

University of Florida Journal of Law & Public Policy

VOLUME 31

FALL 2020

ISSUE 1

Editorial Board

Editor in Chief

JERRON WHEELER

Executive Notes Editor

RICARDO ARANA

Deputy Editor in Chief

ALAA HADY-GHALIP

Executive Acquisitions Editor

JAMES MCGUIRE

Executive Forum Editor

EMILY GREENTREE

Executive Outreach Chair

VANESSA FERNANDEZ

Executive Symposium Editor

JOVANNA BAILEY

Executive Research Editor

PAUL BARALDI

Executive Articles Editor

SANIQUE BALAN

Executive Managing Editor

SPENCER SATER

Senior Research Editors

LUC ADECLAT

MICHAEL DULMAN

Senior Articles Editors

ANDREW STEVENS

ANNE MARIE TAMBURRO

Senior Managing Editors

MIA LARSON

TANNER STROMSNES

Research Editors

CHELSEA DRAUCKER

GRACE MCLAUGHLIN

DEVIN MOORE

KALEY TANASE

Articles Editors

WES COLLIER

JW GLASS

MADISON MCCOMAS

KYLEE SIPOWSKI

Managing Editors

LAUREN WILMOT

EDITH PEREZ

CONOR RIGSBY

PIERCE SCHULTZ

Faculty Advisor

JON L. MILLS

Staff Editor

LISA-ANN CALDWELL

General Editors

ALEXANDER ADESEYE

HUNTER AMES

BLAKE BACHMAN

KAREN BENITEZ

ADRIANTE CARTER

ZACHARY COLE

RYAN COOK

ALEX COUTURE

AMBER EDNEY

LUCAS GODA

MALAKA GOUDY

JORDAN GRANA

MEGAN JACKSON

SAMA KASEER

KELSEY KILPATRICK

AUDREY KIRSCHENBAUM

VALERIE LAMB

DAVID LEVINE

JACOB MARKHAM

RYLEE MURDOCH

CHARLISA ODOM

MELISSA PETERSEN

ALEXIS RALLIS

ABDEL REYES

STEPHANIE SANCHEZ

PHILIP SLIGER

KEENAN SMITH

SAMANTHA SPANDAU

JACKSON STORY

CLAY TEZEL

BRITTNEY TOLBERT

WILLIAM VASQUEZ

ALYSSA WEISS

ALLYSON WHITTER

STATEMENT OF PURPOSE

The *University of Florida Journal of Law & Public Policy* is an interdisciplinary organization whose primary purpose is the publication of scholarly articles on contemporary legal and social issues facing public policy decisionmakers. The *Journal* is composed of two governing bodies: the Advisory Board and the Executive Board. The Advisory Board is comprised of faculty and honorary members who provide independent guidance. The Executive Board, which includes both law and graduate students, is responsible for researching and preparing each volume for publication. The Executive Board also selects the articles that are published. All student members must complete a writing requirement and help research and prepare the *Journal* for publication.

ACKNOWLEDGMENT

This issue of the *University of Florida Journal of Law & Public Policy* is a direct result of the collaboration and hard work of the *Journal* members, staff, advisors, sponsors, and contributing authors.

The *Journal* extends its deep appreciation for the generosity of the University of Florida Fredric G. Levin College of Law and the Huber C. Hurst Fund in supporting and assisting the *Journal* in its publication of this issue and for supporting our interdisciplinary journal concept.

Special thanks to our faculty advisor, Dean Jon L. Mills, and our staff editor, Lisa-Ann Caldwell.

The *University of Florida Journal of Law & Public Policy* (ISSN# 1047-8035) is published three times per year and is sponsored by the Warrington College of Business Administration and the Levin College of Law, University of Florida. Printed by Western Newspaper Publishing Co., Indianapolis, IN.

Editorial and Business Address: Fredric G. Levin College of Law, University of Florida, P.O. Box 117636, 351 Village Dr., 127 Holland Hall, Gainesville, FL 32611. Phone: (352) 273-0906. Email Address: jlpp@law.ufl.edu.

Subscriptions: \$70.00 U.S. domestic per volume plus sales tax for Florida residents and \$75.00 U.S. international. Single issues are available for \$25.00 U.S. domestic and \$30.00 U.S. international.

© 2020 *University of Florida Journal of Law & Public Policy*.

University of Florida
Journal of Law & Public Policy

VOLUME 31

FALL 2020

ISSUE 1

ARTICLES

THE DOG WALKER, THE BIRDWATCHER AND
RACIAL VOICE: THE MANIFEST NEED TO
PUNISH RACIAL HOAXES.....*Katheryn Russell-Brown* 1

FROM AUTHORITARIAN POLICE
STATE TO BLACK-INCLUSIVE
DEMOCRACY*Melody R. Webb* 11

THE LAW SCHOOL CURRICULUM
AND THE MOVEMENT FOR
BLACK LIVES.....*Teri A. McMurtry-Chubb* 27

BLACK LIVES MATTER: TRAYVON MARTIN,
THE ABOLITION OF JUVENILE JUSTICE
AND #BLACKYOUTHMATTER.....*Nancy Dowd* 43

DO BLACK LAWYERS MATTER TO
THE LEGAL PROFESSION?: APPLYING
AN ANTIRACISM PARADIGM TO ELIMINATE
BARRIERS TO LICENSURE FOR
FUTURE BLACK LAWYERS.....*DeShun Harris* 59

RAP AS A PROXY FOR BLACKNESS:
HOW THE PROSECUTION OF RAP LYRICS
CONTINUES TO UNCONSTITUTIONALLY
RESTRICT FREE SPEECH RIGHTS.....*Austin Vining* 77

ESSAYS

THE WATER FOUNTAIN – A TRUE STORY*Teresa Reid* 97

WHITE PRIVILEGE: WHAT IT IS, WHAT
IT IS NOT, AND HOW IT SHAPES AMERICAN
DISCUSSIONS OF POLICING AND THE
HISTORICAL FIGURES WE HONOR *Neil H. Buchanan* 99

NOTES

DON’T MAKE A RUN FOR IT:
RETHINKING ILLINOIS V. WARDLOW
IN LIGHT OF POLICE SHOOTINGS AND THE
NATURE OF REASONABLE SUSPICION *Edith Perez* 137

FINDING A NEW PATH: USING THE
FIFTEENTH AMENDMENT TO PROTECT
THE VOTING RIGHTS OF RETURNING CITIZENS..... *Ebony Love* 161

INTRODUCTION

Laura A. Rosenbury*

“Black Lives Matter” is simultaneously a statement of what should be obvious, a counter-argument, an aspiration, a movement, and so much more. I applaud the editors of the Florida Journal of Law and Public Policy for convening a group of scholars and students to explore the many meanings of “Black Lives Matter” and to advocate for policy and law reform that will make the term so obvious that it fades from popular discourse. Much work needs to be done before we achieve that milestone, and this symposium joins the work of advocates across the globe who are seeking to make communities and institutions more racially just.

Racial justice requires structural change as well as changes in the choices and decisions of individuals. We cannot simply ask or demand that people embrace the principle that Black lives always do, and should, matter. Instead, the structures we often take for granted—social, political, and economic institutions; urban, suburban, and rural spaces; and law—all inform and shape individual choices.¹ Real change therefore requires structural change, and structural change requires consciousness-raising, creative thinking, coalitional efforts, resources, determination, patience, and persistence.

Lawyers in the United States have a particular duty to engage in this fight for structural change given the law’s historical role in denying the personhood of Black lives. As Professor Gregory Alexander has emphasized, “[l]awyers played a prominent role in constructing pro-slavery ideology” in the American South.² That ideology viewed enslaved beings as property instead of lives that matter.³ And the ideology was sustained by much more than individuals’ animus toward Black lives. Indeed, the “core function” of enslaved individuals “was to anchor and maintain the stability of the proper and preordained social hierarchy.”⁴ Law permitted Black lives to be categorized as property instead of

* Dean and Levin, Mabie & Levin Professor of Law, University of Florida Levin College of Law.

1. See, e.g., Clarissa Hayward, Lynn Oldham & Laura Rosenbury, *What Now? Three Ways to Tackle Structural Injustice*, ST. LOUIS POST-DISPATCH, Nov. 26, 2014.

2. See GREGORY S. ALEXANDER, *COMMODITY & PROPERTY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970* 212 (1997).

3. See, e.g., STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 12 (2011) (“It was clear enough that the slaves themselves were the property, not the slaves’ labor.”); Adrienne Davis, “*Don’t Let Nobody Bother Yo’ Principle*”: *The Sexual Economy of American Slavery*, in *STILL BRAVE: THE EVOLUTION OF BLACK WOMEN’S STUDIES*, 215, 229 (Stanlie M. James, Frances Smith Foster & Beverly Guy-Sheftall, eds. 2009) (analyzing how “[e]nslaved black women gave birth to white wealth” because slaveholders owned the offspring of the women they enslaved).

4. See ALEXANDER, *supra* note 2, at 215.

citizens,⁵ thereby creating social status and privilege for citizens, who were predominantly white. Law therefore played a large role in constructing and supporting racial hierarchy and race itself.

Even as law and society have changed in multiple ways, law continues to play a role in the social construction of race,⁶ and the perpetuation of systems and institutions that maintain racial hierarchy.⁷ This dynamic may be found in criminal law,⁸ property,⁹ family law,¹⁰ tax,¹¹ corporate law,¹² and arguably any legal subject that affects individuals and institutions, meaning law itself. Law is a structure that is susceptible to maintaining racial hierarchy, and law supports many other structures and institutions that maintain racial hierarchy.

Law may also be used to challenge this racial hierarchy, however, and the contributions to this symposium illustrate both existing connections between individual actions and racially unjust structures and the potential for transforming the status quo through creative lawyering and policy reform. For example, Professor Melody Webb situates the predatory actions and tactics of individual police officers within the judicial opinions, statutes, and regulatory mandates that often serve interests far from those of the Black communities they purportedly serve. Professor Webb calls on law to instead foster participatory, neighborhood-based, Black-led policy making that empowers communities to focus on economic and social priorities in addition to addressing crime. Similarly, Professor DeShun Harris embraces the potential of more Black lawyers yet highlights how state licensing structures, centered around bar exams, prevent so many Black law school graduates from entering the profession.

5. *Dred Scott v. Sanford*, 60 U.S. 393, 425–27 (1857).

6. See, e.g., Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3, 27–37 (1994).

7. See, e.g., Darren Lenard Hutchinson, “Continually Reminded of Their Inferior Position”: Social Dominance, Implicit Bias, Criminality, and Race, 46 WASH. U. J.L. & POL’Y 23, 25 (2014) (summarizing the “well-documented history of racism within criminal law and enforcement in the United States” and analyzing what has changed and what persists despite the enactment of laws that mandate race neutrality).

8. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE UNITED STATES 190–200* (rev. ed. 2012) (discussing ways that criminal law created racial hierarchy historically and the ways it continues to do so today); Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 52–79 (2017) (analyzing how Black women’s lives are “routinely erased by the police”).

9. ALFRED BRODY, ALBERTO LOPEZ & KALI MURRAY, *INTEGRATING SPACES: PROPERTY LAW & RACE* 146–86 (2011).

10. Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 631–39 (2011); R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317, 1321–22 (2015).

11. David Brennen, *Race and Equality Across the Law School Curriculum: The Law of Tax Exemption*, 54 J. LEGAL EDUC. 336, 339–49 (2004).

12. Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023, *passim* (2006).

Professor Harris urges state supreme courts and law schools to develop alternative licensing regimes that do not create these racial disparities.

Professor Harris is joined by Professor Teri A. McMurtry-Chubb in focusing on how law schools as institutions have perpetuated racial hierarchy and how law schools may challenge that hierarchy. Professor McMurtry-Chubb emphasizes that “[t]he core legal curricular canon is dense with cases that reiterate to students that Black lives do not matter.” This fact reflects law’s longstanding role in perpetuating racial hierarchy, but law professors often do not explicitly address that reality or explore ways that law could instead emphasize that Black lives do indeed matter. In providing several examples of how law professors could effectively identify and challenge white supremacy while teaching case law, Professor McMurtry-Chubb offers a blueprint for professors and law schools interested in realigning their pedagogy and core curriculum with the “simple, yet highly contested truth” that Black Lives Matter.

This focus on law schools is particularly important, because law schools as structures and institutions shape the paths of individual lawyers. In the past, some law schools explicitly attempted to maintain many aspects of the legal profession as white domains—including the law school publishing this symposium. In 1949, the state of Florida was so opposed to admitting Black students to the University of Florida College of Law that the state moved to institute a law school at Florida A&M, the state’s premier “black college.”¹³ Florida adhered to that plan even after the United States Supreme Court ruled that a Black student must be admitted to the University of Texas School of Law.¹⁴ In 1952, the Supreme Court of Florida, in dismissing Virgil Hawkins’ request to attend the University of Florida College of Law, took judicial notice that there was by that time “a duly established and tax-supported law school maintained exclusively for Negroes” at Florida A&M “at which are offered law courses similar in content and quality to those offered at the College of Law of the University of Florida, an institution maintained exclusively for white students; and that said law school is not merely an ‘organization on paper’ . . . but is in full operation and has classrooms, a law library, a law faculty, and appropriations of public moneys which appear to be sufficient adequately to maintain the law school and to offer legal instruction to such Negro students as are presently enrolled there or who may be reasonably expected to enroll there in the future.”¹⁵

Even after the United States Supreme Court held in 1956 that Virgil Hawkins was “entitled to prompt admission” to the University of Florida

13. GILBERT KING, *BENEATH A RUTHLESS SUN: A TRUE STORY OF VIOLENCE, RACE, AND JUSTICE LOST AND FOUND* 75 (2018).

14. *Sweatt v. Painter*, 39 U.S. 629, 635–36 (1950).

15. *Hawkins v. Board of Control*, 60 So.2d 162, 164 (Fla. 1952).

College of Law,¹⁶ Mr. Hawkins was never able to enroll. In 1958, the College of Law instituted an LSAT cutoff requirement—the first in the college’s history—that he was unable to meet.¹⁷ The racial animus of law school and state officials became embedded in a new law school structure that permitted admission of only the most qualified Black students. George H. Starke, Jr. enrolled later in 1958, becoming the first Black student to attend any public university in Florida. After being “shuffled” by his classmates and prohibited from taking an exam after arriving ten minutes late, Mr. Starke left the College of Law after three semesters, never receiving a law degree.¹⁸

Much has changed at the University of Florida College of Law since that time. W. George Allen became the first Black graduate of the College of Law, and the entire University of Florida, in 1962;¹⁹ the College of Law’s chapter of the Black Law Students Association is named in his honor. In 1989, the state named the College of Law’s legal clinic The Virgil Darnell Hawkins Civil Legal Clinic.²⁰ And Florida’s flagship law school is now the Levin College of Law, after Fred Levin donated \$10 million to the law school in 1999. Mr. Levin was a white classmate of George Starke who, unlike Mr. Starke, graduated in 1961. Mr. Levin and Mr. Starke were friends during law school but after Mr. Starke left, they did not see each other for thirty-five years.²¹ In 2019, the University of Florida awarded Mr. Starke an Honorary Doctorate of Laws.

This progress, however, will never change the fact that the College of Law was founded for white students and excluded Black students for decades in a sustained and successful attempt to maintain racial hierarchy, much like slavery maintained racial hierarchy. Black lives did not matter as much as white lives for a long period in the law school’s history. The College of Law as an institution takes responsibility for the harms caused by this injustice and now enthusiastically extols that Black lives matter. Yet proclamations are not enough. Institutions like the College of Law must continually excavate and challenge the insidious remnants of racial hierarchy that linger in all structures that were built to serve the interests and needs of white citizens to the exclusion of others. Moreover, we must

16. *Hawkins v. Board of Control*, 350 U.S. 413, 414 (1956).

17. Lawrence A. Dubin, *Virgil Hawkins: A One-Man Civil Rights Movement*, 51 FLA. L. REV. 913, 941–42 (1999); Darryl Paulson & Paul Hawkes, *Desegregating the University of Florida Law School: Virgil Hawkins v. The Florida Board of Control*, 12 FLA. ST. U. L. REV. 59, 68 (1984).

18. JOSH YOUNG, AND GIVE UP SHOWBIZ? 27–30 (2014); see also George H. Starke, Jr., *UF in 1958 – I was the first black student*, ORLANDO SENTINEL, Sept. 17, 2017.

19. Gary Blankenship, *Diversity in the Florida Bar*, 74 FLA. B.J. 64, 65 (Apr. 2000).

20. Betty W. Taylor, *A History of Race and Gender at the University of Florida Levin College of Law, 1909–2001*, 54 FLA. L. REV. 495, 509 (2002).

21. YOUNG, *supra* note 18, at 30.

confront the ways that more recent policies and laws may perpetuate racial hierarchy through colorblind mandates and norms.²²

This symposium bravely takes on the work that must be done to realize the promise of Black Lives Matter. Society as a whole must engage in this work, but lawyers and law schools have a particular duty to confront and eliminate the structures that perpetuate racial hierarchy. I thank the editors of the Florida Journal of Law and Public Policy for spurring us to do so at this moment in history with the utmost urgency and determination.

22. See, e.g., Jon Mills, *Diversity in Law Schools: Where Are We Headed in the Twenty-First Century?*, 33 U. TOL. L. REV. 119, 119 (2001) (emphasizing that the state of Florida implemented a new admissions policy for professional schools in 2020 that precludes consideration of race in the admissions process).

THE DOG WALKER, THE BIRDWATCHER AND RACIAL VOICE: THE MANIFEST NEED TO PUNISH RACIAL HOAXES

Katheryn Russell-Brown

INTRODUCTION	1
I. THE LEGACY OF RACIAL HOAXES	2
II. TESTIMONIAL CAPACITY AND RACE.....	5
III. RACIAL HOAXES AS GROUP HARM.....	7
IV. SANCTIONS	8
CLOSING THOUGHTS	9

INTRODUCTION

On May 25, 2020, the same day that George Floyd was killed, there was a different but related racial encounter. That day, Amy Cooper, a White woman, and Christian Cooper, a Black man, crossed paths in New York City’s Central Park.¹ Their encounter led to the most recent national incident involving a racial hoax²—cases where someone who files a false police report relies on racial stereotyping to legitimize their false claim of victimization.³ By triggering images of the *criminalblackman*,⁴ racial hoaxes act as a kind of racial dog whistle. Amy Cooper was walking her dog in a section of Central Park that required owners to leash their dogs.⁵ There was signage to this effect.⁶ While there, Amy encountered Christian, a bird watcher, who asked that she leash her dog.⁷ Amy declined and Christian responded, “[l]ook, if you’re going to do what you want, I’m going to do what I want, but you’re not going to like it[.]”⁸ and

1. Amir Vera & Laura Ly, *White woman who called police on a black man bird-watching in Central Park has been fired*, CNN (May 26, 2020, 4:21 PM), <https://www.cnn.com/2020/05/26/us/central-park-video-dog-video-african-american-trnd/index.html> [https://perma.cc/K4W4-JBAU].

2. See Sarah Maslin Mir, *White Woman Fired After Calling Police on Black Man in Central Park*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/26/nyregion/amy-cooper-dog-central-park.html> [https://perma.cc/YT6D-EKTV].

3. KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME* (2021),forthcoming. Text catalogues 132 racial hoax cases.

4. *Id.* at 14.

5. ABC7, *Central Park: White woman ID’ed as Amy Cooper in NYC calls police on black man over dog leash*, YOUTUBE (May 26, 2020), <https://youtu.be/1aIQ3ABWIZA> [https://perma.cc/3SW7-PKBE] [hereinafter *Central Park Video*].

6. *Id.*

7. See Mir, *supra* note 2.

8. Vera & Ly, *supra* note 1.

proceeded to offer dog treats to her pet.⁹ He also began filming the exchange.¹⁰ Amy, who appears visibly upset, walks quickly toward Christian and asks him to turn off his camera.¹¹ He refuses and she responds by saying she's going to call the police and tell them she is being threatened by "an African American."¹² Amy makes two calls to the New York Police Department and in one she tells the 911 operator, "There is a man, African American, he has a bicycle helmet and he's recording me and threatening me and my dog."¹³ She further embellishes her claims and states, "I am being threatened by a man in the Ramble, please send the cops immediately!"¹⁴ The police responded to the call and after speaking with Amy Cooper and Christian Cooper they concluded there had been a verbal dispute and no arrest was made.¹⁵ Later that evening, Christian Cooper's sister posted the video online.¹⁶ In this case, Christian Cooper was fortunate that the incident amounted to nothing more than an inconvenience.

This Essay shines a spotlight on racial hoaxes, as both historical and contemporary phenomena. The discussion proceeds with three objectives in mind. First, to provide a context for racial hoaxes. This history shows that hoaxes are not benign offenses. Second, to identify the legal and social harms of racial hoaxes. Third, to discuss why sanctions for hoaxes should be reimagined to impose harms that deter future hoaxes. The fact that racial hoaxes continue to be deployed demonstrates that they carry legal and cultural weight. Racial hoaxes are used to activate and privilege some voices over others. The resulting inequity courses through the justice system and makes it possible for some people to give less credence to and have less concern for Black bodies.

I. THE LEGACY OF RACIAL HOAXES

U.S. history has a lengthy catalogue of cases involving violence and harassment against Blacks that began with racial hoaxes. The 1921 Tulsa, Oklahoma massacre was initiated by a false claim that a Black man had

9. *Id.*

10. *See* Mir, *supra* note 2.

11. *Central Park Video*, *supra* note 5.

12. Mir, *supra* note 2.

13. *Id.*

14. *Id.*

15. Kimberly Dole, *Woman in Viral Central Park Video Fired by Employer: 'We Do Not Tolerate Racism of Any Kind,'* 1010 WINS (May 26, 2020, 11:18 AM), <https://1010wins.radio.com/articles/no-arrests-made-in-viral-of-white-woman-in-central-park> [<https://perma.cc/V5AW-42VW>].

16. Allie Yang, *Christian Cooper accepts apology from woman at center of Central Park confrontation*, ABC NEWS (May 28, 2020, 2:59 PM), <https://abcnews.go.com/US/christian-cooper-accepts-apology-woman-center-central-park/story?id=70926679> [<https://perma.cc/NS8D-XZC2>].

attempted to sexually assault a White woman.¹⁷ The story energized scores of Whites to begin burning Black-owned properties, and, additionally, to begin shooting and rounding up Blacks in the Greenwood district of the city.¹⁸ This area, which was known as “Black Wall Street,” was home to a prosperous Black community of teachers, doctors, lawyers, and business owners.¹⁹ The fabricated crime was used to justify wide scale carnage, including officials who deputized White citizens to act as police and round up and detain Blacks in Tulsa’s convention center.²⁰ It is estimated that over 800 people were injured and that somewhere between 30 and 300 people were killed.²¹ In this case, there was massive damage to both people and property.²² The 35-square blocks of Greenwood were burned to the ground.²³ In this instance, the hoax was used to regulate and reduce Black advancement and Black humanity.

A false claim that a Black man had assaulted a White woman ignited the Rosewood, Florida massacre.²⁴ In 1923, Whites in Sumner, Florida used the allegations to justify burning down property and also to justify killing Blacks in the neighboring Black town of Rosewood.²⁵ It is estimated that as many as 150 Blacks were killed.²⁶ The 1931 Scottsboro Boys case is another instance of a false claim of sexual assault being used

17. *Scottsboro: An American Tragedy*, PBS (Apr. 2, 2001), <https://www.pbs.org/wgbh/americanexperience/films/scottsboro/> [https://perma.cc/L3MZ-KAAG] [hereinafter PBS].

18. *Id.*

19. Shelia Poole, *Tulsa Race Riots: White mobs reduced black community to rubble in 1921*, ATLANTA J.-CONST. (June 12, 2020), <https://www.ajc.com/lifestyles/tulsa-race-riots-white-mobs-reduced-black-community-rubble-1921/dqF7KzOZgBJLwnerouWbWP/> [https://perma.cc/CH4D-ZVMP].

20. *Id.*

21. Laurie Ochoa, ‘Watchmen’ revived it. But the history of the 1921 Tulsa race massacre was nearly lost, L.A. TIMES (Oct. 27, 2019, 11:29 AM), <https://www.latimes.com/entertainment-arts/story/2019-10-27/history-behind-the-tulsa-race-massacre-shown-in-watchmen>.

22. *See id.*

23. Gretchen Frazee, *What happened 99 years ago in the Tulsa Race Massacre*, PBS (June 19, 2020, 10:51 AM), <https://www.pbs.org/newshour/nation/what-happened-99-years-ago-in-the-tulsa-race-massacre> [https://perma.cc/76VX-9TQ4]; ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION 44 (2002).

24. R. Thomas Dye, *The Rosewood Massacre: History and the Making of Public Policy*, 19 PUBLIC HISTORIAN 25, 29 (1997).

25. *Id.* at 29–32.

26. *See id.* at 25. In 1994, Black descendants of Rosewood victims were awarded \$2 million in reparations, *Jan. 1, 1923: Rosewood Massacre*, ZINN EDUCATION PROJECT: TEACHING PEOPLE’S HISTORY, <https://www.zinnproject.org/news/tdih/rosewood-massacre/> [https://perma.cc/6LJD-WBLH] (last visited Sept. 14, 2020); Margo Harakas, “Owed to Rosewood Voices from a Florida Town That Died in a Racial Firestorm 70 Years Ago Rise from the Ashes, Asking for Justice,” SUN SENTINEL (Feb. 23, 1993), <https://www.sun-sentinel.com/news/fl-xpm-1993-02-21-9301110134-story.html> [https://perma.cc/PXH8-GVZV].

to rally Whites to punish innocent Blacks.²⁷ Two White women claimed that they had been assaulted and raped by nine Black men.²⁸ As a result of these false allegations, eight of the men were sentenced to death and the remaining man's case resulted in a hung jury.²⁹ One of the women, Ruby Bates, later recanted her story.³⁰ The Emmett Till case is another well-known instance of a racial hoax that ended with severe consequences.³¹ In 1955, Till, a fourteen-year-old Black youth from Chicago, visited his Mississippi relatives.³² While patronizing a store, the clerk, a White woman named Carolyn Bryant, told her husband that he had made sexual advances towards her.³³ Bryant's husband, Roy Bryant, and his brother, J.W. Milam, kidnapped Till from his uncle's home.³⁴ Till was killed and his body was dumped into the Tallahatchie River.³⁵ Bryant and Milam, who were charged with Till's murder, were acquitted by an all-White jury.³⁶ A year later, they confessed to murdering Till and provided details of the killing.³⁷

Racial hoaxes in contemporary times do not typically trigger the same violence, however, they can cause clear and consequential harm.³⁸ In 1989, Charles Stuart told Boston police that as he and his wife, Carol (who was seven months pregnant), were returning home from a birthing class, they were robbed and shot by a Black man wearing a jogging suit.³⁹ After Stuart's initial claims, police scoured the Mission Hill neighborhood in Boston.⁴⁰ Following a police line-up, Stuart picked William Bennett, who he said looked like the man who attacked them.⁴¹

27. PBS, *supra* note 17.

28. *Id.*

29. *Id.*

30. *Id.*

31. See generally Ed Pilkington, *Will justice finally be done for Emmett Till? Family hope a 65-year wait may soon be over*, GUARDIAN (Apr. 25, 2020, 2:00 PM), <https://www.theguardian.com/us-news/2020/apr/25/emmett-till-long-wait-for-justice> [https://perma.cc/WA3N-GGFL].

32. *Id.*

33. Carolyn Bryant Donham has provided different accounts about her encounter with Emmett Till. See generally *id.*

34. *Id.*

35. *Id.*; see generally RUSSELL-BROWN, *THE COLOR OF CRIME*, *supra* note 3, at 23–24.

36. Pilkington, *supra* note 31.

37. *Id.*

38. See Jan Ransom, *Case Against Amy Cooper Lacks Key Element: Victim's Cooperation*, N.Y. TIMES (July 7, 2020), <https://www.nytimes.com/2020/07/07/nyregion/amy-cooper-central-park-false-report-charge.html> [https://perma.cc/2U9V-Y7F9].

39. RUSSELL-BROWN, *supra* note 3, at 169.

40. *Id.*

41. *Id.* at 100.

Carol Stuart and the unborn child died days later.⁴² After police began to suspect Stuart, he committed suicide.⁴³

In the 1994 Susan Smith case, a White South Carolina mother told police that she had been carjacked by a young Black man.⁴⁴ Her claims led to a national manhunt involving state and federal law enforcement.⁴⁵ Young Black men in Union, South Carolina were stopped, questioned, and detained.⁴⁶ Nine days later Smith admitted that she had made up the carjacking story.⁴⁷ She had drowned her two boys in her car.⁴⁸

This backdrop of racial hoax cases provides context for public reaction to the Amy Cooper case. Whites who fabricate stories about Blacks committing crime are more likely to be perceived as credible and these racial tales have the potential to cause grave harm. Racial hoaxes work in large part based on how we categorize victims and our stereotypes about race.

II. TESTIMONIAL CAPACITY AND RACE

From the slave codes to the modern era, the U.S. justice system has privileged White voices and silenced Black voices. The history of laws on testimonial capacity illustrates this point.⁴⁹ Under the slave codes, Blacks were not allowed to serve as witnesses in cases involving Whites.⁵⁰ Free states also precluded Black testimonial capacity.⁵¹ An 1850 California law provided that “No Black or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a [W]hite man.”⁵² After slavery ended, the 1866 Civil Rights Act was passed.⁵³ While the legislation granted testimonial rights to all, racial reform was scattershot.⁵⁴ All told, “[W]hite voices were the only voices of legal

42. *Id.*

43. *Id.*

44. *Id.* at 99.

45. RUSSELL-BROWN, *supra* note 3, at 99.

46. See *Smith's brother apologizes to blacks for carjack hoax*, TAMPA BAY TIMES (Oct. 7, 2005), <https://www.tampabay.com/archive/1994/11/09/smith-s-brother-apologizes-to-blacks-for-carjack-hoax/> [<https://perma.cc/9FNR-9V4C>].

47. RUSSELL-BROWN, *supra* note 3, at 99.

48. *Id.*

49. FREDERICK C. BRIGHTLY, A DIGEST OF THE DECISIONS OF THE FEDERAL COURTS, FROM THE ORGANIZATION OF THE GOVERNMENT TO THE PRESENT TIME 403 (1870).

50. See, e.g., J. Clay Smith, *Justice and Jurisprudence and the Black Lawyer*, 69 NOTRE DAME L. REV. 1077, 1106 (1994).

51. See Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 424–25 (1986).

52. See *People v. Hall*, 4 Cal. 399, 400 (1854) (citing 1850 Cal. Stat. 230).

53. Civil Rights Act of 1866, 14 Stat. 27–30 (1866).

54. See Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 457 & 457 n.26 (2016).

truth.”⁵⁵ For centuries the legal system has treated the words of Black people (and other people of color), as untrustworthy compared with the words of White people.⁵⁶ Laws which explicitly denied Blacks the right to bear legal witness against Whites,⁵⁷ were part of larger system of racial hierarchy that undermined Black civil rights and liberties.⁵⁸

This complex socio-legal system includes interconnected policies, practices, and laws that have prevented Blacks from being on equal footing with Whites. Examples include laws that banned Blacks from becoming police officers (or limited their authority to Black neighborhoods),⁵⁹ segregated public schooling,⁶⁰ courtroom practices of referring to Black witnesses by their first names,⁶¹ redlining, restrictive covenants, denial of voting rights, Jim Crow laws that assigned separate and inferior spaces for Blacks to eat, drink, sit, and play separately from Whites, police violence,⁶² and White vigilantes who punished Blacks they believed had undermined the status quo. Together these laws and practices expressed an unimpeachable conclusion that “White is right.” Over two centuries, the legal and social diminishment of Black life has enabled killings like that of George Floyd—who was killed in broad daylight by Minneapolis police officer, Derek Chauvin, who held his knee on Floyd’s neck for nearly nine minutes, while other officers and citizens watched and recorded the incident.⁶³

This history and background is necessary to understand the potential impact of the actions and language used by Amy Cooper. She used her words to place herself on a privileged testimonial perch. Not only did she warn Christian Cooper that she would tell the police that she’s being threatened by an African American man, but when she calls the police, she emphasizes that her alleged attacker is an “African American” man.⁶⁴

55. *Id.* at 455.

56. *Id.* at 452–53.

57. *Id.* at 455.

58. *See id.* at 476.

59. Taylor Hosking, “The Long History of Black Officers Reforming Policing From Within,” *THE ATLANTIC* (Dec. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-long-history-of-black-officers-reforming-policing-from-within/547457/> [<https://perma.cc/JH9C-4V78>]; *see also* W. MARVIN DULANEY, *BLACK POLICE IN AMERICA* 8 (1996).

60. PAULI MURRAY, *STATES’ LAWS ON RACE AND COLOR* 14 (Pauli Murray ed., 1997).

61. *See Mary Hamilton*, LDF: THURGOOD MARSHALL INSTITUTE, <https://tminstituteldf.org/tmi-explains/thurgood-marshall-institute-briefs/tmi-briefs-active-voice/mary-hamilton/> [<https://perma.cc/2AB2-U8B9>] (last visited Sept. 15, 2020); *Ex parte* Hamilton, 156 So. 2d 926, 926 (Ala. 1963), *rev’d sub nom*, *Hamilton v. Alabama*, 376 U.S. 650 (1964).

62. *See, e.g.*, *Jamison v. McClendon*, 2020 WL 4497723, at *2 (S.D. Miss. 2020).

63. *George Floyd: What happened in the final moments of his life*, BBC (July 16, 2020), <https://www.bbc.com/news/world-us-canada-52861726> [<https://perma.cc/F6XB-CZ62>].

64. Jan Ransom, *Amy Cooper Faces Charges After Calling Police on Black Bird-Watcher*, *N.Y. TIMES* (July 8, 2020), <https://www.nytimes.com/2020/07/06/nyregion/amy-cooper-false-report-charge.html> [<https://perma.cc/S8XW-5CKB>].

By doing this, Amy Cooper was tapping into two presumptive racial truths; that White women are justifiably fearful of Black men and that White narratives are more trustworthy than Black narratives.

III. RACIAL HOAXES AS GROUP HARM

After weeks of calls for the NYPD to file a criminal claim against Amy Cooper,⁶⁵ she was charged with filing a false report in the third degree, a Class A misdemeanor offense that carries a maximum penalty of a year in jail or probation for three years, and a maximum fine of \$1,000.⁶⁶ The case was dismissed following Amy Cooper's completion of five therapy sessions focused on racial identity. Christian Cooper declined to cooperate with the investigation because he believed that Amy Cooper was already punished for the harms caused by her actions.⁶⁷ The taped encounter received widespread national attention and Amy Cooper was heavily criticized on social media and was fired from her job.⁶⁸ This raises the question, who was harmed by Amy Cooper's racial hoax? By his response, Christian Cooper appears to classify the incident as a private encounter between citizens, one that caused him, and only him, offense.⁶⁹ In this view, the encounter was a microaggression—a personal racial slight.⁷⁰

However, an alternative analysis is that racial hoaxes cause not only individual harm but also group harm. Thus, any innocent person who is subject to questioning (Susan Smith case),⁷¹ arrest (Charles Stuart case),⁷² harassment or death (Tulsa massacre,⁷³ Rosewood,⁷⁴ Scottsboro Boys,⁷⁵

65. Janelle Griffith, *NYC officials call for police probe of white woman's 911 call on black man in Central Park*, NBC NEWS (May 28, 2020, 4:03 PM), <https://www.nbcnews.com/news/us-news/nyc-officials-call-police-probe-white-woman-s-911-call-n1216451> [https://perma.cc/K68R-2CKH].

66. Kelly McLaughlin, *Amy Cooper, the woman who called 911 on a Black bird-watcher in Central Park, has been charged with falsely reporting an incident*, INSIDER (July 6, 2020, 3:24 PM), <https://www.insider.com/amy-cooper-charged-false-reporting-central-park-incident-christian-cooper-2020-7> [https://perma.cc/BY3H-TH75]; N.Y. PENAL LAW § 240.50 (McKinney 2019).

67. See Jan Ransom, *Case Against Amy Cooper Lacks Key Element: Victim's Cooperation*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/07/07/nyregion/amy-cooper-central-park-false-report-charge.html> [https://perma.cc/GBS2-SD8D].

68. *Id.*

69. *See id.*

70. CHESTER M. PIERCE, *THE BLACK SEVENTIES* 265, 266, 272 & 282 (Floyd B. Barbour ed., 1970) (describing microaggressions as “subtle” and “automatic” exchanges or put downs).

71. RUSSELL-BROWN, *supra* note 3, at 99.

72. *Id.* at 169.

73. PBS, *supra* note 17.

74. Dye, *supra* note 24.

75. PBS, *supra* note 27.

and Emmett Till⁷⁶ cases) as the result of a racial hoax is harmed. Racial hoaxes also pose harm to Blacks as a group. They are reminders of the prevailing racial narratives about Blackness (that equate it with criminality)⁷⁷ and the precarity of safety in public spaces, if challenged by Whites.⁷⁸ Racial hoaxes illuminate the unassailability of White allegations against Blacks. This constricts how Blacks navigate public spaces.⁷⁹ In addition to causing harm to Blacks as a group, these hoaxes amplify existing racial inequities by re-ringing the racial bell. As history makes clear, racial hoaxes have been used as a cloak for racial violence. They create further division between Blacks and police agencies.⁸⁰

IV. SANCTIONS

This discussion has presented an overview of how racial hoaxes reflect and reinforce the existing racial legal hierarchy. Given the myriad harms that hoaxes can cause, the question arises: How should they be punished? There are laws against filing false reports of crime: in most jurisdictions, filing a false police claim is a misdemeanor offense, subject to a fine and less than one year behind bars.⁸¹ In those instances where a racial hoax perpetrator is charged with any offense, it is filing a false report.⁸² However, state and federal laws are largely silent on punishing the unique harms posed by racial hoaxes.⁸³ Notably, the day after the Cooper incident, a New York state legislator introduced a bill that would make filing a false police report eligible for a hate crime charge.⁸⁴

A strong case can be made that people who perpetrate racial hoaxes should face serious punishment. For the law to function as a deterrent, hoax perpetrators (and the public at large), have to know that they will likely face punishment. As noted earlier, most racial hoax perpetrators are not charged with filing a false police report—the one law on the books that covers their actions.⁸⁵ Therefore, step one requires that hoax

76. Pilkington, *supra* note 31.

77. See Chan Tov McNamara, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 334, 344 & 348 (2019).

78. See *id.* at 353 (2019).

79. When a racial hoax becomes national news, it becomes a “macroaggression.” See RUSSELL-BROWN, *supra* note 3, at 27.

80. RUSSELL-BROWN, *supra* note 3, at 44.

81. See, e.g., CAL. PENAL CODE § 148.5 (West 2020) (punishable by maximum fine of \$1,000 and/or 6 months in jail).

82. In approximately less than one half of cases identified as racial hoaxes was the perpetrator charged with filing a false police report. RUSSELL-BROWN, *supra* note 3, at 106.

83. In 1995, in response to two high profile hoax cases, a New Jersey state legislator introduced a bill designed to punish hoax offenders. It was never passed. RUSSELL-BROWN, *supra* note 3, at 122.

84. H.D. A3566, 116th Assemb., Legis. Sess. (N.Y. 2019).

85. RUSSELL-BROWN, *supra* note 3.

perpetrators face charges for their racially-charged false reports. Step two is that the sanction should deter not only a particular perpetrator from committing other hoaxes in the future, it should also deter others in the general public from committing racial hoaxes.⁸⁶ This could be done by increasing the maximum fine from \$1,000 to \$5,000.⁸⁷ Step three is to determine whether the racial hoax caused specific identifiable individual harm. If so, that could be considered an aggravating factor. The final step requires a look at whether racial hoax perpetrators should face incarceration. If so, then a determination must be made whether a longer period—over one year—is warranted. Related to this is the consideration of whether the level of offense should be raised from a misdemeanor to a felony. Increasing time beyond bars for commission of a racial hoax is not ideal. It is also worth considering whether other types of sanctions should be imposed, such as community service, an apology, or racial bias training.⁸⁸ The goal here is to have laws and practices in place that acknowledge the seriousness of the racial hoax and punish it accordingly. In doing so, a racial hoax law can help to restore the voice of the disenfranchised, those who have historically been denied testimonial capacity.

CLOSING THOUGHTS

Racial hoaxes have a long and sordid history. This Essay highlights what this history tells us about how they have been used to criminalize Black life. Specifically, these hoaxes reinforce racial hierarchy by privileging statements made by Whites over those made by Blacks. As discussed, this inequity is deeply rooted in legislation that deemed it unlawful for Blacks to testify and in any way bear witness against Whites.⁸⁹ The racial hoax is a direct descendant of these laws. False reports of crime that invoke race are symptomatic of a justice system that allows race to impact outcomes. Racial hoaxes inflict varied harm, including on those who are wrongfully brought in the justice system due to a false claim. False claims create further support for Black fear and loathing of interactions with law enforcement. The community harm is greatest in racial hoax cases that receive national attention. Cases such as Amy Cooper's sound a loud cautionary bell of racial distress. Given the harms and potential harms of racial hoaxes, the sanctions should be greater and alternative penalties should be given serious consideration. Recent incidents have pushed large numbers of American citizens to reflect inward and outward to examine how race and systemic racism are

86. Katheryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 INDIANA L.J. 594, 619 (1996).

87. *See id.*

88. *Id.*

89. *See* Smith, *supra* note 50.

embedded in our institutions, particularly the justice system. Reflection and revised approaches are necessary. Otherwise, we can expect past to be prologue, and another racial hoax will result in unnecessary detainment, delinquency, destruction, or death.

FROM AUTHORITARIAN POLICE STATE TO BLACK-INCLUSIVE DEMOCRACY

*Melody Webb**

INTRODUCTION	11
I. PATTERN OF AUTHORITARIAN POLICING PRACTICES.....	12
II. PRACTICES ROOTED IN HISTORY	15
III. SUBJUGATION OF BLACK PEOPLE AND OCCUPATION OF BLACK COMMUNITIES	16
IV. SABOTAGING ACCOUNTABILITY BY DEFLECTING BLACK COMMUNITY PRIORITIES	17
V. THE PRIORITY OF BLACK POVERTY VERSUS PATERNALISTIC POLICYMAKING.....	18
VI. AUTHORITARIAN POLICE SILENCING OF BLACK CULTURAL VOICE.....	20
VII. DISABLING BLACK VOICES.....	21
VIII. TRANSFORMING OUR BROKEN DEMOCRACY.....	22
IX. A DEMOCRATIC APPROACH TO POLICING POLICY	22
X. ACCOUNTABILITY MEASURES THROUGH INCLUSIVE POLICY-MAKING PRACTICES	23
CONCLUSION.....	24

INTRODUCTION

On May 25th, 2020, almost four dark years into Donald Trump's authoritarian rule, America glimpsed, in George Floyd's murder, four centuries of policing terror that defines the Black experience in America. The practices of American policing institutions in Black communities and against Black people are predatory. These practices result from a racialized, paternalistic attitude toward Black people and Black

* Melody Webb, Esq, is Program Director and Professorial Lecturer in Law at George Washington University Law School, where she lectures on family law, racial equity, social justice lawyering, and the intersections of these practice areas. She is a graduate of Harvard Law School and Harvard College.

communities, and they fail to sufficiently address pervasive inequities Black people and Black communities have faced over centuries. Aggressive policing tactics—while rejected by the communities in which they are employed as ineffective, dangerous, and destabilizing to Black communities and families—have continued without community consent. Recently, these practices and policies have come under scrutiny due to several highly publicized, heinous police killings of Black people.¹ This police terror must cease. Lawmakers, executive branch officials, and policing institutions must be held accountable by measures designed through “inclusive policymaking.” Such Black-led policies should be fashioned from a community that has built its internal power through collective decision-making, cultivating its cultural strength and political knowledge. The policies would derive from Black community members in neighborhood-based sites that build power with storytelling and political education. To aid policymaking, the state should catalyze civic participation and community-building by providing civic and cultural centers to support the community transformation inclusive policymaking entails and by grounding its new policies in values of humility and empathy that promote democratic participation, including Black community agency and dignity.

I. PATTERN OF AUTHORITARIAN POLICING PRACTICES

Marlies Glasius, a professor of International Relations within the University of Amsterdam’s Department of Politics, defines authoritarian practices as “a pattern of actions, embedded in an organized context, sabotaging accountability to people (‘the forum’) over whom a political actor exerts control, or their representatives, by disabling their access to information and/or disabling their voice.”² Professor Glasius argues that authoritarian practices can and do occur in nations where democratic elections are held.³ This Essay applies the authoritarianism framework developed by Professor Glasius to American policing practices in low-income Black American communities and against Black individuals.⁴ Further, this Essay argues that these practices share the attributes of

1. Associated Press, *Police Chokeholds Come Under Scrutiny Around the World Following George Floyd’s Death*, L.A. TIMES, (June 5, 2020), <https://www.latimes.com/world-nation/story/2020-06-05/police-chokeholds-scrutinized-worldwide-after-george-floyd-death>.

2. Marlies Glasius, *What Authoritarianism Is...and Is Not: A Practice Perspective*, 94:3 OXFORD ACAD.: INT’L AFFS., 515, 527, (2018), <https://academic.oup.com/ia/article/94/3/515/4992409> [<https://perma.cc/EV2W-GQ7K>].

3. *Id.* at 529.

4. This paper references Black people and Black communities in the sense of their subjugation to racialized disparate treatment, and primarily, by policing institutions and by police officers who are principally non-Black.

Professor Glasius' definition of authoritarian⁵: they comprise a pattern of abusive actions sanctioned by the judiciary and under the direction of executive and legislative authority, and by their very nature, these policing practices simultaneously suppress political participation by Black people and disable the Black community's voices. This Essay argues for reform centered around extrapolations of pro-democratic features of accountability; as Professor Glasius outlines it: a neighborhood infrastructure that facilitates the inclusion and leadership of impacted Black people on policymaking around policing and other matters that impact their well-being.⁶

Ranging from "broken windows" policing, which purports to achieve neighborhood safety by hyper-focusing on petty offenses⁷ to "stop and frisk" patrols, pretextual traffic stops, and racial profiling, American policing practices against Black Americans comprise a pattern of frequent, abusive, and punitive actions, primarily by local, state, and at times, federal policing institutions who carry them out under color of law.⁸ These policies have a surveillance aspect.⁹ They rely on police discretion disproportionately and lead to frequent and degrading¹⁰ contacts for minor infractions that are characterized by what scholar Gustafson labels as symbolic street level "ceremonies."

The racialized nature of authoritarian policing practices against Black people transcend age, gender, class, and neighborhood boundaries and are felt most intensely in highly policed, lower income Black communities. In its sweep and totality, and separately from the enduring cultural practices that bind, police terror corrals black people into an "Occupied Black State".¹¹ In a paper on Black experiences in heavily policed lower income communities, political science scholar Vesla M. Weaver and her colleagues capture this result through one resident's

5. Marlies Glasius, *What authoritarianism is...and is not: a practice perspective*, OXFORD ACADEMIC: INTERNATIONAL AFFAIRS, May 2018, at 527, 515–33, <https://academic.oup.com/ia/article/94/3/515/4992409> [<https://perma.cc/36TA-2NYE>].

6. *Id.*

7. Sarah Childress, *The Problem With "Broken Windows" Policing*, FRONTLINE (June 28, 2016), <https://www.pbs.org/wgbh/frontline/article/the-problem-with-broken-windows-policing/> [<https://perma.cc/HD4Z-K9NS>].

8. See generally Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 UCLA L. REV. (2020), https://www.uclalawreview.org/abolishing-racist-policing-with-the-thirteenth-amendment/#_ftnref3 [<https://perma.cc/475L-9YT8>].

9. See generally Vesla Weaver et al., *Withdrawing and Drawing In: Political Discourse in Policed Communities*, J. OF RACE, ETHNICITY AND POL. (2020), <https://isps.yale.edu/research/publications/isps20-03> [<https://perma.cc/FUE8-2HGW>].

10. See generally Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297 (2013).

11. By "Occupied Black State" I mean the physical spaces inhabited by Black people, with respect to racialized surveillance, control, and subjugation by police agents of the state and the resulting social, economic, political, and physical harm against Black community members.

reaction of frustration and dismay regarding aggressive policing after being stopped by police officers for “drinking out of [a] paper bag[.]”¹²

These street-level tactics are the implementation of legislative and regulatory mandates that serve the interests of policymakers to raise revenue,¹³ to justify their budgets¹⁴, or to ostensibly disrupt crime¹⁵, but not to serve the communities which they govern. The courts have ingrained in law these racially discriminatory policing practices. Discussing the Court’s rulings since the “original stop and frisk case,” scholar Paul Butler stated, “For the last roughly fifty years, since *Terry v. Ohio*, the Supreme Court has been expanding police power with the design of controlling black men.”¹⁶ Largely through Fourth Amendment jurisprudence, the Court has upheld nearly unfettered discretion by police officers around using reasonable suspicion in situations that involve circumscribing Black people’s autonomy when in contact with the police, particularly in communities that have high crime levels.¹⁷

These practices, however, have not been viewed as effective in lowering crime.¹⁸ In addition to enforcing minor infractions at the street level that present dubious value to the community, scholars have documented “distorted responsiveness”¹⁹ in which policing institutions fail to respond where the community needs police involvement the most.²⁰

The pattern of racialized authoritarian policing practices fuel the American carceral state and fashion the Occupied Black State through the disproportionate levels of arrest, pre-trial detention, prosecution,

12. Gwen Prowse et al., *The State from Below: Distorted Responsiveness in Policed Communities*, URB. AFFS. REV. 1423, 1437 (2019); see *infra* notes 19, 20, 39, 59, 73 and accompanying text.

13. THE SENT’G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 5 (2018). See *infra* notes 18, 22, 23 and accompanying text.

14. See Robert Vargas et al., Capitalizing on Crisis: Chicago Police Responses to Homicide Waves 1920-2020, SocArXiv (Oct. 12, 2020), <https://osf.io/preprints/socarxiv/2d9cn>

15. See Vargas et al., *supra* note 14.

16. Paul Butler, *Equal Protection and White Supremacy*, 112 NW. U. L. REV. 1457, 1459 (2018).

17. See Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245 (2010) (arguing that the Fourth Amendment legitimizes the conflation of race and suspicious behavior subject to police determination).

18. THE SENT’G PROJECT, *supra* note 12, at 4; see also Emma Pierson et al., *A Large-scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736 (2020). See *infra* notes 22, 23 and accompanying text.

19. See Prowse et al., *supra* note 12, at 1425. See *infra* notes 20, 39, 59, 73 and accompanying text.

20. *Id.* at 1446. See *supra* notes 12, 19 and accompanying text. See *infra* notes 39, 59, 73 and accompanying text.

incarceration and sentencing of Black people.²¹ Studies generally reveal bias toward Black people by actors across the criminal legal process, including police officers, prosecutors, and judicial officers.²² This systemic and unequal application of laws has tragic results: a Black man has a one in three chance of being arrested over his lifetime and of being imprisoned;²³ Black women's incarceration rate is twice the rate of white women;²⁴ and the overall incarceration rate for Black Americans is more than three times higher than the general population.²⁵ The collateral consequences impact the incarcerated individual, their family members, and their communities. This dims their future employment and occupational licensing prospects, impedes their access to voting, and elevates the likelihood of perpetuating intergenerational poverty and incarceration through dire educational, employment, and health outcomes for their children.²⁶

II. PRACTICES ROOTED IN HISTORY

Current racially disparate criminal policies and practices are rooted in laws and policies states imposed on Black people since the Reconstruction period. These include punitive laws that solely applied to Black people with the intention of retaining control over formerly enslaved Black Americans: Black Codes,²⁷ "pig laws"²⁸ for agricultural crimes, punitive laws for vagrancy, and leasing offenders for their labor.²⁹

21. Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. 2 (2018), www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [<https://perma.cc/5YC9-9KDS>]. See *infra* notes 29, 31 and accompanying text.

22. See, e.g., THE SENT'G PROJECT, *supra* note 12. See *infra* note 23, 24.

23. See THE SENT'G PROJECT, *supra* note 12, at 9. See *supra* notes 8, 11, 15 and accompanying text.

24. See THE SENT'G PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS 2 (2019), <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf> [<https://perma.cc/6FUP-HSNZ>] (reporting on Black women incarceration in 2017).

25. REP. DON BEYER OF THE JOINT ECON. COMM., 116TH CONG., REP. ON THE ECONOMIC STATE OF BLACK AMERICA IN 2020, at 21 (Comm. Print 2020).

26. See Margaret E. Finzen, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO J. ON POVERTY L. & POL'Y 299, 307 (2005) (discussing the effect of occupational and licensing restrictions on a convicted felon's opportunity to obtain employment). See also Jeffery Robinson, *The Racist Roots of Denying Incarcerated People Their Right to Vote*, ACLU: SPEAK FREELY (MAY 3, 2019, 10:45 AM), <https://www.aclu.org/blog/voting-rights/racist-roots-denying-incarcerated-people-their-right-vote> [<https://perma.cc/B45H-KKX8>].

27. See Audrey Robinson-Nkongola & Jack G. Montgomery, *Wandering the Web—Laws that Affect the Life of Americans from Slavery to the 21st Century*, 28:2 AGAINST THE GRAIN 83 (2016), <https://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=7341&context=atg> [<https://perma.cc/MTV4-K4WZ>].

28. See *id.*

29. Hinton et al., *supra* note 21.

From a legal system in which prisons re-enslaved Black people to work on plantations to a current system of prisons disproportionately populated with “the descendants of slaves,” policing practices perpetuate the structural racialized domination of Black Americans.³⁰ This four-century old treatment takes the modern form of inequitable administration of laws that are ostensibly race-neutral.³¹

III. SUBJUGATION OF BLACK PEOPLE AND OCCUPATION OF BLACK COMMUNITIES

Authoritarian policing practices in Black communities lead to dominance of Black people that may be endemic to policing. Studies have affirmed concerns about brutal and racially motivated policing practices.³² There is evidence the training and disposition of some police officers make them prone to violent behavior.³³ Studies have shown that white police officers who police Black neighborhoods tend to show hegemonic behaviors that reinforce Black people’s lower status in the social hierarchy.³⁴ Social dominance theory holds that groups assigned lower societal status (Black people) are accorded worse treatment (brutality and death) by those who hold the power (the police) to maintain the hierarchy.³⁵ As such, the police are a central figure in reinforcing the hierarchy.³⁶ This may explain their view of themselves as warriors, which, when combined with their hierarchy enforcement role, leads them to an antagonistic world view against the public generally and predisposes them to prejudge and brutalize Black people as perpetrators particularly.³⁷

Finally, the police, violence-prone and predatory, assume the role of an occupying force and register a demobilizing toll on political power in Black communities. Black voices captured by Vesla Weaver and her colleagues through the Portals conversations study³⁸ with people in

30. See Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 268 (2008), https://scholarship.law.upenn.edu/faculty_scholarship/576 [<https://perma.cc/LZW4-MPR5>].

