenancy in common. The history of racial discrimination by lawmakers and legal practitioners, coupled with a lack of awareness of the past and unscrupulous practices by contemporary attorneys, have created widespread distrust of the legal system among African American landowners. One potential result of this suspicion is a widespread disinclination to pursue estate planning services and steps toward clearing title.

This Article proposed strengthening cultural competence efforts in the training and development of attorneys in order to curb land loss and advance trust in the profession. This Article also argued that attorneys and judges should understand both the history of Black landownership and its role in developing a collective culture. In doing this, judges may better recognize non-economic factors in rendering judgments in partition cases, thus better adhering to the majority of states' statutory preferences. Although laws have historically functioned to deter Black landownership, legal professionals are uniquely situated to assist in halting this unacceptable trend.