31. Hinton et al., *supra* note 21, at 3.

32. See Jim Sidanius et al., *Social Dominance Orientation, Hierarchy Attenuators and Hierarchy Enhancers: Social Dominance Theory and the Criminal Justice System*, 24 J. Applied Soc. Psychol., February 1994, at 338, 360.

33. See Inae Oh, *Minneapolis Banned Warrior-Style Police Training. Its Police Union Kept Offering It Anyway*, Mother Jones, May 28, 2020, <https://www.motherjones.com/crime-justice/2020/05/bob-kroll-minneapolis-warrior-police-training/> [<https://perma.cc/35AV-KBM3>].

34. See Sidanius et al., *supra* note 29, at 360.

35. See *id.* at 340.

36. See *id.* at 342.

37. See *id.* at 341–42.

38. See *A Policed People’s Account of the State*, PORTALS POLICING PROJECT, <https://www.portalspolicingproject.com/> [<https://perma.cc/59TL-WEFD>] (last visited Sept. 29, 2020) (explaining the Portals conversations as part of a study involving 850 conversations in six

highly policed neighborhoods characterize the impact of these predatory policing practices against Black people. These Black voices lead to Black people responding with an intentional and dignified retreat from interactions with the face of the state and the police, and from civic engagement.³⁹ Compounding the physical threat to Black bodies, these state actors inflict a psychic terror on the occupied Black community that suppresses participation and faith in government.⁴⁰

These practices have been made possible through increased police funding at the local level augmented by federal dollars.⁴¹ In recent years, budgets for police activities have tripled despite falling crime rates.⁴² The sharp drop in violent crime and property crime since the 1990s has not seen a commensurate reduction in police spending.⁴³ Cash assistance benefits like Temporary Assistance of Needy Families, safety net, and housing programs receive substantially less funding than police budgets, although police spending is less than spending on education and aggregate spending on public welfare.⁴⁴

IV. SABOTAGING ACCOUNTABILITY BY DEFLECTING BLACK COMMUNITY PRIORITIES

While resolving social and economic problems in Black communities ranks as a top concern to Black Americans, state and local officials favor spending on police departments. Policymakers defend their use of and investment in these policing strategies, with a popular argument for these strategies being that Black communities clamor for crime control as a priority.⁴⁵

cities in highly policed communities in which residents discussed with one another topics of policing and incarceration; gender and age diverse, a majority of, but not all, participants were Black).

39. Vesla Weaver, Gwen Prowse & Spencer Piston, *Too Much Knowledge, Too Little Power: An Assessment of Political Knowledge in Highly Policed Communities*, 81 J. POL., no. 3, 1155, 1163 (2019).

40. *See id.*

41. Brian Naylor, *How Federal Dollars Fund Local Police*, NPR (June 9, 2020), <https://www.npr.org/2020/06/09/872387351/how-federal-dollars-fund-local-police> [https://perma.cc/J98V-6ZSL].

42. Polly Mosendz & Jameelah D. Robinson, *While Crime Fell, the Cost of Cops Soared*, BLOOMBERG L. (June 4, 2019, 4:00 AM), <https://news.bloomberglaw.com/white-collar-and-criminal-law/while-crime-fell-the-cost-of-cops-soared> [https://perma.cc/NAG5-FAMX].

43. Richard C. Auxier, *What Police Spending Data Can (and Cannot) Explain Amid Calls to Defund the Police*, URB. INST. (June 9, 2020), <https://www.urban.org/urban-wire/what-police-spending-data-can-and-cannot-explain-amid-calls-defund-police> [https://perma.cc/SR5E-FKXG].

44. *Id.*

45. *See* Aaron Ross Coleman, *How Black People Really Feel about the Police, Explained*, VOX (Jun. 17, 2020, 8:30 AM), <https://www.vox.com/2020/6/17/21292046/black-people-abolish-defund-dismantle-police-george-floyd-breonna-taylor-black-lives-matter-protest> [https://perma.cc/D9G4-AQ28].

In a recent poll, a majority of Black participants indicated that they had greater concern about police brutalizing minorities than about local crime, and they found it to be a “good idea” that the City Council of Minneapolis vowed to break up their police force.⁴⁶

Confidence in local police is considerably low among Black Americans. Just 14% of Black people express “a lot of confidence” in their local police, and 41% some confidence, while 42% of white people say they have a lot of confidence in their local police and 39% say they have some confidence.⁴⁷ In fact, Black communities have a mix of priorities: As James Forman, Jr. described it, “Surveys fail to wrestle with the myriad ways in which American racism narrowed the options available to black citizens and elected officials in their fight against crime.”⁴⁸ Emily Bazelon theorizes that surveys may show Black people supporting police hiring “partly because they don’t see the government providing other resources for making their neighborhoods safe.”⁴⁹ In fact, when asked about strategies to foster improved relationships with the police, nearly three-quarters of participants ranked “holding police officers responsible for the misconduct.”⁵⁰

V. THE PRIORITY OF BLACK POVERTY VERSUS PATERNALISTIC POLICYMAKING

This prioritization of policing by policymakers’ clashes with the stark reality of disproportionate poverty levels among Black people. There is a large income and wealth gap between Black and white households.⁵¹ This chasm has been deepened by the COVID-19 pandemic.⁵²

46. *Id.*

47. Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, PEW RESEARCH CENTER: SOCIAL DEMOGRAPHIC TRENDS (Sept. 29, 2016), <https://www.pewresearch.org/social-trends/2016/09/29/the-racial-confidence-gap-in-police-performance/> [https://perma.cc/MZ5T-YZW6].

48. JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 12 (2017).

49. Emily Bazelon, *A Discussion About How to Reform Policing*, N.Y. TIMES (June 13, 2020), <https://www.nytimes.com/interactive/2020/06/13/magazine/police-reform.html> [https://perma.cc/GY4C-RV85].

50. BLACK FUTURES LAB, *MORE BLACK THAN BLUE: POLITICS AND POWER IN THE 2019 BLACK CENSUS* 8 (2019), <https://blackfutureslab.org/wp-content/uploads/2019/05/More-Black-than-Blue.pdf> [https://perma.cc/9HZZ-MJLM].

51. Kriston McIntosh, *Examining the Black-white Wealth Gap*, BROOKINGS (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/> [https://perma.cc/Z9KS-7BKH] (“At \$171,000, the net worth of a typical white family is nearly ten times greater than that of a Black family (\$17,150) in 2016.”).

52. Greg Rosalsky, *How The Crisis Is Making Racial Inequality Worse*, NPR: PLANET MONEY (May 26, 2020, 6:30 AM), <https://www.npr.org/sections/money/2020/05/26/860913793/how-the-crisis-is-making-racial-inequality-worse> [https://perma.cc/2CYN-CUW7].

By emphasizing policing over economic and social progress, policymakers have effectively ignored the panoply of policies favored by the Black community, opting for a paternalistic approach that subordinates Black communities' voices regarding their own needs. By sizable numbers of greater than 85%, Black participants in the Black Census Project reported they favored economic and social priorities: raising the minimum wage to \$15 an hour; providing affordable health care; increasing wages to sustain families; decreasing college costs; and providing affordable housing.⁵³ Concerning the police, Black respondents overwhelmingly expressed concern over police officers in the community using excessive force and killing Black people.⁵⁴ Nearly 90% believe that the government should play a role in solving social and economic problems that include: providing adequate housing for people who lack it; providing affordable and quality health care for all Americans; and addressing the gap between the rich and poor.⁵⁵

Paternalism has been defined as “the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm.”⁵⁶ As federal and local policymakers have witnessed a pressing range of structural injustices burdening the Black community, they have poured funding into policing,⁵⁷ opting for a paternalistic approach that subordinates Black community preferences to focus on a broad array of concerns, denying both Black agency and Black community influence.

Instructive in the paternalistic approach that informs policing policy is the ubiquitous “protect and serve” motto⁵⁸ used by police departments. The motto, which has been litigated, is an ironic⁵⁹ symbol to highly policed Black people because it gives credence to the misleading idea that policing places primacy on protecting Black community members rather than causing harm. The Supreme Court has ruled that the police are not

53. BLACK FUTURES LAB, *supra* note 47, at 8.

54. *Id.*

55. *Id.* at 11.

56. Gerald Dworkin, *Paternalism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2020), <https://plato.stanford.edu/archives/fall2020/entries/paternalism/> [https://perma.cc/92ZE-QSQ4].

57. *State and Local Finance Initiative: Police and Corrections Expenditures*, URBAN, <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/police-and-corrections-expenditures> [https://perma.cc/JKT2-K8W9] (last visited Sept. 11, 2020).

58. See Stuart Schrader, *To Protect and Serve Themselves: Police in US Politics Since the 1960s*, 31 PUB. CULTURE (Issue 3) 601, 601 (2019).

59. See Prowse et al., *supra* note 12, at 16 (“[O]ne 55-year-old Black woman admitted being confused: ‘I don’t know what they want us to do, or how they want us to feel.’ For some participants, the experience of distorted responsiveness lead to the conclusion that police protection was a hoax. Several mocked a common motto of police—‘Protect and Serve.’”).

required to protect citizens outside of police custody.⁶⁰ The motto serves as a reminder of the government's failure to protect and serve Black communities.

Rather than serving and protecting, American policing has its foundation in performing authoritarian practices. As Brandon Hasbrouck observes, "The institution of policing was designed to protect and serve the racial hierarchy blessed by the U.S. Constitution itself."⁶¹

The precursors of contemporary policing institutions were used to protect private property interests,⁶² to suppress labor uprisings in the northern cities and towns,⁶³ to pursue and return enslaved people, and later, to monitor newly emancipated Black people,⁶⁴ not to protect vulnerable communities. Stuart Schrader describes the police as a professionalized, "entrepreneurial" force with autonomy⁶⁵ and "political wherewithal" who possess economic strength and access to resources.⁶⁶ Over the course of American history, the police have protected none other than themselves and served none other than themselves.⁶⁷ In fact, the police have operationalized the policies of paternalism into authoritarian behaviors.

This paternalism frames a biased regulatory and legal paradigm that claims to benefit the Black community while authorizing policing that brutalizes Black people. This paternalism legitimizes authoritarian policing.

VI. AUTHORITARIAN POLICE SILENCING OF BLACK CULTURAL VOICE

American policing has also appeared in more conventional authoritarian forms through efforts to silence oppositional Black cultural expression on political issues. Professor Glasius explains in her description of authoritarian practices that voices subject to sabotage can be expressed in rap music.⁶⁸ Two specific examples demonstrate this. First, federal police agents sought to silence rap music containing political messages protesting poverty and oppressive police presence in

60. See *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200–01 (1989).

61. See Hasbrouck, *supra* note 8, at 202.

62. See Schrader, *supra* note 55, at 602.

63. See Malaika Jabali, *If You're Surprised by How the Police Are Acting, You Don't Understand US History*, GUARDIAN: OPINION (June 5, 2020, 5:30 PM), <https://www.theguardian.com/commentisfree/2020/jun/05/police-us-history-reform-violence-oppression> [https://perma.cc/TK4Q-MNN9].

64. See Gary Potter, *The History of Policing in the United States*, EKU ONLINE (June 25, 2013), <https://plsonline.eku.edu/sites/plsonline.eku.edu/files/the-history-of-policing-in-us.pdf> [https://perma.cc/L5W5-GQXS].

65. See Schrader, *supra* note 55, at 604–05.

66. See *id.* at 607.

67. See *id.* at 602.

68. See Glasius, *supra* note 2, at 528.

Black communities—the popular 1990s N.W.A. rap song, “F--- Tha Police.”⁶⁹ Second, according to British-born Black rap star 21 Savage’s lawyers, federal agents in U.S. Immigration and Customs Enforcement (ICE) detained the artist on February 3, 2019 for overstaying his visa following his release of a popular video for a song that criticized American immigration enforcement policies.⁷⁰

This structurally biased paternalistic policymaking that has resulted in authoritarian policing can be transformed. As Kaaryn Gustafson concluded in her paper on the criminalization of poverty, “U.S. policymakers recognize crime as a social problem but refuse to recognize poverty as a social problem. Thus, it is criminals whose actions arouse political and media attention.”⁷¹ This decision-making by state actors, which ignores or supplants the voices of Black communities, has justified authoritarian policing practices and has demobilized subjugated Black communities. Dorothy Roberts calls police terror one leg of the trifecta of anti-democratic systems, along with mass incarceration and capital punishment, intended to impose “a racist order” in America.⁷²

VII. DISABLING BLACK VOICES

Authoritarian policing frames the Black experience as an “Occupied Black State”, culminating in disempowering Black voices. First, as discussed earlier, police surveillance in Black communities drives people’s disengagement from civic life.⁷³ Second, mass incarceration, fed by aggressive policing tactics, serves to disenfranchise and marginalize Black communities, stressing social networks for collective power.⁷⁴ Third, as historic targets of voter suppression tactics, Black people have faced escalated voter suppression campaigns since the 2013 Supreme Court decision in *Shelby County v. Holder*,⁷⁵ which effectively struck down a key Voting Rights Act of 1965 provision requiring certain states

69. See Peter Hart, *Straight Outta Compton’s Censorship Lesson*, NAT’L COAL. AGAINST CENSORSHIP (Aug. 25, 2015), <https://ncac.org/news/blog/straight-outta-comptons-censorship-lesson> [<https://perma.cc/HEW3-LCYA>]; see also NWA, F--- THA POLICE (Ruthless Records and Priority Records 1988) (with lyrics including “F--- the police comin’ straight from the underground A young n--- got it bad ‘cause I’m brown And not the other color so police think They have the authority to kill a minority”); Steve Hochman, *Compton Rappers Versus the Letter of the Law: FBI Claims Song by N.W.A. Advocates Violence on Police*, L.A. TIMES (Oct. 5, 1989), <https://www.latimes.com/archives/la-xpm-1989-10-05-ca-1046-story.html> [<https://perma.cc/VG U5-L4JX>].

70. See Gina Cherehus, *U.S. Targeted 21 Savage For His Rap Lyrics, Lawyer Says*, REUTERS (Feb. 15, 2019, 9:49 AM), <https://www.reuters.com/article/us-people-21-savage-idUSKCN1Q41TC> [<https://perma.cc/Q59C-LHHC>].

71. Gustafson, *supra* note 10, at 337.

72. Roberts, *supra* note 27, at 284.

73. Prowse et al., *supra* note 12, at 1450.

74. See Roberts, *supra* note 27, at 280.

75. *Shelby County v. Holder*, 570 U.S. 529 (2013).

to obtain federal approval prior to making changes in their election procedures.⁷⁶ The Black Census Project estimates that in 2016, felony convictions were responsible for the disenfranchisement of 2.2 million Black Americans, 7.4% of the Black voting-age population.⁷⁷ In 2016, voter turnout for Black Americans fell to 59.4% from the previous high of 66.6% in 2012.⁷⁸ Together with other forces, the state, through authoritarian policing, has engaged in a pattern of acts disempowering Black communities. This is what Professor Glasius discusses in regimes, and what applies here: “an active practice of disrupting or sabotaging accountability”⁷⁹ to those communities.

VIII. TRANSFORMING OUR BROKEN DEMOCRACY

Authoritarian policing of the Black State is a two-level tragedy of malfeasance by state actors: first, policymakers in local, state, and federal bodies and, second, police institutions, which are their agents. This oppressive authoritarian rule of Black people and Black communities can be abolished, but not with ill-fated pedestrian measures that lack capacity to eradicate systemic practices or to heel hegemonic police officers or their enabling police institutions. It can only be dissolved through a transformation of our approach and our values: we must actualize the participatory democracy for which we have a promise in the United States Constitution.

IX. A DEMOCRATIC APPROACH TO POLICING POLICY

The policies and practices that created the Occupied Black State must and can be disbanded through the state’s commitment to an inclusive transformative participatory policymaking paradigm founded on pro-democratic principles.⁸⁰ While Professor Glasius’ authoritarianism definition does not seek to characterize what might constitute a democracy,⁸¹ her schemata lends itself to envisioning model pro-democratic practices. These possibilities suggest a model for policymakers to disrupt authoritarian policing practices through democratizing their decision-making processes.

76. REP. DON BEYER OF THE JOINT ECON. COMM., 116TH CONG., REP. ON THE ECONOMIC STATE OF BLACK AMERICA IN 2020, at 21 (Comm. Print 2020).

77. BLACK FUTURES LAB, *supra* note 47, at 16.

78. REP. DON BEYER OF J. ECONOMIC COMM., 116TH CONG., REP. ON THE ECONOMIC STATE OF BLACK AMERICA IN 2020, at 21 (Comm. Print 2020).

79. *See* Glasius, *supra* note 2, at 521.

80. *See generally* Roberts, *supra* note 27.

81. *See* Glasius, *supra* note 2, at 521.

X. ACCOUNTABILITY MEASURES THROUGH INCLUSIVE POLICY-MAKING PRACTICES

Federal, state, and local legislative and regulatory bodies should commit to adopting guiding principles, values, and policies that fortify and advance Black mobilization and power⁸² and should commit to operationalizing these principles, values, and policies through funding civic infrastructures in Black communities. Here are some suggestions:

1. Legislators should center their regulatory framework, processes, and programs around values that promote democratic governance: Black community agency and dignity, humility, and empathy.
2. Inclusive policy-making practices should lead legislature's approach to governance. They should support practices for impacted people that are accountable to and led by Black community members harmed by authoritarian policing.
3. A best interest of the Black community framework for impacted Black communities when passing new laws or regulations should guide development of affirmative laws, regulations, practices, and actions by the state and localities that are purported to benefit Black communities. Such programs and projects should advance Black communities in the areas of physical and mental health needs, supporting human dignity and cultural expression.
4. All policy measures before a legislative or regulatory body for consideration that are likely to have a detrimental impact on Black communities, such as police racial profiling measures, should undergo an analysis of Black Community Adversity Impact (BCAI). The BCAI analysis would serve to highlight needed modifications to mitigate adverse effects upon the safety, mental health, physical health, economic well-being, social well-being, and dignity of Black people.
5. The substantive standards for policymaking in the "best interest" of the Black community should be consonant with the highest quality of life and human dignity, consistent with international human rights principles for children and families.⁸³
6. The principles should be operationalized through funding an infrastructure of neighborhood-based civic-cultural centers in Black communities that serve as venues to facilitate an exchange of ideas for envisioning a future around police dissolution, reform or reduction; and to support, monitor, evaluate, report, and take future action with respect to long-term outcomes. These spaces should provide channels between community members and political officials and should support

82. See Symposium, *Police in America: Ensuring Accountability and Mitigating Racial Bias* Feat. Paul Butler, 11 NW. J. L. & SOC. POL'Y. 385, 396 (2017) (describing the power of community mobilization in addressing policing tactics).

83. See Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3, 46.

engagement through Black American cultural traditions of storytelling, music, and fine arts as political expression. Among other benefits, this infrastructure would develop and cultivate a pipeline of activists and aspirants to elective office. Through this system, the lifeblood of accountable government and Black community agency and political participation would include sustenance for the dignity and well-being of Black people, Black communities, and a health democracy.

This model would engender state accountability for its policing policies. The proposed infrastructure would facilitate state inclusion of Black community leadership, ideas, concerns, and solutions regarding policing policies and the range of critical inequities that impact Black lives, communities, and futures.⁸⁴

CONCLUSION

As the country crafts policy solutions to the festering problem of police policies and practices that degrade, occupy, and demobilize Black communities, officials around the country should be guided by core values. Central to this is respect for the agency of Black people at the neighborhood, community, and national levels to lead the assessment and problem-solving approach to persistent racialized inequities. As the Black Census authors warn, “Political leaders who rely on the political participation of Black people must pay attention and act on the concerns of Black Census respondents if they want Black communities to remain engaged or mobilize further.”⁸⁵ The proposed model in this paper would foster power, action, and pathways to change with policymakers and allies.

Black-led policymaking in a participatory democratic framework will forge a path to a transformative reality for Black American lives and communities. The oppressive regulatory paradigms by elitist state actors that produce racialized coercive policing propel Black community impoverishment and Black community disempowerment. These approaches can, and should, be reimaged. As Black and allied lawyers and activists advance new possibilities for, while also reducing harm against, Black people, such as through a solidarity economy,⁸⁶ rethinking police budgets, strengthening social citizenships, and liberating Black people from physical, economic, and political oppression, there is more that these lawyers must do. They must prioritize disruption of the anti-democratic forces of the paternalistic policymaking industrial complex that perpetuate the inherently broken policing reform agenda. That flawed agenda aids and abets injustice against Black people. Instead, lawyers

84. Glasius, *supra* note 2, at 525.

85. BLACK FUTURES LAB, *supra* note 47, at 8.

86. Renee Hatcher, *Solidarity Economy Lawyering*, 8 TENN. J. RACE GENDER & SOC. JUST. 23, 24 (2019).

must build a framework for state action that fulfills the promise of our constitutional democracy: Black community agency and Black power that will ensure authoritarian policing is abolished. This can be made possible by prioritizing the well-being and liberation of the Occupied Black State, through enshrining Black civic inclusion and Black civic leadership in all of our public and private institutions and decision-making bodies, from the smallest units of our polity in urban and rural communities to our largest policymaking entities on the global stage. This work is not easy: it must be pursued until it is accomplished!

THE LAW SCHOOL CURRICULUM AND THE MOVEMENT FOR BLACK LIVES

Teri A. McMurtry-Chubb*

Abstract

This Article discusses how faculty can substantively address white supremacy in the law school curriculum as part of the Movement for Black Lives. Because legal education sets how law students are taught to think about public policy and racial justice in the legal system, law schools' failure to educate students critically about white supremacy in the core law school curriculum makes them active participants in the legal system's devaluation of Black lives.

INTRODUCTION	27
I. RECRUITMENT, RETENTION, AND THE MOVEMENT FOR BLACK LIVES.....	28
II. THE MOVEMENT FOR BLACK LIVES IN THE CLASSROOM.....	30
A. <i>Teaching the Movement for Black Lives in Criminal Law: Grappling with Goetz</i>	32
III. THE MOVEMENT FOR BLACK LIVES IN LEGAL REASONING	36
A. <i>Integrating the Movement for Black Lives into Civil Procedure: Re-Framing Iqbal & Twombly</i>	37
IV. BEYOND REPRESENTATION IN THE MOVEMENT FOR BLACK LIVES.....	39
CONCLUSION.....	40

INTRODUCTION

Do Black Lives Matter in the law school curriculum? What would it look like if they did? The killings of Breonna Taylor, Ahmaud Arbery, and George Floyd brought with them protests, police response, and political maneuverings as White Americans were forced to grapple with their own fragility¹ and the fragility of Black lives. Black lives—students, staff, faculty, and administrative—remain fragile in U.S. law schools where their presence is used as evidence of racial progress even as

* Professor of Law, University of Illinois at Chicago Law School. The author thanks God, whose blessings are too numerous to count, and her husband, Mark Anthony Chubb, who reaffirms that their Black Lives Matter every day.

1. ROBIN D'ANGELO, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM (2018).

institutional commitments to Black lives stall beyond simple representation.² Like most academic institutions, law schools look to the superficial recruitment of Black students and faculty, and hire Black administrative staff, while turning a blind eye to the substantive work of providing inclusive environments that support its Black lives academically through graduation;³ during the tenure and promotion processes; and through mentorship and sponsorship,⁴ wage equity, and transparent hiring practices. As law schools re-open in the midst of a global health pandemic, we must face the pandemic of white supremacy that pervades all levels of law school operations. Black lives in law school are neither fungible and interchangeable, nor valuable only to prove an institution's commitment to diversity, equity, and inclusion (DEI) efforts. Rather, law schools must examine how the manner in which they train law students for law practice either serves or undermines the cause of justice.

I. RECRUITMENT, RETENTION, AND THE MOVEMENT FOR BLACK LIVES

Asserting that Black lives matter in law school is a controversial proposition that draws ambiguous affirmation. When Justice Sandra Day O'Connor authored her opinion in *Grutter v. Bollinger*,⁵ she revealed how law schools view Black lives in the context of legal education and who benefits from their presence.⁶ In examining whether the University of Michigan Law School's affirmative action admissions policy passed Constitutional muster, she wrote:

[T]he Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

2. Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489, 505–11 (2019).

3. *Id.* at 510.

4. *Id.*; Sponsorship differs from mentorship, in that a mentor acts as a senior advisor because they have "walked" the way their mentees wish to walk. A sponsor acts as an advocate within their sponsee's institution or field to advocate for their interests and advancement. For more on sponsorship see Robin C. Hilsabeck, *Comparing Mentorship and Sponsorship in Clinical Neuropsychology*, 32:2 THE CLINICAL NEUROPSYCHOLOGIST 284 (2018); Manasa Ayyala et al., *Mentorship Is Not Enough: Exploring Sponsorship and Its Role in Career Advancement in Academic Medicine*, 94:1 ACAD. MED. 94 (2019).

5. 539 U.S. 306 (2003).

6. *Id.* at 330–31.

The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."⁷

These "benefits" have not necessarily accrued to Black students. Rather, they make Black students' acceptable presence in law school contingent on their ability to promote cross-racial understanding, break down stereotypes, and contribute enlightenment and interest to the classroom conversation. Black law students are placed in a position to continually prove that they deserve a place in their law school classes, while White students are presumed to belong there. These are the hidden assumptions on which diversity in legal education rests. The benefits that Justice O'Connor wrote about are unidirectional—historically, law schools have not been overly concerned about what benefits, if any, Black students receive from their interactions with White students in law school classrooms, and have not pondered their commitment to Black student success.⁸

DEI professionals have been in high demand to provide resources to help faculty address racial inequities and the macro and microaggressions that polarize their classrooms.⁹ However, DEI trainings alone are ineffective to address structural inequities in higher education and the professions.¹⁰ As a preliminary matter, any DEI training that does not differentiate between its White participants and participants of color to meet the separate needs of each is ineffective on its face. First, while every person of color is not an expert on race and gender issues, absent careful and considered study on the same, people of color do have personal experiences with White supremacy and patriarchy that are distinct from their White peers. Forcing people of color to sit through the same DEI training as their White colleagues ignores these experiences, and fails to acknowledge that trauma informed strategies are necessary to negotiate institutional relationships strained by racial macroaggressions,

7. *Id.* at 330.

8. Jessica C. Harris et al., *Who Benefits?: A Critical Race Analysis of the (D) Evolving Language Of Inclusion in Higher Education*, THOUGHT AND ACTION, Winter 2015, <https://vtechworks.lib.vt.edu/bitstream/handle/10919/84030/EquitySocialJustice.pdf?sequence=1&isAllowed=y> [<https://perma.cc/DJS5-GFRT>].

9. The perspectives that Professor McMurtry-Chubb offers here are based on her experience as a DEI consultant.

10. See, e.g., Frank Dobbin & Alexandra Kalev, *Why Doesn't Diversity Training Work? The Challenge for Industry and Academia*, 10:2 ANTHROPOLOGY NOW 48 (2018).

microaggressions, and racially discriminatory practices.¹¹ Second, White DEI training participants are often resentful of required trainings and take that resentment out on their colleagues of color explicitly through macro and microaggressions.¹² To the extent that these trainings center whiteness, primarily in attempts to minimize White resentment and soft-pedal discussions of racial inequity, they act in obeisance to white supremacy. Third, without a change in campus culture or an administration willing to make deep substantive changes to every area of law school operations, these trainings are but one drop in an ocean of discriminatory, harmful attitudes and practices. Unless critical interventions are introduced into legal education, it is unlikely that lawyers will cease to replicate inequities in the way they conceptualize, frame, interpret, and apply the law.¹³

II. THE MOVEMENT FOR BLACK LIVES IN THE CLASSROOM

The foundational pedagogy for any inclusive and equitable classroom should be one that focuses on the relationship between professor and student.¹⁴ This point may seem obvious, but it is paramount when considering faculty requests to “receive training on how to facilitate difficult conversations in the classroom.”¹⁵ On the surface, this request seems reasonable. However, it is a request that actually reinforces racial hierarchies in relationships between Black professors and their peers and Black professors and their students. Black professors and their non-White counterparts do not necessarily have the option of avoiding issues of privilege and power when they enter a classroom setting. On the contrary, students often see their ability to teach them (or not) through the lenses

¹¹ See, e.g., William Ming Liu, Rossina Zamora Liu, Yunkyoung Loh Garrison, et. al., *Racial Trauma, Microaggressions, and Becoming Racially Innocuous: The Role of Acculturation and White Supremacist Ideology*, 74 *American Psychologist* 1 (2019); Thema Bryant-Davis, *Microaggressions: Considering the Framework of Psychological Trauma in Microaggression Theory: Influence and Interpretation* 86-101 (2018).

¹² See, e.g., Michael Mobley & Tamara Payne, *Backlash! The Challenge to Diversity Training*, 46:12 *TRAINING & DEVELOPMENT* 45 (1992).

¹³ See, e.g., Teri A. McMurtry-Chubb, *The Practical Implications of Unexamined Assumptions: Disrupting Flawed Legal Arguments to Advance the Cause of Justice*, 58 *WASHBURN L.J.* 531 (2019) (detailing the results of a six-year empirical research study that showed how student attitudes about race, class, gender, and sexuality impacted their ability to formulate viable legal arguments).

¹⁴ Sean Darling-Hammond and Kristen Holmquist, *Creating Wise Classrooms to Empower Diverse Law Students: Lessons in Pedagogy from Transformative Law Professors*, 25 *BERKELEY LA RAZA L.J.* 1, 1, 9, 17–19 (2015) (describing methods law professors use to create inclusive classrooms where all students can succeed).

¹⁵ John D. Vogelsang & Sophia McGee, *Handbook for Facilitating Difficult Conversations in the Classroom* (2015), <http://teach.ufl.edu/wp-content/uploads/2016/07/Handbook-for-Facilitating-Difficult-Conversations2.pdf> [<https://perma.cc/U9GZ-TJSA>] (an example of a guidebook used to facilitate difficult classroom discussions).

of White supremacy and patriarchy.¹⁶ Accordingly, most professors of color do not have the option of avoiding discussions about privilege and power—they are part and parcel of our experience as educators. Yet, throughout our teaching careers, we are placed in environments where our institutions do not recognize this emotional and psychological labor, another dimension of our daily work. Our career success requires that we learn how to facilitate these discussions alone, without any recognition, support, or training by our institutions, or resources for dealing with our own oppression inflicted trauma.¹⁷

A significant component in creating the best classroom environment is developing meaningful relationships with students.¹⁸ This means understanding who our students are, meeting them where they are, and being clear with ourselves about how much of ourselves we wish to reveal in the education process. Ultimately, the best way to learn how to have difficult conversations in the classroom is to have difficult conversations in the classroom—but with support. Educating educators about appropriate language, key terms, and the foundational tenets for discussing privilege and power is an important first step, but it cannot be the only step. We must create inclusive classroom environments through our willingness to address issues of race and gender discrimination head-on.

16. See, e.g., Derrick Bell & Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 349, 359–61 (1989); Teri A. McMurtry-Chubb, *Writing at the Master's Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 DREXEL L. REV. 41, 43, 45–46, 49–50 (2009); Lorraine Bannai, *Challenged X 3: The Stories of Women of Color Who Teach Legal Writing*, 29 BERKELEY J. GENDER L. JUST. 275, 279–81 (2014); MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* (2019); Nantiya Ruan, *Papercuts: Hierarchical Microaggressions in Law Schools*, 31 HASTINGS WOMEN'S L. J. 3, 4, 13 (2019).

17. Anahvia Moody & Jioni Lewis, *Gendered Racial Microaggressions and Traumatic Stress Symptoms Among Black Women*, 43 *Psychology of Women Quarterly* 2 (2019); Monnica T. Williams, Destiny M.B. Printz & Ryan C.T. DeLapp, *Assessing Racial Trauma with the Trauma Symptoms of Discrimination Scale*, *Psychology of Violence* (2018), https://www.researchgate.net/profile/Monica-Williams/publication/328010708_Assessing_Racial_Trauma_With_the_Trauma_Symptoms_of_Discrimination_Scale/links/5bd50d7692851c6b27931976/Assessing-Racial-Trauma-With-the-Trauma-Symptoms-of-Discrimination-Scale.pdf [https://perma.cc/48DZ-WFVY].

18. See *Why Strong Teacher Relationships Lead to Student Engagement and a Better School Environment*, WATERFORD.ORG (Apr. 29, 2019), <https://www.waterford.org/education/teacher-student-relationships/>.

A. *Teaching the Movement for Black Lives in Criminal Law:
Grappling with Goetz*

The core legal curricular canon is dense with cases that reiterate to students that Black lives do not matter. *People v. Goetz*,¹⁹ which details Bernard Goetz's shooting of four unarmed young Black men on a New York City subway, is one such case.²⁰ It evokes strong feelings when taught, and is either memorable to Black law students for how their professor mishandled the classroom discussion by failing to address its racial dynamics, or meaningful because of how their professor embraced a rich discussion on how white supremacy shapes legal definitions of reasonableness in the context of self-defense.²¹

The events that lead Bernard Goetz to shoot Troy Canty (age 19), Darryl Cabey (age 19), James Ramseur (age 18), and Barry Allen (age 19) transpired on Saturday, December 22, 1984, on an IRT express train from the Bronx to lower Manhattan.²² On that day, the four young men approached Goetz on the train.²³ James and Darryl had screwdrivers inside of their coats, which they had previously used to extract coins from video game machines.²⁴ Goetz boarded the train and sat down in the rear section of the same car the young men occupied.²⁵ He was carrying an unlicensed .38 tucked in a waistband holster and had loaded the gun with five rounds of ammunition.²⁶

Troy and Barry approached Goetz, and Troy said to him "give me five dollars."²⁷ None of the young men, including Troy and Barry, had any visible weapons.²⁸ At the time Troy spoke to Goetz, Goetz stood and fired four shots—each right after the other.²⁹ Shot one hit Troy in the chest.³⁰ Shot two hit Barry in the back.³¹ The third shot went through James' arm and into his left side.³² Goetz fired the fourth shot at Darryl, but missed him.³³ After regarding the young men he had wounded, Goetz then shot

19. 497 N.E.2d 41 (N.Y. 1986).

20. *Id.* at 43.

21. Leslie P. Culver, *White Doors, Black Footsteps: Leveraging "White Privilege" to Benefit Law Students of Color*, 21 JOURNAL OF GENDER, RACE & JUSTICE 37, 79–80 (2017).

22. *Goetz*, 497 N.E.2d at 43.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Goetz*, 497 N.E.2d at 43.

27. *Id.* (citation omitted).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Goetz*, 497 N.E.2d at 43.

33. *Id.*

a fifth bullet at Darryl.³⁴ It entered the rear of Darryl's side and severed his spinal cord.³⁵ When the conductor came into the car afterward, Goetz told him that Troy, Darryl, James, and Barry had tried to rob him.³⁶

Bernard Goetz fled the subway car where the shooting occurred, and then left the state for Concord, New Hampshire where he spent the holiday.³⁷ Nine days later, on December 31, 1984, he surrendered to the police in Concord after identifying himself as the New York subway shooter.³⁸ He later told the police that in shooting the young men he wanted to "murder [them], to hurt them, to make them suffer as much as possible."³⁹ Goetz also told the police that before shooting Darryl Cabey with the shot that severed his spinal cord he said "you seem to be all right, here's another."⁴⁰ Lastly, Goetz told police that "if [he] had . . . more bullets, [he] would have shot them again. . . ."⁴¹

Upon his return to New York City, Goetz was arraigned on a charge of attempted murder and criminal possession of a weapon.⁴² The first grand jury only indicted Goetz on a charge of one count of criminal possession of a weapon in the third degree for the gun he used to shoot Troy, Darryl, James, and Barry.⁴³ The grand jury also indicted Goetz on a charge of two counts of criminal possession of a weapon in the fourth degree for guns found in his apartment.⁴⁴ Neither Goetz nor any of the young men testified, although the jury did hear Goetz's statements to the police.⁴⁵ The first grand jury issued no indictment on the attempted murder charge.⁴⁶

The second grand jury indicted Goetz on four charges of attempted murder, four charges of assault, one charge of reckless endangerment, and one charge of criminal possession of a weapon.⁴⁷ Troy and James testified before the second grand jury, and again the jury heard Goetz's statements to the police.⁴⁸ In his presentation to the second grand jury, the prosecutor instructed the jury that in their consideration of whether Goetz could avail himself of the justification of self-defense, the jury had

34. *Id.*

35. *Id.*

36. *Id.*

37. *Goetz*, 497 N.E.2d at 44.

38. *Id.*

39. *Id.* (citation omitted).

40. *Id.* (citation omitted).

41. *Id.* (citation omitted).

42. *Id.*

43. *Goetz*, 497 N.E.2d at 44.

44. *Id.* at 44–45.

45. *Id.* at 44.

46. *Id.* at 45.

47. *Id.* at 45.

48. *Goetz*, 497 N.E.2d at 45.

to determine if “Goetz’s conduct was that of a ‘reasonable man in [Goetz’s] situation.’”⁴⁹

Goetz moved to dismiss the charges in the second indictment on several grounds, including grounds that the prosecutor’s jury instructions with respect to self-defense were incorrect.⁵⁰ The trial court agreed, reasoning that the standard was not objective as the prosecutor instructed, but “wholly subjective, focusing entirely on the defendant’s state of mind when he used such force.”⁵¹ The Appellate Division affirmed the decision, but gave the state of New York leave to appeal.⁵²

The Appellate Court framed the issue as whether the use of deadly force as self-defense is justified under a subjective standard, which focuses on the defendant’s state of mind.⁵³ It found that the standard for self-defense is both objective and subjective, meaning that the finder of fact must determine if the actions were reasonable to the defendant and reasonable under the circumstances.⁵⁴ In the court’s words:

[T]he [l]egislature [did not intend] . . . to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm. To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.⁵⁵

Goetz claimed that he perceived that Troy, Darryl, James, and Barry were a threat to him because when Canty asked him “how are you,” moved close to him and smiled, Goetz “knew from the smile on Troy’s face that he wanted to ‘play with [him].’”⁵⁶ His perception was also informed by being mugged on two prior occasions, even though he confirmed that none of the young men possessed a gun.⁵⁷ In essence, the court’s ruling allowed the jury at Goetz’s trial to decide whether Goetz’s belief that four unarmed young Black men were dangerous was reasonable to him, based on his previous experiences with violence. The

49. *Id.* at 46.

50. *Id.* at 45.

51. *Id.* at 46.

52. *Id.*

53. *Id.*

54. *Goetz*, 497 N.E.2d at 49–50.

55. *Id.* at 50.

56. *Id.* at 44.

57. *Id.*

court also required the jurors to examine whether Goetz's act of firing a gun, in an enclosed subway car at four unarmed young Black men, was reasonable under the circumstances.⁵⁸ Although on its face, the court's clarification of the self-defense standard attempts to do justice, it in no way considers that the "circumstances" under which a jury would evaluate the objective reasonableness of Goetz's actions normalizes young Black men as dangerous. In a society infused with white supremacy, such perceptions are not "aberrational," "bizarre" or "delusional" even though they undermine the cause of justice.

To set the stage for a classroom discussion that seeks to reveal white supremacy in determinations of reasonableness in the use of deadly force against Black people, a professor can contextualize stereotypes about Black men legally and historically when they assign the Goetz case. Short articles, such as the blog post *Antebellum Law is the Precedent for Today's White-on-Black Violence*⁵⁹ about the killing of Ahmaud Arbery or Patrisse Cullors' op-ed *On Trayvon Martin's birthday we remember his life and why we fight for black lives*⁶⁰ are short, easy reads that provide an alternate lens through which students will read the text of the legal opinion. During the classroom discussion, the professor can show clips of the news footage from the day of the shooting and subsequent interviews with Goetz years later, which are widely available online. The interview clips in particular show how Goetz viewed his actions. For example, in an interview with Dateline NBC twelve years after the shooting, Goetz remarked "society is better off without certain people, whether one believes they should be killed or locked up or used for forced slavery. It's just a matter of one's political point of view."⁶¹

Lastly, questions to guide the classroom discussion might include:

1. Is the reasonable person standard a race and gender-neutral standard?⁶²

58. *Id.* at 52.

59. Elizabeth Berenguer, Lucy Jewel, & Teri A. McMurtry-Chubb, *Antebellum Law is the Precedent for Today's White-On-Black Violence*, L. PROFESSOR BLOGS NETWORK: RACE AND THE L. PROF BLOG (June 13, 2020), <https://lawprofessors.typepad.com/racelawprof/2020/06/antebellum-law-is-the-precedent-for-todays-white-on-black-violence-by-professors-elizabeth-berenguer.html> [https://perma.cc/55KT-LG4X].

60. Patrisse Cullors, *On Trayvon Martin's Birthday, We Remember His Life and Why We Fight for Black Lives, Think*, NBC NEWS (Feb. 5, 2018, 12:54 PM), <https://www.nbcnews.com/think/opinion/trayvon-martin-s-birthday-we-remember-his-life-why-we-ncna844711> [https://perma.cc/YDN4-USKG].

61. Stone Phillips, *Interview with Bernard Goetz*, YOUTUBE (Feb. 16, 2008), <https://www.youtube.com/watch?v=VVkUytZCzJ8> [https://perma.cc/U7ES-858M] (originally on Dateline NBC).

62. Note: I include gender, because I want students to get the connection between white supremacy and patriarchy as applied in discriminatory ways to Black men. For more on the tortured white supremacist, patriarchal and capitalist history of the reasonable person standard,

2. If not, in what ways does the court infuse it with racial and gendered meanings?
3. Given the readings and videos that you have watched, what are some ways that the court could have included the history of informal policing in its determination of whether Goetz acted reasonably under the circumstances?
4. Would including this history have led to a just and equitable result?
5. If Goetz had been a Black man, who shot four White young men under the same circumstances, would the court have reached a similar result? Explain your answer.

By modeling critical reading of the reasonable person standard in a criminal law class, a professor can shape how a student both understands this concept in their other classes and utilizes critical reading methods as they study cases throughout law school.

III. THE MOVEMENT FOR BLACK LIVES IN LEGAL REASONING

Legal reasoning is a skill that law professors teach across the curriculum. Yet, we do not problematize the fact that legal reasoning is imbedded in Western rhetorical and reasoning forms.⁶³ In this way, law schools indoctrinate students in the very forms of reasoning that replicate privilege and power.⁶⁴ In order to educate students in a manner that helps them critique how reasoning frameworks impact legal outcomes and thwart lawyers' best intentions to "do" justice, we must disrupt this indoctrination. When this disruption occurs early in a law student's career, it can impact that law student's level of critical thinking in all of their law school classes.

Law and legal language are unique in that they instantiate racial and power relations by privileging Western rhetorical and reasoning forms—especially *logos* or logical reasoning.⁶⁵ In the practical, day-to-day work of teaching and learning, legal language excludes non-Western epistemologies (ways of knowing) and ontologies (ways of being) by forcing conformity through traditional legal process methods disguised

see Lucy Jewel, *Does the Reasonable Man Have Obsessive Compulsive Disorder*, 54 WAKE FOREST L. REV. 1049 (2019).

63. See generally Elizabeth Berenguer, Lucille Jewell & Teri A. McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 205 (2020).

64. *Id.*

65. *Id.*

as neutral and universal. In re-thinking our courses, we must work to reframe them in a manner that lays bare the work of white supremacy and exposes how it is a direct threat to effecting justice in Black lives.

A. *Integrating the Movement for Black Lives into Civil Procedure*⁶⁶:
Re-Framing Iqbal & Twombly

*Ashcroft v. Iqbal*⁶⁷ and *Bell Atlantic Corporation v. Twombly*⁶⁸ are foundational to law students' understanding of how to draft complaints. *Iqbal* reaffirms that legal conclusions in a complaint are not presumed to be true.⁶⁹ *Twombly* requires a complaint to contain sufficient factual allegations to "state a claim [for] relief that is plausible on its face."⁷⁰ These cases and the rules that they establish are usually taught as non-controversial, straightforward "rules" with no racial dynamic. The case *Equal Employment Opportunity Commission v. Catastrophe Management Solutions, Inc.*⁷¹ is illustrative of how the rules for drafting pleadings are centered in Western reasoning structures that center *logos* and seek to obscure how white supremacy colors legal interpretation and analysis.

Chastity Jones applied for a job with Catastrophe Management Solutions, Inc. (CMS).⁷² At the time of her interview, she was wearing her hair in "locs,"⁷³ or a hairstyle characterized by solid pieces of grouped hairs that are various sizes in width and diameter. CMS offered her the job, but subsequently required that Ms. Jones cut off her locs as a condition of her employment.⁷⁴ CMS cited its company grooming policy, which stated in relevant part that "[a]ll personnel are expected to be dressed and groomed in a manner that projects a *professional* and *businesslike* image while adhering to company and industry standards and/or guidelines. . . . [H]airstyle should reflect a *business/professional image*. No *excessive* hairstyles or unusual colors are acceptable[.]"⁷⁵ When Ms. Jones refused to cut off her locs, CMS rescinded its offer.⁷⁶ In

66. For scholarship that approaches civil procedure critically, see, e.g., Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and its Detrimental Impact on Civil Rights*, 92 WASH U. L. REV. 455 (2014). The focus of this part of this Article is to give professors one curricular example of how to critically reframe a key concept in a civil procedure course.

67. 556 U.S. 662 (2009).

68. 550 U.S. 544 (2007).

69. *Iqbal*, 556 U.S. at 681.

70. *Twombly*, 550 U.S. at 570.

71. *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018 (11th Cir. 2016).

72. *Id.* at 1021.

73. *Id.*

74. *Id.* at 1021–22.

75. *Id.* at 1022 (emphasis added).

76. *Id.*

calling her hair “dreadlocks,” literally dreaded (undesirable) hair, CMS placed it in the category of unprofessional and non-businesslike, excessive and beyond the scope of its acceptable grooming practices.

The Equal Employment Opportunity Commission (EEOC) filed a complaint on behalf of Ms. Jones, alleging that CMS’ actions violated Title VII’s prohibitions on race discrimination.⁷⁷ CMS moved to dismiss the EEOC’s complaint, alleging that it failed to state a claim upon which relief could be granted.⁷⁸ Citing *Iqbal* and *Twombly*, CMS argued that “[the EEOC’s] complaint lacks both the foundation of a legally viable claim for relief and the factual basis to create even an inference of intentional discrimination. Specifically, [CMS] maintains as its sole contention that a dreadlock hairstyle is not an immutable characteristic, one which indicates race. Therefore, [CMS’] policy of prohibiting such hairstyles is not actionable under Title VII.”⁷⁹

Four averments in the EEOC’s complaint illustrate how white supremacy informs what is a legal conclusion and what is a sufficient factual allegation. The EEOC plead:

[1] [R]ace “is a social construct and has no biological definition.”

[2] “[T]he concept of race is not limited to or defined by immutable physical characteristics.”

[3] [T]he “concept of race encompasses cultural characteristics related to race or ethnicity,” including “grooming practices.”

[4] [A]lthough some non-black persons “have a hair texture that would allow the hair to lock, dreadlocks are nonetheless a racial characteristic, just as skin color is a racial characteristic.”⁸⁰

Although the EEOC later moved to amend its complaint, it maintained that its initial complaint met the pleading standards outlined in *Iqbal* and *Twombly*. It argued:

[The] amended complaint outlines the historical relations between Blacks and Whites in the United States [and] includes an ugly history of degradation of, and discrimination against, Blacks because of the unique texture of their natural hair dating back to the introduction of slavery

77. *EEOC*, 852 F.3d at 1020.

78. *Id.*

79. Plaintiff’s Brief in Opposition to Defendant Catastrophe Management Solutions’ Motion to Dismiss, *EEOC v. Catastrophe Mgmt. Solutions Inc.*, 852 F.3d 1018 (2016), 2014 WL 4745282, at *1.

80. *EEOC*, 852 F.3d at 1022 (reformatted for clarity).

in the United States. And, the proposed Amended Complaint goes on to allege due to the larger society's normative standards and expectations that Blacks wear their hair in a manner similar to whites, i.e. straightened, Defendant's application of the policy with the ban on [locs] is discriminatory. Finally, the amended complaint spells out that [n]on-Blacks were not subjected to this broad-brush in the implementation of the Defendant's grooming policy—i.e., that the manner in which they manage the natural construct of their hair, regardless of the style in which they wear it, prohibits their employ. Thus, neutralizing the court's argument that [loc'd] hair is not unique to African Americans and that it is beyond the cavil of Title VII.⁸¹

Nevertheless, the court granted CMS's Motion to Dismiss, reasoning that based on the allegations in the EEOC complaint, it could not "identify each of the material elements necessary to sustain a recovery under some viable legal theory."⁸²

The court's reasoning illuminates how white supremacy cannot hold space for any racial knowledge that does not place it at the center. Within its Western reasoning paradigms,⁸³ a hairstyle is just a hairstyle, devoid of cultural meaning or culturally specific grooming practices that best suit its texture. Reframing the pleading rules in the context of white supremacy leads students to question their presentation as neutral, and to understand how legal interpretation is not devoid of value judgments based on misunderstandings about race and gender.

IV. BEYOND REPRESENTATION IN THE MOVEMENT FOR BLACK LIVES

Sixteen years after *Grutter*, in 2019, the ABA reported that only 15% of lawyers in the United States are racial and ethnic minorities.⁸⁴ The statistics for law professors are equally abysmal. As of 2009, the last year for which the Association of American Law Schools published such data, of the approximately 10,965 law professors in the United States, 409 law professors were Black women (3.73%) and 344 (3.14%) were Black men.⁸⁵ Even among these professors you would be hard pressed to find graduates outside of T-14 schools or law schools in the top fourteen of

81. Memorandum in Support of Motion for Leave to Amend Complaint, EEOC v. Catastrophe Mgmt. Solutions Inc., 852 F.3d 1018 (2016), 2014 WL 4745295, at *4.

82. *Id.* at 2.

83. Teri A. McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a "Woke" Legal Academy*, 21 THE SCHOLAR 255 (2019).

84. Nicole Black, *ABA 2019 Report: Lawyer Demographics, Earnings, Tech Choices, and More*, MYCASE, <https://www.mycase.com/blog/2019/08/aba-2019-report-lawyer-demographics-earnings-tech-choices-and-more/> [<https://perma.cc/MNS6-H9L2>] (last modified Aug. 24, 2020).

85. Meera E. Deo, *Looking Forward to Diversity in Legal Academia*, 29 BERKELEY J. GENDER L. & JUST. 352, 356–57 (2014).

the U.S. News and World Report rankings.⁸⁶ For example, much is made of the increasing number of Black women law deans over the last three years. However, of their number (twenty-four), only nine (37.5%) did not graduate from a law school ranked in the T-14.⁸⁷ This is not to diminish the accomplishments of any of these law deans', which are extraordinary, but to give law schools pause when considering faculty and administrative hiring as a significant DEI effort.

CONCLUSION

Representation is important—if you cannot see yourself in your teachers, professors, and lawyers, then it is hard to believe that you can aspire to be them one day. But representation is not representation when lawyers and law professors of color are recruited who conform to normative standards that center white supremacist, patriarchal, and

86. See, e.g., Michael J. Higdon, *A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias*, 87 ST. JOHN'S L. REV. 171, 178–79 (2013); Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1206–07 (2008).

87. The following law deans have been hired over the last three years at their respective institutions; where they attended law school is noted in parentheses after their name:
 Angela Onwuachi-Willig, Boston University (University of Michigan Law School)
 Kimberly Mutcherson, Rutgers-Camden (Columbia Law School)
 Song Richardson, UC Irvine (Yale Law School)
 Tamara Lawson, St. Thomas-Miami (University of San Francisco School of Law)
 Michèle Alexandre, Stetson (Harvard Law School)
 Marcilynn A. Burke, University of Oregon (Yale Law School)
 Danielle M. Conway, Penn State-Dickinson Law (Howard University School of Law)
 Danielle Holley Walker, Howard (Harvard Law School)
 Renée McDonald Hutchins, University of the District of Columbia (Yale Law School)
 Verna Williams, University of Cincinnati (Harvard Law School)
 Camille A. Nelson, Hawaii (LLM Columbia Law School)
 Joan R.M. Bullock, Texas Southern University Thurgood Marshall School of Law (University of Toledo College of Law)
 Felicia Epps, University of North Texas—Dallas (Creighton University School of Law)
 Carla Pratt, Washburn University (Howard University School of Law)
 Patricia Bennett, Mississippi College School of Law (Mississippi College School of Law)
 Dayna Matthew, George Washington (University of Virginia School of Law)
 Eboni Nelson, University of Connecticut (Harvard Law School)
 Browne Lewis, North Carolina Central (University of Minnesota School of Law)
 Sean Scott, California Western Law (New York University School of Law)
 Camille Davidson, Southern Illinois (Georgetown University Law Center)
 Karen Bravo, University of Indiana-Indianapolis (Columbia University School of Law)
 Deidré A. Keller, FAMU (Emory University School of Law)
 Cassandra Hill, Northern Illinois (Howard University School of Law)
 Latonia Haney Keith, Interim Dean, Concordia University School of Law (Harvard Law School)
 This list was obtained from Dean Angela Onwuachi-Willig and Associate Dean Catherine Smith via e-mail transmission on 7/31/2020.

hierarchical notions of quality and excellence. As its mirror, representation can neither stand as a sole challenge to imbedded white supremacist and patriarchal practices in professional education, nor as a proxy for the substantive changes needed in professional school curricula to advance the cause of justice.

In sum, the time for performative DEI measures has come to an end. Law schools must move beyond the superficial to examine how they perpetuate inequities in the core curriculum. They must enact critical interventions that underscore the simple truth - Black. Lives. Matter. Without these steps and more, legal education will continue to challenge the fundamental humanity of Black people and question the value of Black lives.

BLACK LIVES MATTER: TRAYVON MARTIN, THE ABOLITION OF JUVENILE JUSTICE AND #BLACKYOUTHMATTER

Nancy E. Dowd*

I.	DISMANTLING JUVENILE JUSTICE: NOT REFORM BUT “BURNING DOWN THE HOUSE”	46
II.	REDIRECTING OUR SUPPORTS: CULTURAL AND SYSTEMIC CHANGE.....	54
III.	CONCLUSION	56

Seventeen-year-old Trayvon Martin’s 2012 murder and the 2013 acquittal of his killer triggered the #BlackLivesMatter movement.¹ In the evolution of calls for racial justice in the wake of the murder of George Floyd, it is essential that the focus not be unduly narrowed to police as the sole source of harm, to men as the only victims, or to adults as the only targets. The Black Lives Matter movement reminds us that the threat to Black lives is not limited to police, but rather is connected to private citizens as well; is not limited to the criminal justice system, but to the web of systems implicated by systemic racism; and is not limited to adult men, but also includes women and girls, children and youth, even toddlers and babies.² Trayvon Martin’s legacy underscores the importance of

* Professor and David H. Levin Chair in Family Law, and Distinguished University Professor, University of Florida Fredric Levin College of Law. I am grateful for the assistance of Levi Bradford in the preparation of this Essay. I am honored to be a part of this symposium conceived of and organized by the Journal of Law and Public Policy.

1. Jonathan Capehart, *From Trayvon Martin to “BlacklivesMatter,”* WASH. POST, Feb. 27, 2015, <https://www.washingtonpost.com/blogs/post-partisan/wp/2015/02/27/from-trayvon-martin-to-black-lives-matter/> [https://perma.cc/KZC5-9598]. George Zimmerman killed Trayvon Martin February 26, 2012 and in July 2013, Zimmerman was found not guilty. After the verdict, Alicia Garza, Patrisse Collors and Opal Tometi created #BlackLivesMatter in response to the acquittal. *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory/> [https://perma.cc/6SZS-GFMN] (last visited Nov. 1, 2020). The organization is now global. Black Lives Matter initially led demonstrations against private and public violence at the deaths of Michael Brown in Ferguson, Missouri, August 9, 2014; Tamir Rice on November 23, 2014; and Eric Garner, July 17, 2014. For the story of the organization and its current work see Patrisse Cullors, *Black Lives Matter Began After Trayvon Martin’s Death. Ferguson Showed US Staying Power*, NBC NEWS, Jan. 1, 2020, <https://www.nbcnews.com/think/opinion/black-lives-matter-began-after-trayvon-martin-s-death-ferguson-ncna1106651>, including discussion of other groups who have mobilized as well.

2. For an overview of the web of systems that intersect to create inequality, see CHILDREN’S DEFENSE FUND, *THE STATE OF AMERICA’S CHILDREN 2020* (2020), <https://www.childrensdefense.org/wp-content/uploads/2020/02/The-State-Of-Americas-Children-2020.pdf> [https://perma.cc/RZ9Q-CB8N]; see also Nancy E. Dowd, *Children’s Equality Rights: Every Child’s Right to Develop to Their Full Capacity*, 41 CARDOZO L. REV. 1367, 1369 (2020); NANCY E. DOWD, *REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR* (2018) (examining interlocking systems through the lens of the life course of Black boys); BARBARA

remembering and focusing on youth and understanding that the threats posed by racism come not only in the form of lethal private and public violence, but also lesser forms of harm including official incarceration or oversight and unofficial, private, harassment, discrimination, and lack of support. The issues of children and youth are linked to those of adults but also involve unique situations and needs.

In this Essay, I focus on abolition³ of the juvenile justice system, including the virtual elimination of incarceration; the dismantling of the existing juvenile justice (or injustice) system; breaking the school to prison pipeline and the criminalization of school discipline; creating social services with the goal of problem-solving and support of children and youth; teaching skills of restorative justice to support the development and conflict resolution skills of every child; comprehensively surrounding every child, every youth with the means and resources to succeed rather than systems designed to make them fail; and addressing the disproportionate negative contacts between schools, police, teachers, administrators, judges, and other system actors, by eliminating bias and fostering affirmative multidimensional, multiracial,

BENNETT WOODHOUSE, *THE ECOLOGY OF CHILDHOOD: HOW OUR CHANGING WORLD THREATENS CHILDREN'S RIGHTS* (2020). For the particular application of inequalities to women and girls of color, see *#SayHerName Campaign*, AFRICAN AM. POL'Y FORUM, <https://aapf.org/sayhername> [<https://perma.cc/Z8UG-4765>] (last visited Nov. 1, 2020); KIMBERLE WILLIAMS CRENSHAW WITH PRISCILLA OCEN & JYOTI NANDA, *BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED* (2015), https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/BlackGirlsMatter_Report.pdf [<https://perma.cc/UAA2-H9LN>]. On inequalities at birth, see Susan Nitttrouer, *Ending the Lottery*, 71 FLA. L. REV. FORUM 132 (2019); JAMILA TAYLOR, CRISTINA NOVOA, KATIE HAMM & SHILPA PHADKE, *ELIMINATING RACIAL DISPARITIES IN MATERNAL AND INFANT MORTALITY* (May 2, 2019), <https://www.americanprogress.org/issues/women/reports/2019/05/02/469186/eliminating-racial-disparities-maternal-infant-mortality/> [<https://perma.cc/PW9B-S7HP>].

Even very young children of color are subject to discipline and policing. For example, an 8-year-old was arrested at school after having a tantrum. Jaclyn Peiser, *"You're going to jail": Body Cam Video Shows an 8-Year-Old Florida Boy Arrested at School*, WASH. POST, Aug. 11, 2020, <https://www.washingtonpost.com/nation/2020/08/11/video-florida-boy-arrested/> [<https://perma.cc/LN6A-JKQ3>]; A child as young as 4 has been arrested in Florida. See Tonya Alanez, *The Youngest Kid Ever Arrested in Florida was a 4-Year-Old*, ORLANDO SUN SENTINEL, Jan. 23, 2016, <https://www.sun-sentinel.com/news/florida/fl-children-arrested-in-florida-20160122-story.html> [<https://perma.cc/DX7C-MA4C>]. Differentials in daycare discipline are widespread. Bill Hathaway, *Implicit Bias May Help Explain High Preschool Expulsion Rates for Black Children*, YALE NEWS (Sept. 27, 2016), <https://news.yale.edu/2016/09/27/implicit-bias-may-explain-high-preschool-expulsion-rates-black-children> [<https://perma.cc/RR2N-6FLC>].

3. I draw inspiration and content from Dorothy E. Roberts, *Foreward: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019), and a closer read of the historical concept of abolition, including the unfinished process of reparations and repair with respect to harms as well as the historic failure to affirmatively support equality, dignity, and equal humanity that continues to infect multiple systems and results in ongoing inequality.

multicultural humanity. The goal of abolition is not simply to dismantle the structure and culture of harm, but also to replace harm with support.

The current juvenile justice system is a failure for virtually all who come in contact with it. It does not serve the well-being of the children and youth committed to its care, reflected particularly in high rates of recidivism, subsequent involvement as adults with the criminal justice system, and negative educational and employment outcomes. It does not rehabilitate or correct, nor does it problem solve, and it does not increase societal well-being or safety.

Overwhelmingly, system failure affects boys, especially boys of color.⁴ The failure is exacerbated for girls, doubly disadvantaged by a system even less well designed for them and again filled primarily with girls of color.⁵

The call for abolition and the reorientation of resources currently devoted to policies and practices that neither serve the well-being of youth nor the public safety of the community must be accompanied not only with a redistribution of funds but with a significant increase in funds to serve the needs of children and youth. Abolition of the existing system of juvenile justice must be paired with the creation of services and systems to support families, children, and youth. In the following two sections, I first articulate the justification for abolition of the current system. Second, I suggest the framework of support to replace the existing juvenile justice system.

4. On systemic failures in the juvenile justice system, see NANCY E. DOWD, JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 2–3 (Nancy E. Dowd ed., 2011); Shay Bilchik, *Redefining the Footprint of Juvenile Justice in America*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 21, 21–23 (Nancy E. Dowd ed., 2011). On the disproportionate impact of the juvenile justice system on boys of color, see CHILDREN’S DEFENSE FUND, *supra* note 2, at 28–29; Joshua Rovner, *Disproportionate Minority Contact in the Juvenile Justice System*, SENTENCING PROJECT (May 1, 2014), <https://www.sentencingproject.org/publications/disproportionate-minority-contact-in-the-juvenile-justice-system/> [<https://perma.cc/S536-ZQ8X>]; Dowd, *Children’s Equality Rights*, *supra* note 2, at 1374 n.24, 1375 n.25. On patterns of recidivism, see the research compiled in MST Services, *Do We Know the Full Extent of Juvenile Recidivism?* (Nov. 1, 2018), <https://info.mstservices.com/blog/juvenile-recidivism-rates> [<https://perma.cc/V5A5-A6NY>]; The Annie E. Casey Foundation, *No Place for Kids: The Case for Reducing Juvenile Incarceration* (2011), <https://www.aecf.org/resources/no-place-for-kids-full-report/> [<https://perma.cc/J3XK-PWAT>].

5. On girl offenders in the juvenile justice system, see Danielle E. Parrish, *Achieving Justice for Girls in the Juvenile Justice System*, 65 SOCIAL WORK 149–58 (April 2020); SAMANTHA EHRLMANN, NINA HYLAND & CHARLES PUZZANCHERA, GIRLS IN THE JUVENILE JUSTICE SYSTEM, U.S. DEP’T OF JUST. (2019), <https://ojdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/251486.pdf> [<https://perma.cc/QK9K-WMMC>]; Sara Goodkind, *Gender-Specific Services in the Juvenile Justice System: A Critical Examination*, 20 AFFILIA 52 (2005); Lawanda Ravoir & Vanessa Patinao, *Girl Matters: Unfinished Work*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 160–61 (Nancy E. Dowd ed., 2011).

I. DISMANTLING JUVENILE JUSTICE: NOT REFORM BUT “BURNING DOWN THE HOUSE”⁶

Calls for abolition of the adult criminal justice system, including the system of mass incarceration and the defunding and overhaul of policing, must be matched with a similar elimination of the current system of juvenile justice, including the virtual elimination of incarceration in all forms used to hold children and youth.⁷ Not only must incarceration in its many forms within the youth and adult criminal justice systems be eliminated, but also the confinement of children and youth in immigration facilities.⁸

Youth incarceration mirrors the high rates of confinement, racial and ethnic disproportionality, and failed outcomes of the adult system.⁹ A

6. See NELL BERNSTEIN, *BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON* (2014).

7. The exceptions where incarceration might be necessary are the rare circumstances where confinement is necessary for the safety of the community or of the youth themselves, and then only under therapeutic conditions, not punitive conditions. On abolition of incarceration except when absolutely necessary, see generally James Bell, *Child Well Being: Toward a Fair and Equitable Public Safety Strategy for the New Century*, in *A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM* (Nancy E. Dowd ed., 2015); Peter Leone, *Doing Things Differently: Education as a Vehicle for Youth Transformation and Finland as a Model for Juvenile Justice Reform*, in *A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM* (Nancy E. Dowd ed., 2015); Ursula Kilkelly, *Youth Courts and Children's Rights: The Irish Experience*, 8 *YOUTH JUSTICE* 39, 40 (2008); Ursula Kilkelly, *Reform of Youth Justice: The 'New' Children Act 2001*, *IRISH J. OF CRIM. L.* Part 2 (2007).

8. For reports on immigration youth detention including very young children, and the impact of such detention on children, see David R. Katner, *Trump's Policy of Putting Kids in Cages: Six Dead, Thousands Separated from Parents, Making America Great Again?* Draft on file with author; Dara Lind, *The Trump Administration's Separation of Families at the Border, Explained*, *VOX* (Aug. 14, 2018, 1:29 PM), <https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents> [<https://perma.cc/8MA6-BBMY>]; All Things Considered, *Whistleblowers Warn of Harmful Conditions for Children in Migrant Detention Centers*, *NAT'L PUB. RADIO* (Dec. 8, 2018, 5:32 PM), <https://www.npr.org/2018/12/08/674327419/whistle-blowers-warn-of-harmful-conditions-for-children-in-migrant-detention-cent> [<https://perma.cc/AVR7-DA73>]; Sheri Fink & Caitlin Dickerson, *Border Patrol Facilities Put Detainees with Medical Conditions at Risk*, *N.Y. TIMES*, Mar. 5, 2019, <https://www.nytimes.com/2019/03/05/us/border-patrol-deaths-migrant-children.html> [<https://perma.cc/Y7NT-M4ZC>]. For a statement on the adverse impact of immigration detention on child development, see Jack P. Shonkoff, *Statement by Center Director Jack P. Shonkoff, M.D. on Separation of Families* (June 20, 2018), <https://developingchild.harvard.edu/about/press/shonkoff-statement-separating-families/> [<https://perma.cc/NX72-TM6A>].

9. See the data collected in JOSHUA ROVNER, *THE SENTENCING PROJECT, DECLINES IN YOUTH COMMITMENTS AND FACILITIES IN THE 21ST CENTURY* (2015), <https://www.sentencingproject.org/wp-content/uploads/2016/02/Youth-Commitments-and-Facilities.pdf> [<https://perma.cc/572Y-SGWJ>] (35,659 youth are incarcerated, down from 76,262 in 2000, and arrests are down 39%); see also WENDY SAWYER, *PRISON POL'Y INITIATIVE, YOUTH CONFINEMENT: THE WHOLE PIE* 2019 (2019), <https://www.prisonpolicy.org/reports/youth2019.html> [<https://perma.cc/4QTD->

substantial percentage of youth are committed to adult facilities, so, to some degree, the two systems overlap.¹⁰ Elimination of youth incarceration also must include the abolition of the practice of transferring youth to adult prosecution and incarceration.¹¹

The rate of youth incarceration has dropped 50–60% since 2000 as a result of persistent efforts of advocates, the failed outcomes of the system, the high costs of incarceration, the value and success rates of other options, and other factors.¹² This substantial drop has occurred in nearly all states, with some states achieving a two-thirds drop in their youth incarceration rate.¹³ Overall, one-third of juvenile justice facilities have been closed.¹⁴ Significantly, this drop in confinement has come at no cost to public safety.¹⁵ Indeed, to the extent the system acts only to confine and punish, rather than to accomplish any developmental or rehabilitative purpose, this is not surprising. Incarceration has served to increase the risk of recidivism, not to decrease that risk, and has contributed to adverse public and personal outcomes rather than to youth well-being and greater public safety.¹⁶

While this reduction in incarceration is meaningful, it is far from enough for several reasons. First, this huge drop must be placed in context; it is a reduction from an excessive, massive rate of incarceration.¹⁷ Even with this substantial decrease, *the rate of youth*

KKPT]. On the injustice of the adult system see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

10. By one estimate there are 4,000 youth-under-18 confined in adult prisons and jails. SAWYER, *supra* note 9.

11. On the transfer of juvenile cases to the adult criminal justice system, see JEREE THOMAS, CAMPAIGN FOR YOUTH JUST., *YOUTH TRANSFER: THE IMPORTANCE OF INDIVIDUALIZED FACTOR REVIEW* (2018), http://www.campaignforyouthjustice.org/images/20180314_CFYJ_Youth_Transfer_Brief.pdf [<https://perma.cc/R4LN-7TWD>] (see especially page 4, recommendation made in 2012 by task force of state attorneys-general to whenever possible, prosecute in the juvenile justice system, not the adult system; see also data on disproportionality of transfer by race, at page 6); see also JAMES AUSTIN ET AL., U.S. DEP'T OF JUST., *JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT* (2000), <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf> [<https://perma.cc/2DZ5-EGPP>]; EDWARD P. MULVEY & CAROL A. SCHUBERT, U.S. DEP'T OF JUST., *TRANSFER OF JUVENILES TO ADULT COURT: EFFECTS OF A BROAD POLICY IN ONE COURT* (2012), <https://ojdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/232932.pdf>.

12. For data on the drop in the incarceration rate, see ROVNER, *supra* note 9, at 1.

13. *Id.* at 2.

14. *Id.* at 6.

15. *Id.* at 1.

16. See recidivism data MST Services, *supra* note 4; transfer data THOMAS, *supra* note 11, at 4; see also mass incarceration data Bell, *supra* note 7.

17. THE SENTENCING PROJECT, *FACT SHEET: TRENDS IN U.S. CORRECTIONS 2* (2020), <https://www.sentencingproject.org/publications/trends-in-u-s-corrections/> [<https://perma.cc/PJ5X-T4UV>] (discussing how the rate of incarceration increased 500% in the past 40 years, by one estimate, with 2.2 million people currently in the nations prisons and jails; for youth trends see page 6).

*incarceration in the United States still remains higher than any other country in the world, mirroring the adult incarceration rate, also the highest in the world.*¹⁸ Thus, although the U.S. figures have dropped dramatically, from 355 per 1000 in 1999 to 138 per 1000 in 2017, the U.S. still leads the world with the highest rate of incarceration.¹⁹

According to 2019 figures, on any given day, roughly 48,000 youth are confined in detention centers, long-term facilities, adult prisons and jails, residential treatment, group homes, and other settings.²⁰ Some children are as young as age twelve or younger; the largest proportion of children is teenagers age sixteen or older.²¹ On a daily basis, 1,995 children are arrested each and every day.²² Those arrests, which include arrests at school as well as on the streets and in homes, can include children as young as six.²³

Second, the disproportionality pattern within the rate of incarceration on the basis of race, ethnicity, and gender has not budged.²⁴ *Rather than using policies of reduction to also attack racial and ethnic disproportionality, especially for Black boys and youth who experience rising disproportionality as they get deeper into the system, the racial pattern has been perpetuated.*²⁵ If there has been one shift in this time frame, it is the steady decline in numbers of girls in a system traditionally framed for, and populated by, boys.²⁶ Yet among girls, the racial pattern of disproportionality has been sustained as well.²⁷

Third, *the vast majority of children and youth in the system are not serious offenders.* Only about one fourth of those incarcerated have

18. See PETER WAGNER & WANDA BERTRAM, PRISON POL'Y INITIATIVE, WHAT PERCENT OF THE U.S. IS INCARCERATED?" (AND OTHER WAYS TO MEASURE MASS INCARCERATION) (explaining that the U.S. has less than 5% of the world's population, however the U.S. also has 20% of the global population of incarcerated people).

19. ANNIE E. CASEY FOUND., FEWER YOUNG PEOPLE ARE RESIDING IN JUVENILE JUSTICE FACILITIES (2020), <https://datacenter.kidscount.org/updates/show/258-fewer-residing-in-juvenile-justice-facilities> [<https://perma.cc/A5LD-5BVS>]; see WORLD REPORT, HUMAN RIGHTS WATCH (2016), www.hrw.org; see also ANNIE E. CASEY FOUND., KIDS COUNT DATA CENTER (2017), www.datacenter.kidscount.org [<https://perma.cc/48LD-28HK>]; ACLU, AMERICA'S ADDICTION TO JUVENILE INCARCERATION: STATE BY STATE, <https://www.aclu.org/issues/juvenile-justice/youth-incarceration/americas-addiction-juvenile-incarceration-state-state> [<https://perma.cc/8CL3-LFUN>] (discussing the incarceration rate state by state).

20. SAWYER, *supra* note 9.

21. *Id.*

22. CHILDREN'S DEFENSE FUND, *supra* note 2, at 28.

23. *Id.*

24. SAWYER, *supra* note 9.

25. See *id.*

26. Samantha Ehrmann et al., U.S. Dep't of Just., Girls in the Juvenile Justice System (2019), <https://ojdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/251486.pdf> [<https://perma.cc/QN42-TQQW>].

27. *Id.*

committed violent offenses.²⁸ And it should be remembered that those held in immigration detention centers have committed no offense that requires criminal detention.²⁹

The rationale for ending incarceration for all but the small minority of kids who are a risk to themselves or others is two-fold. First, incarceration is developmentally unsound and promotes recidivism rather than successful development.³⁰ Second, the configuration of who is in the system, and the absence of explanations other than bias for those patterns, points to the issue of who is there and why and highlights issues of systemic racism in the streets, schools, and within the juvenile justice system.³¹ The system is fatally flawed because it is unfair and unjust.

Developmentally the largest group in the juvenile justice system, teenagers, especially fifteen through seventeen-year-olds, are behaving like adolescents—taking risks, not exercising good judgment, rebelling against authority and rules, and finding themselves as individuals distinct from their parents.³² They have not finished developing neurologically while at the same time they have matured sufficiently to think and act independently, although not always making the best decisions or behaving according to social norms.³³ A large proportion of adolescents engage in behavior that breaks the rules of criminal law, particularly the laws relating to sex and substance use (legal or illegal substances), as well as assault and minor property crimes.³⁴ An even more substantial group breaks the particular rules that exclusively govern the lives of minors, so-called status offences like the requirement that minors be “governable” by their parents.³⁵ Rule-breaking, even antisocial behavior, is common among adolescents.³⁶ The most successful way to “cure” or problem-solve difficult or defiant adolescent behavior is simply waiting for youth to grow older; they mature and outgrow it, as evidenced by declining rates of offending at age seventeen that continue to drop dramatically as youths age during their twenties.³⁷ This developmental pattern suggests that

28. WENDY SAWYER & PETER WAGNER, PRISON POL’Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2020 (2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/B4UC-JCXS>].

29. See Lind, *supra* note 8.

30. DOWD, *supra* note 4, at 72.

31. See *id.*, at 3–4.

32. See DOWD, *supra* note 4, at 3; see also ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 52–53 (2008); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1402 (2019).

33. See DOWD, *supra* note 4, at 2–3.

34. *Id.* at 3.

35. *Id.* at 2.

36. See SCOTT & STEINBERG, *supra* note 32, at 39, 51.

37. *Id.* at 53.

punitive responses are categorically at odds with these developmental realities and undermine the ability of youth to transition to positive adulthood and citizenship with gains, not losses, to public safety and positive contributions to their communities. The juvenile justice system as currently structured is *not* developmentally informed, *disrupts* positive development, and fails to solve the problems of kids within the system. In addition, because the system imposes collateral consequences on education and employment, it treats offending as a marker of future failure and criminal activity, rather than as a typical deviation or normal developmental path (or the bad luck of being caught doing exactly what thousands of other teenagers do without detection).³⁸ Rather than redirect adolescents toward positive development, the juvenile justice system prepares kids for the adult criminal justice system.

The strong pattern of racial and ethnic disparities—and the skewing of the system toward a toxic structure for its intended subjects, boys (with further negative consequences for girls and for LGBT youth)—is the second justification for abolition. The system is not fair. Its negative consequences and impacts are meted out disproportionately to children and youth of color. Moreover, disproportionality grows as a child gets deeper into the system; the most serious consequences reflect the highest rate of disproportionality:

The kids who are arrested and who move into the juvenile justice system disproportionately are children of color, and boys. This is visible every day in juvenile courts. Black youth are 16 percent of the population aged ten to seventeen but constitute 52 percent of juvenile violent crime index arrest rates, and 33 percent of juvenile property crime index arrest rates. Children of color are disproportionate to their percentage of the population in every stage of the juvenile justice system: arrests, formal charging instead of diversion, transfer to the adult system for charging and prosecution, conviction, and residential placement.³⁹

Girls' presence in the system has been rising dramatically—they now constitute approximately thirty percent of arrests—and disproportionately these are girls of color.⁴⁰ Another rising group in the system are LGBTQ youth, estimated at approximately thirteen percent of

38. SUE BURRELL, *Collateral Consequences of Juvenile Court: Boulders on the Road to Good Outcomes*, in *A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM* (Nancy E. Dowd ed., 2015).

39. DOWD, *JUSTICE FOR KIDS*, *supra* note 4, at 3–4; *see also* CHILDREN'S DEFENSE FUND, *supra* note 2; Rovner, *supra* note 4; and Dowd, *supra* note 4 (discussing data on disproportionality).

40. *See* Parrish, *supra* note 5; EHRMANN, *supra* note 5; Goodkind, *supra* note 5; and Ravoira, *supra* note 5 (data and scholarship on girls in the juvenile justice system).

the juvenile justice system population.⁴¹ Both girls and gender non-conforming youth are ill-served in a system that was not designed for them in mind, exacerbating the effects of a system poorly designed to support the boys who were assumed to be the population to be served.

Finally, the presence of COVID presents an additional reason to abolish youth incarceration to make kids safer. The immediacy of the need to deinstitutionalize kids is clear. According to a report by the American Academy of Pediatricians, there are serious unmet needs in dealing with the juvenile justice population during the pandemic.⁴² This beginning of the process of abolition could be the rationale to trigger the process of permanent abolition by eliminating youth incarceration and pursuing more successful alternatives.

The necessary abolition of the juvenile justice system is not limited to practices of confinement. Rather, it is essential to examine and eliminate the entire system and create in its place a system of support for youth that incorporates an entirely different set of goals, practices, and systemic supports. Essential aspects of the process of abolition require confronting the front end of the system, pre-incarceration, including policing and arrests, as well as practices of oversight through the probation system. It is indicative of the failure of the existing juvenile justice system that the primary recommendation of the Juvenile Justice Project at the University of Florida College of Law in its comprehensive analysis of the system in 2011 was the recommendation that kids should be kept out of the system at all costs.⁴³ To accomplish that goal, the Project recommended recasting front-end parts of the juvenile justice system to reduce the interface of kids with the system.⁴⁴

Rather than recasting or reforming the front end of the juvenile justice system, however, abolition requires elimination and replacement.⁴⁵ This must begin with policing, linking this with the adult policing debate generated in the wake of the death of George Floyd. This requires not just retraining, a reduction in the militarization of police, or a reduction in

41. *Youth in the Juvenile Justice System*, TREVOR PROJECT, <https://www.thetrevorproject.org/get-involved/juvenile-justice/> [https://perma.cc/2QSR-X6L3].

42. AMERICAN ACAD. OF PEDIATRICS, RESPONDING TO THE NEEDS OF YOUTH INVOLVED WITH THE JUSTICE SYSTEM DURING THE COVID-19 PANDEMIC (2020), <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/responding-to-the-needs-of-youth-involved-with-the-justice-system--during-the-covid-19-pandemic/> [https://perma.cc/HP8R-TF4X]. It should be noted that the AAP also has sharply criticized the practices of solitary confinement and sentences of life in prison without parole as totally inconsistent with developmental and health science regarding adolescents. *Id.*

43. DOWD, *supra* note 4, at 16.

44. *Id.* See also NANCY E. DOWD, A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM (Nancy E. Dowd, ed. 2015) (a visionary recasting of the system in the second volume arising out of the Juvenile Justice Project, collecting models for a reformulated system).

45. See Bell, *supra* note 7; Leone, *supra* note 7; Kilkelly, *supra* note 7.

police budgets, but a wholesale reorientation of what it is police do, why, and who they serve. This must include a specific rethinking of how police interact with children and youth, which must be both developmentally informed and racially informed, in the sense of positive racial interaction with children and youth, their families, and their communities.⁴⁶ The existing pattern of policing is one of subordination and control, highly disproportionate for kids of color and deadly for far too many.⁴⁷ Against a backdrop of commonplace adolescent behavior that violates both criminal and status laws, the reaction to that behavior has typically been a high volume of arrests in daily interactions and a disproportionate set of arrests for kids of color, especially Black boys.⁴⁸ There is contemporary evidence that policing of children and youth, and treating their behavior as subject to arrest, can change.⁴⁹ Along with the recent reduction of youth incarceration, there has been a significant reduction in the volume of arrests.⁵⁰ While that data may be interpreted as reflecting less criminal offending, the developmental data would suggest otherwise. The shift in arrest statistics has not been accompanied by a shift in the treatment of kids of color. The pervasive and persistent presence of racism in the system, or, perhaps more accurately, the functioning of the system as a control system for kids of color, persists.⁵¹

In addition to abolishing current policing practices and the policy of criminalization of (some) adolescents' behavior by arrest, abolishing the front-end connection between schools and the existing juvenile justice system must be part of essential reform. The "school to prison pipeline"

46. See KENNETH NUNN, *The Black Nationalist Cure to Disproportionate Minority Contact*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM, *supra* note 4, at 135; PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (illustrated ed. 2018).

47. See VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO Boys* (2011).

48. *Id.*

49. See Nicole Karlis, *Oakland is at the Forefront of a National Movement to Abolish Police from K-12 Schools*, Salon (June 30, 2020, 11:52 PM), <https://www.salon.com/2020/06/30/oakland-is-at-the-forefront-of-a-national-movement-to-ban-police-from-k-12-schools/> [<https://perma.cc/DJR6-JK9R>]; Nicole Chavez, *A Movement to Push Police Out of Schools is Growing Nationwide. Here is Why*, CNN (June 28, 2020, 1:52 PM), <https://www.cnn.com/2020/06/28/us/police-out-of-schools-movement/index.html> [<https://perma.cc/PLF3-JTEU>]; and *Mission, DIGNITY IN SCHOOLS* (2017), www.dignityinschools.org/about-us/mission/ [<https://perma.cc/G9AH-XZK3>] (last visited Oct. 1, 2020) (advocacy group whose motto is "counselors not cops"), for discussions on the movement to abolish police in schools, which is an offshoot of calls for radical reform in policing.

50. THE SENTENCING PROJECT, *supra* note 17, at 6.

51. See Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 331 (2016) [hereinafter Nance, *Dismantling*]; Jason P. Nance, *Students, Police and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 957 (2016) [hereinafter Nance, *Students and Police*].

was constructed; it can and must be deconstructed.⁵² Not only has this pipeline criminalized school discipline, extending bad police practices into schools, but it has also reinforced racial bias against children of color by a system that refers discipline problems to criminal consequences more often for those children.⁵³ Just as the existing juvenile justice system has not benefitted kids or increased public safety, so too the criminalization of school discipline has neither benefitted kids nor made schools safer.⁵⁴ The abolition of the criminalization of school discipline is a critical step to disengage school discipline from the criminal justice system. Further steps are essential, including the reorientation of discipline around developmentally-based interventions and the teaching of dispute resolution skills, such as those at the core of school-wide restorative justice practices.⁵⁵

Another important component of abolition is the probation system. The current system in practice appears to trip up adolescents rather than support them; it ignores the developmental literature and instead imposes a draconian system of punishments with predictable negative outcomes.⁵⁶ The failure of this approach is nowhere more evident than in the number of kids confined due to probation violations for insignificant violations.⁵⁷

52. See Nance, *Dismantling*, *supra* note 51, at 324 (arguing that the school-to-prison pipeline results from academic underachievement and over-disciplining students); Nance, *Students and Police*, *supra* note 51, at 929 (arguing that the school-to-prison pipeline arose from the criminalization of school discipline).

53. See Nance, *Dismantling*, *supra* note 51, at 331; Nance, *Students and Police*, *supra* note 51, at 957.

54. See Nance, *Dismantling*, *supra* note 51, at 339, 342, 344–45; Nance, *Students and Police*, *supra* note 51, at 948; Kim, *supra* note 45, at 949.

55. In addition to the advocacy group cited in *supra* note 45, there is the restorative justice movement, Matt Davis, *Restorative Justice: Resources for Schools*, EDUTOPIA (Oct. 4, 2013), <https://www.edutopia.org/blog/restorative-justice-resources-matt-davis> [<https://perma.cc/BD3P-UZ53>]; and wraparound projects like The Brotherhood Sister Sol, a holistic, evidence-based program to support youth that has been operating for 25 years, see The Brotherhood Sister Sol, <https://www.brotherhood-sistersol.org> [<https://perma.cc/CAP8-CXUN>] (last visited Oct. 3, 2020).

56. For the operation and impact of the probation component of the juvenile justice system see Jesse Kelley, *Thousands of Youth are Incarcerated for Low-Level Status Offenses and Technical Violations. This Needs to Stop*, May 23, 2018, INSIDE SOURCES (MAY 23, 2018), <https://www.insidesources.com/thousands-youth-incarcerated-low-level-status-offenses-technical-violations-needs-stop/> [<https://perma.cc/YY29-HU7Y>]; SAWYER, *supra* note 9.

57. The Annie E. Casey Found., *Progress Accelerates for Eliminating Confinement as a Response for Juvenile Probation Violations*, THE ANNIE E. CASEY FOUND. BLOG (Feb. 6, 2019), <https://www.aecf.org/blog/progress-accelerates-for-eliminating-confinement-as-a-response-to-juvenile/> [<https://perma.cc/3JZN-7RWB>] (noting that of kids incarcerated, 23% are there for technical violations); see THE ANNIE E. CASEY FOUND., *TRANSFORMING JUVENILE PROBATION: A VISION FOR GETTING IT RIGHT* (2018), <https://www.aecf.org/resources/transforming-juvenile-probation/> [<https://perma.cc/SW7S-3FAH>].

The identification of what is wrong with the existing juvenile justice system is not limited to incarceration, policing, arrests and probation; these parts of the system are offered here not as components requiring piecemeal, gradual reform, but rather as symptoms of systemwide failure. Abolition of the system, comprehensively defined, is what is needed.

II. REDIRECTING OUR SUPPORTS: CULTURAL AND SYSTEMIC CHANGE

Racial justice requires not only abolition but replacement; not only better systems of social, familial, and community support but requires a *substantial addition* to existing supports if we are dedicated to making #BlackYouthMatter. The system of juvenile justice must be replaced with interventions designed to support developmental success rather than lifelong failure, viewing youth issues as social and familial rather than judicial. The goal must be full developmental support for all children; not a system of correction and punishment, but of well-being and support. The ultimate replacement for death, violence, and subordination is life, affirmative support, and equality.

Existing systems that purportedly are designed to provide support to children, youth, and families have failed to provide sufficient support and, to the contrary, are frequently systems of subordination. The child welfare system, for example, is underfinanced, unsuccessful, and functions as a oversight system that disproportionately subordinates children of color and their families.⁵⁸ Beginning in pregnancy and continuing from birth through childhood, the health care system fails to provide nondiscriminatory, supportive care.⁵⁹ Healthcare disparities linked to the social determinants of health that further exacerbate health inequalities again are disproportionately suffered by children and families of color.⁶⁰ The uneven quality of child care, early childhood education, and other early childhood inputs means inequality among children is present virtually from birth, and those inequalities are exacerbated rather than equitably addressed once children begin school.⁶¹ Other systems might be added to this list, particularly housing and income

58. DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2001).

59. On health insurance, see *Health Care Coverage for Children*, CHILD TRENDS, <https://www.childtrends.org/indicators/health-care-coverage> [https://perma.cc/E447-NHJG] (last visited Oct. 3, 2020); on food insecurity, see CHILD FOOD INSECURITY, FEEDING AMERICA (2018), <https://www.feedingamerica.org/sites/default/files/research/map-the-meal-gap/2016/2016-map-the-meal-gap-child-food-insecurity.pdf> [https://perma.cc/Q8GD-6S3F]; on housing insecurity, see OFFICE OF POLICY DEV. & RESEARCH, U.S. DEPT. OF HOUS. & URBAN DEV., *PROTECTING CHILDREN FROM UNHEALTHY HOMES AND HOUSING INSTABILITY* (2014), <https://www.huduser.gov/portal/periodicals/em/fall14/highlight3.html> [https://perma.cc/L2MT-A62T].

60. Dowd, *Children's Equality Rights*, *supra* note 2, at 1378.

61. CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014).

supports; what I have mentioned here are offered only as a way of thinking, seeing, and understanding our current context.

Underlying these inadequate systems are poverty and racism. Poverty among children is shockingly common and racially disproportionate.⁶² And the common characteristic of the existing failed interlocking systems is their racialized, negative operation. The inadequacies and failings of these systems are evident in the configuration of kids in the existing juvenile justice system: overwhelmingly these are poor children, disproportionately children of color, and with a high incidence of a history of abuse or neglect as well as mental health problems.⁶³ This exposes the lack of resources and support, the need to create robust supports, and that those supports must be part of a broad commitment to deal with the overarching factors of poverty and race.

In prior work I have argued that what is needed is a comprehensive New Deal for Children that would include, but not be limited to, the following areas:

Health, including prenatal health, children's health, and family health, focusing on health equity and the determinants of health, not simply treatment; including also nutrition support and supportive family visits

Education, beginning with early childhood education, continuing through primary and secondary education, and postsecondary college or other training; including mental health screening and early identification and support for learning disabilities and other disabilities

Parental support, including economic support, education, skills, services, birth and adoption paid leave, leave to care for sick children or to participate in children's educational activities, and other policies to ensure work-family balance
Universal high-quality childcare and after-school programs

Adolescent youth services support, including work, skills, enrichment, and well-being; fostering positive identities of race and gender; safety, nonviolence, positive

62. Child poverty in the United States overall stands at approximately one in 5 children. Poverty is highest from birth to age five. For Black children, the rate is one in three children for children from birth to age five, and near that rate for children from five to seventeen. The highest rate is for Native American children, who exceed a one in three poverty rate. CHILDREN'S DEF. FUND, CHILD POVERTY IN AMERICA 2017: NATIONAL ANALYSIS (2018), <https://www.childrensdefense.org/wp-content/uploads/2018/09/Child-Poverty-in-America-2017-National-Fact-Sheet.pdf> [https://perma.cc/P7C9-HW57] [hereinafter CHILD POVERTY].

63. David R. Katner, *Delinquency, Due Process, and Mental Health: Presuming Youth Incompetency*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM, 104, 104 (Nancy E. Dowd ed., 2015); DOWD, *supra* note 2, at 2; Leslie Joan Harris, *Challenging the Overuse of Foster Care and Disrupting the Path to Delinquency and Prison*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM, *supra* note 4.

sexuality; and juvenile justice as a system of well-being and rehabilitation with incarceration as a last resort

Child and family well-being and crisis support, prevention to the extent possible of domestic violence and child abuse and neglect by effective interventions, after minimizing factors that contribute to these behaviors, and providing effective systems for children who go into foster care

Resilience support for sources of toxic stress or episodic stress to children, families, and communities

Anti-poverty, economic-stabilization measures including cash transfers, in-kind transfers, services, and support

Housing, either separately or as part of an overall economic policy, ensuring neighborhoods without concentrated poverty or concentrated poor housing or housing conditions

Public safety, including positive relationships between police and children, and peaceful neighborhoods.⁶⁴

A New Deal for Children would be guided by the following principles: that systems be developmentally informed; that system change involves both system abolition or reform as well as system creation; that childhood poverty be eliminated and income inequality be reduced substantially; that systemic and structural change be accompanied by cultural change confronting and dismantling racism; that national standards be combined with local empowerment, flexibility, and variation; that universal goals must be combined with supporting children as we find them; that equality is understood as inclusive of equity and dignity; and that metrics be rigorously developed to accomplish the essential task of reframing systems that actually ensure developmental support of every child to their maximum capacity—in other words, to achieve developmental equality.⁶⁵

III. CONCLUSION

Trayvon Martin would be 25 years old if he was still with us. His death and the lack of accountability for his death due to a skewed judicial system indicts all of us. The trope of the dangerous Black boy/man is at the heart of the ongoing murders of Black men and women, boys and girls, as perceived threats to white supremacy. Trayvon's death is linked to the history of violence against African Americans and has been

64. NANCY E. DOWD, REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR 148–49 (2018).

65. *Id.*

repeated this year in the Georgia case of Ahmaud Arbery,⁶⁶ circumstances that are eerily reminiscent of the slave patrols designed to control Black bodies⁶⁷ and the complicity of communities and authorities in the violence of lynching.⁶⁸ Trayvon Martin's story links private and public systems and actors. In widening our focus and examining the youth equivalent of the adult criminal justice system, the juvenile justice system, we see not only flaws that demand abolition of the juvenile justice system and replacement, but also links to other systems that perpetuate a dysfunctional, racialized ecology.

It reminds us of the depth of the cultural and systemic issues that face us. It also reminds us that our deeply racist beliefs, and their locus in assertions of white supremacy, are not limited to violence against Black adults. As we approach nearly a decade since Trayvon's death, that anniversary should not be met with more lives sacrificed, but with significant, sustained, systemic, widespread change at the local, state, and federal levels to achieve racial justice and equality that values the lives of Black children and youth as well and guarantees to them that their lives matter as adults.

66. On the murder of Ahmaud Arbery, see Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES, Sept. 10, 2020, <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html>. Arbery, a 25-year-old Black man, was pursued by two men, a father and son, and a third man who filed the encounter. All three, after month of time and only after extensive media exposure, were indicted after four prosecutors reviewed the case, with the indictment coming from the fourth prosecutor, along with a federal investigation into how local law enforcement and prosecutors handled the case. The father is a former retired police officer and was an investigator with the local district attorney's office. The father and son claimed that Arbery resembled someone responsible for local break-ins, but reporters found that police had no reports filed of any break-ins or attempted break-ins. Georgia has a "citizen's arrest" law.

67. Roberts, *supra* note 58, at 20–21 (slave patrols). Notable about the patrols is the blurring of private versus public policing, a pattern that is of significance given the murders of black youth and adults by both private citizens (often claiming to be fulfilling a public role, such as George Zimmerman claiming to be part of a neighborhood watch when he pursued Trayvon Martin).

68. CHRISTOPHER WALDREP, *LYNCHING IN AMERICA: A HISTORY IN DOCUMENTS* 1 (Christopher Waldrep ed., 2006); JAMES H. MADISON, *A LYNCHING IN THE HEARTLAND: RACE AND MEMORY IN AMERICA* 65 (2001); MONICA MUNOZ MARTINEZ, *THE INJUSTICE NEVER LEAVES YOU: ANTI-MEXICAN VIOLENCE IN TEXAS* (2018).

DO BLACK LAWYERS MATTER TO THE LEGAL PROFESSION?: APPLYING AN ANTIRACISM PARADIGM TO ELIMINATE BARRIERS TO LICENSURE FOR FUTURE BLACK LAWYERS

*DeShun Harris**

Abstract

The legal profession has an anemic representation of Black lawyers. In 2020, the population of Black lawyers was 5% of the legal profession compared to White lawyers who made up 86% of the profession.¹ Drastic action is needed to change this disparity. The time for changing that disparity has never been clearer than now. The Black Lives Matter movement took hold of the nation in 2020 after the death of George Floyd and the protests that followed.² It now may be the largest movement in U.S. history.³ The movement has engaged the public by raising awareness about issues impacting Black Americans and by charging institutions with making change.⁴ Many have argued that the movement was aided by the disruption caused by COVID-19, which confined people to their homes giving them time to consider race issues and ways they could engage in changing those issues.⁵ Given the limited representation of Black lawyers in the profession, what can the legal profession do in this movement to eliminate barriers to licensure for future Black lawyers?

This Essay will explore how antiracism can provide a path for the legal profession to eliminate barriers to licensure for aspiring Black lawyers. Specifically, this Essay will examine the current licensing policies that promote racial inequities by applying an antiracism

* DeShun Harris is the Assistant Clinical Professor of Law and Director of Bar Preparation at the University of Memphis, Cecil C. Humphreys School of Law.

1. 2020 *ABA Profile of the Legal Profession* 33, A.B.A. (July 28, 2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf> [https://perma.cc/5DE7-4JM6].

2. Mary Blankenship & Richard V. Reeves, *From the George Floyd moment to a Black Lives Matter movement, in tweets*, THE BROOKINGS INSTITUTION (July 10, 2020), <https://www.brookings.edu/blog/up-front/2020/07/10/from-the-george-floyd-moment-to-a-black-lives-matter-movement-in-tweets/> [https://perma.cc/J5P4-5FJL].

3. *Black Lives Matter May Be the Largest Movement in U.S. History*, HARVARD UNIV. (July 3, 2020), <https://carrcenter.hks.harvard.edu/news/black-lives-matter-may-be-largest-movement-us-history> [https://perma.cc/Z8NZ-QHQJ] (explaining that at least 15 million people participated in the George Floyd protests, which is an unprecedented level of participation).

4. John Eligon, *Black Lives Matter Grows as Movement While Facing New Challenges*, N.Y. TIMES (Sept. 3, 2020), <https://www.nytimes.com/2020/08/28/us/black-lives-matter-protest.html> [https://perma.cc/UD38-7YRU] (“The speed at which the protests of the last three months have spread and the scale of support they have received speak to the foundation that the Black Lives Matter movement has laid over the past several years, academics said.”).

5. Lore Oxford, *Culture out of crisis: How armchair activism became a force for change*, CAMPAIGN (July 23, 2020), <https://www.campaignlive.co.uk/article/culture-crisis-armchair-activism-became-force-change/1689269> [https://perma.cc/PRK3-4GT8].

paradigm. But the antiracist paradigm requires more than identifying the problem, it requires dismantling policies and replacing them with policies that eradicate barriers. Thus, this Essay will evaluate solutions the legal profession can undertake to eliminate the barriers to licensure for aspiring Black lawyers.

I.	DO BLACK LAWYERS MATTER TO THE LEGAL PROFESSION?: APPLYING AN ANTIRACISM PARADIGM TO ELIMINATE BARRIERS TO LICENSURE FOR FUTURE BLACK LAWYERS	60
II.	THE BAR EXAM AND COVID-19.....	63
III.	ANTIRACISM: OVERVIEW OF THE PARADIGM.....	68
IV.	USING THE BAR EXAMINATION FOR LICENSURE IS A POLICY THAT CREATES LICENSING DISPARITIES FOR BLACK LAWYERS	69
V.	DEVELOPING AND IMPLEMENTING ANTIRACIST POLICIES TO INCREASE THE LICENSURE OF BLACK LAWYERS	72
I.	DO BLACK LAWYERS MATTER TO THE LEGAL PROFESSION?: APPLYING AN ANTIRACISM PARADIGM TO ELIMINATE BARRIERS TO LICENSURE FOR FUTURE BLACK LAWYERS	

While Black Lives Matter has existed since 2013, the movement has seen a big shift in favorable public support and engagement throughout 2020 following the death of George Floyd and the protests that followed.⁶ It may now be the largest movement in U.S. history.⁷ Black Lives Matter's goal is to eliminate white supremacy and violence toward Black people and to create inclusive spaces for Black growth.⁸ The movement has been assisted by a pandemic where people now find themselves with more time to face these issues head on and to participate in the movement through protest and other actions.⁹ The Black Lives Matter movement has been praised for not only raising awareness but for seeking and getting concrete action, such as changing policing in some cities, and the removal

6. See Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [https://perma.cc/AFE8-68FM].

7. *Id.*

8. *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> [https://perma.cc/HU2C-NDPK] (last visited Sept. 21, 2020).

9. See Buchanan et al., *supra* note 6.

of symbols of white supremacy such as the Confederate flag.¹⁰ Some businesses, sports franchises, and other prominent structures are raising awareness of issues affecting Black Americans, and others have pledged to make changes to include more Black voices and bodies into traditionally White spaces.¹¹ One space where Black voices and bodies are disproportionately absent is the legal profession; for the year 2020, the American Bar Association (ABA) provides statistics showing that 86% of American attorneys are White and 5% are Black.¹² The percentage of Black attorneys has been virtually unchanged since 2010.¹³

Throughout the struggle in America for the rights and liberties of Black Americans, Black lawyers have been at the forefront. For example, Black lawyers like Charles Hamilton Houston and Thurgood Marshall led the NAACP's fight for modern civil rights.¹⁴ These lawyers strategized to bring an end to "the 'separate but equal' doctrine of *Plessy v. Ferguson*."¹⁵ Today, lawyers like Benjamin Crump lead the fight against the continuing assault on the bodies of Black Americans.¹⁶ While not every Black person aspiring to become a lawyer wants to pursue justice in this way, Black lawyers are important to the law, as they bring experiences, values, and knowledge that aid them in assisting clients and cases of all kinds.¹⁷ In a world that is consistently changing, Black voices and perspectives are necessary to the growth and changes in the legal profession. Further, not having Black attorneys and judges results in community distrust of the entire legal system.¹⁸ Unfortunately for Black people, the pathway to becoming a lawyer is paved with significant barriers.

10. *See id.*

11. *See* Tracy Jan, Jena McGregor, Renae Merle & Nitasha Tiku, *As big corporations say 'blacks lives matter,' their track record draws skepticism*, WASH. POST (June 13, 2020, 6:21 PM), <https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/> [https://perma.cc/T93B-FC8Y].

12. *ABA National Lawyer Population Survey: 10-Year Trend in Lawyer Demographics*, A.B.A., https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2010-2020.pdf [https://perma.cc/N825-8R6V] (last visited Sept. 12, 2020).

13. *Id.*

14. *See* J. Clay Smith Jr., *Thurgood Marshall: An Heir of Charles Hamilton Houston*, 20 HASTINGS CONST. L.Q. 503, 511–12 (1993).

15. *See id.* at 506 n.16, 511 (citing 163 U.S. 537 (1896)).

16. *See generally* Nicquel Terry Ellis, *George Floyd's family lawyer Ben Crump has often been the man beside the mourners*, USA TODAY (June 3, 2020, 4:42 PM), <https://www.usatoday.com/story/news/2020/06/03/ben-crump-civil-rights-lawyer-also-man-beside-mourners/5274494002/> [https://perma.cc/29UT-VFKA].

17. Yolanda Young, *The story behind the Black Lawyers Matter slogan and why you should believe it*, ROLLING OUT (July 12, 2016), <https://rollingout.com/2016/07/12/story-behind-black-lawyers-matter-slogan-believe/> [https://perma.cc/YR6Q-X7YD] (last visited Sept. 21, 2020).

18. Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 387 (2002).

After the death of George Floyd—an unarmed Black man killed by police—bar associations, law schools, and various legal organizations made public statements acknowledging the value of Black lives and committing to combat racial injustice.¹⁹ But the legal profession has long been aware of its lack of diversity and the injustice within it, which excludes aspiring Black Lawyers through a strict adherence to entrance exams for schooling and the bar exam for licensing.²⁰

This Essay focuses on the current bar exam as a licensing mechanism. It has been an effective gatekeeper for excluding many aspiring Black lawyers.²¹ The 2020 collision of the Black Lives Matter movement and COVID-19, a highly contagious disease at the center of a worldwide pandemic, has created a clear space to implement real change as it relates to pathways to licensure, particularly the bar exam. A shift in the paradigm used is needed to move the legal profession from simply acknowledging a problem and giving hollow commitments to eradicating the disparities.²²

The traditional view of racism, which does not recognize racial disparities as an injustice, is one reason why a paradigm shift is needed.²³ Traditional views of racism typically view racism as occurring when there is an overt or subtle racism that occurs through the use of symbols, words, or actions that are clearly racist (e.g., past policies of segregation or verbalized beliefs that Black lives are inferior to White ones).²⁴ Under traditional views of racism, as long as the system, policy, or structure is not designed for a racist purpose, it is not racist but is instead neutral and may continue.²⁵ But racism is not limited in this way, and antiracism offers a paradigm that recognizes that reality.²⁶

19. Vault Law Editors, *Law Firm & Law School Responses to the Black Lives Matter Movement*, VAULT (June 11, 2020), <https://www.vault.com/blogs/vaults-law-blog-legal-careers-and-industry-news/law-firm-law-school-responses-to-the-black-lives-matter-movement> [https://perma.cc/N5GB-4AEP] (last visited Sept. 21, 2020); *Statements on George Floyd Death and Protests*, A.B.A., https://www.americanbar.org/groups/bar_services/resources/resourcepages/floydstatements/ [https://perma.cc/SA2U-D8EU] (last visited Sept. 29, 2020).

20. See Curcio, *supra* note 18, at 367 (arguing that the LSAT and bar exam disproportionately exclude people of color from the practice of law).

21. See generally George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 104 (2003) (arguing about the gatekeeping function the bar exam has had to exclude black lawyers).

22. See *id.*

23. George Lipsitz, *The Logic of "Illogical" Opposition: Tools and Tactics for Tough Times*, in ANTIRACISM INC.: WHY THE WAY WE TALK ABOUT RACIAL JUSTICE MATTERS, 273, 273 (2019).

24. See *id.* at 274 (arguing that responses to racism were based on assumptions that racism is "aberrant, irrational, individual, and intentional").

25. See IBRAM X KENDI, *HOW TO BE AN ANTIRACIST* 20 (2019) (arguing that neutrality is a racist movement).

26. See Lipsitz, *supra* note 23, at 274 (arguing that racism is collective).

Antiracism changes how we interpret racism.²⁷ Racism is defined as the support of policies that promote racism through action or inaction or by spreading racist ideas.²⁸ Antiracism is defined as the support of policies that promote antiracism through action and by spreading antiracist ideas.²⁹ The neutral ground of “not racist” does not exist in the antiracist paradigm.³⁰ Antiracism recognizes that racism “is structural, systemic, collective, and cumulative.”³¹ The antiracist paradigm forces the legal profession to classify its support of licensure pathways as either racist or antiracist and challenges the profession to make active change to support antiracist pathways. While this Essay focuses on race and the bar exam, it is incredibly important to note that “racism is always intersectional. It is *ever* present, but *never* present only by itself.”³² Thus, the struggle for racial justice also encompasses other struggles for justice, including both class and gender.³³ This Essay will first explore the bar exam and the issues that arose due to COVID-19 in 2020. It will then explain antiracism, how it applies in the context of bar examinations, and what it offers in creating solutions for increasing pathways to licensure for more Black aspiring lawyers.

II. THE BAR EXAM AND COVID-19

The bar exam, a standardized test, has the purported purpose of determining whether the test-taker is minimally competent to practice in a given jurisdiction.³⁴ The bar exam is often touted as a method of consumer protection against incompetence.³⁵ Proponents of the exam argue it is a fair exam.³⁶ They argue that no test is capable of measuring all lawyering skills and that the exam is one way to at least measure some of those important skills.³⁷ Critics of the bar exam have been quick to

27. Anna North, *What it means to be anti-racist*, Vox (June 3, 2020, 1:50 PM), <https://www.vox.com/2020/6/3/21278245/antiracist-racism-race-books-resources-antiracism> (last visited Sept. 12, 2020); KENDI, *supra* note 25, at 13.

28. KENDI, *supra* note 25, at 13.

29. *Id.*

30. North, *supra* note 27; KENDI, *supra* note 25, at 19.

31. Lipsitz, *supra* note 23, at 274.

32. *Id.* at 276.

33. *Id.*; see also BLACK LIVES MATTER, *supra* note 8.

34. See *Uniform Bar Examination*, NCBE, <http://www.ncbex.org/exams/ube/> [<https://perma.cc/D67L-E3J7>] (last visited Sept. 25, 2020) (stating the purpose is to test skills and knowledge every attorney should have).

35. Shepherd, *supra* note 21, at 126.

36. Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, THE BAR EXAM’R 8, 15 (1997), <https://thebar-examiner.org/wp-content/uploads/PDFs/660497-Klein-Bolus.pdf> [<https://perma.cc/8QF9-PJH7>] (arguing that the test’s mechanics and grading have no effect on the differences of bar exam performance among racial groups).

37. Curcio, *supra* note 18, at 371.

point out the lack of evidence that it actually measures competency.³⁸ They also argue, since it is a closed-book and timed exam, that it does not test in a way that is reflective of what lawyers actually do.³⁹ The exam has also been criticized for incorporating racial bias.⁴⁰ Notwithstanding the arguments for and against the exam, the bar exam has a history of being used to protect the profession from minorities.⁴¹

The bar exam's rise to becoming a prerequisite to practice is rooted in racism.⁴² From around 1840 until before the Great Depression, admission to the legal profession evolved from being reserved for the wealthy to becoming more open for White men, with limited educational requirements and an easy bar exam.⁴³ These opportunities excluded most Blacks; for example, in 1910 only .7% of lawyers were Black despite comprising 11.1% of the U.S. population.⁴⁴ The ABA even rescinded the membership of three Black men it accidentally admitted (though ultimately they were admitted).⁴⁵ To exclude Black members in the future, the ABA required all recommendations for membership to include disclosure of race, which remained in place until 1943.⁴⁶

However, by the 1920s and 1930s, the legal profession's Black and minority populations expanded as access to legal education grew as a result of U.S. Supreme Court cases that prohibited the practice of state schools excluding Blacks, forcing those states to create separate programs or to integrate.⁴⁷ Access also grew as for-profit part-time programs arose.⁴⁸ These avenues resulted in doubling the Black population of lawyers, even though the population continued to remain relatively

38. *Id.* at 370 (arguing that states have not tested the exam to ensure it actually measures competence).

39. Stephanie Francis Ward, *A better bar exam? Law profs weigh in on whether test accurately measures skills required for law practice*, ABA J. (Jan. 8, 2020, 10:09 AM), <https://www.abajournal.com/web/article/building-a-better-bar-exam> [<https://perma.cc/9C2L-UP8U>].

40. Shepherd, *supra* note 21, at 126; see generally Christina Chong, *Battling Bias: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 31 (2018).

41. Shepherd, *supra* note 21, at 126.

42. *Id.* at 104.

43. *Id.* at 108.

44. *Id.* at 109.

45. Cecil J. Hunt II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 754 n.193 (1996) (citing GERALDINE R. SEGAL, *BLACKS IN THE LAW: PHILADELPHIA AND THE NATION* 17 & 19 (1983)); Alan Dershowitz, *Unequal Justice*, N.Y. TIMES (Jan. 25, 1976), <https://www.nytimes.com/1976/01/25/archives/unequal-justice-counselor-counsel-thyself.html> [<https://perma.cc/K74D-YNB2>]; see Shepherd, *supra* note 21, at 109.

46. Shepherd, *supra* note 21, at 109 (stating the exclusion of blacks from the ABA).

47. *Id.* (citing, for example, *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950)).

48. *Id.*

small.⁴⁹ “[T]he bar acted to stop the influx of new minority lawyers in two new ways that did not involve the overt discrimination that was becoming increasingly difficult: decreasing bar exam pass rates and tightening law school accreditation.”⁵⁰ The rationale for decreasing bar passage was to alleviate overcrowding.⁵¹

It was the ABA that worked during the Depression era to create a system that licensed only applicants from ABA-accredited law schools and that required an education before law school.⁵² Before 1920, law school was not the only pathway to the profession.⁵³ The ABA’s accreditation efforts, both present and past, have been successful in depressing the pathways to becoming an attorney for Blacks.⁵⁴ Blacks are effectively kept out of the profession due to ABA accreditation standards that regulate entering credentials like the LSAT and bar passage rates.⁵⁵ As Professor George Shepherd points out, “Other than a specific prohibition on [B]lacks’ receiving legal education, a dedicated racist could not have constructed standards that more effectively permit whites to enter the legal profession but filter out [B]lacks.”⁵⁶

By far the most common adaption of the modern-day bar exam is the Uniform Bar Examination (UBE).⁵⁷ As of August 2020, thirty-seven jurisdictions have adopted the UBE.⁵⁸ The UBE is not created by state bar examiners but is outsourced to the National Conference of Bar Examiners (NCBE).⁵⁹ The components of the exam include the Multistate Bar Exam, Multistate Essay Exam, and two Multistate Performance Tests.⁶⁰ The Multistate Bar Exam consists of 200 multiple-choice questions.⁶¹ The Multistate Essay Exams consists of six essays.⁶² And the Multistate Performance Test is a performance test that requires test takers

49. *Id.* at 110.

50. *Id.*

51. *Id.*

52. Shepherd, *supra* note 21, at 112.

53. *Id.* at 149.

54. *Id.* at 113, 120.

55. *Id.* at 104–05; see generally Erin Thompson, *Law Schools Are Failing Students of Color: Higher debt and lower employment rates create a “justice gap” that’s nearly impossible to escape*, THE NATION (June 5, 2018), <https://www.thenation.com/article/archive/law-schools-failing-students-color/> [https://perma.cc/9FVZ-BV3T].

56. Shepherd, *supra* note 21, at 119.

57. Ward, *supra* note 39.

58. Understanding the Uniform Bar Examination, NAT’L CONF. OF BAR EXAM’RS, <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209> https://perma.cc/FSE5-KXUW] (last visited Sept. 9, 2020).

59. *What Is the Uniform Bar Exam (UBE)?*, KAPLAN, <https://www.kaptest.com/bar-exam/what-is-the-uniform-bar-examination> [https://perma.cc/C3XX-ELVF].

60. NCBE, *supra* note 34.

61. NAT’L CONF. OF BAR EXAM’RS, *supra* note 58.

62. *Id.*

to draft a “lawyerly” document within time constraints.⁶³ The exam does not require test takers to know any state specific law.⁶⁴ States that have chosen to require applicants to learn state-specific concepts do so outside of the bar exam.⁶⁵ While there are still state-created tests with varying components in states like California, Florida, and Michigan, most have adopted the UBE.⁶⁶ Bar exams, whether UBE or state-created, typically occur in person during both February and July of each year.⁶⁷

COVID-19 displaced the July 2020 bar exam in many states.⁶⁸ COVID-19 caused a world-wide shutdown. It is highly contagious and affects varying communities differently, particularly the elderly, minorities, and those with pre-existing conditions.⁶⁹ Entire countries placed their populations under lockdown orders that required them to stay inside their homes with exceptions for necessities such as grocery shopping or traveling to a hospital.⁷⁰ Schools and businesses deemed non-essential were closed to contain the spread of the virus.⁷¹ Countries also implemented social distancing, mask wearing, and contact tracing.⁷² In the United States, the federal government left the individual states largely responsible for putting safety provisions in place to protect their own populations.⁷³

As a result of COVID-19, the legal profession had to adapt. Law schools across the nation shifted to online instruction by March 2020 and many schools adopted new grading policies, which included converting

63. *Id.*

64. *Id.*

65. *Id.*

66. *Comprehensive Guide to Bar Admission Requirements 2020* 28–29, NCBE (Judith A. Gunderson & Claire J. Guback eds., 2020), https://www.ncbex.org/pdfviewer/?file=%2Fassets%2FBarAdmissionGuide%2FCompGuide2020_021820_Online_Final.pdf [https://perma.cc/MU2B-64EB].

67. *Taking the Bar Exam*, HARVARD LAW SCHOOL, <https://hls.harvard.edu/dept/dos/taking-the-bar-exam/> [https://perma.cc/8QEC-6WSV] (last viewed Sept. 9, 2020).

68. See Pilar Margarita Hernández Escontrías, *The Pandemic Is Proving the Bar Exam Is Unjust and Unnecessary*, SLATE (July 23, 2020, 5:45 PM), <https://slate.com/news-and-politics/2020/07/pandemic-bar-exam-inequality.html> [https://perma.cc/XWM6-DD4H].

69. *Who is most at risk of dying from coronavirus?*, WEBMD (Aug. 11, 2020), <https://www.webmd.com/lung/qa/who-is-most-at-risk-of-dying-from-coronavirus> [https://perma.cc/JE3M-LTC9].

70. Reality Check team, *Coronavirus: What measures are countries taking to stop it?*, BBC NEWS (Apr. 1, 2020), <https://www.bbc.com/news/world-51737226> [https://perma.cc/7RL7-7MRM].

71. *Id.*

72. Gavin Yamey & Dean T. Jamison, *U.S. Response to COVID-19 is Worse than China's. 100 Times Worse*, TIME (June 10, 2020, 7 AM), <https://time.com/5850680/u-s-response-covid-19-worse-than-chinas/> [https://perma.cc/J7ZJ-4PBB].

73. *Two centuries of law guide approach to modern pandemic*, A.B.A. (Apr. 2020), <https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic/> [https://perma.cc/UTC6-V8EA].

to pass/fail grading, in recognition of the differing conditions that students experienced.⁷⁴ As a result of the pandemic, two mainstays of legal education, namely in-person instruction and the traditional letter-based grading system, were adapted to meet the crisis. Yet, many state bar examiners took a wait-and-see approach to the bar exam. Because COVID-19 was spreading widely throughout the world, many considered an in-person exam—for which hundreds or thousands gather in one facility—to be a public safety issue.⁷⁵ Some states, nonetheless, chose to proceed with the exam, electing to implement social-distancing measures, asking applicants to wear masks, performing temperature checks, and even requiring applicants to sign waivers.⁷⁶ Other states were more cautious and implemented online exams, diploma privilege, or temporary practice measures.⁷⁷

To many, the states' insistence on administering bar exams seemed misplaced, unnecessary, and poorly planned in the midst of a pandemic that saw growing infection rates and loss of life. Petitions were signed and filed, letters were drafted, articles were composed, and social media was used to push state bar examiners towards eliminating the exam.⁷⁸ To some, the insistence on the exam served as evidence that the bar exam is antiquated and unjust, that those in charge of administering it were so tied to the tradition of the test that they put applicants at risk, or that they failed to recognize the disparities created in moving online.⁷⁹

The handling of the crisis should serve as a catalyst for a real conversation about what the profession is protecting and why it is worth sacrificing this class of bar-takers. The NCBE seemingly stood in defense of in-person exams by arguing that in-person exams are best.⁸⁰ While they

74. Karen Sloan, *Pass/Fail Grading in Law School Gets Mixed Marks from Students*, LAW.COM (June 17, 2020, 12:20 PM), <https://www.law.com/2020/06/17/passfail-grading-in-law-school-gets-mixed-marks-from-students/> [https://perma.cc/MCT9-G488].

75. Escontrías, *supra* note 68.

76. *Notice to Applicants Regarding COVID-19 Requirements, Protective Measures, and Assumption of Risk for July 2020 North Carolina Bar Examination*, BOARD OF BAR EXAMINERS OF THE STATE OF NORTH CAROLINA, 1–2, https://www.ncble.org/covid_19_requirements; *see also* Colin Campbell, *Hundreds will gather to take the NC bar exam next week. Is it safe?*, THE NEWS & OBSERVER (July 21, 2020, 12:47 PM), <https://www.newsobserver.com/news/coronavirus/article244353552.html>.

77. *July 2020 Bar Exam Jurisdiction Information*, NCBE (Sept. 13, 2020, 9:18 AM), <http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/> [https://perma.cc/9CXY-ZLRN].

78. Brianna Bell, *Florida Bar Examiners: Consider All Other Options to an In-Person Bar Exam in July 2020*, JURIST (June 24, 2020), <https://www.jurist.org/commentary/2020/06/fl-bar-exam-petition-organizers/> [https://perma.cc/8SGB-KWQZ].

79. *See, e.g.*, Escontrías, *supra* note 68.

80. Joe Patrice, *NCBE Offers Online Bar Exam... Sort Of... Not Really*, ABOVE THE LAW (June 2, 2020, 1:45 PM), <https://abovethelaw.com/2020/06/ncbe-offers-online-bar-exam-sort-of-not-really/>.

“purported to accommodate” online exams by releasing an online exam that had half of the testing components, it made the administration of that exam more difficult by forcing state examiners to establish new passing scores, equate the exams, and negotiate reciprocity.⁸¹ Many state examiners, in rejecting diploma privilege, argued for protection of the public.⁸² This situation also shows that significant commitment is necessary to address the problems within these structures, policies, and systems.

III. ANTIRACISM: OVERVIEW OF THE PARADIGM

Antiracism is an idea that has existed since abolition.⁸³ Some scholars have argued that history often portrays colonialism and slavery as though they were uncontested, when there were indeed antiracist ideas.⁸⁴ Antiracism defines racism as supporting or expressing racist ideas.⁸⁵ Racist ideas are those that claim one race is superior or inferior to another race.⁸⁶ But an antiracist supports or expresses antiracist ideas.⁸⁷ An antiracist idea is one that racial groups are equal.⁸⁸ Antiracist ideas also recognize that racial inequity flows from racist policies.⁸⁹ In this paradigm, a person is not defined as an antiracist or as a racist, but rather is characterized as antiracist or racist based on what they are doing at that moment.⁹⁰ The neutral response of “not racist” is eliminated in the antiracist paradigm. Instead, “[a]ll policies, ideas and people are either being racist or antiracist.”⁹¹ The problem with the neutral position of “not racist” is that it is difficult to define and is utilized to defend policies, systems, and structures that produce inequities and oppose policies designed to correct inequities.⁹²

Indeed, the danger in today’s world is that racism is often clouded in antiracist discourse that has been appropriated, incorporated, and

81. *See id.*

82. Escontrías, *supra* note 68.

83. *See* Anna North, *What it means to be anti-racist*, VOX (June 3, 2020), <https://www.vox.com/2020/6/3/21278245/antiracist-racism-race-books-resources-antiracism>.

84. Gargi Bhattacharyya, Satnam Virdee & Aaron Winter, *Revisiting Histories of Anti-Racist Thought and Activism*, 27 IDENTITIES: GLOB. STUD. IN CULTURE & POWER 1, 3 (2020).

85. Ibram X. Kendi, *This is what an antiracist America would look like. How do we get there?*, THE GUARDIAN (Dec. 6, 2018), <https://www.theguardian.com/commentisfree/2018/dec/06/antiracism-and-america-white-nationalism> [<https://perma.cc/Y7HK-6C5X>] [hereinafter *Antiracist America*].

86. KENDI, *supra* note 25, at 20.

87. *Antiracist America*, *supra* note 85.

88. KENDI, *supra* note 25, at 20.

89. *Id.*

90. *Antiracist America*, *supra* note 85.

91. *Id.*

92. *See id.* (asking how many have used the words “I’m not racist” after expressing something that would be racist under antiracism).

neutralized to support racist agendas.⁹³ Those agendas work to maintain the status quo rather than seek reformation.⁹⁴ And they do so by reinterpreting racism.⁹⁵ “For example, conservatives critique protestors like Colin Kaepernick for highlighting patterns of systematic police violence against people of color by saying that stereotyping an entire group of people (i.e., white police officers) is racist.”⁹⁶ Another example is the term “racial discrimination,” which racists redefined in the 1960s to mean that all discrimination on the basis of race is inherently racist.⁹⁷ Under this definition, racial discrimination exists when it is done to create both inequity and equity.⁹⁸ Antiracism reclaims terms and looks at the outcomes with those producing equity being defined as antiracist and those producing inequity as being racist.⁹⁹ The use of language is powerful: affirmative action, which produces equity, is attacked as race conscious while standardized tests, which create racial disparities, are neutral.¹⁰⁰

The antiracism paradigm has a two-part course of action for social change. First, it requires that racial inequity causes are identified and, second, it requires dismantling those causes using antiracist policies.¹⁰¹ Education about racism is not enough, as it leaves in place policies and racist ideas.¹⁰² Rather, policy must be changed to eliminate racial disparities and racist ideas.¹⁰³ Thus, in evaluating the bar exam and the racial disparities, first there must be clarity about what those disparities are and the policies in place that create them. Then there must be an evaluation and implementation of antiracist policies.

IV. USING THE BAR EXAMINATION FOR LICENSURE IS A POLICY THAT CREATES LICENSING DISPARITIES FOR BLACK LAWYERS

State Bar Examiners often express that diversity is important for the profession.¹⁰⁴ Many have conducted studies that demonstrate disparities

93. Felice Blake & Paula Ionide, *Introduction, Part I: Antiracism Incorporated*, in *ANTIRACISM INC.: WHY THE WAY WE TALK ABOUT RACIAL JUSTICE MATTERS* 20 (Felice Blake et al. eds., 2019).

94. *Id.* at 21.

95. *Id.* at 22.

96. *Id.*

97. KENDI, *supra* note 25, at 19.

98. *Id.*

99. *Id.*

100. *Id.* at 20.

101. *Id.* at 231–32 (providing a list of ways to engage in antiracism).

102. *See id.* at 230.

103. KENDI, *supra* note 25, at 230.

104. *E.g.*, *Diversity / Inclusion*, THE FLA. BAR, <https://www.floridabar.org/about/diversity/> [<https://perma.cc/G6PD-UT6Z>] (last visited Jan. 20, 2021).

in bar passage rates by race,¹⁰⁵ but most have continued to use the same instrument to determine licensing. Even if the exam is not deliberately racist, the disparities it creates can no longer be ignored. Supporting tests that have a disparate impact on Blacks (and other minorities) is racist under the antiracist paradigm.¹⁰⁶ The history of standardized tests is filled with racist attempts to demonstrate that Whites are intellectually superior.¹⁰⁷ College entrance exams, like other standardized tests, have been criticized for years because their use results in the exclusion of minority and lower income students from higher education.¹⁰⁸ Standardized tests have been questioned because they measure only one type of achievement, and the outcomes uncover disproportionate access to resources and opportunities.¹⁰⁹

The existing bar passage rate data shows that Black test-takers pass at a lower rate than White test-takers.¹¹⁰ In 1997, an article revealed that the first-time bar passage rate for White people was 30% higher than for Black people.¹¹¹ The California Bar published passage rates for ABA accredited law schools for July 2018 as follows: White 69.5%; Black 45.1%; Latino 56.3%; Asian 66.4%; Other 47.8% (designations by California).¹¹² California shares data on passage rates by race while most states do not publicly report or indicate if this information is collected.¹¹³ Yet, even where the data exists, racial disparities are explained away. For example, one article argued that minorities tended to have lower grade point averages (GPAs), which meant they were less likely to pass the first time because of a lack of preparedness.¹¹⁴ The California Bar Exam

105. See Klein & Bolus, *supra* note 36.

106. *Id.* at 102.

107. *Id.*

108. Eric Hoover, *Our Relationship With Tests Is Unraveling. Why Is Everyone So Conflicted About It?*, THE CHRON. HIGHER EDUC. (July 29, 2020), https://www.chronicle.com/article/crisis-is-changing-the-debate-over-standardized-exams-but-our-relationship-with-them-is-as-conflicted-as-ever?cid=gen_sign_in [<https://perma.cc/4VTC-L797>].

109. See KENDI, *supra* note 25, at 103 (arguing in the context of K-12, looking at other types of achievement and recasting achievement gap to opportunity gap in recognizing that funding is limited in Black schools).

110. Linda F. Wightman, *LSAC National Longitudinal Bar Passage Study*, LSACRSCH. REP. SERIES 1, 78 (1998), <https://www.lawschooltransparency.com/reform/projects/investigations/2015/documents/NLBPS.pdf> [<https://perma.cc/44QN-WMAB>].

111. Klein & Bolus, *supra* note 36, at 8.

112. *General Statistics Report July 2018 California Bar Examination*, THE STATE BAR OF CAL. (2018), https://www.calbar.ca.gov/Portals/0/documents/admissions/JULY2018_CBX_Statistics.pdf [<https://perma.cc/2QY3-D3T3>].

113. Cecil J. Hunt, II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, at 726, 726 n.9 (1996) ("California is the only state which regularly collects and analyzes data concerning the minority pass rate.") (quoting THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON ADMISSION TO THE BAR IN NEW YORK IN THE TWENTY-FIRST CENTURY—A BLUEPRINT FOR REFORM 12 (1992)).

114. Klein & Bolus, *supra* note 36, at 15.

Report similarly found that the gap between Whites and minorities closed when they had similar law school GPAs.¹¹⁵ The stated solution is often that closing the disparities between Blacks and Whites requires Blacks to study more.¹¹⁶ But such advice ignores the possibility that the test fails to measure alternative competencies that Black test takers can show but are not tested for.¹¹⁷ It also fails to recognize the disparities that may inhibit a Black test-taker's ability to study like White test-takers who may have access to more resources.¹¹⁸

It is well-documented that minorities incur more debt, on average, for their education and tend to attend lower ranked schools.¹¹⁹ This is not to suggest that all minorities suffer from financial disparities, but instead to recognize that at the intersection of race and class there arises an additional hurdle for some minorities.¹²⁰ A 1991 study found that 50% of Black students stated they were from the lowest socioeconomic group, compared to only 22% of White students.¹²¹ These two occurrences likely also mean that the conditions in which minorities prepare for the exam may be less than optimal if they are working, financially insecure, or have other concerns weighing on them in addition to preparing for the exam.¹²²

As a result, strict adherence to a test with clear disparities on the basis of race (and other intersections) is racist within the antiracist paradigm. It serves to reinforce the notion that Blacks are intellectually inferior to Whites,¹²³ who pass the bar exam at a higher rate.¹²⁴ It also perpetuates the historical racist intention of keeping Blacks out of the profession.¹²⁵ Thus, a change is needed to correct racial disparities for antiracist licensing policies that result in more Black lawyers.

115. Roger Bolus, *Performance Changes on the California Bar Examination: Part 2*, 1, 61 (2018), <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Bar-Exam-Report-Final.pdf> [<https://perma.cc/N7YP-R4K8>].

116. Klein & Bolus, *supra* note 36, at 15.

117. See KENDI, *supra* note 25, at 103 (arguing achievement tests measure one type of achievement).

118. *Id.* (arguing in the K-12 context that standardized test reveal an opportunity gap).

119. Shepherd, *supra* note 21, at 136 n.136, 138 (citing Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 23 (1997)).

120. See *id.* at 135.

121. *Id.* at 134–35 (citing Wightman, *supra* note 119, at 25 tbl.N5).

122. *Id.* at 135.

123. KENDI, *supra* note 25, at 101.

124. *General Statistics Report July 2018 California Bar Examination*, THE STATE BAR OF CAL. (2018), https://www.calbar.ca.gov/Portals/0/documents/admissions/JULY2018_CBX_Statistics.pdf [<https://perma.cc/SB87-F4YX>].

125. See generally Shepherd, *supra* note 21, at 108.

V. DEVELOPING AND IMPLEMENTING ANTIRACIST POLICIES TO INCREASE THE LICENSURE OF BLACK LAWYERS

Researching and implementing reforms to licensure is hard work. But it is not unlike the work that state bar examiners have already done in moving from state created exams to the UBE, for which many have already invested time, money, and effort.¹²⁶ Those same investments can be committed to determining how to eradicate the disparities in bar passage for Black applicants (and other minorities). In particular, because these state bar examiners have entrusted the NCBE with developing the exam, they should put the onus on the NCBE to produce better bar passage rates for Black applicants. The New York Bar Association's Task Force recognized the issues with the NCBE and acknowledged the racial and gender disparities in the exam.¹²⁷ The NCBE has not been completely unresponsive to the disparity and has invested in better outcomes by partnering with organizations such as the Council on Legal Education Opportunity to increase the preparedness of Black and other minority applicants.¹²⁸ But that is not enough, as the exam itself needs to be evaluated again and modified.¹²⁹

A lot has been written about how the bar examination or the licensure process can change.¹³⁰ The NCBE is currently engaged in its own evaluation of what the next version of bar exam will look like.¹³¹ The options available for licensing fit into three broad categories: (1) replacing the exam with other mechanisms for licensing; (2) getting rid of the exam; or (3) changing the exam.¹³² For example, those who advocate for replacing the bar exam with alternative measures or adding

126. See Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 9 (2019) (stating states invested resources to determine if the UBE was a good fit for licensure in their state); see also Curcio, *supra* note 18, at 418 (arguing the hurdle to changing the bar exam is the time, money, and effort).

127. N.Y. STATE BAR ASS'N, REPORT OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON THE NEW YORK BAR EXAMINATION 37 (2020), <https://nysba.org/app/uploads/2020/03/Report-of-the-Task-Force-on-the-New-York-Bar-Examination.pdf> [https://perma.cc/3TUX-RY7B].

128. NCBE and CLEO Announce New Collaboration, NAT'L CONF. OF BAR EXAM'RS (Oct. 26, 2018), <http://www.ncbex.org/news/cleo-collaboration/> [https://perma.cc/LYA4-7TQN].

129. See Shepherd, *supra* note 21, at 148 ("[Accreditation] should be removed as a barrier to the legal profession.").

130. See generally Ward, *supra* note 39; Claudia Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action* 1 (The Ohio St. U. Legal Stud. Working Paper Series No. 537), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559060 [https://perma.cc/WP77-S7GZ] (arguing for changes during COVID-19); Griggs, *supra* note 126, at 2, 5; Curcio, *supra* note 18, 365–66.

131. NCBE Bar Exam Evaluation Status, NAT'L CONF. OF BAR EXAM'RS (2020), <https://testingtaskforce.org/about/>.

132. DeShun Harris, *Antiracist Strategies to Increase Licensure for Minorities*, RAISING THE BAR (forthcoming).

new measures for licensing, often refer to apprenticeship programs which allow for working in or observing a legal practice as a pathway for licensing.¹³³ Diploma privilege would eliminate the need for a bar exam.¹³⁴ Diploma privilege, which already exists in Wisconsin, allows graduates of a state to be licensed without taking a bar exam.¹³⁵ This pathway is often rejected by state bar examiners because of a perception that bar exams protect the public.¹³⁶ Changing the bar exam can take many forms, with some arguing it would be better to use different testing methods or to test different competencies.¹³⁷ Changing the exam is feasible. For example, dozens of states have neglected state-created exams and state-specific content to adopt the NCBE's UBE.¹³⁸ In fall of 2020, several states will forego an in-person exam and will instead administer an online exam in the homes of bar exam test takers.¹³⁹ The NCBE was able to accommodate this transition for those states that opted for a UBE-like exam.¹⁴⁰ Thus, while some may argue that the pandemic is a singular event, it is clear that changing the exam is not only possible but has been done. And permanent change is already occurring with California lowering its pass score, a move many believe is the result of the convergence of the Black Lives Matter movement and COVID-19.¹⁴¹ While changing, eliminating, or even creating alternatives to the bar exam causes some individuals concern about how to protect the public, attempting to eliminate the disparities in the exam can result in new innovations for protecting the public.¹⁴²

No solution to eliminating racial disparities in licensure will perfectly satisfy all stakeholders. Further, any newly adopted licensing framework will need to be studied to ensure it effectively eliminates racial

133. See Curcio, *supra* note 18, at 401–03.

134. See Griggs, *supra* note 126, at 65 (explaining diploma privilege).

135. *Id.*

136. See *In Re: Petition for Emergency Rule Waiver*, No. M2020-00894-SC-BAR-BLE (Tenn. 2020) (per curiam) (rejecting a petition for diploma privilege for 2020 after proceedings in which Tennessee Board of Law's argued that an exam is needed to "ensure[] that persons admitted to the bar will be able to service the public well and avoid harm").

137. See, e.g., Curcio, *supra* note 18, at 411 (suggesting how bar examiners might test legal drafting and research ability).

138. Griggs, *supra* note 126, at 3.

139. *July 2020 Bar Exam Jurisdiction Information*, NAT'L CONF. OF BAR EXAM'RS, <http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/> [<https://perma.cc/777K-LEAJ>] (last updated Sept. 1, 2020, 2:35 PM).

140. *NCBE COVID-19 Updates*, NAT'L CONF. OF BAR EXAM'RS, <http://www.ncbex.org/ncbe-covid-19-updates/> [<https://perma.cc/C8JZ-JV5C>] (last updated June 1, 2020, 4 PM).

141. Maura Dolan, *California is easing its bar exam score, which critics argue fails to measure ability*, L.A. TIMES (July 26, 2020, 5 AM), <https://www.latimes.com/california/story/2020-07-26/california-lowers-bar-exam-score-coronavirus> [<https://perma.cc/534U-5E7K>].

142. Shepherd, *supra* note 21, at 148.

disparities.¹⁴³ But continuing to support a policy that creates a significant barrier to licensure for Blacks is racist even in its use of neutrality as a defense, especially given its rise based on racism.¹⁴⁴ It will also need to be studied to ensure that it is not creating new disparities.¹⁴⁵ Longstanding change to the bar exam is possible and needed to eliminate racial disparities in passage rates. But it will require stakeholders to invest in making these changes. It will require some significant mindset shifts in addition to the work needed to research and implement antiracist policies for licensing, as evidenced by the patchwork of state bar examiners responses to COVID-19.¹⁴⁶

While this Essay has focused on what state bar examiners and stakeholders can do in altering, eliminating, or changing licensing, there is one particular stakeholder that cannot be overlooked: law schools. Law schools, in admitting and graduating Black law students, have a responsibility to see them become licensed.¹⁴⁷ While part of that responsibility is to advocate for licensure that eliminates racial disparities, law schools also bear responsibility for the implicit and explicit messages they send to their Black students about their ability to succeed academically and on the bar exam.¹⁴⁸ If law school grade point average is a factor for minority students' ability to pass the bar exam,¹⁴⁹ what is keeping these students from achieving academically? Antiracism requires law schools to describe and understand what is keeping their Black students from achieving academically and passing the bar exam.¹⁵⁰ Antiracism also requires law schools to make changes to address the problems they identify and describe.¹⁵¹ In the quest to eliminate

143. KENDI, *supra* note 25, at 231–32.

144. Dan Subotnik, *Does Testing = Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge of Learning*, 8 U. MASS. L. REV. 332, 368 (2013); *Antiracist America*, *supra* note 85; Shepherd, *supra* note 21, at 108.

145. KENDI, *supra* note 25, at 231–32.

146. See generally Marsha Griggs, *An Epic Fail*, 64 HOW. L.J. (2020), <http://dx.doi.org/10.2139/ssrn.3657379> [<https://perma.cc/NV6X-5PG8>] (forthcoming).

147. See 2020-2021 *Standards and Rules of Procedure for Approval of Law Schools*, Standard 316 Bar Passage, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf [<https://perma.cc/XD39-AGSB>] (requiring law schools to have 75% of graduates pass the bar exam within two years of their graduation).

148. Kristin Booth Glen, *Thinking out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 384 n.164 (2003).

149. See Bolus, *supra* note 115, at 61.

150. Cf. Glen, *supra* note 148, (noting the lack of “open and direct discussions [“among many law school faculties”] which focus . . . on possible solutions to the problem [of minority bar passage]”) (citing Daniel O. Bernstein, *Minority Law Students and the Bar Examination: Are Law Schools Doing Enough?*, 58 THE BAR EXAM’R 10, 10 (Aug. 1989), https://repository.law.wisc.edu/api/law_files/search?mediaID=25620?accessMethod=download [<https://perma.cc/5HWC-KXZS>]).

151. *Id.*

racial inequalities, every part of the profession will need to work toward implementing antiracist policies to open the profession to more Black lawyers.

In conclusion, the collision of the Black Lives Matter movement and COVID-19 in 2020 has created a profound opportunity for the legal profession to make needed changes to its licensing policies to make way for more Black lawyers. Antiracism provides a paradigm through which to enact radical change to licensing. If nothing else, it challenges the profession to affirm its commitment to racism through the use of racially-disparate licensing policies or to commit to antiracism and eliminate those barriers—by learning more about those disparities and disbanding the policies that create them.

RAP AS A PROXY FOR BLACKNESS: HOW THE PROSECUTION OF RAP LYRICS CONTINUES TO UNCONSTITUTIONALLY RESTRICT FREE SPEECH RIGHTS

Austin Vining*

Abstract

Increasingly, prosecutors have charged rap artists under various true threats statutes based solely on the content of their song lyrics despite artists' First Amendment freedom of speech claims. This Article examines the progression of the true threats jurisprudence and its application to cases involving rap lyrics while also taking a critical look at the barriers Black Americans have faced in attempting to exercise their constitutionally protected right to free speech. Next, this Article contemplates various free speech theories which provide the basis for protecting the types of speech often at issue in rap music cases. Finally, this Article concludes by suggesting that courts should import the third prong of the *Miller* test, which requires an analysis of “*whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.*” In doing so, courts would strike a more appropriate balance between prosecutors' interests and defendants' First Amendment rights.

INTRODUCTION	78
I. PROSECUTION UNDER STATE AND FEDERAL THREATS STATUTES	82
A. Watts v. United States	82
B. Elonis v. United States	84
C. People v. Oduwole	86
II. LEGAL ISSUES INVOLVING RACE AND THE FREEDOM OF SPEECH	89
A. <i>America's Origin</i>	89
B. <i>The Civil Rights Era</i>	90
III. RAP MUSIC AS A PROXY FOR BLACKNESS	90
IV. FREE SPEECH THEORIES PROVIDE RATIONALES FOR PROTECTING LYRICS	91

* Graduate Research Fellow, Marion B. Brechner First Amendment Project, University of Florida, Gainesville, Fla.; B.A., 2014, Psychology, Louisiana Tech University; B.A., 2014, Journalism, Louisiana Tech University; M.A., 2016, Journalism, University of Mississippi; J.D. Candidate, Levin College of Law, University of Florida; Ph.D. Candidate, Mass Communication, University of Florida. The author would like to thank Professor Michelle S. Jacobs for her comments on an earlier draft of this Article.

A. <i>Democratic Self-Governance</i>	92
B. <i>Safety-Valve Theory</i>	92
C. <i>Self-Actualization</i>	93
CONCLUSION.....	93

INTRODUCTION

After a 2012 scuffle with law enforcement that ultimately led to their arrests, Jamal Knox and Rashee Beasley wrote and recorded a rap song titled “Fuck the Police.”¹ The video, uploaded to YouTube, features the pair “looking into the camera and motioning as if firing weapons.”² The lyrics include “descriptions of killing police informants and police officers.”³ The lyrics specifically refer to Officer Kosko and Detective Zeltner, the law enforcement agents involved in the 2012 incident.⁴ The lyrics⁵ suggest that the artists know when Kosko and Zeltner’s shifts are over and that the crimes noted in the song might occur where the officers sleep.⁶ Further, the rap mentions Richard Poplawski, who had previously killed three police officers in Philadelphia.⁷ In the background of the song, both police sirens and gunfire can be heard.⁸ The pair were charged with two counts of terroristic threats and witness intimidation.⁹

“Fuck the Police” was the sole basis for the witness intimidation and terroristic threats charges.¹⁰ The full lyrics of the rap were reported in the court’s decision; however, a sample edited for length is provided here:

[Chorus:] If y’all want beef we can beef/I got artillery to
shake the mother fuckin’ streets/If y’all want beef we can
beef/I got artillery to shake the mother fuckin’ streets.

...

[Verse 1:] This first verse is for Officer Zeltner and all you
fed force bitches/And Mr. Kosko, you can suck my dick you
keep on knocking my riches/You want beef, well cracker I’m
wit it, that whole department can get it/All these soldiers in
my committee gonna fuck over you bitches/Fuck the, fuck
the police, bitch, I said it loud.

-
1. Commonwealth v. Knox, 190 A.3d 1146, 1148–49 (Pa. 2018).
 2. *Id.* at 1149.
 3. *Id.*
 4. *Id.*
 5. *Id.* at 1149–50.
 6. *Id.* at 1149.
 7. *Id.* at 1149–50.
 8. *Id.* at 1149.
 9. *Id.* at 1150–51.
 10. *Id.* at 1151.

The fuckin' city can't stop me/Y'all gonna need Jesus to bring me down/ And he ain't fuckin' wit you dirty devils/We makin' prank calls, as soon as you bitches come we bustin' heavy metal.

So now they gonna chase me through these streets/And I'ma jam this rusty knife all in his guts and chop his feet/You taking money away from Beaz and all my shit away from me/Well your shift over at three and I'm gonna fuck up where you sleep.

...

[Verse 2:] I ain't really a rapper dog, but I spit wit the best/I ain't carry no 38 dog, I spit with a tec/That like fifty shots nigga, that's enough to hit one cop on 50 blocks nigga/I said fuck the cops nigga/They got me sittin' in a cell, watchin' my life just pass me, but I ain't wit that shit/Like Poplawski I'm strapped nasty.

...

[Verse 3:] They tunin' in, well Mr. Fed, if you can hear me bitch/Go tell your daddy that we're boomin' bricks/And them informants that you got, gonna be layin' in the box/And I know exactly who workin', and I'm gonna kill him wit a Glock/Quote that.

Cause when you find that pussy layin' in the street/Look at the shells and put my shit on repeat, and that's on Jesus' blood/Let's kill these cops cuz they don't do us no good/Pullin' your Glock out cause I live in the hood/You dirty bitches, bitch!¹¹

With this evidence in mind, the court set out to find whether criminal liability could be based on rap lyrics containing threatening verses to law enforcement officers.¹²

Knox argued that the lyrics were protected by the First Amendment¹³ and that any conviction based on his speech would be a violation of constitutional rights.¹⁴ The lyrics,¹⁵ Knox contended, were “merely artistic in nature” and “never meant to be interpreted literally.”¹⁶ Further, Knox “consider[ed] himself a poet, musician, and entertainer. Rap music

11. *Id.* at 1149–50.

12. *Id.* at 1148.

13. *See* U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

14. *Knox*, 190 A.3d at 1151.

15. *See id.* at 1148–50 and accompanying text.

16. *Id.* at 1153.

serve[d] as his vehicle for self-expression, self-realization, economic gain, inspiring pride and respect from . . . peers, and [for] speaking on public issues including police violence, on behalf of himself and others”¹⁷

In *Knox*, the court set out to determine “whether the song communicated a ‘true threat’ falling outside First Amendment protections.”¹⁸ Holding that the lyrics constituted a “true threat directed to the victims,” the court rejected the First Amendment claim and found Knox and Beasley guilty.¹⁹ The Supreme Court denied certiorari.²⁰

The Supreme Court rarely takes true threats cases, and when it does, decisions are often narrow.²¹ Scholars have criticized the Court for taking a minimalistic approach to the issue.²² Professors Clay Calvert and Matthew Bunker attribute constitutional avoidance, judicial minimalism, and partisanship as factors that have “thwarted the advancement and coherence of First Amendment doctrine, if not tossed it into greater confusion” since 2011.²³

This lack of clarity has had especially severe consequences in the context of rap music.²⁴ However, it is naïve to believe the sole issue in the prosecution of rap lyrics are the words themselves; rap is often used as a proxy for Blackness in the courts.²⁵ In an amicus brief submitted in *Knox* by rap music scholar Erik Nielson,²⁶ rap artist Michael Render

17. *Id.*

18. *Id.* at 1149.

19. *See id.* at 1151 (quoting *Commonwealth v. Knox*, Nos. 201206621, 201303870, 201304264, slip op. at 19–20 (C.P. Allegheny Aug. 11, 2015)).

20. *Knox v. Pennsylvania*, 139 S. Ct. 1547 (2019).

21. *See* Clay Calvert & Matthew D. Bunker, *Fissures, Fractures & Doctrinal Drifts: Paying the Price in First Amendment Jurisprudence for a Half Decade of Avoidance, Minimalism & Partisanship*, 24 WM. & MARY BILL RTS. J. 943, 954 n.20 (2016) (citing Jan Komárek, *Reasoning with Previous Decisions: Beyond the Doctrine of Precedent*, 61 AM. J. COMP. L. 149, 164 (2013)) (observing that prior to *Elonis*, “the Court had not squarely addressed a true threats case in more than a decade”).

22. *See id.* at 951 nn.58–59, 951–52 n.60 (citing Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 42 (2011); A.E. Dick Howard, Essay, *Out of Infancy: The Roberts Court at Seven*, 98 VA. L. REV. IN BRIEF 76, 84 (2012)).

23. Calvert & Bunker, *supra* note 21, at 951–52.

24. *See infra* note 28, at 22.

25. *See id.* at 2–3.

26. Erik Nielson is Associate Professor of Liberal Arts at the University of Richmond, where his research and teaching focus on hip hop culture and African American literature. He has published widely on African American music and poetry, with a particular emphasis on rap music, and has served as an expert witness or consultant in dozens of criminal cases involving rap music as evidence. Brief for Michael Render (“Killer Mike”), Erik Nielson et al. as Amici Curiae Supporting Petitioner at 1, *Knox v. Pennsylvania*, 139 S. Ct. 1547 (2019) (No. 18-949).

(“Killer Mike”),²⁷ and other academic and industry leaders, *amici* argued that “rap music has been the subject of unique scrutiny in determining when speech constitutes a true threat of violence and thus falls outside the ambit of First Amendment protection, in part because of its close association with the [B]lack men who historically have created it.”²⁸ Attorney David Morrow further criticized the court’s decision in *Knox*, noting that it “demonstrates a complete lack of understanding” about the rap genre.²⁹ “The idea that someone could receive between two and six years in prison for rap is not just an injustice,” Morrow wrote, “[i]t is objectively wrong.”³⁰

Over time, rap music became more than artistic expression and artists began addressing social and political issues, bolstering the argument it should be protected under the First Amendment.³¹ As highlighted in the Nielson/Render amicus brief, “[r]appers used their platform to raise awareness about the problems facing urban America, and they became more comfortable challenging public figures and institutions that appeared uninterested in, or downright hostile to, America’s most vulnerable citizens.”³² In the 1980s, rap groups started using their power to take on the country’s most powerful and targeted issues, ranging from inequality and inner-city drug use to racism and police brutality.³³

While lyrics from rap and hip hop have been prosecuted under a number of different offenses—including obscenity,³⁴ incitement to violence,³⁵ and others³⁶—this Article aims to address prosecution under the true threats carveout³⁷ from the First Amendment. This Article especially takes aim at the often-overlooked factor that race plays in the prosecution of rap lyrics by applying a critical race theory lens.³⁸

First, Part I looks at the progression of true threats jurisprudence through three major cases.³⁹ Next, Part II provides a historical primer on the barriers placed on Black Americans’ free speech rights, a struggle that

27. Michael Render (“Killer Mike”) is a Grammy-award winning rapper, community activist, and highly regarded author and public speaker who lectures on a wide range of issues, particularly those related to race, social inequality, and police brutality. His father was an Atlanta police officer. *Id.*

28. *Id.* at 2–3.

29. David Morrow, *Freedom to Rap*, 23 TYL 3, 3 (2019).

30. *Id.*

31. Brief in support for the Petitioner, *supra* note 26.

32. *Id.*

33. *Id.*

34. *Skyywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 582 (S.D. Fla. 1990).

35. *See Davidson v. Time Warner, Inc.*, No. Civ. A. V–94–006, 1997 WL 405907, at *1 (S.D. Tx. Mar. 31, 1997).

36. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 387–88 (5th Cir. 2015).

37. *Watts v. United States*, 394 U.S. 705, 708 (1969).

38. *See infra* Part III.

39. *See infra* Part I.

continues today.⁴⁰ Then, Part III examines how rap has become a proxy for Blackness and the effect that has had on stifling constitutional protections.⁴¹ Part IV examines popular free speech theories that would provide rationale for protecting the type of speech implicated in *Knox*.⁴² Finally, this Article concludes by suggesting a possible path forward to protect rap artists' speech under the First Amendment.⁴³

I. PROSECUTION UNDER STATE AND FEDERAL THREATS STATUTES

This Part considers three cases that collectively trace the evolution of the true threats doctrine, from its initial carveout from First Amendment protection to its more recent application to rap music cases.⁴⁴ The theme drawn from true threats jurisprudence shows that the Court's reluctance to address the First Amendment in its rare recent decisions has left lower courts without exact rules to apply when considering charges based on lyrics.⁴⁵ Additionally, the muddled tests currently in use are not adequate for determining rap lyrics constitute true threats because courts and juries often lack the cultural context to fully understand the speech.

A. *Watts v. United States*⁴⁶

The true threats doctrine was established in the 1969 landmark case *Watts v. United States*.⁴⁷ Watts, an 18-year-old rally attendee, was discussing police brutality when an older attendee suggested that the young people present should seek more education before voicing their opinions.⁴⁸ Watts responded:

They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.⁴⁹

After which, Watts was arrested and charged under a 1917 statute prohibiting any person from "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States"⁵⁰

40. See *infra* Part II.

41. See *infra* Part III.

42. See *infra* Part IV.

43. See *infra* Part V.

44. See *infra* Part I, Sections A–C.

45. See Calvert & Bunker, *supra* note 21, at 944 & 951–52.

46. 394 U.S. 705 (1969).

47. *Watts*, 394 U.S. at 705.

48. *Id.* at 705–06.

49. *Id.* at 706.

50. *Id.* at 705–06 (alteration in original).

A jury upheld Watts' conviction, and the United States Court of Appeals of the District of Columbia affirmed the judgment.⁵¹ Upon review, the Supreme Court found the statute constitutional on its face.⁵² However, it noted the need to distinguish criminal speech from that which is constitutionally protected under the First Amendment.⁵³ The Court ultimately held that Watts' speech, which was political in nature, did not rise to the level of true threat prohibited by the statute.⁵⁴

In its decision, the Supreme Court built on its opinion from five years prior in *New York Times Co. v. Sullivan*,⁵⁵ opining that laws concerning speech must be weighed "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on public officials."⁵⁶ Key to Watts' success was the context in which he spoke.⁵⁷ The Court noted that as Watts argued, his statement was nothing more than "a kind of very crude offensive method of stating a political opposition to the President,"⁵⁸ and given the conditional nature of Watts' proclamation and the audience's reaction, little room was left for an alternative interpretation.⁵⁹

Scholars have criticized *Watts* for its failure to define true threats.⁶⁰ As Professor Frederick Schauer astutely notes, *Watts* "provides virtually no information on just what a threat *is* other than what Watts said was not one."⁶¹ Instead, true threats jurisprudence has largely evolved in the circuit courts, which have adopted various tests. Professor Jessica Miles explains that "[u]nder the objective test, the fact finder asks if a reasonable listener, or, in some jurisdictions, a reasonable speaker or reasonable person, would find the communication at issue to be threatening."⁶²

Complicating matters further, Professor Jennifer Rothman observes that many circuit courts "have allowed for the admission of the alleged

51. *Id.* at 706.

52. *Id.* at 707.

53. *Id.*

54. *Id.* at 708.

55. 376 U.S. 254 (1964).

56. *Watts*, 394 U.S. at 708 (quoting *Sullivan*, 376 U.S. at 270).

57. *Id.* at 708

58. *Id.*

59. *Id.*

60. Clay Calvert, Emma Morehart & Sara Papdelias, *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime*, 38 COLUM. J.L. & ARTS 1, 7 (2014).

61. Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 211 (2003).

62. Jessica Miles, *Straight Outta SCOTUS: Domestic Violence, True Threats, and Free Speech*, 74 U. MIAMI L. REV. 711, 716 (2020).

victim's reaction as evidence of how a reasonable person would interpret the statement.”⁶³ This subjective audience-reaction test is the third factor in the ill-defined federal true threats jurisprudence. It should be noted that the Supreme Court has yet to weigh in on the validity of the reasonable-speaker, reasonable-listener, or audience-reaction tests.⁶⁴ As described in the introduction, this uncertainty has left a fog over true threats jurisprudence.⁶⁵

B. *Elonis v. United States*⁶⁶

The Supreme Court took up its first and only true threats case involving song lyrics in 2014.⁶⁷ Anthony Elonis took to Facebook posting “self-styled rap lyrics containing graphically violent language and imagery concerning his wife, co-workers, a kindergarten class, and state and federal law enforcement.”⁶⁸ In the posts, Elonis often included several disclaimers noting that the lyrics were not intended to be taken as truth and that he believed he was exercising his First Amendment rights.⁶⁹ However, many who saw the posts considered them threatening.⁷⁰ Elonis’ boss ultimately fired him for threatening a co-worker, and his wife was granted a protection order.⁷¹

Elonis argued that his speech was protected by the First Amendment as “constitutionally protected works of art.”⁷² Similar to the arguments presented in *Knox*,⁷³ Elonis contended his speech was similar to that of rappers and singers performing shows or releasing recorded music.⁷⁴ In his brief, he included a lengthy excerpt with the lyrics of a famous rapper who rapped about killing his ex-wife.⁷⁵ Elonis hoped to juxtapose his expression with other popular art and thereby enjoy the same First Amendment protections.⁷⁶

However, the Court narrowly decided the case on the *mens rea* issue and therefore avoided addressing the First Amendment arguments.⁷⁷

63. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 283, 288 (2001).

64. *Id.*

65. *See supra* notes 19–21.

66. 135 S. Ct. 2001 (2015).

67. *Id.*

68. *Id.* at 2002.

69. *Id.* at 2005–06.

70. *See id.* at 2006 (noting Elonis’s wife, *inter alia*, felt “extremely afraid for [her] life”).

71. *Id.* at 2005–06.

72. *Id.* at 2016 (Alito, J., concurring in part and dissenting in part).

73. *Commonwealth v. Knox*, 190 A.3d 1146, 1148 (Pa. 2018), *cert. denied sub nom. Knox v. Pennsylvania*, 139 S. Ct. 1547 (2019).

74. *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring in part and dissenting in part).

75. *Id.*

76. *See id.*

77. *Id.* at 2012.

Scholars have criticized the case for failing to clarify the constitutional issue of when speech falls into unprotected territory under the true threats carveout of the First Amendment.⁷⁸ Further, the Court was given the opportunity to address true threats made in the context of the Internet and social media, another opportunity on which it punted.⁷⁹

Despite avoiding the constitutional issue, *Elonis* does represent a departure from the traditional rap-music based prosecution.⁸⁰ Here, the Court's holding on the *mens rea* issue established that the prosecution must prove that a defendant intended to actually carry out any alleged threats.⁸¹ Professor Donald Tibbs praises this development as "the proposition that prosecuting hip-hop now requires more than just putting a Black face to the music and claiming that hip-hop lyrics tell the entire truth."⁸²

However, other scholars have noted that deciphering artists' intent has not been a straightforward endeavor.⁸³ Rap music often depicts violence, especially gang violence, although such depictions are often exaggerations.⁸⁴ As one scholar, Erin Lutes explains, "[i]n spite of the creative license that many rappers take when crafting their songs, scholars have noted that the legal system has increasingly used rap lyrics as evidence as if the words were truthful and autobiographical."⁸⁵ Lutes highlights that this sort of interpretation raises particular concerns "in the context of criminal trials because it allows prosecutors to prove various elements of crime by circumstantial evidence that was crafted to glamorize either fictionalized or grossly exaggerated depictions of badness—often of the same type of criminal behaviors for which a particular defendant may be on trial."⁸⁶

Likewise, Professors Clay Calvert and Matthew Bunker write that the true threats doctrine places a tremendous burden on speakers to clarify their messages.⁸⁷ In the context of rap music, the pair explain that "the

78. See Calvert & Bunker, *supra* note 21, at 943–44, 946.

79. See *id.* at 944.

80. See Donald F. Tibbs & Shelly Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What's "Unconstitutional" About Prosecuting Young Black Men Through Art*, 52 WASH. U. J.L. & POL'Y 33, 42 (2016).

81. *Id.*

82. *Id.*

83. See Erin Lutes, James Purdon & Henry F. Fradella, *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 AM. J. CRIM. L. 77, 84 (2019) (describing "[d]eciphering such intent from song lyrics" as a "precarious undertaking").

84. *Id.* at 84–85.

85. *Id.* at 85 (internal quotations omitted).

86. *Id.*

87. Clay Calvert & Matthew D. Bunker, *Know Your Audience: Risky Speech at the Intersection of Meaning and Value in First Amendment Jurisprudence*, 35 LOY. L.A. ENT. L. REV. 141, 201 (2014).

messages are conveyed in an artistic genre of music that is heavily stigmatized and that features narrative conventions that might not be understood by a reasonable jury serving as a surrogate for a reasonable person.”⁸⁸ In other words, context is key in determining true threats, and most courts and juries do not have the requisite familiarity with rap music to understand the context. With this in mind, Professors Calvert and Bunker suggest that a reasonable person probably should not take Elonis’s lyrics as literal.⁸⁹

C. *People v. Oduwole*⁹⁰

In 2011, Olutosin Oduwole was charged with “the intent to commit the offense of making a terrorist threat” pursuant to Illinois state law.⁹¹ The basis for the charges was a piece of paper with the handwritten words:

I Lead She a follower, I’m Single and I’m not wit her, but
she gott a throat deeper than a Sword Swallower/glock to the
head of

. . .

SEND 2 to . . . paypal account if this account doesn’t reach
\$50,000 in the next 7 days then a murderous rampage similar
to the VT shooting will occur at another prestigious highly
populated university. THIS IS NOT A JOKE!⁹²

The note was found in Oduwole’s unattended vehicle before it was towed from the Southern Illinois University—Edwardsville campus.⁹³ The officer who found the paper slightly protruding from the center console acknowledged that a person outside of the vehicle would not be able to read the note.⁹⁴

Later that day, a warrant was served on Oduwole’s on-campus apartment.⁹⁵ Among other things, police seized a gun, ammunition, and nearly 2,000 pages of writings.⁹⁶ The officer who reviewed the writings

88. *Id.* at 202.

89. *Id.* at 204.

90. 985 N.E.2d, 316 (Ill. App. Ct. 2013).

91. *Id.* at 318.

92. *Id.* 318, 320. The State and Oduwole agreed to the facts that “Seung-Hui Cho, a full-time student, armed with a 9-millimeter. Glock and a .22-caliber Walther pistol, shot and killed 32 people, students and faculty, on the campus of Virginia Tech, and then killed himself.” *Id.* at 318. The top lines were written in black ink and the lines at the bottom were written in blue ink. *Id.* at 320.

93. *Id.* at 320.

94. *Id.* at 320–21.

95. *Id.* at 321.

96. *Id.*

testified that “a large percentage of the notebook entries appeared to be rap lyrics and writings related to the defendant’s aspiring rap career” and that “some of the same symbols and words that were present on the paper seized from the defendant’s vehicle were also present in the notebooks.”⁹⁷

During cross-examination, one of the officers involved in the case acknowledged that there was no evidence that Oduwole was going to communicate the contents of the paper to anyone.⁹⁸ However, the officer testified that he regarded the lines as a threat to the college community.⁹⁹ The officer stated that “he could not possibly consider” the words Oduwole had written “to represent creative writing, given that the Virginia Tech incident occurred three months prior and given his knowledge of [Oduwole’s] Internet purchase of four handguns.”¹⁰⁰ The parties stipulated that Oduwole had opened a PayPal account under an alias two months before the note was seized.¹⁰¹

A promoter of rap music, including Oduwole’s, testified that some of Oduwole’s lyrics were violent and “that violent lyrics are common in the rap industry.”¹⁰² However, the promoter testified that Oduwole was not “a violent person,” but rather “a nice person.”¹⁰³ Another individual, who was present at Oduwole’s apartment at the time of his arrest, testified that Oduwole “came up with the idea for the Virginia Tech rap lyrics while they watched an episode of ‘Law and Order.’”¹⁰⁴ Finally, University of California Professor Dr. Charis Kubrin, an expert in the field of rap music, testified that the paper seized from Oduwole’s vehicle “constituted the formative stages of a rap song.”¹⁰⁵

A jury convicted Oduwole of attempting to make a terroristic threat.¹⁰⁶ However, on appeal, an Illinois appellate court partially reversed the judgment, finding that the state failed to meet its burden of proving that Oduwole had taken a “substantial step,” as required to prove an inchoate offense.¹⁰⁷ The court declined to address any other issues raised by Oduwole.¹⁰⁸

Professor Andrew Kerr used Oduwole’s lyrics to make the keen observation that artistic value of lyrics can be assessed “*only when rapped*

97. *Id.*

98. *Id.* at 322.

99. *Id.*

100. *Id.*

101. *Id.* at 322.

102. *Id.* at 323.

103. *Id.*

104. *Id.*

105. *Id.* at 328–29.

106. *Id.* at 316.

107. *Id.* at 324–26.

108. *Id.* at 327.

by a rapper.”¹⁰⁹ He compared the Oduwole lyrics, which appear to be “a rough draft of some kind of personal poem or rap,” to the lyrics of a popular rap song, which as written, would make little sense to most readers.¹¹⁰ This assessment carries significance as artists increasingly attempt to invoke First Amendment protections for their lyrics based on the artistic nature of the speech. If the artistic value cannot be determined until the lyrics are performed by the artists, such is the appropriate context in which the lyrics should be presented at trial.

In reviewing *Oduwole* and similar cases, criminologist Adam Dunbar found that prosecutors generally follow the same playbook in prosecuting rap lyrics.¹¹¹ First, they “treat rap lyrics as literal, self-referential narratives that can be easily interpreted by the lay public.”¹¹² Second, “[p]rosecutors reinforce the first-person narrative perspective by reading the lyrics at trial like a journal entry, without rhyme or music.”¹¹³ And finally, they “claim that the lyrics are simply a reflection of the rapper’s lifestyle.”¹¹⁴ Dunbar’s research indicates this problematic because the mere label of rap music induces negative evaluations, even when controlling for the actual lyrics.¹¹⁵

Professors Charis Kubrin and Erik Nielson called *Oduwole* a “blatant criminalization of rap lyrics.”¹¹⁶ The scholars lambast the trial court’s opinion for its potential chilling effect on rappers.¹¹⁷ “Without the First Amendment protecting these artists,” they write, “it would not be surprising if [other artists] began following *Oduwole* by modifying their art to avoid prosecution.”¹¹⁸ Professors Kubrin and Nielson note that in the aftermath of this decision, freedom of speech now comes with a racial caveat.¹¹⁹

This Part shows the unclear development the present-day true threats jurisprudence. The Supreme Court’s reluctance to further define the doctrine has left a series of piecemeal tests and questions of constitutional validity. Further, these tests lack the appropriate consideration of context—and all-too-important key in determining whether speech qualifies as a true threat, thus evading First Amendment protection. This failure to consider context is especially poignant in cases involving rap

109. Andrew J. Kerr, *Aesthetic Play and Bad Intent*, 103 MINN. L. REV. 83, 94 (2018).

110. *Id.* at 93.

111. Adam Dunbar, Charis E. Kubrin, and Nicholas Scurich, *The Threatening Nature of ‘Rap’ Music*, PSYCHOL., PUB. POL’Y, & L., 280, 289 (2016).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 RACE & JUST. 185, 194 (2014).

117. *Id.* at 201–02.

118. *Id.* at 202.

119. *Id.*

lyrics, where juries typically lack the understanding necessary to make such determinations within the genre. The next Part focuses on the unequal history and development of free speech protections for Black people in the United States.

II. LEGAL ISSUES INVOLVING RACE AND THE FREEDOM OF SPEECH

Throughout the United States' history, Black Americans have not had access to the rights and privileges afforded to their white counterparts.¹²⁰ Enshrined in the Constitution is the Framers' intent that enslaved people were second-class citizens.¹²¹ However, some seem disillusioned that the First Amendment transcends race—that somehow this law is unique among others in its ability to provide equal protection to people of color.¹²² How quickly some forget that when the First Amendment was ratified, many Black Americans were considered property.¹²³

A. America's Origin

In the free speech context, unjust restrictions on Black rights trace back to America's slave era.¹²⁴ In response to conspiracies regarding slave rebellions, the Slave Codes were enacted to protect the social order by criminalizing Black speech and assembly and also preventing Black people from learning to read and write.¹²⁵ Sometimes, the mere mention of revolt was all that was needed for prosecution.¹²⁶ One such rumored rebellion in Charleston, South Carolina in the early 1820s led to the execution of thirty-five Black men and forty more exiled.¹²⁷

120. See *infra* Part II, Sections A, B, C.

121. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. IV, § 2, cl. 3. See also Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 311 (1988) (noting that “the Constitution contains a number of specific provisions such as the fugitive slave clause and the three-fifth compromise which plainly recognize the existence of the institution of slavery”).

122. Cass R. Sunstein, *Free Speech and Democracy*, 6 DRAKE L. REV. 25, 27 (1995); see generally *Korematsu v. United States*, 323 U.S. 214, 234–35 (1944) (Murphy, J., dissenting) (noting that the exclusion order for the internment of Japanese Americans during WWII was “an obvious racial discrimination” that “depriv[ed] all those within its scope of the equal protection of the laws guaranteed by the Fifth Amendment”).

123. See generally *Dred Scott v. Sandford*, 60 U.S. 393, 393 (1856).

124. Donald F. Tibbs & Shelly Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What's “Unconstitutional” About Prosecuting Young Black Men Through Art*, 52 WASH. U. J.L. & POL'Y 33, 42–45 (2016).

125. *Id.* at 44.

126. *Id.* at 43.

127. *Id.*

B. *The Civil Rights Era*

During the late 1950s and early 1960s, various states attempted to shut down NAACP chapters on the basis of refusing to submit membership lists.¹²⁸ This behavior was a direct infringement on the members' right to freedom of association, which is covered under the First Amendment freedom of speech.¹²⁹ The Supreme Court ultimately ruled this practice unconstitutional in the 1964 landmark decision in *NAACP v. Alabama*.¹³⁰

More recently, a report from the Department of Justice showed that the rights of Black people were infringed during the protests in Ferguson, Missouri.¹³¹ There, law enforcement officials arrested people for a number of constitutionally protected activities including “talking back to officers, recording public police activities, and lawfully protesting perceived injustices.”¹³² According to the report, “[Ferguson Police Department’s] suppression of speech reflects a police culture that relies on the exercise of police power—however unlawful—to stifle unwelcome criticism.”¹³³

III. RAP MUSIC AS A PROXY FOR BLACKNESS

As detailed in Part II, the United States has continually thwarted Black Americans' First Amendment rights to free speech and free expression.¹³⁴ Part I shows the way this recurring issue has manifested in the prosecution of rap lyrics.¹³⁵ While not all of the defendants in the rap music trials are Black,¹³⁶ the artform's origin and cultural connection with Black America cannot be overlooked when considering this issue.

Viewing rap lyrics in their proper context is vital. The lyrics, while sometimes provocative, violent, and profane, do not actually communicate true threats.¹³⁷ The judiciary has repeatedly ignored this nuanced truth.¹³⁸ Other types of music, including country music, echo similar themes of violence—yet reactions have not included the prosecution of the artists.¹³⁹ In the Nielson/Render amicus brief for *Knox*,

128. See, e.g., *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 289–90 (1964); *Bates v. City of Little Rock*, 361 U.S. 516, 517 (1960); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 295 (1961).

129. *NAACP*, 377 U.S. at 308.

130. *Id.* at 310.

131. U.S. DEP'T OF JUST., C.R. DIV., *THE FERGUSON REPORT: DEPARTMENT OF JUSTICE INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 27–28 (2015).

132. *Id.* at 24.

133. *Id.* at 28.

134. See *supra* Part II.

135. See *supra* Part I.

136. See Calvert & Bunker, *supra* note 21.

137. Brief in support for the Petitioner, *supra* note 26.

138. *Id.*

139. *Id.* at 20.

the authors note that “[r]esearch tells us that listeners unfamiliar with hip hop culture may have difficulty being reasonable when it comes to rap music because it often primes enduring stereotypes about the criminality of young Black men, its primary creators.”¹⁴⁰ They add that “[i]n the criminal justice system, the results of this racial bias are evident in the disparate treatment that people of color face at virtually every phase of the criminal justice process.”¹⁴¹

Social scientist Carrie Fried conducted a study asking participants to read lyrics and identify if they were from rap or country songs.¹⁴² The lyrics used in the study were actually from an American folk song.¹⁴³ However, when asked a series of opinion questions including “[t]his song promotes violence, riots, and civil unrest” and “[t]hey should ban such songs entirely,” the participants who labeled the lyrics as rap reported significantly more negative reactions than those who identified the folk song lyrics as country.¹⁴⁴

The study suggests that rap songs are significantly more likely to be perceived as dangerous and offensive.¹⁴⁵ Fried posited that “[o]ne reason that rap music, in particular, receives negative reactions may be that it is seen as a predominantly Black form of music.”¹⁴⁶ Further, Fried explained that “[r]ap music, because of its association with African American culture, is judged through the tainted lens of a Black stereotype which includes traits such as violence, hostility, and aggression.”¹⁴⁷

When coupled with the United States’ treatment of Black Americans, the evidence in this Part strongly suggests that the prosecution of rap lyrics is an unconstitutional restriction on free speech.¹⁴⁸ As *Knox* and the cases in Part I illustrate, the judiciary has not been keen to acknowledge any racial connection in the rap lyrics cases.¹⁴⁹ Such an acknowledgement would be a beneficial step in securing equal protection in these types of cases.

IV. FREE SPEECH THEORIES PROVIDE RATIONALES FOR PROTECTING LYRICS

This Part looks at three popular free speech theories: democratic self-governance, the safety-valve theory, and self-actualization. It is important

140. *Id.* at 19.

141. *Id.* at 19–20.

142. Carrie B. Fried, *Who’s Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCH. 705, 709 (1999).

143. *Id.* at 710.

144. *Id.* at 710–11.

145. *See id.* at 716.

146. *Id.* at 707.

147. *Id.*

148. *See supra* Part II.

149. *See supra* Introduction and Part I.

for free speech doctrine to be rooted in theory, and each of the theories provided offers an underlying basis for protecting rap and hip hop lyrics under the First Amendment.¹⁵⁰

A. *Democratic Self-Governance*

The values enshrined in the First Amendment freedom of speech are often promoted as a means to protecting the democratic self-governance in the United States.¹⁵¹ The best known advocate for the democratic self-governance theory, Alexander Meiklejohn, valued speech primarily for its contribution to people's ability to govern themselves.¹⁵² Above all, Meiklejohn emphasized the importance of informed voters.¹⁵³ For him, the purpose of free speech "is to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."¹⁵⁴ Because of this belief, Meiklejohn believed that "no idea, no opinion, no doubt, no belief, no counter belief, no relevant information" should be kept from the public.¹⁵⁵ As noted, rap and hip hop lyrics are frequently used to critique political and social issues, as artists seek to inform listeners about corruption and other injustices. Such expression fits squarely within the Meiklejohn's desire for a well-informed electorate.

B. *Safety-Valve Theory*

Related to democratic self-governance theory, the safety-valve theory promotes the freedom of expression as a way to produce gradual change in society.¹⁵⁶ By allowing dissent, individuals can peacefully advocate for their ideas in a democratic way.¹⁵⁷ As Professor Thomas Emerson wrote, stifling free speech would "leav[e] those suppressed either apathetic or desperate. It thus saps the vitality of the society or makes resort[ing] to force more likely."¹⁵⁸ Essentially, without free speech, critics would be driven underground where their ideas may eventually bottle up into violent reactions.¹⁵⁹ The safety-valve theory suggests that rap and hip hop artists' freedom of speech allows for healthy forms of expression, which otherwise could bottle up and result in dangerous, disruptive conduct.

150. *See infra* Part IV, Sections A–C.

151. KENT R. MIDDLETON ET AL., *THE LAW OF PUBLIC COMMUNICATION* 30 (2016).

152. *Id.*

153. *Id.* at 31.

154. *Id.*

155. *Id.*

156. *Id.* at 32.

157. *Id.*

158. *Id.*

159. *Id.*

C. Self-Actualization

Third and finally, the theory of self-actualization comes from the recognition that speech not only promotes societal values, but it also enriches the life of the speaker.¹⁶⁰ As Professor Thomas Emerson posited, the right to freedom of speech “derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being.”¹⁶¹ Likewise, Professor Laurence Tribe considers freedom of speech a fundamental good, that is, “an end in itself, an expression of the sort of society we wish to become and the sort of persons we wish to be.”¹⁶² As rap and hip hop artists are permitted to freely express themselves, they are allowed to engage in a basic human right, and they are more fully able to participate in the human experience.

CONCLUSION

The Supreme Court’s reliance on judicial minimalism and constitutional avoidance has left a cloud of confusion around true threats jurisprudence.¹⁶³ With the Court rejecting certiorari on recent cases like *Knox*,¹⁶⁴ it is essentially endorsing the decisions made by the lower courts. However, the failure to address the First Amendment arguments regarding the higher protection due to artistic and political expression is an affront to constitutional rights.¹⁶⁵

Though ratified more than 200 years ago, the First Amendment’s guarantees to all Americans have been a false promise.¹⁶⁶ Part II details instances from the inception of the United States to recent years in which Black Americans have been oppressed through the restriction of their free speech rights.¹⁶⁷ While the United States has made progress in racial equality, the prosecution of rap lyrics merely serves as the next step in a pattern of unconstitutionally denying privileges guaranteed to all Americans.

This Article argues that the primary reason rap and hip hop lyrics are not afforded the same First Amendment protection as other genres is because of their strong association with Black culture.¹⁶⁸ Research shows that with that association comes negative stereotypes including “violence,

160. *Id.*

161. *Id.* at 32.

162. *Id.*

163. *See* Calvert & Bunker, *supra* note 21, at 950–51.

164. *See* *Knox v. Pennsylvania*, 139 S. Ct. 1547 (2019) (mem.).

165. *See supra* Part IV, Sections A, C.

166. *See supra* Part II.

167. *See supra* Part II.

168. *See supra* Part III.

hostility, and aggression.”¹⁶⁹ These negative associations are especially poignant when mostly white judges and juries are asked to make determinations about true threats statutes and their application to rap lyrics.

Existing theories for protecting free speech bolster the argument that song lyrics, especially those with political messages, should fall within the protection of the First Amendment.¹⁷⁰ One of the hallmarks of free speech theory posits that political expression should receive the utmost protection.¹⁷¹ Further, allowing such speech promotes social stability and reifies the natural right humans have to express themselves.¹⁷²

How then, should this problem be addressed? As with many other issues in First Amendment jurisprudence, the judiciary is particularly well-situated to address the issue.¹⁷³ As more rap lyrics end up on trial, the Supreme Court should grant certiorari and provide meaningful First Amendment analysis to the issue, abandoning its practice of judicial minimalism and constitutional avoidance.¹⁷⁴ Looking to other First Amendment doctrines would give the Court an opportunity to import safeguards that would allow the true threats carveout to stand without offending the rights of rap and hip hop artists.

The third prong of the *Miller* test provides a potential path forward.¹⁷⁵ In *Miller v. California*, the Supreme Court established a test for determining obscene speech, another categorical exemption from free speech rights.¹⁷⁶ The three-prong test first asks whether “the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.”¹⁷⁷ Next, courts must consider “whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.”¹⁷⁸ Finally, and relevant to the current analysis, the *Miller* test requires consideration of “*whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.*”¹⁷⁹

169. Fried, *supra* note 143, at 707.

170. *See supra* Part IV.

171. *See supra* Part IV, Section A.

172. *See supra* Part IV, Sections B, C.

173. *See, e.g.,* William Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 FLA. L. REV. 209, 211–12 (1983) (describing the assumption that the judiciary would feel bound to protect the freedoms guaranteed by the Bill of Rights).

174. *See* Calvert & Bunker, *supra* note 21, 944–45.

175. *See* *Miller v. California*, 413 U.S. 15, 39 (1973).

176. *Id.* at 39.

177. *Id.*

178. *Id.*

179. *Id.* (emphasis added).

By importing the third prong of the *Miller* test¹⁸⁰ to true threats analyses, an essential constitutional safeguard would be put in place for rap and hip hop artists. As music is inherently artistic and rap music is often political, this necessary protection would include much of the speech from the aforementioned cases.¹⁸¹ Without this protection as precedent, courts have repeatedly rejected artists' legitimate First Amendment defenses, and presently, there is nothing to suggest that similar prosecution of rap and hip hop lyrics will not continue. Given the United States' abysmal track record pertaining to the protection of minority's rights, this measure is long overdue to ensure the equal protection of all Americans' First Amendment rights.

180. *Id.*

181. *See* Calvert & Bunker, *supra* note 21, at 974.

THE WATER FOUNTAIN—A TRUE STORY

Teresa Reid

On a hot and humid day in the early 1960's, a five-year-old, pig-tailed, curious, and very thirsty little girl stood in front of the two grey water fountains in the J.M. Field's Department Store in Opa-locka, Florida.

She hadn't been there before, and she couldn't read the signs. All she knew was that she was thirsty, there were the fountains, and she needed a drink. After all, her Momma, who was standing right there, said she could.

As she approached the fountain on the left, and stretched up to take a sip, she felt a tap on her arm and heard an unfamiliar voice filled with great concern: "Oh no, no. Not that one, dear. The *other* one's for you."

The little girl, still thirsty, stopped and turned towards the voice. A woman wearing a stern look and a blue button-downed dress—a dress much better than the little girl's Momma ever wore—pointed repeatedly to the signs. "See honey. See, the *other* one's for you."

"Momma," the still thirsty little girl asked, "what, what does she mean? Can't I get a sip?"

"Of course you can, honey," her Momma's voice was calm and smooth. "You go right ahead."

"But, but, she's using the *wrong* one," the woman in blue argued.

"My baby's thirsty," and the little girl's Momma turned away from the woman and towards the little girl. "Go ahead honey, get your drink." And the little girl did.

"Well, I've never . . . !" The woman in blue walked off, shaking her head as she went.

"Momma, did I do something wrong?" The little girl asked, wiping her mouth with a chubby little hand.

"Of course not, baby."

"Well, what do the letters say?" The little girl always had questions.

"They say nothing that makes any sense, baby."

WHITE PRIVILEGE: WHAT IT IS, WHAT IT IS NOT, AND HOW IT SHAPES AMERICAN DISCUSSIONS OF POLICING AND HISTORICAL ICONOGRAPHY

Neil H. Buchanan*

Abstract

What is White privilege? In this Essay, I explore the privileges that White men take for granted in dealing with the police, even as I acknowledge that the most privileged Americans are still potentially subject to arbitrary and unaccountable police abuses. I also examine the debate over changing the names of places in the United States, as well as taking down the statues of the people who have long been treated as heroes, including the founding generation. The common thread between these two topics is that privilege allows White people not even to notice when they receive favorable treatment. They do not feel privileged when dealing with the police, because their baseline assumption is that they will not be targeted because of their race. They do not feel privileged when thinking about the heroes of American history, because history has always been written largely as the story of White men; so if anyone else tries to think about history in a different way, the proposed changes challenge White people's long-held presumptions. It is those very presumptions that are the evidence of privilege.

INTRODUCTION	100
I. WHITE PRIVILEGE.....	103
A. <i>Everyone Should Have My Privilege (at Least)</i>	103
B. <i>Understanding Privilege, or At Least Trying To</i>	107
II. STATUES AND PLACE NAMES: WHO IS HONORED, AND WHY?	114
A. <i>The Statues and Place Names Compromise Is This Decade's Version of Civil Unions</i>	114
B. <i>Writing and Rewriting History, from Columbus to Jefferson and Beyond</i>	122
C. <i>Reassessing America's Founders is Deeply Patriotic</i>	129
CONCLUSION.....	135

* Professor of Law and James J. Freeland Eminent Scholar Chair in Taxation, Fredric G. Levin College of Law, The University of Florida. My thanks to Brenna Cameron '22, Jovanna Bailey '21, and Mark Atwater '21 for excellent research assistance.

INTRODUCTION

Early in his career, the comedian Eddie Murphy was a cast member on “Saturday Night Live.” In one classic and hilarious 1984 sketch, “White Like Me,”¹ filmed in the form of a documentary, Murphy showed himself “going undercover” as a White person.² After working with a hair and make-up artist, changing the way he walked and talked, and studying stereotypically White “culture” (such as Hallmark cards), Murphy went out to experience being White in America.³ At one point, for example, he applied for a loan at a bank, and he was amazed when the loan officer said that none of the purported rules for issuing loans apply to White people.⁴ The officer then happily pulled out stacks of cash and gave them to Murphy, saying, “Just take what you want, Mr. White. Pay us back any time—or don’t, we don’t care!”⁵

The power of Murphy’s brilliant mock documentary derived from its subversive humor in suggesting not only that White people treat each other much differently than they treat Black people—which is clearly true—but that the privileges of being white are so extensive that White people give each other things without a second thought—which is not true. The absurdity of the privileges that Murphy imagined added to the impact of his keen observation that even seemingly non-racial social and commercial interactions are infected by racial bias.

It was only years later that the term “White privilege” began to be used widely, communicating the idea that White people are afforded advantages that people of color, and particularly Black people, are routinely denied.⁶ The backlash from some White Americans has been revealing, however, because a common retort has been, in essence, “I don’t notice any privileges being given to *me*.”⁷ Especially for those who are economically struggling and of relatively low social status, the idea that they are “privileged” apparently sounds like a cruel joke.⁸

1. Saturday Night Live, *White Like Me* – SNL, YOUTUBE (Aug. 29, 2013), https://www.youtube.com/watch?v=l_LeJfn_qW0 [https://perma.cc/FN56-U26Y].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Joshua Rothman, *The Origins of “Privilege,”* NEW YORKER (May 12, 2014), <https://www.newyorker.com/books/page-turner/the-origins-of-privilege> [https://perma.cc/W7RH-8EAM].

7. Cory Collins, *What Is White Privilege, Really?*, TEACHING TOLERANCE (2018), <https://www.tolerance.org/magazine/fall-2018/what-is-white-privilege-really> [https://perma.cc/2JY6-C7PG] (“The word *white* creates discomfort among those who are not used to being defined or described by their race. . . . [T]he word *privilege*, especially for poor and rural white people, sounds like a word that doesn’t belong to them—like a word that suggests they have never struggled.”).

8. *Id.*

The reason for this misunderstanding, I suggest, is that a large aspect of White privilege is passive rather than active. Unlike Murphy's fictional Mr. White, most White people do not live in a world where advantages are literally handed to them with a smile. It is still possible to be miserable as a White person, as suicide rates dramatically attest.⁹ If "privilege" is understood as being given things that other people do not receive,¹⁰ then it is perhaps understandable that most White people do not think that they are being handed the good life on a silver platter.

What that interpretation misses, of course, is that White people's privileges consist in large part in *not* experiencing negative things—negative things that non-White people endure regularly but that are invisible to those who are not targeted for abuse.¹¹ For example, White parents do not have to have "the talk" with their sons to tell them how to avoid antagonizing police, nor do White people need to think about where they can travel in the country in a way that avoids bigoted confrontations.¹² The absence of bad experiences is easy not to notice, especially for those who have never talked about these issues with someone who is not White.

In this Essay, I discuss two distinct ways in which White privilege operates. In Part I, I discuss how very fortunate White Americans are to be able to expect that the police are not likely to harm them.¹³ (I set aside the separate issue of gender-based mistreatment by police that too often affects all women, not because it is less important but because that issue deserves its own deep and lengthy discussion.) The reality is that White people are privileged by living without fear of racially motivated police misconduct.¹⁴

In Part II, I move to the question of whether statues of historical figures should be removed from public areas, and I extend the inquiry into the question of changing the names of places (cities, streets, and so on) because of the misdeeds of the people who are thus honored.¹⁵ This is a form of White privilege in the sense that far too many historical figures—including but certainly going beyond the key figures of the

9. *Suicide Statistics*, AM. FOUND. FOR SUICIDE PREVENTION (Mar. 1, 2020), <https://afsp.org/suicide-statistics/> [<https://perma.cc/2LDB-UUDK>].

10. See Collins, *supra* note 7.

11. *Id.*

12. John Blake, *George Floyd. Ahmaud Arbery. Breonna Taylor. What can black parents possibly tell their kids now about staying safe?*, CNN (May 20, 2020, 12:39 PM), <https://www.cnn.com/2020/05/29/us/black-parents-children-safety-talk-blake/index.html> [<https://perma.cc/FCS2-QCEV>].

13. See *infra* Part I (discussion on police interactions).

14. *Police shootings database 2015-2020*, WASH. POST (Sept. 23, 2020), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/?itid=lk_in_line_manual_10 [<https://perma.cc/6MR9-RKTF>].

15. See *infra* Part II (discussion on the removal of statues and changing place names).

Confederacy—are treated as heroes in spite of their having owned slaves and defended slavery, engaged in White supremacist oppression against racial minorities, and other shameful actions.¹⁶ To defend those people by saying, “Well, they did good things, too,” is to privilege White historical figures by deliberately ignoring their often-horrific acts, treating them as “complicated” people who should not be judged by current moral standards.

Those excuses are based on a sense that White Americans can simply decide what is important to them, and if “other people” are offended by statues or city names that glorify White violence and domination, then those other people need to simply get over it. Never being confronted with public displays honoring those who have targeted White people with violence and subjugation, the privileged never stop to think that they are benefiting from entering a public square that—without anyone ever needing to say it out loud—is carefully curated not to offend White people.

Together, these two categories of privilege offer a window into why many White people seem so resistant to reconsidering their assumptions about the world. The thinking seems to be that, if White people do not feel targeted by police and feel no pain from existing statues and place names, why should other people be so sensitive? Surely, those other people must be imagining things.

But of course, that is not true. My aim in this Essay is to offer some insights into how White privilege operates, offering my own experiences and understandings as I have become more aware of the passive privileges that I have long taken for granted.

I hasten to add that maybe, as the actor Kevin Bacon recently put it, “it’s a good time for old white guys like me to just shut up and listen. Speechless is probably a good choice.”¹⁷ Given that I have been offered the honor and privilege of publishing these thoughts in the Journal of Law & Public Policy’s issue focusing on Black Lives Matter, however, I feel that I can at least try to use this opportunity to say something that might be helpful in untangling what White privilege is, what it is not, and how it operates at the pre-conscious level.

16. Elliot C. McLaughlin, *Racist statues in America: The horrific acts behind the names*, CNN (June 17, 2020, 10:42 AM), <https://www.cnn.com/2020/06/16/us/racist-statues-controversial-monuments-in-america-robert-lee-columbus/index.html> [https://perma.cc/QX5J-UGN2].

17. Isobel Lewis, *‘Old white guys like me need to shut up and listen’: Kevin Bacon shows support for Black Lives Matter movement*, INDEPENDENT (June 15, 2020, 9:59 AM), <https://www.independent.co.uk/arts-entertainment/films/news/kevin-bacon-tonight-show-jimmy-fallon-black-lives-matter-a9566046.html> [https://perma.cc/7L4N-DGLG].

I. WHITE PRIVILEGE

A. *Everyone Should Have My Privilege (at Least)*¹⁸

It has become difficult even to begin writing about newsworthy issues, because there is so much going wrong in the world. When the issue of systemic racism came to dominate our lives in the Summer of 2020, however, it became even more of a challenge to try to engage in a positive way. As a white Anglo-Saxon Protestant man with a titled academic position, I have to ask myself what this aging liberal can say that does not run the danger of being presumptuous or possibly tone-deaf.

It then occurred to me that I can come at this by acknowledging my privilege. I am committed to engaging with others and to trying to understand and help (if I can) those who have reason to fear the police, but maybe it is also useful at least to try to describe what it is like *not* to fear the police.

That is, I can attempt to explain how the privileges of race, class, and gender play out in ways that are often all too easy to take for granted. Stopping to think about what I have almost never had to think about is enlightening, not only in terms of my own self-awareness but as a means of asking what a much better world would look like.

The short version is simple: The privileges that I enjoy are great. I am fortunate. Everyone should also be able to enjoy the same privileges and take them for granted. Is that possible?

In 1971, the Supreme Court handed down *Palmer v. Thompson*,¹⁹ the primary holding of which is that a city may choose not to operate desegregated facilities if its decision appears neutral on its face.²⁰ The Jackson, Mississippi city council had decided to close public swimming pools rather than integrate them,²¹ which the Court by a 5-4 vote held did not violate equal protection.²²

The *Palmer* case has come to embody the concept of “leveling down or leveling up.”²³ That is, in order to make two unequal things equal, we can move the higher one down to the level of the lower one, or we can move the lower one up to the level of the higher one.²⁴ “No one gets to swim in city pools” is equality, and so is “Everyone gets to swim in city

18. This sub-Part is an edited and updated version of Neil H. Buchanan, *Everyone Should Have My Privileges*, DORF ON LAW (June 9, 2020), <http://www.dorfonlaw.org/2020/06/everyone-should-have-my-privileges.html> [<https://perma.cc/MN2Y-5RGY>].

19. 403 U.S. 217 (1971).

20. *Id.* at 225–26.

21. *Id.* at 219.

22. *Id.*

23. Michael C. Dorf, *Discrimination and the “Leveling Down” Puzzle*, JUSTIA: VERDICT (Feb. 3, 2020), <https://verdict.justia.com/2020/02/03/discrimination-and-the-leveling-down-puzzle> [<https://perma.cc/SPE8-F5K2>].

24. *Id.*

pools.” Level down or level up, either way you end up equal. But that hardly means that both approaches are right.

As I noted above, people in my position in society are on the higher level when it comes to our interactions with the police. It makes no sense to level down, making us as afraid of the police as everyone else is. This is a situation where expanding the group of people who have the privilege of not being afraid of the police is in principle quite straightforward, even though it has never been done in this country—and even though there are powerful actors, including the now-former occupant of the White House and his lawless Attorneys General,²⁵ who want to keep things as they are.

Contrast this leveling up or down question with the issue of economic inequality. When Senator Bernie Sanders says that billionaires should not exist,²⁶ he is of course not saying that physical harm should come to billionaires but simply that there is something deeply unjust about a system that creates billionaires while children go hungry and people die because health care is not recognized as a human right. A just society would not create billionaires in this first place, much less tolerate their effects on our society and political system.

Although there are right-wing propagandists who would like us to say that we should all aspire to be billionaires rather than disparaging them,²⁷ the fact is that there is a limit to how much leveling up we can do when it comes to income and wealth inequality. Billionaires, or people who think that they have a reasonable shot at becoming extremely wealthy, definitely have something to lose from progressive policies that would level things out a bit. To be clear, there is no defensible argument against Sanders’s—or Elizabeth Warren’s—anti-inequality policies (which are quite mild), but saying that it is *worth it* to reduce the privileges of those at the top does not deny that we would be doing so.

When it comes to dealing with the police, however, there is simply no reason why the privileges that the lucky minority to which I belong takes for granted could not become the norm for everyone.²⁸ Fair treatment by

25. See Greg Sargent, Opinion, *The real lawless extremist in the race is Trump. And he has William Barr’s help*, WASH. POST (Sept. 3, 2020), <https://www.washingtonpost.com/opinions/2020/09/03/only-one-candidate-is-lawless-extremist-he-has-william-barrs-help/> [https://perma.cc/V37V-S964] (describing the President and Attorney General as lawless).

26. See Thomas Kaplan, *Bernie Sanders Proposes a Wealth Tax: ‘I Don’t Think That Billionaires Should Exist,’* N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2019/09/24/us/politics/bernie-sanders-wealth-tax.html> [https://perma.cc/9UUI-Y8G6] (quoting Bernie Sanders).

27. See Rush Limbaugh, *Wealth and American Exceptionalism*, THE RUSH LIMBAUGH SHOW (Dec. 9, 2013), https://www.rushlimbaugh.com/daily/2013/12/09/wealth_and_american_exceptionalism/ [https://perma.cc/SP3V-Z2B7] (criticizing the disparagement of wealthy persons).

28. I say “minority” here because, as I noted in the Introduction, women—including White women—reasonably fear interactions with the police in ways that I do not.

law enforcers is not—or at least need not and should not be—a limited resource that only a few can enjoy.

What does this privilege look like? To be clear, I do worry when I have interactions with law enforcement officers, because I am aware that a motivated bad officer could do something to me and get away with it. Immunity is immunity, and my privilege is not absolute. (Absolute immunity is what Donald Trump thinks he had and deserved.²⁹) But this underlying fear is eased for people like me by two factors. First, if something bad happens, I have resources on which to draw (not just money but friends and acquaintances, including lawyers and judges) that would give me a decent chance of redress.

More importantly, second, I go about my daily life able to presume that nothing bad is likely to happen when it comes to the police and me. I will not be profiled and thus pulled over pretextually, and it is quite unlikely that I will be treated harshly in any interaction with law enforcement. This is in part because the police are also aware that people like me are better able to challenge and resist mistreatment, reinforcing the loop of privilege.

But what does that look like in real life? Consider a remarkable example from several years ago, when I was living in Washington, D.C.—remarkable mostly because of what did *not* happen to me in what could have become a very fraught situation.

On a beautiful Saturday afternoon in May 2008, I decided to walk from my office several blocks west of the White House to a movie theater several blocks east. As I approached the front of the White House, the Secret Service suddenly came out and closed the sidewalk without explanation. I was told to take a different route, and (because I was unfamiliar with the area) I ended up walking all the way around to the South Lawn.

Because of some poorly placed metal barriers, I ended up walking on a driveway that was actually supposed to be closed to the public. I was not particularly close to the White House itself, but as I emerged from a grove of trees, I was surprised to see tourists gathered ahead and to my right, behind two knee-high fences. About one hundred yards ahead of me was a Secret Service squad car and some officers on bicycles leaning against the car and chatting.

I decided not to turn and walk away, because I worried that it would look like I was fleeing. I thought, “Well, they’ll notice me at some point and tell me that I’m in the wrong place, and I’ll follow their instructions.” When they finally did see me, one officer yelled over his car’s speaker, “Step over the fence.” I thought, “OK, there are two fences here, but he

29. *See* *Trump v. Vance*, 140 S. Ct. 2412, 2429 (2020) (rejecting the President’s argument that he holds absolute immunity from the issuance of a state criminal subpoena).

said ‘fence,’ singular. I guess he wants me to step over the first fence and wait.” Again, I did not want to appear to be fleeing, and it seemed important to obey orders precisely.

The officers had gone back to their conversation, and several minutes passed before they even noticed me again, but I waited patiently. When they did finally realize that I was still there, the officer shouted sarcastically: “Get over the fence. It’s *not that difficult!*” I saw red, because I did not like being publicly mocked, especially because I had been careful to follow orders. Angered and annoyed, I then scowled at the officers as I walked on, not looking away for several minutes until I was too far away to see them. They watched me the entire time, and we were essentially engaged in a stare-down as I walked by.

It was only later that I realized just how insane it had been for me to be so brazen in my defiance. If I were not living in my privileged world, I would not have been able to assume that I could get away with such an attitude, and I suspect that a non-privileged person would never even consider doing what I did—at least not without knowing that they risked much worse than a mere staring contest with a few Secret Service agents.

The most fascinating aspect of this, I think, is that everything I did was based on my unexamined presumption that I was quite safe in doing so. My father had never sat me down for a talk and said, “Neil, because you’re privileged, you can be confrontational with police officers.” Living when and where I lived and knowing how that world treated me, no one had to tell me that I could get away with things that others would never even consider doing. I have, in my life, rolled my eyes at police officers and argued with them, all the while considering it perfectly normal not to fear violent consequences.

Contrast my attitude with how Eric Garner³⁰ or George Floyd³¹ conducted themselves before their murders. Consider that, if somehow an officer did appear to be killing someone like me with a choke hold or other excessive force, not only bystanders but other officers would be much more likely to intervene.

And it is not just in those extreme situations that privilege arises. I recall when I was in my twenties, hearing a friend tell a story from his student days at Hampshire College in Massachusetts. It was actually a rather delightful tale that involved my friend and his drunk/high buddies trying to steal a Big Boy statue from the front of a restaurant. The full-

30. See Al Baker, J. Davis Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [https://perma.cc/LUN5-LLFQ] (describing the events leading up to Eric Garner’s death).

31. See *What We Know About the Death of George Floyd in Minneapolis*, N.Y. TIMES (Sept. 12, 2020), <https://www.nytimes.com/article/george-floyd.html> [https://perma.cc/W7GB-A37P] (describing the events leading up to George Floyd’s death).

sized Big Boy statue! The story included their dealing with the police officers who arrived on the scene, with the perpetrators knowing that they would get away with merely a warning and advice to go home and sleep it off. Would a non-privileged kid have even considered doing something like that? Would the police have treated him so indulgently? The questions answer themselves.

The nature of this kind of privilege is that it need never be seriously doubted. Yes, as I explain in Part I.B. below, there are limits to what people like me can expect to get away with, but that is not always a bad thing. What I want, more than anything, is for the world at least to level up when it comes to police interactions with the public. Everyone should be able to assume that the police will not use excessive force, will not escalate, and will not treat any of their fellow citizens as the enemy.

What I have is precious, but it only becomes obvious how precious it is when one looks at the alternative. This is an area in which the new normal is not some hard-to-imagine world of sweetness and light. All it requires is that the people to whom public safety is entrusted treat all citizens in the same way that they currently treat our most privileged citizens. No one loses, and plenty of people win.

B. *Understanding Privilege, or At Least Trying To*³²

It is a testament to the depth of the wounds of systemic racism in America that the protests³³ sparked by the police murder of George Floyd continued with such intensity for so long. Especially during a public health disaster,³⁴ it takes a lot to get people to sustain this kind of action and passion. But with literally centuries of injustice unaddressed, it apparently took that final spark to start a conflagration.

That is both sad and hopeful. The centuries of tragedy, of murder upon murder and oppression upon oppression, are shameful to contemplate, especially because so many people knew about it but could not get everyone else to focus on such chronic injustice. The hope is that this is, at long last, when things will change in fundamental ways.

In Part I.A above, I argue that this change should involve “leveling up,” meaning that giving people equal protection requires that we move

32. This sub-Part is an edited and updated version of Neil H. Buchanan, *Understanding Privilege, Or At Least Trying To*, DORF ON LAW (June 18, 2020), <http://www.dorfonlaw.org/2020/06/understanding-privilege-or-at-least.html> [<https://perma.cc/NT7P-5RAB>].

33. See Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/V7UF-Q47Z>] (describing the series of protests that have followed the death of George Floyd).

34. See NPR, *Protesting Racism Versus Risking COVID-19: ‘I Wouldn’t Weigh These Crises Separately’* (June 1, 2020, 4:46 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/06/01/867200259/protests-over-racism-versus-risk-of-covid-i-wouldn-t-weigh-these-crises-separate> [<https://perma.cc/4FYZ-4NPT>] (explaining that racism poses a dire health threat, and protests are therefore justified even during the COVID-19 pandemic).

currently disadvantaged people up to the best levels of treatment that society already affords its privileged citizens.³⁵ It would be possible to level down by creating a terroristic police state that trains its guns and violence against everyone regardless of race or class, but although that would be equal treatment, it would not be justice.

Here, I want to continue my discussion of what it means already to be at the top level of social status in the sense of how the justice system treats people. That is, even if we succeed in leveling up, will we still need to do more for everyone, the privileged and the currently unprivileged alike?

As it turns out, leveling up would unfortunately not be enough—as important and essential as it is. Even the people like me at the top level know that random police violence could possibly be visited upon us under certain circumstances. After, or while, we level up, we need to raise the bar and change the way the law enforcement system treats everyone. What would that look like?

The big message in Part I.A was that people like me currently have every reason to expect—and everyone else should also be able to expect—that the police will not overreact to what we do. I shared a somewhat unusual story about a time when I accidentally found myself on the wrong side of fences separating the South Lawn of the White House from a gaggle of tourists. Had I not been a middle-aged white guy wearing L.L.Bean summer casual clothes, we have every reason to believe that the situation would not have gone well.

Moreover, I pointed out that the police (in this case, the Secret Service) were not even provoked when I “gave them attitude,” which I later realized was the true measure of what White privilege looks like. No one had ever said to me, “Do not look an officer in the eye, and for God’s sake do NOT in any way show disrespect.” It is not that somehow my parents had failed me, because this is simply not advice that people like me need to have hammered into them at a young age.

The murder in Atlanta of Rayshard Brooks³⁶ last June captured such expectations perfectly. Had I ever fallen asleep at a drive-thru, or frankly anywhere else in public, I would have expected to be respectfully (or at least nonviolently) woken up by a passerby or a police officer. If I were intoxicated in such a situation, the worst I might expect is a DUI charge, although even that would possibly not happen if I (like Brooks) said that I could simply leave the car in a parking lot and walk home.

Again, my message here is that the world should change so that my presumptions become everyone’s presumptions. Everyone should be treated decently, without fear of being beaten or killed by police who

35. See discussion *infra* Part II.A.

36. Aimee Ortiz, *What We Know About the Death of Rayshard Brooks*, N.Y. TIMES (Sept. 10, 2020), <https://www.nytimes.com/article/rayshard-brooks-what-we-know.html> [<https://perma.cc/S27U-HSJF>] (describing the events leading up to the death of Rayshard Brooks).

escalate the situation. There is no trade-off here, because the sum is not zero. I do not have to give up any of my current privilege to allow others to enjoy the same. At that point, it would no longer meaningfully be called “privilege,” of course, but that is precisely the point.

One of the ways that I have noticed my privilege over the years is in my easy presumption that I can travel essentially anywhere that I want to travel. It is true that, even within the U.S., there are places where I might feel endangered, but never would I feel that the police were my enemy. And with rare exceptions, the locals treat me as if I am welcome, or at least tolerated.

When I was in my late twenties, I took three driving trips across the country, two on my own and one with a White male friend. This necessarily involved making stops for gas and food in remote places, staying overnight in cheap hotels next to the highway, and so on. The worst feeling that I ever experienced was merely that some people at roadside stops in Wyoming and Nebraska were looking at my preppy clothes and sneering at me. Never once did I feel in danger.

I thought to myself back then, “What would this be like if I were black, Latino, Middle Eastern, or anyone who doesn’t ‘look White’?” (I will set aside here the overlapping but distinct issues that I would have confronted as a woman—especially traveling alone—but a reckoning on those issues is also long overdue.) Not just the local police, but everyone I came in contact with, would have presented at least the possibility of a dangerous interaction.

At that time, I had not yet heard about the Green Book (formally titled *The Negro Motorist Green Book*), which was published and regularly updated from the mid-1930’s through the mid-60’s, which was quite literally a survival guide for blacks who traveled around the country.³⁷ Even so, and even though my travels were in the late 1980’s, it was obvious that part of my privilege was simply that I had the freedom to travel without much concern about being targeted by local cops or citizens.

As I noted above, however, it is not true that even someone with my privileges has nothing at all to worry about. A recent article, “Confessions of a Former Bastard Cop,”³⁸ ought to be required reading for everyone who wishes to weigh in on the policing issues facing this country. Even for someone like me who thinks of himself as quite aware of the systemic part of systemic racism in policing, it is an eye-opening piece.

37. VICTOR H. GREEN, *THE NEGRO MOTORIST GREEN BOOK* (1940), <https://digitalcollections.nysl.org/items/dc858e50-83d3-0132-2266-58d385a7b928> [<https://perma.cc/FA63-FH9Q>].

38. Officer A. Cab, *Confessions of a Former Bastard Cop*, MEDIUM (June 6, 2020), <https://medium.com/@OfcrACab/confessions-of-a-former-bastard-cop-bb14d17bc759> [<https://perma.cc/Y4Y9-NAP2>].

Here is (by the author's own description) the most important part of the article, for people of all races and backgrounds:

If you take nothing else away from this essay, I want you to tattoo this onto your brain forever: if a police officer is telling you something, it is probably a lie designed to gain your compliance.

Do not talk to cops and never, ever believe them. Do not "try to be helpful" with cops. Do not assume they are trying to catch someone else instead of you. Do not assume what they are doing is "important" or even legal. Under no circumstances assume any police officer is acting in good faith.

Also, and this is important, do not talk to cops.

I just remembered something, do not talk to cops.

Checking my notes real quick, something jumped out at me:

Do
not
fucking
talk
to
cops.
Ever.³⁹

Coming from a former police officer, those words (and his supporting evidence and arguments) are simply stunning. To emphasize his point, he adds this comment later in the piece:

If you take only one thing away from this essay, I hope it's this: do not talk to cops. But if you only take two things away, I hope the second one is that it's possible to imagine a different world where unarmed black people, indigenous people, poor people, disabled people, and people of color are not routinely gunned down by unaccountable police officers.⁴⁰

But is he only aiming his comment at non-privileged people? Is it okay for guys (and I do mean guys) like me to assume that the cops are on our

39. *Id.* (formatting in original)

40. *Id.*

side? The author certainly does not say so, and nothing in his argument suggests that police officers will not lie to people like me whenever they want to, and for whatever reasons.

Notwithstanding my privilege, I do worry about interacting with the police. Years ago, I moved into a house in a Milwaukee suburb, and I found that a previous owner had left a box of bullets in a basement closet. Having no desire to keep them and realizing that it would be a terrible idea simply to throw them out with the garbage, I took them to the local police station. I explained the situation, and I was surprised when the officer demanded that I provide my name and address. I was so stunned that I complied, but I was quickly troubled by the idea that there was a police report with my name on it that connected me to a box of bullets. Why should my being a responsible citizen result in my name being put on a police report? In a similar situation (not with bullets this time, thankfully) more recently, I said to the officer, “I decline to provide my name,” and he angrily said, “Then I’m not going to help,” even though I was reporting something that had nothing to do with me and was in fact a Good Samaritan situation.

More worrisome was a moment during my clerkship in Oklahoma City, when I went to the local convenience store one evening and stood hoping to buy a candy bar while waiting for the clerk to appear (presumably after taking a break in the back of the store). Suddenly, a young White police officer rushed in and told me that I had to get into the back of his squad car. As he was forcing me out of the store, another (White male) customer arrived, and he was also grabbed and pushed into the car beside me. As we were being shoved inside, the officer slammed the door on my co-detainee’s legs and started kicking the door to close it.

It turned out that the convenience store had been robbed, but that does not explain why I would be a suspect, given that I stood idly waiting to pay for a Hershey bar—or why the officer roughed up both of his detainees. Because I was clerking for a federal judge, I asked him the next day if there was anything I could do. The (White male) judge, who had previously been the state’s attorney general, smiled knowingly and said: “No, you should just drop this. You do not want to cross the police. They can make your life miserable—and mine, too, frankly.” I am not at all equating what happened to me with what happens to far too many people in this country, but what I discovered was that there is effectively no way to address even relatively harmless abuses.

And that is the other big lesson about systemic abuse of power. The system encourages the police to show venom toward non-privileged people, but what seems to especially motivate bad police behavior is being told that they have misbehaved.

There has been a longstanding effort to make the police untouchable, an effort that is very much reinforced by movies and TV shows that

glorify police violence⁴¹ and make heroes of cops who “play by their own rules.”⁴²

For example, last year I came across an Amazon Prime series called *Bosch*,⁴³ which is based on a series of crime novels. Getting even a few minutes into the first episode, which aired in 2014, I noticed two things.⁴⁴ First, this was like every other cop show in depicting the police’s aggrieved resistance to supervision and discipline. And second, watching that show in the summer of 2020 was an especially fraught experience.

Like other police procedurals (especially the long-running *CSI*), the show is an homage to the police, even when the stories depict the unpleasant side of policing. In the first season, the main character (an LAPD detective) was being sued by the widow of a suspect whom he had shot in an alley when the suspect pulled what looked like a gun out of his pocket.⁴⁵ There was no video of the interaction, and the only claim by the plaintiff (based on no evidence) was that Bosch had planted a gun at the scene after the fact.⁴⁶

All of the familiar grievances and tropes are there: a sneering attorney who is willing to twist everything to make the cop look bad, the sense that “you have to do what you have to do,” and on and on. The cops hate everyone: the courts, the lawyers (including the prosecutors), internal affairs detectives, the politicians, and certainly any attempt at citizens’ oversight of police use of deadly force. In *Bosch*, the police captain who is most opposed to reining in LAPD abuse – fighting against a weaselly politician, of course – is played by Lance Reddick (a Black actor who played Baltimore Police Lt. Daniels in “The Wire”), and his entire agenda is to “protect our house.”⁴⁷ “Our house” is most assuredly not “our city,” but rather the insular metaphorical house within which the police attempt to evade accountability.

These shows are almost always written by former police officers, or they have “consultants” who are retired officers.⁴⁸ The idea that any case like the one in “Bosch” would have been brought at all is farfetched in

41. See Mary Beth Oliver, *Portrayals of Crime, Race, and Aggression in “Reality-Based” Police Shows: A content analysis*, 38 J. BROAD. & ELEC. MEDIA 179, 189 (1994).

42. Nick Pinto, *Investigating the harsh realities of ‘Cops,’* COLUM. JOURNALISM REV. (July 16, 2019), https://www.cjr.org/united_states_project/running-from-cops-taberski-headlong.php [<https://perma.cc/7526-55DF>].

43. *Bosch* (Amazon Prime broadcast Jan. 14, 2015).

44. *Bosch: Chapter One: ‘Tis the Season* (Amazon Prime broadcast Jan. 14, 2015).

45. *Id.*

46. *Id.*

47. Lance Reddick, IMDB, <https://www.imdb.com/name/nm0714698/> [<https://perma.cc/PDZ8-NG7U>] (last visited Sept. 10, 2020).

48. Diane Haithman, *When Hollywood Calls the Cops*, L.A. BUS. J. (Sept. 15, 2017), <https://labusinessjournal.com/news/2017/sep/15/when-hollywood-calls-cops-lapd/> [<https://perma.cc/NJX4-R37H>].

the extreme, much less that he would actually lose. (In a later episode, the jury found for the plaintiff but awarded \$1 in damages.)⁴⁹ What causes real-world officers like those in Buffalo to shove a White male BLM protester and then leave him bleeding on the sidewalk⁵⁰—with one officer yanking the other away to prevent him from helping⁵¹—must surely be this overwhelming sense of grievance. That is certainly what we are seeing from local police union representatives who rant in front of cameras about the injustice of the very idea that police officers could be disciplined or held criminally liable.⁵²

In the end, then, the privilege that people like me enjoy in our dealings with the police (as well as in every other aspect of life) is important but still limited—limited by the extent to which we know that the police are shielded from consequences, even when they abuse their power. If I tried to intervene to stop an act of police brutality, I too would risk being brutalized myself, even with all of my privilege.

We desperately need to level up, allowing everyone to enjoy what privileged members of society take for granted. That is a lot to try to accomplish, but it is a bare minimum. Once we have done that, we must go further and prevent everyone from being victimized by abusive officers acting with impunity. Unaccountable power, especially backed up by the gun, is a disease that has been killing people. The current moment is an attempt to find the cures to that disease. Accountability is essential.

49. *Bosch: Chapter Four: Fugazi* (Amazon Prime broadcast Feb. 13, 2015).

50. Neil Vigdor et al., *Buffalo Police Officers Suspended After Shoving 75-Year-Old Protester*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/05/us/buffalo-police-shove-protester-unrest.html> [<https://perma.cc/G47U-XMR5>].

51. *Id.*

52. See Noam Scheiber et al., *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (June 20, 2020), <https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html> [<https://perma.cc/6CUU-NJDQ>].

II. STATUES AND PLACE NAMES: WHO IS HONORED, AND WHY?

A. *The Statues and Place Names Compromise Is This Decade's Version of Civil Unions*⁵³

I never thought that I would see NASCAR ban the Confederate flag from its events.⁵⁴ Ever. I could not imagine Mississippi getting rid of that flag's inclusion in its state flag.⁵⁵ Ever. I never thought that entire high school sports teams would take a knee during the national anthem,⁵⁶ or that Mitt Romney would join a civil rights march against systemic racism,⁵⁷ or that any number of other politicians would embrace the phrase "Black Lives Matter."⁵⁸ Ever. Ever. Ever.

Even so, we often see things happen suddenly that had once seemed unthinkable. I have noted at various times, for example, that the public's attitude about cigarette smoking once seemed implacable: Smoking was viewed as an individual's right, dammit!⁵⁹ But in very short order, not only did smoking become "uncool" but New York City's smoking ban⁶⁰—even in bars and restaurants—was adopted in cities across the

53. This sub-Part is an edited and updated version of Neil H. Buchanan, *Biden's Statues and Names Compromise is 2020's Version of Civil Unions*, DORF ON LAW (July 2, 2020), <http://www.dorfonlaw.org/2020/07/bidens-statues-and-names-compromise-is.html> [https://perma.cc/T4C6-JD2G].

54. Steve Almasy, *NASCAR Bans Confederate Flags at All Races, Events*, CNN (June 10, 2020, 11:29 PM), <https://www.cnn.com/2020/06/10/us/nascar-bans-confederate-flag-spt-trnd/index.html> [https://perma.cc/WBV6-FUYP].

55. Rick Rojas, *Mississippi Governor Signs Law to Remove Flag with Confederate Emblem*, N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2020/06/30/us/mississippi-flag.html> [https://perma.cc/FQ2M-RCS5].

56. Christina Zdanowicz, *An Entire High School Baseball Team Kneled During the National Anthem to Protest Police Brutality*, CNN (June 16, 2020, 3:26 PM), <https://www.cnn.com/2020/06/16/us/iowa-baseball-team-kneels-trnd/index.html> [https://perma.cc/4484-YCFS].

57. Michael S. Rosenwald, *Republicans Like George Romney Who Supported Civil Rights Wouldn't Recognize Trump's GOP*, WASH. POST: RETROPOLIS (June 8, 2020, 2:20 PM), <https://www.washingtonpost.com/history/2020/06/08/george-romney-mitt-trump-protests-civil-rights/> [https://perma.cc/QEX9-5TXK].

58. Annie Linskey, *Democratic Convention Embraces Black Lives Matter*, WASH. POST: POLITICS (Aug. 18, 2020, 12:16 AM), https://www.washingtonpost.com/politics/democratic-convention-embraces-black-lives-matter/2020/08/18/f1de2ce8-e0f7-11ea-b69b-64f7b0477ed4_story.html [https://perma.cc/A2Z6-D8BG].

59. Yvette van der Ejik & Gerard Porter, *Human Rights and Ethical Considerations for a Tobacco-Free Generation*, 24(3) NAT'L CTR. FOR BIOTECHNOLOGY INFO. (TOBACCO CONTROL) 238 (2015).

60. Georgia Dull, *And as the Gaspers of the World Unite, Nonsmokers Become Fashionably Cool*, N.Y. TIMES (Nov. 5, 1975), <https://www.nytimes.com/1975/11/05/archives/and-as-the-gaspers-of-the-world-unite-nonsmokers-become-fashionably.html> [https://perma.cc/RU7V-5M3N]; Michael Cooper, *Mayor Signs Law to Ban Smoking Soon At Most Bars*, N.Y. TIMES (Dec. 31, 2002), <https://www.nytimes.com/2002/12/31/nyregion/mayor-signs-law-to-ban-smoking-soon-at-most-bars.html> [https://perma.cc/SVH6-7RMS].

country and the world.⁶¹ Paris without people smoking arrogantly (and now merely being arrogant)? *Quelle horreur!*

Drunk driving went from cool to unacceptable in a few short years in the mid-1980's.⁶² Marijuana is now legal and widely accepted in many states, with nary a Jeff Sessions to turn it into a culture war battle.⁶³ Bill Cosby is a pariah.⁶⁴ Harvey Weinstein is serving a 23-year prison sentence.⁶⁵ There are, of course, different reasons for each of these changes, but they all once seemed unthinkable.

In addition to the current debate about statues, flags, and place names, same-sex marriage is the other huge issue about which, when public attitudes suddenly and radically changed for the better, advocates happily said things like: "I thought that, if this ever happened, it certainly would not be in my lifetime."

Here, I first want to discuss the current reconsideration of Confederate and other racist iconography, offering some examples that I think are especially telling. But my larger point, telegraphed in the title of this sub-Part, is that I think the position that President Joe Biden and others have taken⁶⁶—yes to ending idolatry of traitors, no to similarly condemning Founding-era slave-owners and others—is the equivalent of the creation of so-called civil unions during the years prior to the acceptance of same-sex marriage.

As it happens, I drove through Richmond, Virginia in July of 2020. I did not stop for a variety of reasons, but it did offer an opportunity to

61. See Cooper, *supra* note 60; U.S. State and Local Issues: Smoke-Free Laws, CAMPAIGN FOR TOBACCO-FREE KIDS (Aug. 31, 2020), <https://www.tobaccofreekids.org/what-we-do/us/smoke-free-laws> [https://perma.cc/4Q9V-LNT7].

62. David J. Hanson, *Drunk Driving is Unacceptable Socially and Legally Today as Never Before*, ALCOHOL PROBS. & SOLS. (1997), <https://www.alcoholproblemsandsolutions.org/drunk-driving-is-unacceptable/> [https://perma.cc/N7LY-7GTD].

63. Maria McFarland Sanchez-Moreno, Opinion, *How anti-marijuana Jeff Sessions became the best thing to happen to pot legalization*, USA TODAY (May 6, 2018, 4:39 PM), <https://www.usatoday.com/story/opinion/2018/05/06/marijuana-legalization-jeff-sessions-colorado-washington-controlled-substance-enforcement-column/573156002/> [https://perma.cc/HNA9-QGUD].

64. Daniel Arkin, *Bill Cosby was once 'America's Dad.' Now he's a convicted pariah*, NBC NEWS (Apr. 26, 2018, 6:54 PM), <https://www.nbcnews.com/storyline/bill-cosby-scandal/bill-cosby-was-once-america-s-dad-now-he-s-n869396> [https://perma.cc/KQA9-K22W].

65. Eric Levenson, Lauren del Valle & Sonia Moghe, *Harvey Weinstein sentenced to 23 years in prison after addressing his accusers in court*, CNN (Mar. 11, 2020, 4:26 PM), <https://www.cnn.com/2020/03/11/us/harvey-weinstein-sentence/index.html> [https://perma.cc/EE2Z-MH5E].

66. Annie Linskey, *On monuments, Biden draws distinction between those of slave owners and those who fought to preserve slavery*, WASH. POST (June 30, 2020, 4:39 PM), https://www.washingtonpost.com/politics/on-monuments-biden-draws-distinction-between-those-of-slave-owners-and-those-who-fought-to-preserve-slavery/2020/06/30/a98273d8-bafe-11ea-8cf5-9c1b8d7f84c6_story.html [https://perma.cc/ST3W-B6LR].

reflect on that fascinating city. I had never visited until about three years earlier, but when I finally spent time there, I immediately fell in love.

Well, sort of. Every time that I try to describe Richmond to people who have never been there, I say something like this: “If you can completely compartmentalize the ubiquity of Confederate iconography, then you’ll love that city. *But* there is quite a bit to compartmentalize.” I have returned two or three more times for weekend visits, and I honestly have never truly felt comfortable with those mental gymnastics.

Still, nearly everything else about Richmond appealed to me. It is a medium-sized city, a state capital, and a university town.⁶⁷ (I was surprised to learn that Virginia Commonwealth University is an urban campus and enrolls over 30,000 students;⁶⁸ the much smaller University of Richmond is out in a rich suburban area.⁶⁹) There is an arts district near downtown, next to which hipsters and artists are reclaiming an abandoned neighborhood of row houses. The Carytown neighborhood is (pre-COVID, anyway) a thriving LGBTQ+ area and is not far from the Virginia Museum of Fine Arts, which has among other things a beautiful sculpture garden. Vegan-friendly restaurants are easy to find.

Or, to put it more simply, Richmond is an American city in the 21st century—youth-centered, economically reviving,⁷⁰ progressive, blue.⁷¹ Well, except for all of that Confederate stuff.⁷² My take on the situation is that Richmonders have long been embarrassed by all of it, but the state legislature (often dominated until recently by the Republican Party)⁷³ has

67. NATIONS ONLINE PROJECT, *Satellite View and Map of the City of Richmond, Virginia*, https://www.nationsonline.org/oneworld/map/google_map_Richmond.htm [<https://perma.cc/ACJ9-BBE9>] (last visited Oct. 13, 2020).

68. Mike Porter, *VCU joins national student success initiative*, VCU NEWS (Dec. 7, 2018), https://www.news.vcu.edu/article/VCU_joins_national_student_success_initiative [<https://perma.cc/9REQ-NC9Y>].

69. Genevieve Siegel-Hawley et al., *Confronting School and Housing Segregation in the Richmond Region: Can We Learn and Live Together?*, RICHMOND SCH. OF PROF. & CONTINUING STUD. 8 (Sept. 2017), <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1074&context=spcs-faculty-publications> [<https://perma.cc/6NHM-FSMK>]; N.Y. TIMES, *Economic Diversity and student outcomes of the University of Richmond*, <https://www.nytimes.com/interactive/projects/college-mobility/university-of-richmond> [<https://perma.cc/5SSH-JL5Z>].

70. *Richmond, VA Demographics*, AREA VIBES, <https://www.areavibes.com/richmond-va/demographics/> [<https://perma.cc/MU8X-DKDE>] (last visited Oct. 12, 2020).

71. Sabrina Tavernise & Robert Gebeloff, *How Voters Turned Virginia From Deep Red to Solid Blue*, N.Y. TIMES (Nov. 9, 2019), <https://www.nytimes.com/2019/11/09/us/virginia-elections-democrats-republicans.html> [<https://perma.cc/9XY8-7S3W>].

72. Deepa Shivaram & Kyle Stewart, *Virginia has the most Confederate memorials in the country, but that might change*, NBC NEWS (June 9, 2020, 6:44 AM), <https://www.nbcnews.com/news/us-news/virginia-has-most-confederate-memorials-country-might-change-n1227756> [<https://perma.cc/GZ4D-PVKL>].

73. Reid Wilson, *Democrats win control of Virginia Legislature*, THE HILL (Nov. 5, 2019), <https://thehill.com/homenews/campaign/469164-democrats-flip-virginia-state-senate> [<https://perma.cc/EE6X-4S99>].

forced the city to continue to display and apparently celebrate its role as the capital of a treasonous rebellion against the United States.⁷⁴

The most well-known controversies have swirled around Monument Avenue.⁷⁵ I honestly did not know anything about that street (or much else about Richmond, to be honest), so when I drove down a beautiful avenue lined by stately homes, I was shocked to see not just statues but full installations honoring Jefferson Davis,⁷⁶ Stonewall Jackson,⁷⁷ J.E.B. Stuart,⁷⁸ Robert E. Lee,⁷⁹ and someone named Matthew Fontaine Maury.⁸⁰ Slack-jawed, I then came upon the much newer statue of civil rights icon (and Richmond native) Arthur Ashe,⁸¹ and I had to laugh and applaud the locals' ingenuity.

The point is that this was the kind of situation in which, even when I returned in 2018 and 2019 (that is, even *after* Charlottesville⁸²), my reaction was glum resignation. "This is *never* going to change," I said.

74. See, e.g., Andrew Lawler, *The origin story of Monument Avenue, America's most controversial street*, NAT'L GEOGRAPHIC (July 27, 2020), <https://www.nationalgeographic.com/history/2020/07/origin-story-monument-avenue-america-most-controversial-street/#close> [https://perma.cc/D9UD-T2WF].

75. *On Monument Avenue: Controversial From the Start*, AM. CIV. WAR MUSEUM: BLOG (Aug. 17, 2017), <https://acwm.org/blog/monument-avenue-controversial-start/> [https://perma.cc/6KRZ-BEPM].

76. Charlie Grymes, *Jefferson Davis on Monument Avenue in Richmond*, VA. PLACES, <http://www.virginiaplaces.org/vacities/monavedavis.html> [https://perma.cc/A777-SZEY] (last visited Sept. 21, 2020).

77. Charlie Grymes, *Stonewall Jackson on Monument Avenue in Richmond*, VIRGINIA PLACES (last visited Sept. 21, 2020), <http://www.virginiaplaces.org/vacities/monavejackson.html> [https://perma.cc/6T8U-9SZV]. *Id.*

78. Charlie Grymes, *J.E.B. Stuart on Monument Avenue in Richmond*, VIRGINIA PLACES (last visited Sept. 21, 2020), <http://www.virginiaplaces.org/vacities/monavestuart.html> [https://perma.cc/JWX8-TEEL].

79. Charlie Grymes, *Robert E. Lee on Monument Avenue in Richmond*, VIRGINIA PLACES (last visited Sept. 21, 2020), <http://www.virginiaplaces.org/vacities/monavelee.html> [https://perma.cc/RT3J-WSFY].

80. Charlie Grymes, *Matthew Fontaine Maury on Monument Avenue in Richmond*, VIRGINIA PLACES (last visited Sept. 21, 2020), <http://www.virginiaplaces.org/vacities/monavemaury.html> [https://perma.cc/YCB2-NCMJ].

81. Charlie Grymes, *Arthur Ashe on Monument Avenue in Richmond*, VIRGINIA PLACES (last visited Sept. 21, 2020), <http://www.virginiaplaces.org/vacities/monaveashe.html> [https://perma.cc/WT8T-BDF5].

82. See generally Debbie Lord, *What happened at Charlottesville: Looking back on the rally that ended in death*, The ATLANTA J.-CONST. (Aug. 13, 2019), <https://www.ajc.com/news/national/what-happened-charlottesville-looking-back-the-anniversary-the-deadly-rally/fPpnLrbAtbxSwNI9BEy93K/> [https://perma.cc/U4EF-DLPW] (describing the white supremacist terrorist attack that occurred at Charlottesville, Virginia during the 2017 Unite the Right rally).

On my first drive from Washington, D.C. to Richmond, I had noticed an official road sign guiding people to the Stonewall Jackson Shrine.⁸³ *Shrine*?! Here are Merriam-Webster's definitions for that word:

1 a : a case, box, or receptacle especially: one in which sacred relics (such as the bones of a saint) are deposited

b : a place in which devotion is paid to a saint or deity
:SANCTUARY

c : a niche containing a religious image

2 : a receptacle (such as a tomb) for the dead

3 : a place or object hallowed by its associations⁸⁴

This is not about “understanding our history,” or some such dodge. Finally, the National Park Service announced in 2019 that they would change the name to the “Stonewall Jackson Death Site”⁸⁵ (rather than, say, pretending that Definition #2 above is what they intended all along). So, even before 2020's upheaval, there had been some small progress in how we handle these issues. But again, even the most optimistic among us never thought that Richmond would quickly, and at long last, update its most publicly embarrassing ties to a pro-slavery rebellion.

One of the attack lines that people like Donald Trump have used—beyond the usual nonsense about heritage and “erasing history”—was that this is a slippery slope.⁸⁶ If you do not like Confederate statues and places names, he and others say, what about slave-owning people like George Washington and Thomas Jefferson?⁸⁷ Do you want to stop honoring them? Do you? Well, *do you*?

Trump has been pushing this bogus line for several years,⁸⁸ and I recall having a dinner with some other law professors in 2018 where this question came up. One respected senior scholar offered this: “I have no problem differentiating between those who founded the nation and those

83. Chris Mackowski, *Site of Stonewall Jackson's Death Gets New Name*, EMERGING CIV. WAR (Sept. 18, 2019), <https://emergingcivilwar.com/2019/09/18/site-of-stonewall-jacksons-death-gets-new-name/> [https://perma.cc/NW9T-KX8J].

84. *Shrine*, <https://www.merriam-webster.com/dictionary/shrine> [https://perma.cc/3LPC-2URY] (last visited Sept. 22, 2020).

85. Mackowski, *supra* note 83.

86. Darlene Superville, *Trump Says 'Learn from History' Instead of Removing Statues*, ASSOCIATED PRESS (June 23, 2020), <https://apnews.com/article/fa842fd5bcf509bdc6d199c31e134f53>.

87. *Id.*

88. Eugene Scott, *Trump's Ardent Defense of Confederate Monuments Continues as Americans Swing the Opposite Direction*, WASH. POST (July 1, 2020, 2:11 PM), <https://www.washingtonpost.com/politics/2020/07/01/trumps-ardent-defense-confederate-monuments-continues-americans-swing-opposite-direction/> [https://perma.cc/TS6D-H654].

who tried to destroy it.” This felt right at the time, and variations on that comment are now widely circulating.⁸⁹ The problem is that this is all a bit too clever.

Even more surprising than the speed with which Confederate statues and names are being removed and changed is that serious people are now talking openly about reconsidering Washington, Jefferson, and others.⁹⁰ If some people in Columbus, Ohio, have a problem—a very understandable one—with their city’s association with a genocidal slaver,⁹¹ what about Washington, D.C., which is a district named not only after Columbus but also for a man who owned over 300 slaves?⁹²

Along with *New York Times* columnist Charles Blow, I have no problem reconsidering whether Washington deserves to be spared. In Blow’s words: “Some people who are opposed to taking down monuments ask, ‘If we start, where will we stop?’ It might begin with Confederate generals, but all slave owners could easily become targets. Even George Washington himself. To that I say, ‘abso-fricking-lutely!’”⁹³ Yes, even “the good ones” should be reconsidered.

For one thing, they were not, *ahem*, good. They owned slaves, and they did so even while the Enlightenment thinkers from whom they claimed inspiration openly condemned it. George and Martha Washington did not merely bide their time, passively owning people—as if that should be dismissed with the word “merely”—but actively tracked

89. *Should Statues Of Historic Figures With Complicated Pasts Be Taken Down?*, NPR MORNING Edition (June 23, 2020, 5:04 AM), <https://www.npr.org/2020/06/23/881992636/should-statues-of-historic-figures-with-complicated-pasts-be-taken-down> [https://perma.cc/8CLA-CRPW].

90. Camille Caldera, *Fact Check: Washington Monument, Lincoln Memorial, Aren’t at Risk of Removal*, USA TODAY (Sept. 5, 2020, 1:17 PM), <https://www.usatoday.com/story/news/factcheck/2020/09/04/fact-check-washington-monument-lincoln-memorial-werent-risk-removal/5692073002/> [https://perma.cc/ZGA3-GKG2]; *Mayor Bowser Releases DCFACES Working Group Report*, DC (Sept. 1, 2020), <https://dc.gov/release/mayor-bowser-releases-dcfaces-working-group-report> [https://perma.cc/68BG-SNEV].

91. History.com Editors, *Why Columbus Day Courts Controversy*, HISTORY (Sept. 17, 2020), <https://www.history.com/news/columbus-day-controversy> [https://perma.cc/G8K2-SBQP]; Alicia Lee, *Why Christopher Columbus Wasn’t the Hero we Learned About in School*, CNN (June 12, 2020, 7:04 AM), <https://www.cnn.com/2020/06/12/us/christopher-columbus-slavery-disease-trnd/index.html> [https://perma.cc/D5BZ-JR28]; Alicia Lee, *Thousands Sign Petition to Rename Columbus, Ohio to ‘Flavortown’ After Native Son Guy Fieri*, CNN (June 22, 2020, 12:22 PM), <https://www.cnn.com/2020/06/21/us/guy-fieri-flavortown-columbus-ohio-petition-trnd/index.html> [https://perma.cc/HJ4P-DYQ8].

92. *A Decision to Free His Slaves*, GEORGE WASHINGTON’S MOUNT VERNON, <https://www.mountvernon.org/george-washington/slavery/washingtons-1799-will/#:~:text=Of%20the%20317%20slaves%20at,reed%20upon%20his%20wife’s%20death> [https://perma.cc/FN7V-E2T5] (last visited Oct. 13, 2020).

93. Charles M. Blow, *Opinion, Yes, Even George Washington*, N.Y. TIMES (June 28, 2020), <https://www.nytimes.com/2020/06/28/opinion/george-washington-confederate-statues.html> [https://perma.cc/FN7V-E2T5].

down an escaped slave (at least one) and used them as “dower slaves.”⁹⁴ Jefferson’s transgressions are even more widely known.⁹⁵

The point is that one can appreciate the good that these men did without building shrines to them or continuing to ignore their shameful and monstrous realities. If society reaches a point where we say, “You know, those guys are historically important but did horrible things, so maybe we should stop treating them as deities,” I would be fine with that.

Biden, however, has taken the now-centrist position that Washington and Jefferson are out of bounds, because they were not traitors to the United States.⁹⁶ Why am I not surprised? Even a politician with a record of taking bold positions (very much unlike Biden, in other words) would almost certainly be eager to claim this easy middle ground in our current difficult moment.

The similarities to the same-sex marriage debate are palpable, once one thinks about it. I, and nearly everyone I knew with similar political views, originally reacted with great discomfort to the very idea of same-sex marriage. It just seemed *so extreme*, we thought, and it would be political suicide. We came up with diversionary arguments (“Well, marriage is a dying and corrupt institution, so why should we bother fighting to extend it to more people?”), and then we quite suddenly allowed ourselves to admit that it was an essential civil rights issue. In the end, people’s views “evolved.”⁹⁷

And now, the cautious strategy regarding statues and place names is to occupy space that is politically safe only because of the bravery of people who rejected the previous status quo. This is the same position as those who, during the middle years of the country’s same-sex marriage

94. Sarah Pruitt, *When One of George Washington’s Enslaved Workers Escaped to Freedom*, HISTORY (Feb. 18, 2020), <https://www.history.com/news/george-washington-and-the-slave-who-got-away> [<https://perma.cc/64FN-PLBV>]; Michele L. Norris, *George and Martha Washington Enslaved 300 People. Let’s Start With Their Names*, WASH. POST (June 26, 2020), https://www.washingtonpost.com/opinions/george-and-martha-washington-enslaved-300-people-lets-start-with-their-names/2020/06/26/d3f7c362-b7e7-11ea-a510-55bf26485c93_story.html [<https://perma.cc/PU4S-CBJQ>].

95. Henry Wiencek, *The Dark Side of Thomas Jefferson*, SMITHSONIAN MAG. (Oct. 2012), <https://www.smithsonianmag.com/history/the-dark-side-of-thomas-jefferson-35976004/> [<https://perma.cc/WTv8-EU9C>].

96. Johnathan Easley, *Biden: Government Must Protect Monuments to Washington, Jefferson*, HILL (June 20, 2020, 2:47 PM), <https://thehill.com/homenews/campaign/505271-biden-government-must-protect-monuments-to-washington-jefferson> [<https://perma.cc/9PP7-K8VF>].

97. See, e.g., Zeke J. Miller, *Obama Says He Didn’t Mislead on Gay Marriage*, TIME (Feb. 11, 2015, 8:50 AM), <https://time.com/3704760/barack-obama-gay-marriage-david-axelrod/> [<https://perma.cc/H5NY-Z9DS>].

debate, found themselves embracing what we now see as an untenable and dishonest middle ground known as civil unions.⁹⁸

That is not to say that civil unions were unimportant at the time. They were a huge step forward, just as getting rid of Confederate statues, flags, and place names represents real progress now.⁹⁹ And for a variety of reasons, the current debate might not reach the same clear conclusion that the country reached on same-sex marriage.¹⁰⁰ For example, I sincerely doubt that Washington, D.C., will be renamed, or even that the Jefferson Hotel in Richmond (where I have stayed) will abandon the name of its native-son slaveholder.

But maybe some or all of those things actually will change. Stalingrad and Leningrad are now historical names and nothing more.¹⁰¹ Istanbul was Constantinople, and it is not our business to say why “Constantinople got the works.”¹⁰²

Even though we currently appear to have ended up—due to a political standoff—stopping well short of a full reckoning on Jefferson and the rest, that does not mean that half-measures are actually defensible (or sensible). Civil unions, for all the progress that they represented, should not have been the point at which political stasis set in. Yet it could have ended there.

Those who want to make the case that the slaveholding founders should continue to receive a pass on the iconography front need to come up with something better than, “Well, they did important things, and they did fewer bad things than Stonewall Jackson did.” We can recognize important accomplishments without engaging in idolatry or the willful erasing of ugly reality.

98. Neil H. Buchanan, *Biden’s Statues and Names Compromise is 2020’s Version of Civil Unions*, DORF ON LAW (July 2, 2020, 12:54 PM), <http://www.dorfonlaw.org/2020/07/bidens-statues-and-names-compromise-is.html> [<https://perma.cc/9SYU-59AR>].

99. Alisha Ebrahimji et al., *Confederate Statues are Coming Down Following George Floyd’s Death*, CNN (July 1, 2020), <https://www.cnn.com/2020/06/09/us/confederate-statues-removed-george-floyd-trnd/index.html> [<https://perma.cc/ZW45-L58X>].

100. See *Obergefell v. Hodges*, 576 U.S. 644, 670–71 (holding that the right to marry was a fundamental right which extended to same-sex couples).

101. Buchanan, *supra* note 98.

102. THE FOUR LADS, *Istanbul (Not Constantinople)* (Columbia Records 1953).

B. *Writing and Rewriting History, from Columbus to Jefferson and Beyond*¹⁰³

Donald Trump decided to stand up for Confederate generals and symbols, accusing everyone else of being eager to erase history.¹⁰⁴ He has, of course, decided that any attempt to change the way history is presented—actually, that any progressive change at all—is a horrific act of leftist fascism.¹⁰⁵ This is all deranged, and it should continue to be treated with derision.

For the sane world, however, there are still a lot of interesting questions to confront, and we must at least try to begin to think through possible answers. In Part II.A above,¹⁰⁶ I joined the side of those who argue that nothing should be off the table, which means that the answer to Trump’s slippery slope-style question—If Robert E. Lee goes, will Washington and Jefferson be next?—might be yes. *Might* be, although the arguments can be complicated and nuanced.

Here, I want to ask what it means to “erase history” and then to suggest that the cases in favor of continuing to honor some of the historical figures now under reconsideration are actually not all that strong. In Part II.A, I analogized Joe Biden’s position—essentially that Confederate generals are categorically different from the founders, because the former tried to destroy the nation that the latter built—to the middle-ground solution in the same-sex marriage debate, that is, creating civil unions.¹⁰⁷ Neither of these centrist compromises is exactly satisfying, but it is still a sign of progress when a hyper-cautious centrist like Biden no longer feels it politically necessary to dance around the question of Confederate iconography.

The fundamental difference between the same-sex marriage debate and the current debate about the nation’s founders is that there is no direct analogy to marriage equality when it comes to honoring historical figures.

103. This sub-Part is an edited and updated version of Neil H. Buchanan, *Writing and Rewriting History, from Columbus to Jefferson and Beyond*, DORF ON LAW (July 7, 2020), <http://www.dorfonlaw.org/2020/07/writing-and-rewriting-history-from.html> [https://perma.cc/YLZ2-Z7P5].

104. Max Greenwood, *Trump on removing Confederate statues: ‘They’re trying to take away our culture’*, THE HILL (Aug. 22, 2017), <https://thehill.com/homenews/administration/347589-trump-on-removing-confederate-statues-theyre-trying-to-take-away-our> [https://perma.cc/LM3F-R3JU]; Neil H. Buchanan, *Writing and Rewriting History, from Columbus to Jefferson and Beyond*, DORF ON LAW (July 7, 2020, 12:26 PM), <http://www.dorfonlaw.org/2020/07/writing-and-rewriting-history-from.html> [https://perma.cc/5SGH-B6AG].

105. See Suzanne Nuyen, *Trump Flouts Virus Rules, Warns Of ‘New Far-Left Fascism’ At Mount Rushmore Event*, NPR (July 4, 2020, 3:25 AM), <https://www.npr.org/2020/07/04/887222928/trump-flouts-virus-rules-warns-of-new-far-left-fascism-in-speech-ahead-of-july-4> [https://perma.cc/XH65-QF7F].

106. See discussion *supra* Part II.A.

107. *Id.*

That is, even if one views Biden's approach as a halfway measure, the full measure is not to automatically drop the names of every historical figure and remove every statue. Instead, this debate ends up being a classic facts-and-circumstances inquiry, the type of analysis that people with legal training both love and hate.

Law is all about finding baseline principles. What do we do when there is no consensus baseline? We argue, reconsider, and reach uneasy compromises. Welcome to real life.

To be sure, many people are extremely uncomfortable with all of this, not merely Trump and his supporters. For example, former *New York Times* columnist Roger Cohen, whose work was often excellent, apparently could not wrap his head around the idea that it is important to debate the not-easy cases:

Some of the founders are now under attack for owning slaves. When George Washington and Thomas Jefferson fall from grace, you have to wonder. Union generals, including Ulysses Grant, who fought to defeat the Confederacy and slavery, were not good enough. They were imperfect, the human condition.

Moral absolutism has its giddy day. The guillotine falls. This is madness. Be careful what you say. It is the hour of the new judges; the judged are scared; and judgment of the judges may be decades or even centuries off.

. . . .

We can celebrate our history without hiding from its stains.¹⁰⁸

How exactly are those founders "under attack"?¹⁰⁹ We are simply asking whether they deserve to be held up as heroes. That is not an attack but an unavoidable question, a question that only seems avoidable to those who approve of the current answer.

To listen to Cohen, however, people like me are simply being nitpicky, because they/we refuse to admit that the human condition is imperfect. But this is not moral absolutism. It is a question about whether the way that we have been honoring these particular imperfect humans should continue. We remember certain imperfect humans in one way, and we remember others in other ways (or not at all). And that can change.

108. Roger Cohen, *A Difficult Independence Day*, N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2020/07/02/opinion/july-4th-coronavirus.html> [https://perma.cc/224E-D29L].

109. *See id.*

So no, this is not madness, because we are all now asking how best to “celebrate our history without hiding from its stains.”¹¹⁰ It is the reflexive defenses of Washington and Jefferson that are stain-free. History will be reconsidered in the future, no matter what. If the current judges are judged differently, then so be it. That is how the public performance of shared history works.

Indeed, shared history must necessarily be selective, and there is no reason that the selections of heroes made during previous eras deserve to be maintained in perpetuity—to be etched in stone, sometimes literally. If we are supposedly erasing history, we have to ask how the history that we are erasing was written in the first place.

Yet even that gives too much ground to those who are now shouting about other people stealing and rewriting history. After all, if anyone can be accused of erasing and rewriting history, it is Confederate sympathizers—who have done so for more than a century after their side lost the war.¹¹¹ The South explicitly fought the war to prevent the abolition of slavery, a fact that screams out from all of the historical evidence.¹¹² But over time, we were told (by groups such as the United Daughters of the Confederacy¹¹³) to believe that it was a War of Northern Aggression,¹¹⁴ that the states that insisted on enforcing a national Fugitive Slave Act were fierce defenders of states’ rights,¹¹⁵ and that the current celebrations of the traitors are merely about families’ heritage.¹¹⁶ If that is not erasing history, it is difficult to know what would be.

Back in the 1970’s, a U.S. Senator joked about the Panama Canal: “We should hang on to it. We stole it fair and square.”¹¹⁷ Confederate sympathizers such as Trump look at the neo-Confederate whitewashing of history and the “Lost Cause” myth and say the same: *We stole the history of the Confederacy, and we’ll fight like hell to keep what we stole.*

Taking down statues or changing the names of places does not erase history. There is a clear difference between the historical record and the celebration of parts of it. People who objected when Pete Rose was

110. *Id.*

111. Buchanan, *supra* note 98.

112. Frank James, *Slavery, Not States’ Rights, Caused Civil War Whose Political Effects Linger*, NPR (Apr. 11, 2011, 4:42 PM), <https://www.npr.org/sections/itsallpolitics/2011/04/12/135353655/slavery-not-states-rights-was-civil-wars-cause> [<https://perma.cc/6H8Q-GMVW>].

113. Allen G. Breed, *‘The lost cause’: the women’s group fighting for Confederate monuments*, THE GUARDIAN (Aug. 10, 2018), <https://www.theguardian.com/us-news/2018/aug/10/united-daughters-of-the-confederacy-statues-lawsuit> [<https://perma.cc/UV69-5FHH>].

114. Buchanan, *supra* note 98.

115. *Id.*

116. *Id.*

117. *To Unsteal the Panama Canal*, N.Y. TIMES (Feb. 14, 1977), <https://www.nytimes.com/1977/02/14/archives/to-unsteal-the-panama-canal.html> [<https://perma.cc/XX9M-VQCZ>].

banned from the Baseball Hall of Fame¹¹⁸ were apoplectic because, they pointed out, he had the most hits in major league history (a history that included more than a half-century in which only White men could play,¹¹⁹ but never mind).

But keeping someone out of the Hall of Fame does not say that he did not get those hits. The record book still says that Rose had more hits than any other player.¹²⁰ If all we cared about were keeping accurate records, we would not even have halls of fame, because we already have compendia of statistics. A hall of fame exists explicitly for the purpose of bestowing special honors, and it is entirely appropriate for people to say that such honors should not merely replicate one part of the historical record.

Indeed, even when an organization decides to change the record book—for example, adding asterisks or simply saying that some achievements do not count (due to steroid use, among other things)—that still does not change history. Anyone who cares to do so could still consult the historical record and know that seventy-three home runs were hit by one player in a single season and were counted at the time,¹²¹ even if the record book later were to be changed to say that those home runs will no longer be counted.¹²² The facts of history do not change in these cases, but the ways we think about them do.

Similarly, we need not deny that, say, Kevin Spacey did some remarkable things as an actor,¹²³ but that does not require us to honor him.¹²⁴ His movies exist, so we are not “wiping away history.” If people no longer want to see him act, his movies (like so many others) will no longer be made or shown. That is not a rewrite of the past. That is supply and demand. Personally, I can still enjoy, say, *BABY DRIVER* with

118. Murray Chass, *Rose, in Deal, Is Said to Accept Lifetime Ban for Betting on Reds*, N.Y. TIMES (Aug. 24, 1989), <https://nyti.ms/29yuQho> [<https://perma.cc/4JCT-5N3P>].

119. *The History of Baseball and Civil Rights in America*, SPORTS ILLUSTRATED (June 11, 2020), <https://www.si.com/mlb/rockies/hof-chatter/the-history-of-baseball-and-civil-rights-in-america> [<https://perma.cc/BNW7-XAJE>].

120. Evan Caminker & Erwin Chemerinsky, *Pete Rose Has Done His Time*, N.Y. TIMES (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/opinion/pete-rose-baseball.html> [<https://perma.cc/94RS-NQYY>].

121. Selena Roberts, *BASEBALL; Bonds Hits 73rd Home Run, Then Ponders Free Agency*, N.Y. TIMES (Oct. 8, 2001), <https://www.nytimes.com/2001/10/08/sports/baseball-bonds-hits-73rd-home-run-then-ponders-free-agency.html> [<https://perma.cc/J9LV-YTF5>].

122. Harold Friend, *Barry Bonds: MLB Must Delete His Records or Move on from Him*, BLEACHER REPORT (May 13, 2012), <https://bleacherreport.com/articles/1181749-mlb-must-delete-barry-bonds-records-or-leave-him-alone> [<https://perma.cc/LMT9-7QMV>].

123. KEVIN SPACEY, IMDB, <https://www.imdb.com/name/nm0000228/> [<https://perma.cc/6VXG-JCAU>] (last visited Sept. 22, 2020).

124. *Kevin Spacey: Special Emmy award withdrawn after assault allegations*, BBC (Oct. 31, 2017), <https://www.bbc.com/news/entertainment-arts-41816238> [<https://perma.cc/AHX7-NDPS>].

Spacey¹²⁵ but can no longer stomach Woody Allen's films; but everyone will draw lines in different places. Some cases are more extreme than others, but that is not a reason to ignore the less-extreme ones.

Similarly, in politics, there is no reason that our reconsideration of when to engage in public celebration should, per Biden¹²⁶ (and Cohen¹²⁷), be limited to the most extreme cases. As I argued in Part II.A, we can look anew at Washington and Jefferson and conclude that we have ignored the bad too long and overvalued the good.¹²⁸ Again, that does not deny their accomplishments. It says that their stories are more complicated, that the facts and circumstances deserve to be reconsidered, and possibly concluding that people who have been unthinkingly revered are no longer deserving of our worship.

Again, the facts will be different for different historical figures. In Part II.A, I noted that Christopher Columbus enslaved people upon his arrival in the Caribbean, and he became a slave trader.¹²⁹ What is especially interesting about Columbus, however, is just how weak the other side of his balance sheet is.

To be blunt, what the hell did Christopher Columbus do that makes him a hero? Washington and Jefferson did things that deserve to be celebrated (more on that in a moment), but what did Columbus do that was admirable? He was looking for a trade route and instead found an island with an exploitable population of indigenous peoples.¹³⁰

I remember in a public grade school (many years ago) being taught that Columbus did not discover America. Eric the Red supposedly did, centuries earlier.¹³¹ Even in the usual U.S. mythology, then, Columbus's big achievement should be a "meh." He captained ships and found things that other Europeans exploited.¹³² What did he *do* for what became the United States?

If we are in the business of balancing credits and debits, then, Columbus is a particularly easy case. For no particular reason, his achievements have been overstated and his atrocities ignored. Other than the cost of putting up new street signs, why exactly should we continue to treat him as we have for far too long?

125. SPACEY, *supra* note 123.

126. *See* Easley, *supra* note 96.

127. *See* Cohen, *supra* note 108.

128. *See* discussion, *supra* Part II.A.

129. *See* discussion, *supra* Part II.A.

130. Delno West, *Christopher Columbus and His Enterprise to the Indies: Scholarship of the Last Quarter Century*, 49 WM. & MARY Q. 254, 260 (1992).

131. Eric Weiner, *Coming to America: Who Was First?*, NPR (Oct. 8, 2007, 2:22 PM), <https://www.npr.org/templates/story/story.php?storyId=15040888> [<https://perma.cc/3E5D-HN5W>].

132. Dave Roos, *The Ships of Christopher Columbus Were Sleek, Fast—and Cramped*, HISTORY (Oct. 10, 2019), <https://www.history.com/news/christopher-columbus-ships-caravels> [<https://perma.cc/W85E-KGAF>].

Other cases raise their own balancing tests, some much easier than others. Andrew Jackson certainly is also an easy case. Even setting aside his fake populism and corruption (including imprisoning judges¹³³), Jackson was a genocidal maniac who authored the “Trail of Tears” that killed thousands upon thousands of Native Americans.¹³⁴ Are there positive things that he did as president? Sure, but that cannot possibly make this a difficult case.

What about George Washington? Here, we have a much more obvious case on the positive side, what with his decision to serve only two terms,¹³⁵ to inveigh against political factionalism,¹³⁶ and so on. But as one of *Dorf on Law*’s readers pointed out in a comment on my short post commemorating Independence Day last year: “The Brits lost the First War of American Secession, c. 1774-1783, through logistical ineptitude and their own domestic corruption as much as anything else; the Colonies didn’t ‘win.’”¹³⁷ Which means that Washington’s supposed military prowess in “winning our independence” is itself a contestable and selective reading of history.

That is not to say that everyone would view even a man who owned 300 slaves and used the government’s powers to recapture his escaped slaves as unworthy of public honor,¹³⁸ given his positives. I personally think that it is shocking that people are not willing to confront Washington’s ugly side, but that is what public discussions are about.

And what of Thomas Jefferson? His soaring rhetoric has inspired many people, including me. It is worth remembering, however, that even his moving Declaration of Independence includes this complaint about King George III: “He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.”¹³⁹

133. History.com Editors, *Andrew Jackson shuts down Second Bank of the U.S.*, HISTORY (Sept. 6, 2019), <https://www.history.com/this-day-in-history/andrew-jackson-shuts-down-second-bank-of-the-u-s#:~:text=President%20Andrew%20Jackson%20announces%20that,as%20the%20E2%80%9CBank%20War.%22> [https://perma.cc/RJK5-JY6F].

134. History.com Editors, *Trail of Tears*, HISTORY (July 7, 2020), <https://www.history.com/topics/native-american-history/trail-of-tears> [https://perma.cc/FKV6-4964].

135. Elaine Zelby, *Which US Presidents chose not to run for a second term?*, MEDIUM (Feb. 2, 2019), <https://medium.com/useless-knowledge-daily/which-us-presidents-chose-not-to-run-for-a-second-term-eba9cb2660cb> [https://perma.cc/XXK7-FW2N].

136. John Avlon, *George Washington’s Farewell Warning*, POLITICO (Jan. 10, 2017), <https://www.politico.com/magazine/story/2017/01/washingtons-farewell-address-warned-us-about-hyper-partisanship-214616> [https://perma.cc/7J29-PNCL].

137. CEP, Comment to Neil H. Buchanan, *Happy (?) Independence Day*, DORF ON LAW (July 3, 2020), <http://www.dorfonlaw.org/2020/07/happy-independence-day.html#comments> [https://perma.cc/EH8X-4VWZ].

138. GEORGE WASHINGTON’S MOUNT VERNON, *supra* note 89.

139. The Declaration of Independence (U.S. 1776).

Even Exhibit A in the pro-Jefferson canon, then, is hardly an unsullied celebration of high ideals. More to the point, however, the negative side of Jefferson's story is especially awful. He owned hundreds of slaves,¹⁴⁰ and he was a serial rapist.¹⁴¹ He did not free his slaves upon his death¹⁴² (which would not have erased the stain, but it would have been better than what he did). And even on the more mundane side, Jefferson's role in the acts that led to the landmark *Marbury v. Madison*¹⁴³ case are not what one would call "good facts" in his case for iconic status.¹⁴⁴ One of Jefferson's direct descendants wrote an op-ed in *The New York Times* in which he called for the Jefferson Memorial in Washington(!), D.C.(!), to be transformed into a memorial to Harriet Tubman.¹⁴⁵ He argued that Jefferson's slave plantation is memorial enough, because:

[A]t Monticello, you will learn the history of Jefferson, the man who was president and wrote the Declaration of Independence, and you will learn the history of Jefferson, the slave owner. Monticello is an almost perfect memorial, because it reveals him with his moral failings in full, an imperfect man, a flawed founder. That's why we don't need the Jefferson Memorial to celebrate him.¹⁴⁶

In other words, one need not choose to stop paying attention to Jefferson but instead to pay attention to him in a more complete way. That is not erasing history but adding to it.

As I wrote in Part II.A, I do not expect my point of view to prevail (at least for now), especially given the Biden/Cohen unwillingness to recognize anything other than a bright-line rule.¹⁴⁷ That does not mean, however, that they are right. History will continue to be understood in

140. *Slavery FAQs - Property*, THOMAS JEFFERSON'S MONTICELLO, <https://www.monticello.org/slavery/slavery-faqs/property/> [<https://perma.cc/T2ZG-XUMV>] (last visited Oct. 12, 2020).

141. See Farah Stockman, *Monticello Is Done Avoiding Jefferson's Relationship With Sally Hemings*, N.Y. TIMES (June 16, 2018), <https://www.nytimes.com/2018/06/16/us/sally-hemings-exhibit-monticello.html> [<https://perma.cc/6EXQ-J3XA>].

142. THOMAS JEFFERSON'S MONTICELLO, *supra* note 140 (Throughout his life and in his will, Jefferson freed a total of (at the most) nine or ten of the human beings whom he had owned as slaves—a far cry from what one might have expected of the individual who penned the words “all men are created equal.”).

143. 5 U.S. 137 (1803).

144. See History.com Editors, *Marbury v. Madison Establishes Judicial Review*, HISTORY (Feb. 20, 2020), <https://www.history.com/this-day-in-history/marbury-v-madison-establishes-judicial-review> [<https://perma.cc/7PMK-6VTP>].

145. Lucian K. Truscott, Opinion, *I'm a Direct Descendant of Thomas Jefferson. Take Down His Memorial*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/07/06/opinion/thomas-jefferson-memorial-truscott.html> [<https://perma.cc/6P2K-GAZT>].

146. *Id.*

147. See discussion *supra* Part III.A.

different ways. We need not pretend that our habitual honoring of people from Columbus on down was well thought out in the first place.

We are not changing the past. We are deciding how we, today, will celebrate or condemn the past. That is not only our right: it is inevitable.

C. *Reassessing America's Founders is Deeply Patriotic*¹⁴⁸

U.S. Senator Tammy Duckworth, an Illinois Democrat, upset some people in the summer of 2020.¹⁴⁹ She was asked whether statues of George Washington, Thomas Jefferson, and so on should be brought down, and she replied that it was legitimate to have a “national dialogue” about that question.¹⁵⁰ She did not say that she agreed with those who would change the national deification of those (slave-owning) men, only that discussing it is legitimate.¹⁵¹

Naturally, she was quickly excoriated by those on the right who are constantly looking for wedge issues, including (of course) Donald Trump.¹⁵² Duckworth responded with a pointed and moving op-ed in *The New York Times*, in which she stated emphatically:

I don't want George Washington's statue to be pulled down any more than I want the Purple Heart that he established to be ripped off my chest. I never said that I did.

But while I would risk my own safety to protect a statue of his from harm, I'll fight to my last breath to defend every American's freedom to have his or her own opinion about Washington's flawed history. What some on the other side don't seem to understand is that we can honor our founders while acknowledging their serious faults, including the

148. This sub-Part is an edited and updated version of Neil H. Buchanan, *Reassessing America's Founders is Completely Patriotic*, DORF ON LAW (July 10, 2020), <http://www.dorfonlaw.org/2020/07/reassessing-americas-founders-is.html> [<https://perma.cc/Q9X5-ZBVF>].

149. See *Interview With Food and Drug Administration Commissioner Stephen Hahn; Interview With Sen. Joni Ernst (R-IA); Interview With Sen. Tammy Duckworth (D-IL); Interview With Austin, Texas, Mayor Steve Adler*. Aired 9-10a ET, CNN: TRANSCRIPTS, <https://www.cnn.com/videos/politics/2020/07/05/sotu-duckworth-statue.cnn> [<https://perma.cc/P9KK-Z4MX>] (last visited Oct. 13, 2020) [hereinafter *Duckworth Interview*].

150. *Id.*

151. *Id.*

152. Donald J. Trump for President, <https://www.donaldjtrump.com/media/trump-campaign-statement-on-sen.-tammy-duckworths-openness-to-tearing-down-george-washington-statues/> [<https://perma.cc/SM37-2GW9>] (last visited Apr. 1, 2021); see also Lauren Lantry, *Sen. Duckworth Defends her patriotism, Tucker Carlson's right to free speech*, ABC NEWS (July 10, 2020, 5:23 PM), [https://abcnews.go.com/Politics/sen-tammy-duckworth-defends-patriotism-tucker-carlsons-free/](https://abcnews.go.com/Politics/sen-tammy-duckworth-defends-patriotism-tucker-carlsons-free/story?id=71715148) story?id=71715148 [<https://perma.cc/DJH9-TJEQ>].

undeniable fact that many of them enslaved Black Americans.¹⁵³

Duckworth's military service resulted in her losing both legs on a battlefield in Iraq (hence the Purple Heart),¹⁵⁴ and she acidly added this about Trump and his culture warriors: "They should know, though, that attacks from self-serving, insecure men who can't tell the difference between true patriotism and hateful nationalism will never diminish my love for this country—or my willingness to sacrifice for it so they don't have to. These titanium legs don't buckle."¹⁵⁵

Well played. I happen to disagree with Duckworth on the merits of Washington and Jefferson, but as she points out, that is not the larger issue here. She knows that such discussions are not only appropriate and natural but that they are nothing to fear. They are certainly patriotic.

The problem is that Republicans are not the only ones who get it wrong about this issue. Some who claim to be centrists smugly assert that Duckworth is wrong both politically and morally.¹⁵⁶ What the heck are they talking about?

In Parts II.A and II.B, I explained why I find the reassessment of Washington, Jefferson, and others to be long overdue.¹⁵⁷ Path dependence and transition costs are formidable obstacles to change, of course, but on the merits, it is hardly a stretch to say that we might not want to honor those men who wrote and did important things but who also engaged in the systematic enslavement and serial rape of other human beings. Even in the 1700's, enlightened people—and we certainly have always liked to think of Washington, Jefferson, and the others as enlightened—understood that this abomination must not stand.¹⁵⁸

As I wrote, however, each person can and should do their own balancing test to determine whether these and other historical figures should continue to be honored. I was thus pleased to see Senator

153. Tammy Duckworth, Opinion, *Tammy Duckworth: Tucker Carlson Doesn't Know What Patriotism Is*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/opinion/tammy-duckworth-tucker-carlson.html?auth=login-facebook&searchResultPosition=1> [<https://perma.cc/LGK8-9VXL>].

154. *See id.*

155. *Id.*

156. Matt Bai, Opinion, *Why is the party with a strong chance of winning playing a reckless game with U.S. history?*, WASH. POST (July 8, 2020, 6:29 PM), <https://www.washingtonpost.com/opinions/2020/07/08/going-after-washington-jefferson-isnt-just-wrong-its-politically-negligent/> [<https://perma.cc/D8YQ-5CGE>].

157. *See discussion supra* Parts II.A, II.B.

158. John R. Howe, Jr., *John Adam's Views of Slavery*, 49 J. NEGRO HIST. 201, 201 (1964); Richard J. Werther, *Roger Sherman: The Only Man Who Signed All Four Founding Documents*, J. AM. REVOLUTION (Sept. 28, 2017), <https://allthingsliberty.com/2017/09/roger-sherman-man-signed-four-founding-documents/> [<https://perma.cc/77R8-G4ZE>].

Duckworth make precisely the same point.¹⁵⁹ Leaving aside the founding generation, I continue to think of Christopher Columbus and Andrew Jackson as easy calls against public honor, but I concede that Washington and Jefferson have much more on the plus side of their balance sheets. That is why we should have a dialogue.

So far, so good. Is this good politics, though? Again, I have been clear all along that I understand why this is dangerous ground for Joe Biden and the Democrats, so the deliberate mangling of Duckworth's words by the Trumpists was completely predictable.¹⁶⁰ I have likened Biden's stated approach—the founders are off limits, but of course Confederate iconography must go—to the creation of civil unions as a compromise in the same-sex marriage debate,¹⁶¹ but that does not mean that it is not smart politics. In fact, for a few years, the civil unions dodge was the best that we could hope for, given the (rapidly evolving) politics of that moment.

As it happens, the usual defenses of the regrettable choices of the founding generation regarding slavery—explicitly protecting slavery in the new nation,¹⁶² agreeing to the three-fifths compromise,¹⁶³ and so on—take as a given that the more progressive founders had no choice but to give in to the pro-slave colonies, where the presumption is that *if they had had their druthers*, the better men among the founders would have ended slavery entirely. That idea has even made it into popular culture, with the Broadway play and film *1776* depicting the history in exactly that way.¹⁶⁴

That does not absolve the slaveholding founders themselves, of course, because no one was forcing them to enslave or brutalize other human beings. Washington, Jefferson, and the others could and should have said, “Well, we lost that political battle, but we as individuals can still do what's right,” but they instead chose to continue to own humans as property.

In any event, if I were advising Democrats—a prospect that both they and I would find equally unpleasant, I suspect—I would have been fully on board in telling Biden and others to try not to engage with a debate

159. Duckworth, *supra* note 153.

160. *See id.*

161. Annie Linksey, *On monuments, Biden draws distinction between those of slave owners and those who fought to preserve slavery*, WASH. POST (June 30, 2020, 4:39 PM), https://www.washingtonpost.com/politics/on-monuments-biden-draws-distinction-between-those-of-slave-owners-and-those-who-fought-to-preserve-slavery/2020/06/30/a98273d8-bafe-11ea-8cf5-9c1b8d7f84c6_story.html [https://perma.cc/TFG7-55M2].

162. Matthew Spalding, *How to Understand Slavery and the American Founding*, HERITAGE FOUND. (Aug. 26, 2002), <https://www.heritage.org/american-founders/report/how-understand-slavery-and-the-american-founding> [https://perma.cc/DZ67-D9P6].

163. *Three-Fifths Compromise*, ENCYCLOPEDIA BRITANNICA (June 26, 2020), <https://www.britannica.com/topic/three-fifths-compromise> [https://perma.cc/C5H4-LTMJ].

164. *1776* (Columbia Pictures 1972).

about the founders' place in the American political firmament. Better to steer clear, even now, given the fundamental threat to American constitutional democracy that Trump still poses.

As I noted above, however, there is a slice of the centrist punditocracy that cannot simply leave it at that simple statement: "This is politically explosive, so leave it alone."¹⁶⁵ Instead, the guardians of the conventional wisdom are using this as an opportunity once again to bash progressives for daring to be progressive.¹⁶⁶ And there is not a more self-satisfied centrist than Matt Bai, formerly of *The Times* and now with *The Washington Post*.¹⁶⁷ Because he is an anti-conservative, I have frequently agreed with Bai's writings over the years. Even so, he is most in his element when he can go after people to his left, especially by engaging in false equivalence.¹⁶⁸

In July 2020, Bai penned an op-ed in which he could have made the simple case that Democrats would be wise to tamp down the debate over the founding generation.¹⁶⁹ And he sort of wrote that column, saying that Duckworth's position left him "wondering why a party with a strong chance of winning back the White House in November would want to play such a reckless game when it comes to the nation's history."¹⁷⁰

Okay, fine, but this is Matt Bai, so he could not leave it at that. His opening paragraph is absurdly (but all too typically) overwrought: "I watched with a kind of horrified fascination last weekend as Sen. Tammy Duckworth (D-Ill.) pointedly refused—twice—to answer a direct question from CNN's Dana Bash about whether statues of George Washington around the country should be torn down and replaced."¹⁷¹

Duckworth's op-ed had not yet been published when Bai attacked her, but he did link (via the word "refused" in the quote above) to the CNN transcript of the interview¹⁷² that incensed him so much. Here are those two supposedly pointed "refusals":

BASH: "Senator, I know that you support change in the name of military bases named after Confederate leaders. But there are leaders like George Washington and Thomas

165. Buchanan, *supra* note 95.

166. *Id.*

167. *Matt Bai*, WASH. POST, <https://www.washingtonpost.com/people/matt-bai/> (last visited Sept. 26, 2020); *Matt Bai*, N.Y. TIMES, <https://www.nytimes.com/by/matt-bai> [<https://perma.cc/7L4G-6K9B>] (last visited Sept. 26, 2020); Duckworth, *supra* note 153.

168. Neil H. Buchanan, *False Equivalence from Down Under*, DORFONLAW (Jan. 21, 2011), <http://www.dorfonlaw.org/2011/01/false-equivalence-from-down-under.html> [<https://perma.cc/L8ZU-K7EX>].

169. Bai, *supra* note 167.

170. *Id.*

171. *Id.*

172. *Duckworth Interview*, *supra* note 143.

Jefferson who were slave owners, and some people are demanding that their monuments come down, too. So, in your view, where does it end? Should statues, for example, of George Washington come down?”

DUCKWORTH: “Well, let me just say that we should start off by having a national dialogue on it at some point.”¹⁷³

Duckworth, obviously aware that it would be a bad idea for the interview to become sidetracked on that issue, then tried to pivot the conversation back to Trump’s criminal mishandling of the pandemic, the Russian bounties on American soldiers, and so on.¹⁷⁴ Bash responded:

BASH: “So, that might be -- be true, but George Washington, I don’t think anybody would call him a traitor. And there are ...”

DUCKWORTH: “No.”

BASH: “... moves by some to remove statues of him. Is that a good idea?”

DUCKWORTH: “I think we should listen to everybody. I think we should listen to the argument there. But remember that the president at Mount Rushmore was standing on ground that was stolen from Native Americans who had actually been given that land during a treaty.”¹⁷⁵

Duckworth then returned to coronavirus and the other issues.¹⁷⁶

For Bai, this was a cause of “horrificed fascination.”¹⁷⁷ Rather than trying to focus on Trump’s failures, Duckworth “pointedly refused—twice—to answer a direct question.”¹⁷⁸ She answered not by offering her own opinion but by saying that she respects other people’s right to have opinions.¹⁷⁹ Bai did not like that answer, obviously, apparently because she did not say, “No, Washington and Jefferson were gods among men and should never be reconsidered.”

Indeed, the telling aspect of Bai’s attack on Duckworth was that he did not leave it at saying that she left herself open politically.¹⁸⁰ He

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *See* Bai, *supra* note 167.

178. *Id.*

179. Jack Turman, *Tammy Duckworth fires back at Tucker Carlson and Trump campaign over statute removal criticism*, CBS NEWS (July 10, 2020, 8:37 PM), <https://www.cbsnews.com/news/tammy-duckworth-tucker-carlson-trump-campaign-statue-removal-criticism/> [https://perma.cc/9PLN-Z5MV].

180. Bai, *supra* note 167.

twisted his response into an attack on the left, saying that political calculations are “not something my progressive friends want to hear right now. (I hesitate to use that word—‘progressive’—since the father of progressivism, Theodore Roosevelt, is among those whose statues are under assault.)”¹⁸¹

If that was not snarky and disingenuous enough, Bai then let this fly: “I’ve been thinking lately about the Taliban. (No, I’m not comparing liberals to Afghanistan’s radical mullahs. Stay with me here.)”¹⁸² Unsurprisingly, he does in fact compare liberals to the Taliban.¹⁸³ He begins by saying that the world ignored the Taliban until they started destroying cultural artifacts, at which point “[t]he world responded with revulsion and outrage, a kind of global gag reflex.”¹⁸⁴

If we are not comparing liberals to the Taliban, what is his point? “[T]he destruction of cultural artifacts often has a resonance that human tragedy, with its faceless statistics, does not. These historical symbols connect us to the flow of human history; erasing that history leaves us diminished and unmoored from any larger purpose.”¹⁸⁵

And there we have it. Bai engages in exactly the diversion that Trump and other Confederate sympathizers love so much, saying that taking down statues means “erasing history.”¹⁸⁶ Worse, we will supposedly lose any connection to a larger purpose. Any change in statues or names is not a *different* way to understand and depict history in the public square. It is complete *erasure*.

Let me repeat that Bai is not merely saying that Democrats would be politically wise not to seem open to a discussion about whether the founders’ public recognition should be changed. He is saying that it is affirmatively a horrible thing to remove statues or update place names. Once something is there, it must stay there, or we do violence to history, just as the Taliban did by blowing up the two Buddhas of Bamiyan.

Why? Well:

In the United States, we don’t raise up statues as shrines to be worshiped, or as instruments of oppression. We tend to erect them as markers of our progress, reminders that even flawed men and women can leave the nation less flawed than they found it. Memorials are sedimentary layers of the American bedrock, there to be excavated and reexamined by every succeeding generation.¹⁸⁷

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. Bai, *supra* note 161.

186. *Id.*

187. *Id.*

This is classic pundit-speak, mixing utter falsehoods (“we don’t raise up statues as shrines to be worshiped”) with pseudo-intellectual pronouncements that inadvertently concede the writer’s own lack of conviction. After all, what are we doing now if not “excavat[ing] and reexamin[ing]” the “layers of the American bedrock”? We are asking how and where we will remind ourselves of our flawed former leaders. Bai cannot get himself to say that such reexamining is a bad idea, so he concedes that it is a good thing even as he condemns those who have the temerity to do so.¹⁸⁸

Bai concludes: “Indiscriminately attacking the nation’s memorials is chilling. Letting Trump have a debate about it is just plain dumb.”¹⁸⁹ The latter point is arguably accurate, but even that is not obviously so. But even if it is, the former claim is frankly idiotic.

Neither Duckworth nor anyone with my views would indiscriminately attack the nation’s memorials. Are there some people who would? Maybe, but even the people who would take down the largest number of statues and change the largest number of names are not being indiscriminate. Saying that “indiscriminate attacks” are “chilling” is merely a tautology, and a pompous one at that. I can say of Bai that “baselessly criticizing one’s opponents is closed-minded,” and if Bai objects that his criticisms are not baseless, I can then say, “Oh, I was only criticizing people who have no basis for their claims.” That is a waste of everyone’s time.

This is, then, yet another example of the “hippie-punching” default among those who view themselves as defining the sensible center. Do we have the freedom to debate important questions? *Yes, of course*, people like Bai say, *but if you should ever be tempted to do so, I’ll attack you for being politically stupid and for attacking our “markers of progress.” How dare you!*

Senator Duckworth, interestingly, quoted George Washington himself, noting that he urged Americans to “guard against the impostures of pretended patriotism.”¹⁹⁰ Who was Washington warning us to worry about? The pseudo-centrists like Bai no less than the buffoons of the Trump cult, all of whom feel no remorse in attacking the patriotism of those with whom they disagree.

CONCLUSION

White privilege takes many forms, but the most important thing to know about it is that it is mostly a matter of what White people can

188. *Id.*

189. *Id.*

190. Richard Lim, *George Washington’s Warning on Disunity*, FOUND. FOR ECON. EDUC. (Sept. 20, 2018), <https://fee.org/articles/george-washingtons-warning-on-disunity/> [https://perma.cc/6T9R-UT7Y].

passively take for granted. Police violence can be visited upon anyone, but White people—and especially White men—have the privilege of not having to actively worry about being targeted by officers of the law because of their race. Similarly, White people who are worried about “erasing history” by removing statues and changing place names have the privilege of thinking that White history is merely “history,” such that any changes to the way we currently represent and understand history are inherently suspect.

If we are going to make further progress, White people need to understand our privilege and see that we are benefiting even when we are not aware that it is happening.

DON'T MAKE A RUN FOR IT: RETHINKING *ILLINOIS V. WARDLOW*¹ IN LIGHT OF POLICE SHOOTINGS AND THE NATURE OF REASONABLE SUSPICION

Edith Perez*

“Nor is it true as an accepted axiom of criminal law that ‘the wicked flee when no man pursueth, but the righteous are as bold as a lion.’”²

Fear and distrust of law enforcement have been longstanding in the Black community.³ Those in power have fueled this fear and distrust through brutal beatings, harassment, and general discrimination.⁴ But today, a new tool exacerbates this problem and makes escaping the violence nearly impossible, deepening the contempt and spreading its adverse effects: the media. Using a hierarchy of “if it bleeds, it leads,” the capitalistic fear-based media targets the anxieties and biases of Americans, creating a more profound fear and distrust of law enforcement while simultaneously strengthening the fear and distrust of Black men.⁵

The law has been slow to reflect the implications of these realities. Courts today are unable to make “commonsense judgments”⁶ that individuals, mainly minorities, genuinely want to avoid contact with police officers.⁷ Instead, courts are bound to maintain a criminal justice system that is blind to the American tradition of violence against

1. *Illinois v. Wardlow*, 528 U.S. 119 (2000).

* Edith Perez earned her Bachelor’s degree University of Florida in 2018 and will earn her Juris Doctor degree from the University of Florida Levin College of Law in 2021. After graduation, Edith will be clerking for a district court judge and hopes to later pursue a career in prosecution. This Note was inspired by her passion for the Fourth Amendment.

2. *Alberty v. United States*, 162 U.S. 499, 511 (1896).

3. See Nikole Hannah-Jones, *Taking Freedom: Yes, Black America Fears the Police. Here’s Why*, PACIFIC STANDARD (May 8, 2018), <https://psmag.com/social-justice/why-black-america-fears-the-police> [<https://perma.cc/2FR4-PW6J>] (“For [B]lack Americans, policing is ‘the most enduring aspect of the struggle for civil rights,’ because it has always been a mechanism for racial control.”).

4. See *id.*

5. See Deborah Serani, *If It Bleeds, It Leads: Understanding Fear-Based Media*, PSYCHOLOGY TODAY (June 7, 2011), <https://www.psychologytoday.com/us/blog/two-takes-depression/201106/if-it-bleeds-it-leads-understanding-fear-based-media> [<https://perma.cc/6JWY-RDWZ>] (describing fear-based media as “depicting categories of people as dangerous and replacing optimism with fatalistic thinking”).

6. *Wardlow*, 528 U.S. at 125.

7. See Rick Jervis, *Who are police protecting and serving? Law enforcement has history of violence against many minority groups*, USA TODAY (June 15, 2020, 3:20 PM), <https://www.usatoday.com/story/news/nation/2020/06/13/mistrust-police-minority-communities-hesitant-call-police-george-floyd/5347878002/> [<https://perma.cc/P738-27DQ>] (describing how the history of violence against minorities has resulted in minority groups’ underusing and avoiding interactions with police).

minorities. By sanctioning the observation of “unprovoked” flight, the Supreme Court decision in *Illinois v. Wardlow* allows for the stop and frisk searches of individuals who flee while present in “high crime” areas, a known proxy for minority neighborhoods.⁸ A Black man’s flight is hardly “unprovoked;” it is a result of racial profiling⁹ and media-bred fear of fatal encounters.¹⁰

INTRODUCTION TO “THE MOST COMMON NEGATIVE INTERACTION”: THE STOP AND FRISK SEARCHES	139
I. <i>ILLINOIS V. WARDLOW</i> AND ITS COLOR-BLIND APPROACH	140
II. DISPARATE APPLICATION OF STOP AND FRISK SEARCHES DESPITE <i>WARDLOW</i> AND BECAUSE OF <i>WARDLOW</i>	143
A. <i>How Wardlow has Adverse Effects on Minorities in Particular</i>	144
B. <i>The Implications of United States v. Mendenhall Urges Reconsideration of the Wardlow Decision</i>	145
III. A BRIEF DISCUSSION OF RACIAL BIAS, WHY BLACK MEN RUN, AND THE MEDIA’S CONTRIBUTION	146
A. <i>How an Impactful Media Contributes to Why Black Men Run</i>	147
1. Highly Publicized Police Shootings: A Discussion of Recent Incidents	148
B. <i>How the Graphic and Highly Publicized Incidents Affect the Mental Health of Black Youth</i>	152
IV. TREATMENT OF REASONABLE SUSPICION AND FLIGHT POST <i>WARDLOW</i>	155
A. <i>A Challenge to Wardlow</i>	155
V. IMPORTANCE OF RECONSIDERING <i>WARDLOW</i> AND THE ULTIMATE OBJECT OF THE DISCUSSION	157
A. <i>Other Problems with the Reasonable Suspicion Doctrine as it Stands Today</i>	158
CONCLUSION	159

8. See *Wardlow*, 528 at 123 & 123 n.1; *infra* II.A (discussion on high crime as a proxy for race).

9. See *Wardlow*, 528 U.S. at 132–33 (Stevens, J., concurring in part and dissenting in part).

10. See *infra* III.A.1 (discussion on police shootings).

INTRODUCTION TO “THE MOST COMMON NEGATIVE INTERACTION”¹¹:
THE STOP AND FRISK SEARCHES

In the wake of highly publicized police shootings, most discussions of the law focus on holding officers accountable.¹² This Article will begin by addressing the standard of reasonable suspicion and the inordinate power it gives police officers over the bodies of Black men. Moving forward to *Illinois v. Wardlow*, this Article will then discuss how, by allowing flight to be considered a factor for reasonable suspicion, the case contributes to the bleakness of police contact with Black men. Subsequently, the discussion focuses on how the reasonable suspicion standard traditionally failed to account for the realities of society even from the time of its creation in *Terry v. Ohio*.¹³ To that point, this Article will then explain how the media has added an additional consideration in the Court’s reasonable suspicion analysis in that it has harvested deeper contempt against minority communities and led to significant mental health issues within them. Ultimately, this Article argues that the *Wardlow* decision is concerning because its holding relies on the loose concept of “high crime area” coupled with “unprovoked flight.”¹⁴ Individuals who may be present in their own neighborhoods and avoiding contact with the police are subject to a stop and frisk search without any other justification.¹⁵

First, as a practical matter, a Black man’s encounter with the police does not always result in fatal wounds. Instead, when subjected to a “stop and frisk search,” his “life [is] interrupted”¹⁶ and his body is felt all over. In *Terry v. Ohio*, the well-established standard for searches and seizures under the Fourth Amendment was diluted¹⁷ when the Supreme Court found that reasonable suspicion, a much lesser standard than probable

11. PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 83 (2017).

12. See, e.g., Ciara McCarthy, *Philando Castile: police officer charged with manslaughter over shooting death*, THE GUARDIAN (Nov. 16, 2016, 12:01 PM), <https://www.theguardian.com/us-news/2016/nov/16/philando-castile-shooting-manslaughter-police-jeronimo-yanez>.

13. *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968).

14. *Wardlow*, 528 U.S. at 124.

15. At minimum, two Supreme Court justices have at least implied that avoiding contact with the police is legal. See *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980) (Stewart, J., joined by Rehnquist, J.) (“Police officers enjoy ‘the liberty (again, possessed by every citizen) to address questions to other persons,’ although ‘ordinarily the person addressed has an equal right to ignore his interrogator and walk away.’”) (quoting *Terry*, at 32–33 (Harlan, J., concurring)) (citation omitted).

16. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013).

17. See Sarah Walker, *Arrest As an Invasion of the Right to Privacy: How Officer Gilroy’s Arrest of Shelwanda Riley for Violating the Fort Pierce Youth Protection Ordinance Violated Her Privacy Rights Under the Florida Constitution*, 19 U. FLA. J.L. & PUB. POL’Y 325, 336 (2008) (“Since *Terry*, the Court’s decisions have required a diminishing quantum of ‘reasonable suspicion’ to justify investigative detentions.”).

cause, was sufficient for a brief stop and search.¹⁸ The police officer in *Terry* was patrolling the area in plain clothes when he observed two men who “didn’t look right.”¹⁹ The police officer approached the men and when they “mumbled something” in response to questions, the police officer grabbed Terry and spun him around to pat the outsides of his body.²⁰ This is now known as the “stop and frisk search.”²¹

To uphold this government action, the Court in *Terry* established the reasonable suspicion standard: “[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”²² The reasonable suspicion standard requires a lower level of justification than the standard used for arrests: probable cause.²³ By recognizing standards other than probable cause to justify searches, “the Court invited more deviation from the traditional outcomes under the Fourth Amendment Doctrine.”²⁴

I. *ILLINOIS V. WARDLOW* AND ITS COLOR-BLIND²⁵ APPROACH

In a 5-4 decision, the Supreme Court held that an officer’s actions “did not violate the Fourth Amendment” for stopping an individual who fled from a “high crime” area.²⁶ The police officers were patrolling an area they deemed to be “heavy” in narcotics trafficking when they observed Wardlow standing next to a building with an “opaque bag” in his hand.²⁷ Wardlow, allegedly, looked in the direction of the police officers and fled through an alley, which prompted the officers to chase him and conduct a protective pat-down.²⁸ Wardlow was arrested after a police officer

18. *Terry*, 392 U.S. at 30.

19. *Id.* at 5.

20. *Id.* at 7.

21. *Id.* at 10.

22. *Id.* at 21.

23. See *Wells v. State*, 922 N.E.2d 697, 700–01 (Ind. Ct. App. 2010) (“Reasonable suspicion is less demanding than probable cause and requires a showing considerably less than a preponderance of the evidence, but still requires a minimal level of objective justification and more than an inchoate and unparticularized suspicion or hunch of criminal activity.”) (citing *Teague v. State*, 891 N.E.2d 1121, 1127 (Ind. Ct. App. 2008)).

24. MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: THE POLICE* (5th ed. 2015) at 41.

25. See Keven Jay Kercher, *Criminal Law—Search and Seizure: The Investigative Stop: What Happens When We Run?* *Illinois v. Wardlow*, 528 U.S. 119 (2000), 77 N.D. L. REV. 123, 140–41 (2001) (citing Reply Brief for Petitioner at 16, *Wardlow*, 528 U.S. 119 (No. 98-1036) (arguing for a color-blind approach to applying the Fourth Amendment)).

26. *Wardlow*, 528 U.S. at 121.

27. *Id.* at 121, 121–22.

28. *Id.* at 122 (majority opinion).

squeezed the opaque bag, felt the shape of a gun, and discovered a .38 caliber handgun.²⁹

In *Wardlow*, the police officer cited the “high crime area” and the fact that Wardlow ran as the specific, articulate facts needed for reasonable suspicion.³⁰ The Illinois Supreme Court below, while agreeing that the area Wardlow was located in was dangerous, rejected the argument that flight in a high crime area supported a finding of reasonable suspicion because the “‘high crime area’ factor was not sufficient standing alone to justify a *Terry* stop.”³¹ The Illinois Supreme Court held the stop, and the subsequent arrest, invalid upon finding “no independently suspicious circumstances to support an investigatory detention.”³² The Supreme Court of the United States disagreed,³³ stating that although a high crime area standing alone is insufficient, an area’s characteristics are relevant to determining whether further investigation is warranted.³⁴

As he dissented in part, Justice Stevens mentioned the defects in *Wardlow* and stated that individuals fleeing from a high crime area arguably may have more innocent motivations for doing so, making an inference of guilt less appropriate.³⁵ Justice Stevens proceeded to remind the Court of various innocent reasons why an individual might run regardless of their location: “to catch up with a friend a block or two away, to seek shelter from an impending storm, . . . to avoid contact with a bore or a bully, . . . any of which might coincide with the arrival of an officer in the vicinity.”³⁶ Even if the flight is prompted by the presence of an officer, an innocent man may still run:

[I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime Nor is it true as an accepted axiom of criminal law that ‘the wicked flee when no man pursueth, but the righteous are as bold as a lion.’ Innocent men sometimes hesitate to confront a jury—not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts³⁷

29. *Id.*

30. *Wardlow*, 528 U.S. at 124.

31. *Id.* at 123.

32. *Id.*

33. *Id.* at 125.

34. *Id.* at 124.

35. *Wardlow*, 528 U.S. at 138–39 & 139 (Stevens, J., dissenting in part and concurring in part) (stating that the officer simply testified, “He looked in our direction.”).

36. *Id.* at 128–29.

37. *Id.* at 131 (quoting *Alberty v. United States*, 162 U.S. 499, 511 (1896)).

The concept of innocent men running out of fear that the system will not protect them may be especially prominent for Black men who are constantly being convicted despite never having committed the crime.³⁸ Remarkably, Justice Stevens acknowledged that minorities have their own innocent reasons for running, such as the belief that “contact with the police itself can be dangerous.”³⁹ He further stated that “these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices.”⁴⁰

Still, the majority asserted that “[unprovoked] flight . . . is the consummate act of evasion,”⁴¹ and found that Wardlow’s presence in a high crime area, coupled with his flight, gave the police officers reasonable suspicion to stop him and conduct a frisk.⁴² Notably, the Court stated, “the reasonable suspicion determination must be based on commonsense judgments and inferences about human behavior.”⁴³ Evidently, this is an objective standard that does not take into account inferences about Black men and their behavior with law enforcement⁴⁴—the reasonable beliefs that Justice Stevens argued for in his dissent.⁴⁵

Shielding police officers under this objective standard allows them to continue seizing individuals in a racially biased manner without any discussion as to whether the stop was motivated by unconstitutional motivations like race. Similar to the objective justifications found in *Terry*—whether a reasonable officer would have feared for his safety⁴⁶—*Wardlow* builds on past Supreme Court decisions⁴⁷ and allows judges to

38. See *All Cases*, THE INNOCENCE PROJECT, <https://www.innocenceproject.org/all-cases/#defendant-african-american> [<https://perma.cc/G39J-QNTV>] (Click “Filter” to display filter options and under “Race of Defendant,” check the box for “African American.” As of September 2, 2020, the webpage showed 380 defendants who had been convicted of a crime for which they were exonerated in a year ranging from 1989 through 2020; of those 380 defendants, more than half (230) were African American) (demonstrating that the number of wrongful convictions is significantly higher among African American men than men from other racial groups).

39. *Wardlow*, 528 U.S. at 132 (Stevens, J., dissenting in part and concurring in part).

40. *Id.* at 133.

41. *Id.* at 124 (majority opinion).

42. *Id.* at 124, 125.

43. *Id.* at 125 (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

44. *Wardlow*, 528 U.S. at 132 n.7 (Stevens, J., dissenting in part and concurring in part) (citing Johnson, *Americans’ Views on Crime and Law Enforcement: Survey Findings*, NAT. INSTITUTE OF JUSTICE J. 13 (Sept. 1997) (“reporting study by the Joint Center for Political and Economic Studies in April 1996, which found that 43% of African-Americans consider ‘police brutality and harassment of African-Americans a serious problem’”).

45. See *Wardlow*, 528 U.S. at 133–34 (Stevens, J., dissenting in part and concurring in part).

46. *Terry*, 392 U.S. at 30.

47. Cf. *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that where there is probable cause to detain a person temporarily for a traffic violation, the seizure does not violate the Fourth Amendment even though the underlying motivation for the stop might have been some other matter).

assess reasonable suspicion without any discussion of the officer's motivations for the initial pursuit and without the individual's motivations for fleeing. Such a combination results in disparate application of stop and frisk searches.

II. DISPARATE APPLICATION OF STOP AND FRISK SEARCHES DESPITE WARDLOW AND BECAUSE OF WARDLOW

In 2014, a police officer who performed a stop and frisk search on 16-year-old Darrin Manning squeezed the minor's testicles so hard that one ruptured⁴⁸ and a grown man reported a police officer for fingering him.⁴⁹ The Supreme Court acknowledges that a stop and frisk search "may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."⁵⁰ Yet, stop and frisk searches continue to be "the most common negative interaction[] that citizens have with the police."⁵¹ Police officers abuse their discretion in choosing their targets and interpreting their actions. For example, officers are more likely to identify "Furtive Movements"⁵² in their justification for stopping Blacks and Hispanics than for whites.⁵³ As a result, minorities are disproportionately stopped and frisked.⁵⁴ Stop and frisk searches are day-to-day interactions

48. See Sebastian Murdock, *Darrin Manning, Pa. Teen, Allegedly Has Testicle Ruptured by Cop*, HUFFPOST (Jan. 23, 2014, 12:40 PM), https://www.huffpost.com/entry/darrin-manning-testicle-rupture_n_4651700 [<https://perma.cc/7VSP-CXGA>]; see also Joaquin Sapien et al., *Over a Dozen Black and Latino Men Accused a Cop of Humiliating, Invasive Strip Searches. The NYPD Kept Promoting Him*, PROPUBLICA (Sept. 10, 2020, 5:00 AM), <https://www.propublica.org/article/over-a-dozen-black-and-latino-men-accused-a-cop-of-humiliating-invasive-strip-searches-the-nypd-kept-promoting-him> [<https://perma.cc/4VX2-KKWJ>].

49. See Maria Perez, *Police Officer Sued for Inappropriate Stop and Frisk, ACLU Lawsuit Alleges*, NEWSWEEK (June 20, 2018), <https://www.newsweek.com/police-officer-sued-inappropriate-stop-frisk-aclu-washington-dc-1034950> [<https://perma.cc/HP8J-ZF6L>].

50. *Terry*, 392 U.S. at 17.

51. BUTLER, *supra* note 11.

52. Furtive movements have been described in myriad ways by different officers at the same police department. One would offer examples of someone's "changing direction, walking in a certain way, [a]cting a little suspicious." Another would explain it as someone "hanging out in front of [a] building . . . and then making a quick movement." *Floyd v. City of New York*, 959 F. Supp. 2d 540, 561 (S.D.N.Y. 2013) (internal quotations omitted). See Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 78 (2015) ("The term 'furtive movements' can be used to refer to an almost-infinite number of actions that an officer might find suspicious. This factor is vague in its meaning and subjective in its interpretation.").

53. *Floyd*, 959 F. Supp. 2d at 661 n.760 ("[O]fficers are more likely to check Furtive Movements as the basis for stopping [B]lacks and Hispanics than for whites . . .").

54. *NYCLU Releases Report Analyzing NYPD Stop-And-Frisk Data*, NYCLU (Mar. 14, 2019), <https://www.nyclu.org/en/press-releases/nyclu-releases-report-analyzing-nypd-stop-and-frisk-data> [<https://perma.cc/V5HT-JYN9>] ("Young [B]lack and Latino males between the ages of 14 and 24 account for only five percent of the city's population, compared with 38 percent of reported stops. Young [B]lack and Latino males were innocent 80 percent of the time.")

that cause widespread detriment and are indisputably conducted in a racially biased manner.⁵⁵ *Wardlow* allows for a broader and more fluid application of reasonable suspicion that intensifies the problematic applications of the stop and frisk search.

A. *How Wardlow has Adverse Effects on Minorities in Particular*

The *Wardlow* Court held that flight and presence in a “high crime area” support a finding of reasonable suspicion.⁵⁶ Notably, the phrase “high crime” has been recognized as a proxy for race.⁵⁷ This becomes apparent upon recognizing that virtually all search and seizure cases lack a discussion of what an officer meant by “high[]crime.”⁵⁸ Sheri Lynn Johnson, “an expert on the interface of race and issues in criminal procedure,”⁵⁹ warns against relying on the expertise of police officers during suppression hearings.⁶⁰ She states that “when a police officer describes a neighborhood as ‘high crime’ or ‘drug-prone,’ a court may completely accept the expertise, risking that the officer’s prejudice about ghetto neighborhoods clouds his evaluation of the probability of crime contributed by the neighborhood.”⁶¹

Police officers are not immune to racial biases.⁶² By not inquiring further into the intentions of the police to discover whether their actions

55. See *Floyd*, 959 F. Supp. 2d at 562 (finding the city of New York liable for the constitutional violations and stating that the city “acted with deliberate indifference toward the NYPD’s practice of making unconstitutional stops and conducting unconstitutional frisks”). The Second Circuit removed Judge Scheindlin for having the appearance of impartiality and stayed the imposition of the remedies she mandated. *Ligon v. City of New York*, 736 F.3d 118, 121 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014). Some argue that Judge Scheindlin’s opinion was based heavily on, and deeply supported by, the data discussed. See *CCR Disappointed by Appeals Court’s Refusal to Hear Judge Reassigned from Stop-and-Frisk Case*, CTR. FOR CONST. RIGHTS (Nov. 14, 2013), <https://ccrjustice.org/home/press-center/press-releases/ccr-disappointed-appeals-court-s-refusal-hear-judge-reassigned-stop> [<https://perma.cc/M5DD-5FT9>].

56. See *Wardlow*, 528 U.S. at 124.

57. See Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 493 (2004) (stating that the phrase “high crime neighborhood” is often a proxy for race).

58. See Andrew Guthrie Ferguson & Damien Bernache, *The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1591 (2008) (“Rarely is there any analysis of why this particular area is a high-crime area, on what objective, verifiable, or empirical data the police officer has based his conclusion,” or whether the cop was aware of this before he made the stop).

59. *Faculty: Professional Biography: Sheri Lynn Johnson*, CORNELL LAW SCHOOL, https://www.lawschool.cornell.edu/faculty/bio_sheri_johnson.cfm [<https://perma.cc/ZB5X-26AE>].

60. See Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 255 (1983) (“The possibility of prejudice is omnipresent in a jury trial, but prejudice may sneak in the back door at a suppression hearing.”).

61. See *id.*

62. See *infra* Part III (discussing, in part, the history of race in America); cf. Mark W. Bennet, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. F. 391, 396 (“[C]ommentators ‘almost universally agree’ that racial disparities are pervasive in the U.S.

amount to racial animus, the judiciary is at risk of placing bias beyond the reach of the law.⁶³ The phrase “high-crime area” has essentially become a term of art and “[t]he neighborhoods typically described as high in crime are disproportionately urban, nonwhite, and poor.”⁶⁴ Moreover, since a person of color is deemed suspicious simply by being present in a white neighborhood,⁶⁵ where are these individuals supposed to go to be free from governmental intrusion? To remedy this issue, “courts must begin taking seriously the requirement that the term be based on objective, quantifiable—statistical or otherwise—settled data”⁶⁶

B. *The Implications of United States v. Mendenhall*⁶⁷ Urges
Reconsideration of the *Wardlow* Decision

The *Wardlow* decision becomes more problematic when considered in conjunction with pre-existing Supreme Court decisions, such as *Mendenhall*. In *Mendenhall*, two DEA agents approached the defendant in an airport because they thought she might be carrying narcotics.⁶⁸ The agents asked whether the defendant would accompany the agents to the DEA office for questioning; the defendant agreed, subsequently consenting to a search that revealed drugs.⁶⁹ Despite the authoritative presence of the DEA agents and their decision to focus on the defendant, the Court found that the defendant was free to leave at any point during the encounter because a “reasonable person would have believed that he was [free to leave].”⁷⁰

Under the “free to leave” logic developed in *Mendenhall*, Black men would live in perpetual states of seizure in their own neighborhoods

criminal justice system.”) (citing Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 872 n1. (2015)).

63. See Katheryn Russell-Brown, *The Academic Swoon over Implicit Racial Bias: Costs, Benefits, and Other Considerations*, 15 DU BOIS REVIEW: SOCIAL SCIENCE RESEARCH ON RACE 185, 193 (2018) (“[W]hen an act of racial bias is categorized as an act of implicit bias, it makes establishing racial animus difficult and may place the racial discrimination beyond legal reach.”).

64. L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 280 (2012) (citing David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677–78 (1994)).

65. See P.R. Lockhart, *Living While Black and the Criminalization of Blackness*, VOX (Aug. 1, 2018), <https://www.vox.com/explainers/2018/8/1/17616528/racial-profiling-police-911-living-while-black> (quoting Paul Butler as saying, “You’re required to justify your existence and your presence in a white space. It makes you feel like less of a citizen and less of a human being.”).

66. Andrew Guthrie Ferguson & Damien Bernache, *The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1593 (2008).

67. *United States v. Mendenhall*, 446 U.S. 544 (1980).

68. *Id.* at 547.

69. *Id.* at 548.

70. *Id.* at 554.

should *Wardlow* be taken to its logical conclusion.⁷¹ Since a Black man's flight from police, especially in a "high crime" area, is seen as a legitimate factor for reasonable suspicion, a Black man can never truly be "free to leave."⁷² A Black man would always be subject to pursuit and detention should he try to evade the police. This result is unjust and legally unsound. It should not stand.

III. A BRIEF DISCUSSION OF RACIAL BIAS, WHY BLACK MEN RUN, AND THE MEDIA'S CONTRIBUTION

A discussion of the interactions between Black men and the police in America warrants an initial acknowledgment that these interactions historically have not been race-neutral. History evidences the disparity in treatment of minorities, first bred by power and violence, then by bias.⁷³

There is an American tradition of "unprovoked killing of Black men" and it "is an old and deep wound that many people in the African American community still grieve."⁷⁴ Today, this animosity is not only present in violent interactions,⁷⁵ but it has propelled into bias that transcends generations. Unsurprisingly, developmental research suggests that racism, bias, and prejudices are "transmitted from one generation to the next."⁷⁶ Police officers are not immune from bias: Research has consistently shown "that police use greater force, including lethal force, with minority suspects than with White suspects."⁷⁷

Police violence is a leading cause of death for young Black men, and at a rate more than twice as high as for young white men.⁷⁸ About 1 in 1,000 Black boys and men can expect to die when interacting with police

71. *Id.*

72. *Wardlow*, 528 U.S. at 124.

73. See, e.g., Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN MAG. (last updated May 29, 2020), <https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/>.

74. Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors' Discretion, and the Stand Your Ground Law*, 23 U. FLA. J. L. & PUB. POL'Y 271, 274 (2012).

75. See *infra* III.A (discussion on documented incidents).

76. See Bart Duriez & Bart Soenens, *The Intergenerational Transmission of Racism: The Role of Right-Wing Authoritarianism and Social Dominance Orientation*, 43 J. RES. PERSONALITY 906 (2009), <http://doi.org/10.1016/j.jrp.2009.05.014> [<https://perma.cc/2XTQ-YYBL>] (detailing how racism and prejudice dispositions transmit from one generation to the next as a result of "fundamental intergenerational transmission of ideology").

77. Joshua Correll et al., *Across the thin blue line: Police officers and racial bias in the decision to shoot*, 92 J. PERSONALITY. SOC. PSYCHOL. 1006, 1006 (2007), <http://dx.doi.org/10.1037/0022-3514.92.6.1006>.

78. Amina Khan, *Getting killed by police is a leading cause of death for young black men in America*, L.A. TIMES (Aug. 19, 2019), <https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men>.

officers.⁷⁹ These events have spillover effects on the mental health of Black communities not directly involved with the incidents.⁸⁰ These effects are part of the reason why Black men and boys run in the presence of police officers.

Studies reveal that this aggression towards Black boys and men is fueled by America's historically irrational fear of Black men.⁸¹ A study found that white people are more likely to perceive a Black male's facial expressions as threatening; white participants were unable to reduce their perception of a threat when a neutral Black male face followed an angry Black male face.⁸² Researchers have additionally identified concerns about implicit bias among police, such as finding that "[B]lack suspects are more likely to be brutalized than white suspects despite engaging in identical behaviors" and finding that "officers are more likely to believe that the use of force against a [B]lack suspect is both reasonable and necessary"⁸³

Although the reality that police officers brutally harass, beat, and shoot Black Americans is traumatizing enough for those in the same community, seeing the images makes the effect more impactful.⁸⁴

A. *How an Impactful Media Contributes to Why Black Men Run*

It goes without saying that law enforcement work environments are among some of the riskiest.⁸⁵ Black Americans especially are able to mentally and emotionally compartmentalize warranted shootings and those that involve irrational killings of unarmed Black men.⁸⁶ However,

79. *Id.*

80. *Id.*

81. See Colin Holbrook et al., *Looming large in others' eyes: racial stereotypes illuminate dual adaptations for representing threat versus prestige as physical size*, 37 EVOLUTION & HUM. BEHAV. 67, 68 & 69 (2016).

82. Tom Jacobs, *Black Male Faces More Likely to be Seen as Threatening*, PAC. STANDARD (June 14, 2017), <https://psmag.com/economics/black-male-faces-3571>; see, e.g., *Tennessee v. Garner*, 471 U.S. 1, 3–4, 4 n.2 (1985) (officer described the defendant as 17 or 18 and about 5'5" or 5'7" when in fact he was 15 and 5'4").

83. L. Song Richardson & Philip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 123 (2014).

84. See *Trauma After Gun Violence*, VANTAGE POINT: BEHAV. HEALTH & TRAUMA HEALING, <https://vantagepointrecovery.com/trauma-gun-violence/> (stating that people who are in the middle of a traumatic experience can have their daily lives affected by their fear, pain and anxiety. "Senseless violence and shocking events can shatter our assumptions that we live in a safe world.").

85. See *Floyd*, 959 F. Supp. 2d at 562 n.27 (citing CHARLES OGLETREE, THE PRESUMPTION OF GUILT 125 (2012) ("[P]olice work diligently every day They work for relatively low pay for the risks that they take").

86. See Alexander Tsai et al., *Antwon Rose's killing by police affects blacks' mental health across the country*, STAT (June 27, 2018), <https://www.statnews.com/2018/06/27/when-police-officers-kill-unarmed-blacks-it-affects-blacks-mental-health-across-the-country/> [<https://perma.cc>

positive interactions are not the topic of conversation in the area of police practices,⁸⁷ much less in the media. This assessment focuses on what impact unlawful police conduct—or police conduct that is presented as unlawful in the media—has on the behavior of Black men.

The media's determination to focus on the police⁸⁸ can be acknowledged as a positive effort to prompt officials to hold the officers accountable. Although holding individuals accountable for their wrongful actions will likely have a deterrent effect, images of police officers emptying their magazines on Black teenagers⁸⁹ have left an unaccounted-for impact in the legal system.

1. Highly Publicized Police Shootings: A Discussion of Recent Incidents

These recent⁹⁰ incidents were selected from the tragically vast collection of highly publicized police shootings because they resulted in the death of a Black man and the shooting was recorded. These criteria were chosen because the likelihood of a shooting receiving national attention is high when the death was caught on camera and the topic is easily shared on social media after receiving national attention. Additionally, it is hard to deny that police officers are shooting and killing Black men when the incidents are recorded. These are a sample of the incidents that the Black youth grow up coping with. All of the victims were Black.

Given the data about young Black boys being perceived as older, it is unsurprising that after twelve-year-old Tamir Rice was shot, an officer

/CLF5-9PJC] (significant mental health effects were found among Blacks as a result of police killings of unarmed but not of armed Black Americans).

87. See Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. J. 677, 685 (1998) (stating that “the Fourth Amendment goal of regulating the use and abuse of government power” was “a goal the Court in *Terry* cited when it reaffirmed the judiciary’s ‘traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security’”) (footnotes omitted).

88. See Nina Feldman, *Police release name of detective who shot unarmed man in Kensington*, WHYY (May 21, 2019), <https://whyy.org/articles/police-shooting-of-harmless-unarmed-man-in-kensington-raises-questions/> [https://perma.cc/SS6U-REUA]. But see Daniel Politi, *Cleveland Paper Thinks You Should Know Tamir Rice’s Father Has Abused Women*, SLATE (Nov. 28, 2014), <https://slate.com/news-and-politics/2014/11/cleveland-paper-defends-publishing-details-about-tamir-rices-parents-criminal-background.html>.

89. See *infra* note 109.

90. The shooting of Oscar Grant in Fruitvale Station meets the criteria for discussion but happened more than ten years ago. See Jemima Kiss, *Fatal police shooting posted on YouTube*, THE GUARDIAN (Jan. 9, 2009), <https://www.theguardian.com/technology/2009/jan/09/subway-killing-video-footage> [https://perma.cc/Q7K3-UHKW].

stated he was a “[B]lack male, maybe [twenty].”⁹¹ In November of 2014, police officers responded to a 911 call reporting someone, “probably a juvenile,” waving a gun around that was “probably fake.”⁹² Surveillance footage captured Officer Loehmann hopping out of his cruiser and, within two seconds, shooting the Black child twice from close range while the child was sitting in a gazebo.⁹³ After pressure from the public and a written request from the Rice family, the surveillance footage was released for all of America to see,⁹⁴ including other Black men, teens, and children. Two responding officers administered first aid to Rice almost four minutes after he had been shot because the officers on the scene did not;⁹⁵ Rice died hours later from the wounds.⁹⁶ A grand jury decided not to indict the shooting officer.⁹⁷

In 2016, over three million Facebook users watched police officers execute Philando Castile while his girlfriend and her four-year-old daughter were in the car.⁹⁸ When he was stopped for a broken taillight, Castile let the police officer know that he had a firearm.⁹⁹ The officer said “don’t pull it out” to which Castile replied, “I’m not pulling it out.”¹⁰⁰ But

91. See German Lopez, *Police thought 12-year-old Tamir Rice was 20 when they shot him. This isn’t uncommon*, VOX (Nov. 26, 2014, 6:10 PM), <https://www.vox.com/2014/11/26/7297265/tamir-rice-age-police>.

92. See Jennifer Schuessler, *911 Operator in Tamir Rice Case Receives 8-Day Suspension*, N.Y. TIMES (Mar. 15, 2017) (stating that the 911 operator who took the call was disciplined by the city’s police chief after failing to relay the “probably a juvenile” and “probably fake” gun information to responding officers).

93. Eric Heisig, *Tamir Rice Shooting: A Breakdown of the Events That Led to the 12-Year-Old’s Death*, CLEVELAND (Jan. 11, 2010), <https://www.cleveland.com/court-justice/2017/01/tamir-rice-shooting-a-breakdown.html> [<https://perma.cc/E4SV-3JMU>].

94. Ryllie Danylko, *Protests Break Out in Cleveland over Tamir Rice Shooting, Ferguson Grand Jury Decision*, CLEVELAND (Jan. 12, 2019), <https://www.cleveland.com/metro/2014/11/protests-break-out-in-cleveland.html> [<https://perma.cc/5KM2-C9MY>].

95. Police inactivity is not uncommon in shootings. See David Hunn & Kim Bell, *Why was Michael Brown’s body left there for hours?*, STL TODAY (Sept. 14, 2014), https://www.stltoday.com/news/local/crime-and-courts/why-was-michael-brown-s-body-left-there-for-hours/article_0b73ec58-c6a1-516e-882f-74d18a4246e0.html [<https://perma.cc/MUV4-CUBP>] (Michael Brown’s body was left on the street for four hours.).

96. Caroline Bankoff, *Cops Who Shot Tamir Rice Didn’t Bother to Give Him First Aid*, N.Y. INTELLIGENCER (Nov. 29, 2014), <http://nymag.com/intelligencer/2014/11/cops-who-shot-tamir-rice-didnt-give-first-aid.html>.

97. Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), <https://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html> [<https://perma.cc/76JP-P9PT>].

98. Issie Lapowsky, *For Philando Castile, Social Media Was the Only 911*, WIRED (July 7, 2017), <https://www.wired.com/2016/07/philando-castile-social-media-911/> [<https://perma.cc/3Y3P-UF8X>].

99. Jay Croft, *Philando Castile Shooting: Dashcam Video Shows Rapid Event*, CNN (June 21, 2017), <https://www.cnn.com/2017/06/20/us/philando-castile-shooting-dashcam/index.html> [<https://perma.cc/AG2T-42SL>].

100. *Id.*

the officer was already drawing his weapon—in a matter of seconds, he fired seven bullets into the car, five of which hit Castile.¹⁰¹ Castile's moans can be heard in the video as he sits with his seat belt still on.¹⁰² A second video recorded by Castile's girlfriend, viewed by millions of people across the nation, shows him bleeding out in his last moments, gasping for air, with his white shirt quickly dampening red and a gun still aimed at him.¹⁰³ The officer handcuffed Castile's girlfriend and placed her in the back of the police car with her daughter.¹⁰⁴ Because she cried and screamed in shock, her four-year-old daughter, who also witnessed the shooting, said: "It's O.K., Mommy," "I'm right here with you," "Mom, [inaudible] because of the screaming, because I don't want you to get [shot]," and "I'm scared."¹⁰⁵ The police officer was acquitted.¹⁰⁶

Laquan McDonald was seventeen years old when he was shot sixteen times on the night of October 20, 2014.¹⁰⁷ In a police report, Officer Van Dyke states that the teen advanced on him, "swinging the knife in an aggressive, exaggerated manner," so he shot once; the department ruled the shooting justifiable and did not take further action.¹⁰⁸ A whistleblower disclosed that an existing video captured by a dashcam contradicted the officer's accounts of the night of the murder, and public pressure resulted in the release of the dashcam footage.¹⁰⁹ The dashcam footage showed McDonald walking away from the officers when Van Dyke fired the first shot; McDonald spun and fell to the ground.¹¹⁰

101. *Id.*

102. CNN, Combined Videos Show Fatal Castile Shooting, YOUTUBE (June 21, 2017), https://youtu.be/85Y_yOm9IhA?t=118 [<https://perma.cc/W6C8-D2ZA>].

103. ABC News, *Philando Castile Police Shooting Video Livestreamed on Facebook*, YOUTUBE (July 7, 2016), <https://www.youtube.com/watch?v=PEjipYKbOOU> [<https://perma.cc/V3CH-XCKJ>].

104. *Philando Castile, Diamond Reynolds, and a Nightmare Caught on Video*, N.Y. TIMES (June 24, 2017), <https://www.nytimes.com/video/us/100000005181340/philando-castile-diamond-reynolds-and-a-nightmare-caught-on-video.html> [<https://perma.cc/F43L-WZT5>].

105. *Id.*

106. *Id.*

107. Dan Good, *Chicago Police Officer Jason Van Dyke Emptied His Pistol and Reloaded as Teen Laquan McDonald Lay on Ground During Barrage; Cop Charged with Murder for Firing 16 Times*, DAILY NEWS (Nov. 24, 2015), <https://www.nydailynews.com/news/national/shot-laquan-mcdonald-emotionless-court-arrival-article-1.2445077>. For record purposes, unlike the previous incidents, the victim here was carrying a knife at the time of the shooting.

108. Sophia Tareen, *Chicago Cops' Versions of Laquan McDonald Killing at Odds with Video*, THE HERALD NEWS (Dec. 5, 2015), <https://www.theherald-news.com/2015/12/05/chicago-cops-versions-of-laquan-mcdonald-killing-at-odds-with-video/aneg9zn/?page=1>.

109. Curtis Black, *How Chicago Tried to Cover up an Execution*, CHI. REP. (Nov. 24, 2015), <https://www.chicagoreporter.com/how-chicago-tried-to-cover-up-a-police-execution/>.

110. *Chicago Dashcam Video Shows Police Killing of Laquan McDonald – video*, THE GUARDIAN (Nov. 24, 2015), <https://www.theguardian.com/us-news/video/2015/nov/24/chicago-officials-release-video-showing-police-killing-of-laquan-mcdonald-video> [<https://perma.cc/PJ3Q-55P9>].

Detectives stated that “only two of the wounds can be linked to the time McDonald was standing.”¹¹¹ Although McDonald never moved on the ground, Van Dyke emptied his chamber and even reloaded; McDonald was on the ground for at least thirteen of the fifteen seconds during which Van Dyke continuously fired his gun.¹¹² Van Dyke was the only officer, of eight present, to shoot.¹¹³ The video was watched on many platforms; one post was viewed more than 4.3 million times.¹¹⁴

The McDonald murder has been characterized as a modern-day lynching¹¹⁵ due to depictions of the killing as being racially charged and caused by a group acting under a false pretext of justice.¹¹⁶ McDonald’s body “was not dangling from a poplar tree, but it was indeed strange fruit.”¹¹⁷ Van Dyke was found guilty of second-degree murder and sixteen counts of aggravated battery; he will serve fewer than three and a half years in prison.¹¹⁸

The deaths of Black people at the hands of police are moving, and many recordings capture the inhumane post-death treatment of these victims by law enforcement. The videos continue for several minutes where officers do not check on the victim for vital signs and sometimes calls for an ambulance are delayed.¹¹⁹ It is as if they had not taken a human life.¹²⁰ For example, Michael Brown’s body laid uncovered for at least ten minutes for spectators to see, and then he was left on the street for four hours.¹²¹ These lynching displays were likely left for deterrence

111. Dan Good, *Chicago Police Officer Jason Van Dyke Emptied His Pistol and Reloaded as Teen Laquan McDonald Lay on Ground During Barrage; Cop Charged with Murder for Firing 16 Times*, DAILY NEWS (Nov. 24, 2015), <https://www.nydailynews.com/news/national/shot-laquan-mcdonald-emotionless-court-arrival-article-1.2445077>.

112. *Id.*

113. *Id.*

114. Block Club Chicago, *Dashcam Video of Officer Jason Van Dyke Shooting Laquan McDonald*, YOUTUBE (Nov. 24, 2015), https://www.youtube.com/watch?v=Ix2N6_jLAgA [<https://perma.cc/QD7L-GYGY>].

115. Shaun King, *Death of Laquan McDonald at the Hands of Chicago Officer Jason Van Dyke is Modern Day Lynching*, DAILY NEWS (Nov. 24, 2015), <https://www.nydailynews.com/news/national/shaun-king-laquan-mcdonald-death-modern-day-lynching-article-1.2446023>.

116. KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME* 35–52 (Richard Delgado & Jean Stefancic eds., 2d ed.1998).

117. King, *supra* note 115.

118. Nausheen Husain, *Laquan McDonald Timeline: The Shooting, the Video, the Verdict and the Sentencing*, CHI. TRIB. (Jan. 18, 2019), <https://www.chicagotribune.com/news/laquan-mcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html> [<https://perma.cc/V3EJ-AUNQ>].

119. Block Club Chicago, *supra* note 114.

120. *Violence: An American Tradition* (Kunhardt Productions Nov. 21, 1995) (stating that the depictions of victims as being less than human facilitate acts of violence against them).

121. David Hunn & Kim Bell, *Why was Michael Brown’s body left there for hours?*, STL TODAY, (Sept. 14, 2014), <https://www.stltoday.com/news/local/crime-and-courts/why-was->

purposes.¹²² Also, during unarmed Eric Harris' last moments, body camera footage shows him face-down on the ground bleeding and crying out "I'm losing my breath," to which Tulsa County sheriff's deputy Joseph Byars responded, "fuck your breath."¹²³ Harris' family issued a statement: "Perhaps the most disturbing aspect of all of this is the inhumane and malicious treatment of Eric after he was shot."¹²⁴ One YouTube account shows the video of Eric Harris was viewed more than 2.7 million times.¹²⁵

Seeing an unarmed individual killed by the very force that swears to ensure public safety becomes more alarming when a lack of empathy for the Black race bleeds through after such an execution. In plain terms, "[t]here's a heightened sense of fear and anxiety when you feel like you can't trust the people who've been put in charge to keep you safe. Instead, you see them killing people who look like you."¹²⁶

B. *How The Graphic and Highly Publicized Incidents Affect The Mental Health of Black Youth*

Longstanding tensions between the Black community and law enforcement multiply both in intensity and scope when incidents of police brutality are easily accessible and splattered across peoples' screens.¹²⁷ What has changed are not the feelings of apprehension and general distrust of police but how and to what degree police behavior impacts communities of color. Because of post-traumatic stress disorder (PTSD), the apprehension of individuals who were personally mistreated by police

michael-brown-s-body-left-there-for-hours/article_0b73ec58-c6a1-516e-882f-74d18a4246e0.html [https://perma.cc/DET6-A9KJ].

122. *Lynching in America*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/emmett-lynching-america/> [https://perma.cc/4MHT-MM4Y] ("[L]ynching, an act of terror meant to spread fear among [B]lacks, served the broad social purpose of maintaining white supremacy in the economic, social and political spheres.").

123. Carlos Miller, *Oklahoma Sheriff Glanz Resigns After "Fuck Your Breath,"* PINAC NEWS (Oct. 4, 2015), <https://newsmaven.io/pinacnews/citizen-journalism/oklahoma-sheriff-glanz-resigns-after-fuck-your-breath-9L3sudpRqkuGUyif5dVaBA/> [https://perma.cc/BG9F-M42U].

124. CBS This Morning, *Tulsa police release video of accidental shooting: "I shot him. I'm sorry,"*, YOUTUBE (Apr. 13, 2015), https://www.youtube.com/watch?v=3Eb_fDe3III [https://perma.cc/85KH-2BJ2].

125. *Id.*

126. Kenya Downs, *When black death goes viral, it can trigger PTSD-like trauma*, PBS NEWS (July 22, 2016), <https://www.pbs.org/newshour/nation/black-pain-gone-viral-racism-graphic-videos-can-create-ptsd-like-trauma> [https://perma.cc/7HBB-9JRJ].

127. Kia Gregory, *How Videos of Police Brutality Traumatize African Americans and Undermine the Search for Justice*, THE NEW REPUBLIC (Feb. 13, 2019), <https://newrepublic.com/article/153103/videos-police-brutality-traumatize-african-americans-undermine-search-justice> [https://perma.cc/3VFV-B4ZE] (stating that "repeated footage [of police violence] can also make some viewers so piercingly aware of police violence that they instinctively disengage from the police rather than risk facing them").

officers is amplified when they see another Black man or child killed by a police officer.¹²⁸ Those who have not personally been targeted by police brutality experience the effects secondhand through media exposure.¹²⁹ For example, LaWanna Gunn-Williams, a psychotherapist, says young adults who repeatedly view footage of police “shooting civilians” can develop PTSD.¹³⁰ This phenomenon is known as “vicarious trauma,” where indirect exposure to violent events can cause emotional distress among those not involved.¹³¹ Bottom line, when an unarmed Black individual is killed by police officers, especially if it appears to be senseless, their deaths are suffered greatly by the entire Black community watching.¹³²

A study, using data from the U.S. Behavioral Risk Factor Surveillance System and the website “Mapping Police Violence,” uncovered national trends in mental health and police use of deadly force and quantified the resulting PTSD.¹³³ Results revealed that “police killings of unarmed [B]lack Americans are responsible for more than 50 million additional days of poor mental health per year among [B]lack Americans.”¹³⁴ No significant impacts on the mental health of Black Americans were found when police killed white Americans, at the lowered rate, or armed Black Americans.¹³⁵ By contrast, during the week of Castile’s death, social media timelines of Black users uncovered indirect “expressions of mental and psychological anguish, from pleas for others not to share these videos, to declarations of a social media hiatus,” said Monnica Williams, a clinical psychologist, and director of the Center for Mental Health Disparities at the University of Louisville.¹³⁶

128. See Imani J. Jackson, *The trauma of police brutality: Column*, USA TODAY (Sept. 2, 2016), <https://www.usatoday.com/story/opinion/policing/spotlight/2016/09/02/trauma-police-brutality-column/89019122/> [<https://perma.cc/3YCD-CC3P>].

129. See *id.* (discussing that “people who aren’t physically present during a violent episode or who have never been the victims of brutality can also experience vicarious trauma”).

130. Downs, *supra* note 126.

131. *Id.*

132. See Jacob Bor et al., *Health Effects of Police Violence Project*, 392 LANCET 302, 306–07 (2018), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2818%2931130-9> [<https://perma.cc/RKG2-3FP5>].

133. *Id.*

134. Tsai et al., *supra* note 86.

135. *Id.*

136. Downs, *supra* note 126; see The Association of Black Psychologists & Community Healing Network, *Family-Care, Community-Care and Self-Care Tool Kit: Healing in the Face of Cultural Trauma* (July 2016), <https://d3i6fh83elv35t.cloudfront.net/newshour/app/uploads/2016/07/07-20-16-EEC-Trauma-Response-Community-and-SelfCare-TookKit-1.pdf> (responding to the findings of adverse mental health effects, Black psychologists released guidelines for African-Americans experiencing cultural trauma from recent media coverage of racial tension).

Predictably, no significant mental health effects were found among white Americans when police killed unarmed Black Americans.¹³⁷ This is unsurprising because Blacks and whites have enduring differences in their perceptions of how well police officers do their jobs.¹³⁸ White people most likely believe that police officers are just doing their best while combating crime, but in fact, Black people are more likely to be killed than their white counterparts even though “white people [are] more likely to be armed when police kill them.”¹³⁹ This dangerous disconnection impedes any significant improvement in the disparate treatment of Black Americans by police.

Since viewers of police violence, especially those whose race matches the victim’s, may develop PTSD from the images, it is noteworthy to acknowledge the effects that PTSD has on the fight-or-flight-response. Fight or flight “prepares the human body to deal with the threat, either by running away or confronting the threat.”¹⁴⁰ The problem with this response is that “[t]he threshold for triggering threat-based hyperarousal is lowered so that any stressor, large or small, can trigger the fight-or-flight response.”¹⁴¹ This suggests that when a Black man is in the presence of police officers, PTSD-like trauma is working in conjunction with the individual’s fight-or-flight response.¹⁴²

The Black man’s interaction with the police is heavily documented but its uniqueness has not yet found a meaningful place in the justice system. As Justice Stevens acknowledged, minorities run because “contact with the police can itself be dangerous.”¹⁴³ Continuing to allow

137. Tsai et al., *supra* note 86.

138. See John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in their Views of Criminal Justice System*, PEW RES. CTR. (May 21, 2019), <https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/> [<https://perma.cc/F8UB-ZZ84>] (showing in a 2017 survey that Blacks gave officers an average rating of 47 and believed the system was biased and whites gave officers an average rating of 72 and thought the system was fine).

139. Brentin Mock, *What New Research Says About Race and Police Shootings*, CityLab, BLOOMBERG (Aug. 6, 2019, 2:28 PM), <https://www.bloomberg.com/news/articles/2019-08-06/race-and-police-shootings-what-new-research-says> [<https://perma.cc/HE79-WD4H>].

140. Barry C. Edwards et al., *How to Transform the Judicial System: Lessons from the Institutionalization of Veterans’ Treatment Courts*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 841, 860 (2019).

141. *Id.* at 861.

142. For a discussion on earlier theories of unique black interactions, see Patricia J. Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731, 755 (1996) (discusses the criminal defense of “[B]lack rage” where defendants presented the expert testimony “to the effect that they possessed a character trait known as [B]lack rage, which ‘apparently causes[B]lacks to react in a certain way against white police officers because [B]lacks judge the actions of a police officer in a manner different from others, thereby allegedly rendering reasonable their actions in this specific case’”).

143. *Wardlow*, 528 U.S. at 132 (Stevens, J., dissenting in part and concurring in part).

flight to support a reasonable suspicion determination will create situations where officers use excessive force, such as the stop and frisk searches, all the more likely.

IV. TREATMENT OF REASONABLE SUSPICION AND FLIGHT POST *WARDLOW*

Before *Wardlow*, state courts disagreed about whether “unprovoked flight” was sufficient grounds to constitute reasonable suspicion.¹⁴⁴ Since *Wardlow*, “flight and the term ‘high crime area’ have gained weight as important factors in determining whether reasonable suspicion of a crime exists.”¹⁴⁵ However, some courts have applied a case-by-case, totality of the circumstances test.

A. A Challenge to *Wardlow*

Citing data indicating that “[B]lack men may have a legitimate reason to flee,” the case that most directly challenged the *Wardlow* decision came from the Supreme Judicial Court of Massachusetts.¹⁴⁶ In *Commonwealth v. Warren*,¹⁴⁷ the court stated: “the finding that [B]lack males in Boston are disproportionately and repeatedly targeted for [field interrogation and observation] . . . suggests a reason for flight totally unrelated to consciousness of guilt.”¹⁴⁸ *Warren* cautioned judges assessing reasonable suspicion to consider the findings of a Boston Police Department report that documented a pattern of racial profiling of Black males in the city of Boston.¹⁴⁹ The legal director of the ACLU of Massachusetts described this ruling as “powerful” because a state’s highest court acknowledged that a Black man’s unique encounter with police officers matters under the law.¹⁵⁰ While *Wardlow* incites confrontation, *Warren* acknowledges that the decision to flee from the

144. *Id.* at 123 n.1 (majority opinion).

145. Keven Jay Kercher, *Criminal Law—Search and Seizure: The Investigative Stop: What Happens When We Run?* Illinois v. *Wardlow*, 528 U.S. 119 (2000), 77 N.D. L. REV. 123, 141 (2001).

146. Zeninor Enwemeka, *Mass. High Court Says Black Men May Have Legitimate Reason to Flee Police*, WBUR NEWS (Sept. 20, 2016), <https://www.wbur.org/news/2016/09/20/mass-high-court-black-men-may-have-legitimate-reason-to-flee-police> [<https://perma.cc/3G7M-9BFE>].

147. *Commonwealth v. Warren*, 58 N.E.3d 333 (Mass. 2016).

148. *Warren*, 58 N.E.3d at 342. See *Boston Police Commissioner Announces Field Interrogation and Observation (FIO) Study Results*, BPD NEWS (Oct. 8, 2016), <https://bpdnews.com/news/2014/10/8/boston-police-commissioner-announces-field-interrogation-and-observation-fio-study-results> [<https://perma.cc/7W52-DHY6>] (approximately 205,000 reports by Boston police officers revealed that Black men were more likely to be targeted for stops, frisks, searches, and interrogations).

149. *Warren*, 58 N.E.3d at 342.

150. Enwemeka, *supra* note 146.

police may be entirely motivated by “the desire to avoid the recurring indignity of being racially profiled.”¹⁵¹

Although it has been the most provocative decision, *Warren* is far from “powerful.” *Wardlow* is still controlling in the federal system and in states that have adopted Fourth Amendment interpretations from the United States Supreme Court.¹⁵² Courts are required to follow *Wardlow* even if they “question the wisdom of that precedent or the public policy behind the law.”¹⁵³ However, the *Warren* decision is still important because it takes into account well-established social data. Interestingly, it also provides a more stringent standard for reasonable suspicion than the Court in *Wardlow*, alleviating some of the concerns of the dilution of the Fourth Amendment.¹⁵⁴

In *Wardlow*, the police officers were patrolling an area designated as “high crime,” a designation that may not have been based on actual crime statistics.¹⁵⁵ The defendant’s presence in this area was deemed relevant, but the court stated that presence, standing alone, is insufficient to support particularized suspicion.¹⁵⁶ In contrast, in *Warren*, a crime was actually reported and officers were on the lookout for suspects, some of whom were Black, who were wearing particular clothing.¹⁵⁷ Additionally, the defendants in *Warren* were approached by the officer because of the proximity of their location to the crime scene.¹⁵⁸ After the police officer rolled down the window of his cruiser and yelled “[h]ey guys, wait a minute,” the defendants made eye contact with the officer, turned around, and jogged to the park.¹⁵⁹ One of the defendants fled again after being approached by another officer on the other side of the park.¹⁶⁰ The court in *Warren* found that since the police officers did not have reasonable suspicion before the flight,¹⁶¹ the defendants could legally choose to walk away and avoid contact with the police.¹⁶² In *Wardlow*, even though the

151. *Warren*, 58 N.E.3d at 342.

152. *E.g.*, *Tracey v. State*, 152 So. 3d 504, 508 (Fla. 2014) (explaining that when deciding search and seizure issues, Florida is “bound to follow United States Supreme Court precedent”) (citing FLA. CONST. art. I, § 12).

153. *See C.E.L. v. State*, 24 So. 3d 1181, 1182–83 (stating that courts are bound “even if [they] question the wisdom of that precedent or the public policy behind the law”).

154. *Walker*, *supra* note 17; *MILLER & WRIGHT*, *supra* note 24.

155. *See* MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURE: THE POLICE* 65 (EDITORS, 5th ed. 2015) (“The government typically does not support the assertion with any statistical analysis of reported crimes, but bases the claim on the impressions of the officer about neighborhoods.”).

156. *Wardlow*, 528 U.S. at 124.

157. *Warren*, 58 N.E.3d at 336.

158. *Id.*

159. *Id.*

160. *Id.* at 338.

161. *Id.*

162. *Warren*, 58 N.E.3d at 341.

Court acknowledged that presence in a “high crime” area was insufficient stand-alone evidence to support reasonable suspicion, the Court and the officers overstated the implications of flight to justify the particularized suspicion.¹⁶³

V. IMPORTANCE OF RECONSIDERING *WARDLOW* AND THE ULTIMATE OBJECT OF THE DISCUSSION

Notably, the Court in *Wardlow* placed a disclaimer in its opinion, stating that:

In reviewing the propriety of an officer’s conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.¹⁶⁴

Arguably, the data may have been unavailable the year the Court issued the decision, but luckily, the data is readily available today. Further, unlike the years before the *Wardlow* decision, both federal and state courts today acknowledge the implications police interactions have on the reaction of members of minority communities.¹⁶⁵ However, even if the Court does not want to accept the available data,¹⁶⁶ its “commonsense judgment” standard should not stand in the face of what society has already begun to realize. Nevertheless, some courts feel bound to follow the *Wardlow* precedent that clearly gives weight to flight in the reasonable suspicion determination, without regard to the reality of race.¹⁶⁷

In addition to recognizing what society and other courts have already recognized—that flight should not be a factor in assessing reasonable suspicion—the Court will signify that it will not sanction states’ unequal application of the law through its law enforcement agencies. The Fourteenth Amendment provides equal protection of the law for all, including Black communities “for whose protection the amendment was

163. See *Wardlow*, 528 U.S. at 124 (“[I]t was also Wardlow’s unprovoked flight that aroused the officers’ suspicion.”).

164. *Id.* at 124–25 (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

165. See *Warren*, 58 N.E.3d at 342; *United States v. Brown*, 925 F.3d 1150, 1156–57 (9th Cir. 2019).

166. See *supra* notes 87, 127, 129, 133, 139–40 and accompanying text.

167. See *C.E.L. v. State*, 995 So. 2d 558, 563 (Fla. Dist. Ct. App. 2008) (en banc), *approved*, 24 So. 3d 1181, 1182 (Fla. 2009) (“This Court is obligated to . . . follow the Fourth Amendment precedent laid out by the United States Supreme Court, even if we question the wisdom of that precedent or the public policy behind the law.”).

primarily designed, that no discrimination shall be made against them by law because of their color.”¹⁶⁸ Allowing flight to be a considerable factor in reasonable suspicion determinations is a strong weapon against the Black community, where police officers have perpetuated concerns and fears through their discriminatory practices. “[T]hese concerns and fears are known to the police officers themselves[] and are confirmed by law enforcement investigations into their own practices.”¹⁶⁹

Further, a finding that flight is not a considerable factor would urge courts to be more skeptical of police officers who subjectively label an area as a “high crime” neighborhood to bolster their reasonable suspicion requirement. Since “high crime” has been recognized as a proxy for race,¹⁷⁰ this healthy skepticism will force law enforcement agencies to justify their target selection based on available crime data and not just on areas they choose to over-police. Optimally, a finding that Black men fleeing from police officers is legally justified—in light of the intense coverage of police misconduct—this can urge local police officers to begin building relationships with Black communities, regaining, or building trust with those they have sworn to protect.

Lastly, a Supreme Court decision that flight is not a cognizable factor in reasonable suspicion will be unlikely to impede law enforcement from doing their job. If an officer has reasonable suspicion for stopping an individual, the officer can pursue that individual. Reasonable suspicion would be valid if fostered by the individual’s location, behavior,¹⁷¹ or other information available to the officer, like tips or a previous or ongoing investigation. But if there is no sufficient reasonable suspicion, under *Mendenhall*, individuals should be free to avoid interaction with the police in any method they deem appropriate for their safety, including flight.

A. *Other Problems with the Reasonable Suspicion Doctrine as it Stands Today*

An additional problem with *Terry* and stop and frisk searches procedures lies in the resulting allowance of evidence to be seized and introduced against individuals whom officers searched without probable cause. If the purpose of a *Terry* pat-down, as the Court stated, is for officer safety,¹⁷² the determination of probable cause to introduce

168. *Shelley v. Kraemer*, 334 U.S. 1, 21 (1948).

169. *Wardlow*, 528 U.S. at 133 (Stevens, J., dissenting in part and concurring in part).

170. *See* Katz, *supra* note 58, at 429 (stating that the phrase “high crime neighborhood” is often a proxy for race); *see also* C.E.L., 24 So. 3d at 1190 (Fla. 2009) (Pariente, J., concurring) (“[Juvenile defendant] was in this ‘high-crime neighborhood’ because it was his home.”).

171. In terms of discussing “furtive movements,” this is another issue that is outside the scope of this Article.

172. *Terry*, 392 U.S. at 30.

evidence and charges against an individual seems unsupported. The Court was concerned that this decision “would constitute . . . an encouragement of [] substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in ‘the often competitive enterprise of ferreting out crime.’”¹⁷³ Under this reasoning, officer safety concerns warrant the search, but the seizure, and inapplicability of the exclusionary rule, is not supported by that same concern. The Court, however, then stated that the “harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, *will not be stopped* by the exclusion of any evidence from any criminal trial.”¹⁷⁴

The Court underestimated the value of removing the incentive for police officers to engage in frequent stops and frisks. If officers were only allowed to search and seize for their own safety, and not for the commencement of a criminal case, stops and frisks would actually reflect the stated purpose of *Terry* stops. In turn, allowing the introduction of evidence against individuals incentivizes more frequent frisks and allows for police officers to harass minority groups, particularly the Black community. A reconsideration of *Wardlow* will not decrease the incentive to stop and frisk searches but will make the intrusions more scrutinized at the inception, which will ensure that searches are in fact “reasonable” under the Fourth Amendment and not a product of police officer bias.

CONCLUSION

These two realities, the prevalence and exhibition of police shootings in the media, and the pervasive stops and frisks that many Black men experience at least once in their life, should be explored, and have their implications acknowledged by the courts and society. Millions of Black youth watch videos of police shooting unarmed Blacks and this causes adverse mental effects, influencing how Black men interact with the police. Much more frequently, a Black individual who has been frisked without a warrant holds certain reactions when a police officer is in the vicinity.¹⁷⁵ The Black man’s interaction with the police is a unique one.¹⁷⁶ Both history and recent events support this fact.

173. *Id.* at 12 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

174. *Id.* at 14–15 (emphasis added).

175. See Nikole Hannah-Jones, *Taking Freedom: Yes, Black America Fears the Police. Here’s Why.*, PAC. STANDARD (May 8, 2018), <https://psmag.com/social-justice/why-black-america-fears-the-police> [<https://perma.cc/WQ6F-A2EX>] ([Black witnesses to a shooting] “feared what could happen if police came rushing into a group of people who, by virtue of our skin color, might be mistaken for suspects.”).

176. RUSSELL-BROWN, *supra* note 116, at 53 (stating that Black men are more likely to feel as though the system does not work or works against them and white men are more likely to feel as though the system is working perfectly fine).

In accordance with the Court's basis of "commonsense judgments" that led to its *Wardlow* decision, if the Court were to take a stance in accord with the data of racial bias, mental health, excessive stops and frisks, and the baseless term of "high crime," the Court should likely conclude that a reasonable person in a Black man's shoes would not feel free to leave and avoid contact with the police. When Black men avoid encounters with police officers, it is often used against them to execute excessive stop and frisk searches. In the worst situations, Black men who flee for their lives might have their lives taken, since their flight could be perceived as a "consummate act of evasion."¹⁷⁷ The holding in *Wardlow* should be reversed to give way to a more comprehensive interpretation of human behavior—whether it be the behavior of Black men or racially biased officers—and an acknowledgment of the media-bred fear of police officers.

177. *Wardlow*, 528 U.S. at 124.

FINDING A NEW PATH: USING THE FIFTEENTH AMENDMENT TO PROTECT THE VOTING RIGHTS OF RETURNING CITIZENS

*Ebony Love**

“[W]e are imprisoned in a political cage—to accept matters as they are. I refuse to do so, because the political terrain as it is currently laid out has left black and other vulnerable communities throughout this country in shambles. I want to choose another path. I want to remake American democracy, because whatever this is, it ain’t democracy.”

-Eddie S. Glaude, *Democracy in Black*¹

INTRODUCTION	162
I. THE HISTORICAL CONSIDERATIONS OF THE FIFTEENTH AMENDMENT	166
A. <i>The Reconstruction Amendments Were Constructed to Appease Political Participants Into Reconstructing the United States After the Civil War</i>	167
1. During Reconstruction, the United States Supreme Court Limited the Fifteenth Amendment to Prevent Only State-Sponsored Voter Rights Discrimination	168
II. THE EVOLUTION OF THE FIFTEENTH AMENDMENT CLASS PROTECTIONS	173
A. <i>The Class the Fifteenth Amendment Protects Changed Over Time to Consider Only Race-Based Voter Discrimination</i>	173
B. <i>The Fifteenth Amendment was Intended to Also Protect the Rights of Returning Citizens</i>	176
III. FLORIDA SENATE BILL 7066 VIOLATES THE FIFTEENTH AMENDMENT	178
CONCLUSION.....	180

* J.D. Candidate 2021, University of Florida Levin College of Law; B.A. 2017, University of Florida. I would like to thank Professor Michelle Jacobs for challenging me to write this paper and all returning citizens who encourage me to fight daily.

1. EDDIE S. GLAUDE, *DEMOCRACY IN BLACK: HOW RACE STILL ENSLAVES THE AMERICAN SOUL* 227 (2016).

INTRODUCTION

The 2018 general election made history when Florida joined 46 other states in automatically restoring voting rights for returning citizens² convicted of felonies.³ Amendment Four on the 2018 Florida ballot amended the language of Florida Constitution Article 6 § 4 to restore the voting rights of some felons “upon completion of all terms of [their] sentence[s] including parole or probation.”⁴ Individuals convicted of “murder or a felony sexual offense” would not get their voting rights automatically restored.⁵

The ballot measure in Florida had bipartisan support.⁶ Organizations that supported the measure generally argued Amendment Four provided returning citizens a second chance to fully participate in society.⁷ They also supported the measure because of its potential reach: Amendment Four enfranchised “more people at once than any single initiative since women’s suffrage.”⁸ Most important, Amendment Four would help alleviate racial disparities in enfranchisement.⁹ The majority of Florida’s returning citizens are white.¹⁰ However, black people were “disproportionately affected . . . [because m]ore than one in five black voters [could not] vote in Florida, compared with about one in 10 voters in the state’s general population []and one in 40 nationwide.”¹¹

By February 2019, the Florida Legislature limited the effectiveness of Amendment Four when the Senate Ethics and Elections Committee

2. The term “returning citizens” is deliberately used in place of “felons” by the Florida Rights Restoration Coalition and by activists working on these issues. This term will be used in this work out of respect and in acknowledgment of their work. Emily Bazelon, *Will Florida’s Ex-Felons Finally Regain the Right to Vote?*, N.Y. TIMES MAG. (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/magazine/ex-felons-voting-rights-florida.html?action=click&module=inline&pgtype=Article> [https://perma.cc/825Y-H7EK] (explaining that “returning citizens” is deliberately used in place of “felons” by the Florida Rights Restoration Coalition and by activists working on these issues).

3. Prior to the 2018 election, the four states that did not allow for the automatic restoration of voting rights to returning citizens that served their full sentence were Florida, Iowa, Kentucky, and Virginia. *See* FLA. CONST. art. 6, § 4 (1992); *see also* IOWA CONST. art 2, § 5; KY. CONST. § 145; VA. CONST. art 2, § 1.

4. FLA. CONST. art. 6, § 4(a) (amended 2018).

5. *Id.* art. 6, § 4(b).

6. *See generally* Steve Bousquet, *Koch-funded group supports voting rights for felons in Florida*, TAMPA BAY TIMES (Sept. 13, 2018), <https://www.tampabay.com/florida-politics/buzz/2018/09/13/koch-funded-group-supports-voting-rights-for-felons-in-florida/> [https://perma.cc/CBB9-JLMA] (explaining how organizations from all political ideologies supported the voter restoration initiative).

7. *Id.*

8. Bazelon, *supra* note 2.

9. *Id.*

10. *Id.*

11. *Id.*

submitted Senate Bill 7066.¹² One purpose of this bill was to amend sections of the Florida statutes to define “completion of all terms of sentence.”¹³ This definition specified that restitution and court fines and fees must be paid to automatically restore the voting rights of an individual convicted of a felony outlined in Fla. Const. Art. VI § 4 (a).¹⁴

Lawmakers that supported Senate Bill 7066 cited vague constitutional concerns and state control over elections as reasons they voted to pass the bill.¹⁵ The bill passed when lawmakers voted along party lines in May 2019.¹⁶ Governor Ron DeSantis supported the bill throughout the legislative process and signed it into law in June 2019.¹⁷

Although some lawmakers who supported Senate Bill 7066 were unconcerned about who the bill would affect,¹⁸ opponents of the bill explained throughout the legislative process it would disproportionately affect Black voters.¹⁹ Before Amendment Four, twenty percent of eligible Black voters could not vote because of their felony convictions.²⁰ Amendment Four and Senate Bill 7066, taken together, brought Florida into the national spotlight in the conversation about mass incarceration and disenfranchisement.

12. S.B. 7066, 2019 Leg., 121st Reg. Sess. (Fla. 2019).

13. *Id.*

14. *Id.*

15. See Janelle Ross, *Amendment 4 in Florida restored voting rights to felons. Now that's back in doubt*, NBC NEWS (Apr. 5, 2019), <https://www.nbcnews.com/news/nbcblk/felon-voting-rights-back-jeopardy-florida-n991146> [<https://perma.cc/88JT-QZWB>] (quoting Republican Rep. Jamie Grant's confusing stance when he was asked whether he knew who would be impacted by the new bill: “I don't want to know the impact of this because it's irrelevant ... If truth and fact and intellectual honesty do not drive our discussion of things related to the Constitution, we have no hope”) (alteration in original); see also Gary Fineout, *Florida GOP moves to rein in felon voting rights*, POLITICO (May 2, 2019), <https://www.politico.com/states/florida/story/2019/05/02/florida-gop-moves-to-rein-in-felon-voting-rights-1005333> [<https://perma.cc/4WBC-CV4D>] (quoting Republican Sen. Rob Bradley who explained why he voted to pass the senate bill: “If they took money from you, if they broke in to your house and stole something that is valuable to you and your family and they have not paid it back, they have not completed their sentence”).

16. THE FLA. SENATE, CS/SB 7066: ELECTION ADMINISTRATION, <https://www.flsenate.gov/Session/Bill/2019/07066/?Tab=VoteHistory> [<https://perma.cc/MRM7-Y6D9>] (last visited Nov. 12, 2019).

17. Steven Lemongello, *The Amendment 4 law: Questions and answers about fines, restitution and 'poll taxes' claims about the felon voting rights act*, ORLANDO SENTINEL (July 5, 2019, 12:27 PM) <https://www.orlandosentinel.com/politics/os-ne-amendment-4-questions-answers-20190703-jppm5c5knrhjte4tvvym3g7g5e-story.html> [<https://perma.cc/VN8Q-AWP3>].

18. See Ross, *supra* note 15 (“Grant said that he'd been asked repeatedly if he knows which Floridians would lose their right to vote due to his bill, or how many would be affected. He said, . . . ‘I don't want to know the impact of this because it's irrelevant’”).

19. *Id.* (explaining how opponents of Senate Bill 7066 framed their argument around the negative impact on Black voters).

20. *Id.*

Scholars in the United States have been developing a national conversation around mass incarceration and disenfranchisement.²¹ These conversations draw the historical connection from the emancipation of slaves to the disenfranchisement of the Black population today.²² Recognizing the disparity today is clear; the difficulty lies in tracking how the legal system allows for disparity in the disenfranchisement of returning citizens.

Black people are imprisoned at a disproportionately high rate for a myriad of reasons stemming from institutionalized racism in the criminal justice system.²³ The United States imprisons 1,489,363 people.²⁴ Thirty-three percent of the U.S. prison population is Black.²⁵ According to the 2010 census, thirteen percent of the U.S. population is Black.²⁶ This disproportionate rate of incarcerating Black people is also seen at the state level. Florida's state prison population is 98,504.²⁷ Forty-seven percent of the Floridian state prison population is Black,²⁸ while seventeen percent of Florida's population is Black.²⁹

Scholars turn to the Thirteenth Amendment to discuss how mass incarceration was intentionally designed to disproportionately affect Black people.³⁰ Lawyers turn to the Fourteenth Amendment to discuss equal protection and due process protections in the face of racial

21. See generally GLAUDE, *supra* note 1 (discussing how race, mass incarceration, and democracy intersect); see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 197–201 (10th Anniversary ed. 2020) (discussing how mass incarceration impacts returning citizens' ability to vote in a historical and global context).

22. See IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 223–47 (2017) (explaining how the United States transitioned through the Civil War and Reconstruction by maintaining a racial hierarchy by denying basic civil rights to Black people).

23. See generally ALEXANDER, *supra* note 21, at 15 (discussing how the United States has developed its current mass incarceration problem and how it disproportionately and intentionally impacts Black communities).

24. U.S. DEP'T OF JUST., NCJ 252156, *PRISONERS IN 2017* at 1 (Apr. 2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/83BE-XD76>].

25. See *id.* at 17.

26. U.S. CENSUS BUREAU, *POPULATION, CENSUS, APRIL 1, 2010* (2010), <https://www.census.gov/quickfacts/fact/table/US/POP010210> [<https://perma.cc/5VZG-7VYK>] (including only monoracial Black or African American persons).

27. U.S. DEP'T OF JUST., *supra* note 24, at 4.

28. *Id.* at 42.

29. U.S. CENSUS BUREAU, *supra* note 26.

30. See, e.g., *13th*, NETFLIX (2016), <https://www.netflix.com/title/80091741> (featuring scholars who interpret the language of the 13th Amendment “[n]either slavery nor involuntary servitude, except as a punishment for crime . . . shall exist in the United States” as a legal loophole to reclassify Black people from slaves to criminals).

discrimination.³¹ In these analyses, the Fifteenth Amendment to the United States Constitution is largely ignored. When Florida enacted Senate Bill 7066, it created a unique contemporary constitutional issue.

Shortly after Senate Bill 7066 was signed into law, five lawsuits representing seventeen plaintiffs were filed in the Northern District of Florida claiming the new law violated their constitutional rights.³² Each of the five suits seek relief under federal civil rights statutes, claiming the plaintiffs' Fourteenth and Twenty-Fourth Amendment rights were violated.³³ Only one suit made the argument that the Fifteenth Amendment also rendered the bill unconstitutional.³⁴ The Northern District of Florida consolidated the five suits into *Jones v. DeSantis*.³⁵

During this litigation in federal court, Governor Ron DeSantis requested an advisory opinion from the Florida Supreme Court for its interpretation of "completion of all terms of sentence."³⁶ That court determined the "completion of all terms of sentence" "plainly refers to obligations and includes 'all'—not some—[legal financial obligations] imposed in conjunction with an adjudication of guilt."³⁷

On October 18, 2019, the Northern District of Florida ruled in favor of the plaintiffs, finding "[a]ccess to the franchise cannot be made to depend on an individual's financial resources."³⁸ On November 15, 2019, the governor appealed to the Eleventh Circuit Court of Appeals.³⁹ The Eleventh Circuit affirmed the Northern District of Florida, finding

31. The 14th Amendment provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.

32. Complaint, *Mendez v. DeSantis*, No. 4:19-cv-272 (N.D. Fla. filed June 15, 2019); Complaint, *Gruver v. Barton*, No. 1:19-cv-121 (N.D. Fla. filed June 28, 2019); Complaint, *Jones v. DeSantis*, No. 4:19-cv-300 (N.D. Fla. filed June 28, 2019); Complaint, *Raysor v. Lee*, No. 4:19-cv-301 (N.D. Fla. filed June 28, 2019); Complaint, *McCoy v. DeSantis*, No. 4:19-cv-304 (N.D. Fla. filed July 1, 2019).

33. Complaint at 1–2, *Mendez*, Case 4:19-cv-00272-WS-CAS; Complaint at 4–6, *Gruver*, Case 1:19-cv-00121-MW-GRJ; Complaint at 1–2, *Jones*, Case 4:19-cv-00300-MW-MJF; Complaint at 3–4, *Raysor*, Case 4:19-cv-00301-MW-MJF; Complaint at 4, *McCoy*, Case 4:19-cv-00304.

34. Complaint at 67–69, *Gruver*, Case 1:19-cv-00121-MW-GRJ.

35. Order Denying Mot. to Dismiss and Prelim. Injunction, *Jones v. DeSantis*, (Case 4:19-cv-00300-RH-MJF), 2019 U.S. Dist. LEXIS 180624, at *2 (N.D. Fla. filed June 28, 2019).

36. Letter from Gov. Ron DeSantis to Chief Justice Canady and the Justices of the Florida Sup. Ct. (Aug 9, 2019).

37. Advisory Opinion to the Governor Re: Implementation of Amendment 4, The Voting Restoration Amendment, 288 So.3d 1070, 1075 (Fla. 2020).

38. *Jones v. DeSantis*, 410 F. Supp. 3d 1284, 1301 (N.D. Fla. 2019) (citing *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1216–17 n.1 (11th Cir. 2005)) (emphasis in original).

39. *Jones v. DeSantis*, 950 F.3d 795, 805 (11th Cir. 2020).

the trial court did not abuse its discretion in finding the proposed legislation violated returning citizens' constitutional rights.⁴⁰

The governor then appealed to the Eleventh Circuit, *en banc*, claiming that Senate Bill 7066 did not create wealth-based discrimination for returning citizens who wished to register to vote.⁴¹ Due to the immediacy of upcoming elections, the *Jones* plaintiffs sent a petition to the United States Supreme Court, who denied their application to vacate the stay placed by the Eleventh Circuit while the case was pending.⁴² On September 11, 2020, the Eleventh Circuit, *en banc*, sided with Florida and upheld Senate Bill 7066.⁴³ The bill has been codified as Florida Statute § 98.0751 (2)(a)(5).⁴⁴ Throughout the *Jones* saga, there was only one mention of the Fifteenth Amendment argument.⁴⁵

Florida Senate Bill 7066, which limits the primary purpose of Florida Constitution Article 6 § 4(a), is unconstitutional because it violates the Fourteenth, Fifteenth, and Twenty-Fourth Amendments to the United States Constitution. This Article will explore how the bill violates the Fifteenth Amendment. First, historical considerations of the Fifteenth Amendment show why the Fifteenth Amendment was drafted and how it was interpreted in the years following its ratification. Then, over time, Supreme Court decisions interpreted the class protections that the Amendment provides. This Article will argue that returning citizens belong to the classes protected under the Fifteenth Amendment.

I. THE HISTORICAL CONSIDERATIONS OF THE FIFTEENTH AMENDMENT

The Fifteenth Amendment to the United States Constitution provides “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”⁴⁶ When the Amendment was first ratified, this right was interpreted by the United States Supreme Court to apply to emancipated slaves.⁴⁷ Today, this right is interpreted as the basic

40. *See id.* at 829.

41. Brief of Defendants-Appellants, *Jones v. DeSantis*, 2020 WL 5493770 (11th Cir. June 19, 2020), 2020 WL 3446227, at *12.

42. *Raysor v. DeSantis*, 140 S. Ct. 2600, 2600 (2020). In her dissent, Justice Sotomayor wrote, “This Court’s order prevents thousands of otherwise eligible voters from participating in Florida’s primary election simply because they are poor. . . . This Court’s inaction continues a trend of condoning disfranchisement.” *Id.* at 2600, 2603.

43. *See Jones v. Governor of Fla.*, No. 20-12003, 2020 WL 5493770, at *9 (11th Cir. Sept. 11, 2020).

44. *See* FLA. STAT. § 98.0751(2)(a)(5) (2019). This Article was originally written in Fall 2019. For the purposes of this Article, the new statute will not be referenced.

45. *See* Complaint at 67–69, *Gruver v. Barton*, Case 1:19-cv-00121-MW-GRJ (N.D. Fla. filed June 28, 2019).

46. U.S. CONST. amend. XV, § 1.

47. *Rice v. Cayetano*, 528 U.S. 495, 512 (2000).

right for qualified individuals to exercise the right to vote, without racial discrimination.⁴⁸

A. The Reconstruction Amendments Were Constructed to Appease Political Participants Into Reconstructing the United States After the Civil War

Slavery was partially eradicated when the Thirteenth Amendment was ratified in 1865.⁴⁹ Following the eradication of slavery, the United States government had to grapple with integrating a new population into society. This interest had to be weighed against re-integrating the states that seceded during the Civil War.⁵⁰ To reconcile these two goals, lawmakers advocated the three Reconstruction Amendments.⁵¹

The Reconstruction Amendments aimed to outlaw slavery, provide citizenship to emancipated slaves, and protect the voting rights of formerly enslaved individuals.⁵² Republican lawmakers strategically planned the wording of the three Amendments to appease their political base following the Civil War,⁵³ expand their voting base,⁵⁴ and eliminate their lingering postwar issues.⁵⁵ These lawmakers knew the racial hierarchy in the South, and used this understanding throughout the Civil War and Reconstruction for political gain.⁵⁶ With Republican lawmakers reluctant to permanently define what was meant through the

48. *Id.*

49. See W. E. B. DU BOIS, *BLACK RECONSTRUCTION* 188 (1935).

50. See KENDI, *supra* note 22, at 229–47 (explaining the transition from the Civil War into Reconstruction and the legal landscape Congress created).

51. See U.S. CONST. amend. XIII, XIV, XV; see also *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm> [<https://perma.cc/CVD3-SSJH>] (last visited Oct. 3, 2020).

52. See KENDI, *supra* note 22, at 232, 241, 245.

53. See *id.* at 235 (discussing how the Thirteenth Amendment’s language “except as a punishment for crime” gave Southern politicians a way to rebuild the South to mimic antebellum society).

54. See *id.* at 245 (discussing why Republicans chose to support the Fifteenth Amendment as a way to maintain a political majority as Southern politicians returned to Congress).

55. See *id.* at 241 (explaining that Republicans used the Fourteenth Amendment to punish Confederates more than to create a failsafe constitutional Amendment to protect against racial discrimination).

56. For example, President Abraham Lincoln understood what the institution of slavery meant and worked to maintain the Union rather than protect enslaved individuals. See ABRAHAM LINCOLN, *FIRST LINCOLN-DOUGLAS DEBATE*, in *THE PORTABLE ABRAHAM LINCOLN* (Andrew Delbanco ed., 1992) (Lincoln expressed that he had “no purpose directly or indirectly to interfere with the institution of slavery in the States where it exists.”); see also ABRAHAM LINCOLN, *LETTER TO HORACE GREELEY, AUGUST 22, 1862*, in *THE PORTABLE ABRAHAM LINCOLN* (Andrew Delbanco ed., 1992) (“If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do it.”).

Reconstruction Amendments,⁵⁷ activists, former Confederates, and businesspeople rushed to the courts to define the scope of each of the Amendments.⁵⁸ Of the three Amendments, the Fifteenth Amendment appears to have the least facial ambiguity. However, whether the Amendment was supposed to undeniably guarantee voting rights has been left to the court's interpretation, as intended by lawmakers when the Amendment was written.⁵⁹

1. During Reconstruction, the United States Supreme Court Limited the Fifteenth Amendment to Prevent Only State-Sponsored Voter Rights Discrimination

During Reconstruction, the United States Supreme Court had three opportunities to interpret the Fifteenth Amendment.⁶⁰ The first opportunity was the *Slaughter-House Cases*.⁶¹ The *Slaughter-House Cases* were actions brought by butchers in Louisiana challenging a state statute that limited the butchering trade.⁶² The butchers claimed the state statute violated the Thirteenth and Fourteenth Amendments to the United States Constitution.⁶³ Here, the Supreme Court provided the first comprehensive evaluation of the three Reconstruction Amendments, taken together.⁶⁴

In the *Slaughter-House Cases*, the Supreme Court hinted at the Fifteenth Amendment. It determined that formerly enslaved people were granted citizenship under the Fourteenth Amendment.⁶⁵ Because this class was granted citizenship, the class had the right to vote.⁶⁶ The Court

57. See KENDI, *supra* note 22, at 241 (“Republicans did not deny Democrats’ charges that the [Fourteenth] Amendment was ‘open to ambiguity and . . . conflicting constructions.’”) (alteration in original).

58. See *id.*

59. See Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 733–35 (1998) (discussing the various disenfranchisement efforts in the South post-enactment of the Fifteenth Amendment and the Supreme Court cases which overturned the de jure ballot exclusion).

60. See *Slaughter-House Cases*, 83 U.S. 36, 71 (1873); *Minor v. Happersett*, 88 U.S. 162, 175 (1874); *United States v. Reese*, 92 U.S. 214, 217 (1875); see Jon Greenbaum, Alan Martinson & Sonia Gill, *Shelby County v. Holder: When the Rational Becomes Irrational*, 57 HOWARD L.J. 811, 816 (2013–2014) (stating Reconstruction ended in 1876).

61. *Slaughter-House Cases*, 83 U.S. at 71.

62. *Id.* at 57, 60.

63. *Id.* at 58.

64. Isaac Chotiner, *The Buried Promise of the Reconstruction Amendments*, NEW YORKER (Sept. 9, 2020), <https://www.newyorker.com/news/q-and-a/the-buried-promise-of-the-reconstruction-amendments> [https://perma.cc/QJM6-QA3W] (“[S]tarting way back, even during Reconstruction with the Slaughterhouse Cases, in 1873, the Supreme Court began whittling away, narrowing the scope of the Reconstruction amendments . . .”).

65. *Slaughter-House Cases*, 83 U.S. at 71.

66. *Id.*

then explained the purpose of the Thirteenth, Fourteenth, and Fifteenth Amendments was to secure “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”⁶⁷

The Fifteenth Amendment was created to protect the voting rights of freed people.⁶⁸ Collectively, the three Amendments protected the interests of emancipated slaves.⁶⁹ The Fifteenth Amendment’s language is used by the Court in *Slaughter-House* to show that the protections preclude discrimination based on race, color, and previous condition of servitude.⁷⁰ Further, the Court explicitly stated that the Fifteenth Amendment intended for all freed slaves to be able to vote: “The negro having, by the [F]ourteenth [A]mendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union.”⁷¹ This clear classification, and the novelty of the evaluation demonstrates that the Supreme Court in 1873 intended for Black people to have the right to vote.

In the *Slaughter-House Cases*, the United States Supreme Court outlined the classes that the Reconstruction Amendments protect.⁷² The plaintiffs were white butchers in Louisiana challenging a state statute.⁷³ The Court explained that these Amendments, while providing new protections for all, were drafted to consider the integration of emancipated slaves into the new social order.⁷⁴ The Court clarified that these Amendments were intended to apply the protections to people enslaved before the end of the Civil War.⁷⁵

The next time the Supreme Court could define the Fifteenth Amendment was in *Minor v. Happersett*.⁷⁶ In *Minor*, a white woman was seeking relief because she was denied the right to register as a lawful

67. *Id.*

68. *Id.*

69. *Id.* at 81 (“The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied . . .”).

70. *Id.* at 71.

71. *Slaughter-House Cases*, 83 U.S. 36, 71 (1873)

72. *Id.* at 71–72.

73. Jonathan Lurie, *Reflections on Justice Samuel F. Miller and the Slaughter-House Cases: Still a Meaty Subject*, 1 N.Y.U. J.L. & LIBERTY 355, 367 (2005).

74. *Slaughter-House Cases*, 83 U.S. at 71–72.

75. *Slaughter-House Cases*, 83 U.S. at 89–90 (“[The Thirteenth Amendment] prohibits slavery and involuntary servitude, except as a punishment for crime. . . . I have been so accustomed to regard it as intended to meet that form of slavery which had previously prevailed in this country, and to which the recent civil war owed its existence, that I was not prepared, nor am I yet, to give to it the extent and force ascribed by counsel.”).

76. *Minor v. Happersett*, 88 U.S. 162 (1874).

voter in Missouri.⁷⁷ The Court explained the concept of citizenship by defining what scope it will accept and where it is not yet prepared to go.⁷⁸

In *Minor*, the Fourteenth and Fifteenth Amendments were considered together to determine suffrage rights.⁷⁹ The Court determined that a child born in the United States, whose parents are citizens, is a citizen of the United States.⁸⁰ It also outlined that it was not willing to reconcile the “doubts” as to whether “children born within the jurisdiction without reference to the citizenship of their parents” were citizens as well.⁸¹

When the Court narrowed the question of which citizens were protected under the Fifteenth Amendment, it moved away from the specific class the Fifteenth Amendment was supposed to protect: emancipated slaves.⁸² The Fourteenth Amendment should have reconciled the doubts that the court was not willing to interpret because it outlined birthright citizenship. It is clear the Court understood this and ignored it because it references free white men’s ability to vote.⁸³ With *Minor*, the new scope of the Fifteenth Amendment was that the “Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void.”⁸⁴

The *Slaughter-House Cases* and *Minor* demonstrate the rush to the courts to define the scope of the Reconstruction Amendments. In both cases, white plaintiffs were using the ambiguous language to define the Amendments in such a way to expand their own political agenda. *Slaughter-House* was used to challenge the overall Reconstruction process⁸⁵ while *Minor* was used to advocate for universal suffrage for white women.⁸⁶ Each case tried to clarify the scope of the Reconstruction Amendments to show how the ambiguous language created emerging

77. *Id.* at 165.

78. *Id.* at 166.

79. *Id.* at 175.

80. *Id.* at 168.

81. *Id.* at 167–68.

82. Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 634, 651–52 (2000).

83. *Minor*, 88 U.S. at 173.

84. *Id.* at 178.

85. Lurie, *supra* note 77, at 359–66.

86. James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote* *Shelby County v. Holder*, 8 HARV. L. & POL’Y REV. 39, 56 (2014).

issues.⁸⁷ They also tried to force the Court to clarify the protected classes for the Amendments.⁸⁸

The last case considered during Reconstruction that defined the Fifteenth Amendment was *United States v. Reese*.⁸⁹ *Reese* concerned a criminal investigation against two inspectors that refused to count the vote of William Garner.⁹⁰ William Garner was a Black man in Kentucky who tried to participate in a local election.⁹¹ The question before the Court was whether the Fifteenth Amendment provides a mechanism to punish those who discriminate against others who wish to vote.⁹² The discrimination had to be based on the protected classes of race, color, or previous condition of servitude.⁹³

The Court reasoned that the Fifteenth Amendment protects those wishing to engage in the elective process.⁹⁴ It found that while the Amendment provides this protection, it does not outline a punishment for those who discriminate.⁹⁵ The Fifteenth Amendment is defined as “not confer[ing] the right of suffrage upon any one. It prevents the States, or the United States . . . from giving preference . . . to one citizen of the United States over another on account of race, color, or previous condition of servitude.”⁹⁶ The Court concluded that Garner did not have an affirmative right to vote through the Fifteenth Amendment.⁹⁷ It also stated that neither Congress nor the Fifteenth Amendment outlines punishment for violating the Fifteenth Amendment.⁹⁸ So, those who discriminate in states where Black people may not vote could not be punished.⁹⁹

The shift from *Slaughter-House* to *Minor* to *Reese* demonstrates that jurists of the time aligned ideologically with the executive branch.¹⁰⁰ Legislators were concerned with gaining power: Southern Confederates

87. See Lurie, *supra* note 77 (discussing the litigation strategy for the *Slaughter-House* plaintiffs who were trying to dismantle Reconstruction in Louisiana and return the political and social structure to an antebellum racial caste system).

88. See Blacksher & Guinier, *supra* note 90, at 56–61 (discussing how white women fighting for voting rights sought judicial clarification in each of the Amendments that provided a new protection but was unclear in the exact classes that were to be protected).

89. 92 U.S. 214, 217 (1875).

90. *Id.* at 215.

91. *Id.* at 224.

92. *Id.* at 216.

93. *Id.*

94. *Id.* at 218.

95. *Reese*, 92 U.S. at 217–20.

96. *Id.* at 217.

97. *Id.*

98. *Id.* at 218, 221.

99. *Id.* at 220.

100. Leslie F. Goldstein, *How Equal Protection Did and Did Not Come to the United States, and the Executive Branch Role Therein*, 73 MD. L. REV. 190, 196 (2013).

were concerned with regaining the power they had before the war; Northern Unionists were concerned with rebuilding the Union and holding the rebellious states accountable.¹⁰¹ As president, Ulysses Grant was determined to stay moderate about Black suffrage.¹⁰² He stated that Northerners believed that “there would be a time of probation, in which the ex-slaves could prepare themselves for the privileges of citizenship before the full right would be conferred.”¹⁰³ Grant stated that he was prepared to follow that thinking, had it not been for his predecessor, President Andrew Johnson, becoming sympathetic to Southern politicians.¹⁰⁴ To preserve the Union, and to balance control, President Grant “favored immediate enfranchisement.”¹⁰⁵

Slaughter-House was decided by the Chase Court (1864–1873) while the Waite Court (1874–1888) decided *Minor* and *Reese*.¹⁰⁶ The Court’s reasoning remained consistent in trying to “moderately” protect the civil rights of African Americans.¹⁰⁷ In cases such as *Reese*, the Waite Court opened up loopholes where civil rights could be limited by the states.¹⁰⁸ But in cases like *Slaughter-House*, the Chase Court maintained that the Reconstruction Amendments were to protect the civil rights of freed slaves and Black people.¹⁰⁹ During Reconstruction, the Court “upheld civil rights principles in important cases,”¹¹⁰ but it did not take the opportunity to prevent legal loopholes for the states to ignore federal law.¹¹¹

The Waite Court attempted to close these loopholes in two cases that alluded to the new constitutional provisions, but did not directly interpret them.¹¹² In both *Ex parte Yarbrough* and *United States v. Cruikshank*, the Supreme Court was reviewing the criminal convictions of white men accused of harassing Black men attempting to exercise their civil rights.¹¹³ In both cases, the Court seemed to interpret the Fifteenth Amendment as providing Black men with the right to vote in state

101. ULYSSES S. GRANT, PERSONAL MEMOIRS OF U.S. GRANT, 479–80 (The Project Gutenberg, 2004) (1885–86) (ebook).

102. *Id.* at 480.

103. *Id.*

104. *Id.* at 479–80.

105. *Id.* at 480.

106. Goldstein, *supra* note 100, at 196–97.

107. *Id.* at 196.

108. *Id.* at 196–97.

109. *Id.*

110. *Id.* at 197–98.

111. *Id.* at 196–97.

112. *Ex parte Yarbrough*, 110 U.S. 651, 665 (1884); *United States v. Cruikshank*, 92 U.S. 542, 555–56 (1876).

113. *See* 110 U.S. at 655–56; 92 U.S. at 557.

elections.¹¹⁴ The Court maintained its pseudo-commitment in upholding civil rights by including the language that indicated that the Fifteenth Amendment guaranteed protection against race-based voter discrimination.¹¹⁵ This commitment was not effective, however, as both cases are largely ignored.¹¹⁶

After Reconstruction, lawyers looked toward limiting the Fifteenth Amendment by narrowing the legal standard that had to be met to show a voting practice was unconstitutional.¹¹⁷ As litigation related to the Fifteenth Amendment proceeded, the protections provided by the Amendment became obsolete.

II. THE EVOLUTION OF THE FIFTEENTH AMENDMENT CLASS PROTECTIONS

When the Supreme Court decided *Slaughter-House*, *Minor*, *Reese*, and *Cruikshank*, the only definitive interpretation of the Fifteenth Amendment it provided was there shall be no state-sponsored voter discrimination based on race.¹¹⁸ In these decisions, the Court proved capable of understanding how Southern ideals and white supremacy would, and did, prevent Black people from voting.¹¹⁹ However, the Court failed to interpret another critical piece of the Fifteenth Amendment: “[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of . . . *previous condition of servitude*.”¹²⁰ From its enactment to today, the Fifteenth Amendment’s narrow interpretation has caused it to lose its power and has prevented it from protecting the rights of the individuals it is supposed to protect.¹²¹

A. *The Class the Fifteenth Amendment Protects Changed Over Time to Consider Only Race-Based Voter Discrimination*

After Reconstruction, the Supreme Court gradually considered whether voting rights were fundamental, and if they were, who could participate. *Ex parte Yarbrough* provided the Court the opportunity to

114. See *Ex parte Yarbrough*, 110 U.S. at 665 (“In such cases [where state law limited voting rights to whites, the Fifteenth] amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and [C]ongress has the power to protect and enforce that right.”); see also *Cruikshank*, 92 U.S. at 555–56 (restating the Fifteenth Amendment confers on Congress the power to protect the right to be free of race discrimination in voting).

115. See *Cruikshank*, 92 U.S. at 555–56.

116. A Shepard’s review of both cases shows that the Fifteenth Amendment interpretation in *Cruikshank* was cited 29 times and the one in *Ex parte Yarbrough* was cited 7 times.

117. See Greenbaum et al., *supra* note 60.

118. See *Cruikshank*, 92 U.S. at 555–56.

119. See *United States v. Reese*, 92 U.S. 214, 224 (1875); see also *Cruikshank*, 92 U.S. at 556.

120. U.S. CONST. amend. XV (emphasis added).

121. See Greenbaum et al., *supra* note 60, at 866.

clear up its confusing interpretation of the Fifteenth Amendment, while also providing space for the Court to think about how race would affect voting rights.¹²²

In 1883, Berry Saunders, a Black man, tried to participate in Georgia's congressional election.¹²³ Three white men disguised themselves and assaulted Saunders.¹²⁴ The men were arrested and convicted for conspiring to violate Saunders' constitutional rights.¹²⁵ In *Ex parte Yarbrough*, the Supreme Court reviewed the convictions and sentences to determine whether a constitutional violation occurred.¹²⁶ In this review, the Court considered the Fifteenth Amendment post-Reconstruction.¹²⁷

In *Ex parte Yarbrough*, the Court reviewed the Fifteenth Amendment to determine "the constitutional authority for federal legislation concerning" voting rights and the right to vote in congressional elections.¹²⁸ The Court determined that the Fifteenth Amendment "clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the states."¹²⁹ It also reasoned that the right to vote was "[guaranteed] by the Constitution and should be kept free and pure by congressional enactments whenever that is necessary."¹³⁰ The Court emphasized that the Fifteenth Amendment was intended to protect people of African descent.¹³¹ The Court inadvertently placed a narrow limitation on precisely what harm must be shown to establish a Fifteenth Amendment violation.¹³² The Court's language also provided a foundation to explain how voting is a fundamental right.

Ex parte Yarbrough provided a foundation for the idea that voting is a fundamental right. It explained that the Fifteenth Amendment provided a mechanism to protect African Americans and designed a way to ensure they enjoyed a basic civil right:

122. Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 394 (1985).

123. *Id.* at 393.

124. *Id.*

125. *Ex parte Yarbrough*, 110 U.S. at 652, 655–57.

126. *Id.* at 654.

127. *Id.* at 664–65.

128. Jordan, *supra* note 126, at 394.

129. *Ex parte Yarbrough*, 110 U.S. at 664.

130. *Id.* at 665.

131. *Id.*

132. *See, e.g.,* Nixon v. Herndon, 273 U.S. 536, 541 (1927) (declaring that a plaintiff that claimed racial discrimination in a voting law had legal standing); *see also, e.g.,* Nixon v. Condon, 286 U.S. 73 (1932) (deciding that state law preventing Black people from voting was unconstitutional).

This new constitutional right [explained in *United States v. Reese*] was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination. The exercise of the right in both instances is guaranteed by the Constitution, and should be kept free and pure by congressional enactments whenever that is necessary. . . . For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by any one exercising its authority, are not within the scope of that amendment, it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself.¹³³

Taken alone, *Ex parte Yarbrough* would not be persuasive because of the precedent provided during Reconstruction. However, the year after *Ex parte Yarbrough*, the Supreme Court expanded this foundation with its decision in *Yick Wo v. Hopkins*.¹³⁴ In *Yick Wo*, the Supreme Court stated that voting, “[t]hough not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.”¹³⁵ Together, *Ex parte Yarbrough* and *Yick Wo* evidence the Court’s acceptance that voting is a fundamental right.¹³⁶ However, the Court was unclear about the proper enforcement mechanism for ensuring all men could exercise the right.¹³⁷

After *Yick Wo*, litigation about the Fifteenth Amendment arose together with other constitutional violations including poll taxing¹³⁸ and gerrymandering.¹³⁹ In these cases, the Court dealt with the Fifteenth Amendment in idealistic terms. At no point did it consider further defining which classes were protected by the Amendment.¹⁴⁰ The Court

133. *Ex parte Yarbrough*, 110 U.S. at 665–66.

134. 118 U.S. 356 (1886).

135. *Id.* at 370.

136. *See* Jordan, *supra* note 126, at 395.

137. *Id.* at 395–97.

138. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 664 (1966).

139. *Baker v. Carr*, 369 U.S. 186, 187–92 (1962); *See generally* Jordan, *supra* note 126, at 395–97.

140. Marc Edward Rivera And Shimica D. Gaskins, *Previous Conditions of Servitude: A Fifteenth Amendment Challenge to Ex-Felon Disenfranchisement Laws*, 1 GEO. J.L. & MOD. CRIT. RACE PERSP. 153, 155 (2008) (stating that “[w]hile the Supreme Court’s Fifteenth Amendment

has failed to recognize that previous condition of servitude constitutes a class distinct from racial classification and should also be protected under the Fifteenth Amendment.

B. The Fifteenth Amendment was Intended to Also Protect the Rights of Returning Citizens

The Fifteenth Amendment declares that voting rights are protected based on “race, color, and previous condition of servitude.”¹⁴¹ In cases like *Slaughterhouse* and *Yick Wo*, race and color were defined for purposes of determining whether discrimination has occurred. The Supreme Court has only discussed the definition of “previous condition of servitude” to address emancipated people of African descent after the Civil War.¹⁴² However, focusing on this narrow definition is to only understand United States history as a moment of transition from the antebellum to the post-Civil War era.

The Thirteenth Amendment provided a loophole allowing slavery to continue existing in the United States. The Amendment states “[n]either slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.”¹⁴³ Following the Civil War, Southern landowners faced a dilemma: finding a labor force to replace the enslaved people that previously farmed the crops.¹⁴⁴ Southern states responded to this dilemma by developing laws and practices to regulate labor.¹⁴⁵ Collectively, the responsive laws passed during the Reconstruction era were known as Black Codes.¹⁴⁶

The Black Codes allowed the legacy of slavery to continue after enslaving humans was declared illegal. Many laws codified in these codes existed in the antebellum South.¹⁴⁷ The codes followed the Georgia model, which came after the Mississippi and South Carolina Codes.¹⁴⁸ The Georgia Code had four main elements: “enticement, vagrancy,

jurisprudence has yet to define ‘previous condition of servitude,’ the word ‘servitude’ is explicitly defined in the text of the Thirteenth Amendment. . . .”).

141. U.S. CONST. amend XV, § 1.

142. See *Slaughter-House Cases*, 83 U.S. 36, 71 (1873); see also *Ex parte Yarbrough*, 110 U.S. at 664 (1884).

143. U.S. CONST. amend XIII, § 1 (emphasis added).

144. Brian Sawers, *Race and Property After the Civil War: Creating the Right to Exclude*, 87 MISS. L.J. 703, 724 (2018).

145. *Id.* at 733–40.

146. *Id.* at 720.

147. *Id.*

148. *Id.* at 721, 733. The original Mississippi and South Carolina Black Codes were legally problematic because they focused on criminalizing activities performed by people of African descent. Consequently, the federal government restricted these original codes. *Id.* at 721.

apprenticeship, and criminalized trespass.”¹⁴⁹ The post-bellum codes were different because they were race-neutral and did not apply exclusively to people of African descent according to the black letter law.¹⁵⁰ However, the landowning class coerced emancipated people into labor and poverty.¹⁵¹

The vagrancy provisions of the Black Codes are one of the direct links from slavery to the legal loophole created by the Thirteenth Amendment.¹⁵² Vagrancy statutes forced emancipated people into work:

Vagrancy was defined broadly, allowing sheriffs and judges to force black people into work. Mississippi defined the “idle” as vagrants, without requiring a showing that the vagrant was destitute. Also, vagrants included “persons who neglect their calling or employment, [or] misspend what they earn.” In Alabama, vagrants were defined to include “stubborn servant[s].” Even attempts to demand higher wages could risk a charge of vagrancy. Virginia defined vagrancy to include refusing “the usual and common wages given to other laborers.” While vagrancy statutes might be race-blind, one planter, former slaveowner, and Klansman noted, “[t]he vagrant contemplated was the plantation negro.”¹⁵³

One punishment for violating vagrancy laws was that vagrants were bound to a term of servitude.¹⁵⁴ Another punishment was that those who were convicted were ordered to pay either a fine or court cost.¹⁵⁵ Failure to pay these fines could cause the convicted person to be forced into performing public work for the county.¹⁵⁶ The worst punishment was that a violating individual could be convicted of a misdemeanor and sentenced to a state or county chain gang.¹⁵⁷

When contemplating the Black Codes and the emerging labor laws, southern lawmakers considered whether the statutes would create civil wrongs or criminal offenses.¹⁵⁸ Ten of the eleven states that enacted these

149. *Id.* at 733.

150. *Id.* at 733–34.

151. Sawers, *supra* note 149, at 733–34.

152. *See id.*

153. *Id.* at 734–35.

154. *A Different Kind of Slavery*, EQUAL JUSTICE INITIATIVE (July 25, 2018), <https://eji.org/news/history-racial-injustice-different-kind-of-slavery/> [<https://perma.cc/KPL8-A9UG>]; *See* Act of Dec. 15, 1865, § 4, 1865–66 Ala. Laws 119, 120; *See* Act of Mar. 12, 1866, § 1, 1865–66 Ga. Laws 119, 234.

155. Sawers, *supra* note 149, at 739.

156. *Id.*

157. Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive*, 51 U. CHI. L. REV. 1161, 1168 (1984).

158. *Id.* at 1166.

new laws made the statutes criminal offenses.¹⁵⁹ For example, in 1867, two-thirds of Texas prisoners were white “but 90 percent of those hired out were black.”¹⁶⁰ By 1930, thirty-seven percent of Georgia’s state population was Black.¹⁶¹ That prison population was eighty-three percent Black by 1932.¹⁶² Of that population, ninety percent of Black people convicted of felonies were sentenced to chain gangs and ninety-five percent of Black people convicted of misdemeanors were sentenced to county labor.¹⁶³

The driving force of antebellum slavery was free labor, and the driving force behind the post-bellum labor laws was to maintain a cheap labor force.¹⁶⁴ Lawmakers took advantage of the loophole in the Thirteenth Amendment by creating laws that criminalized behaviors that challenged the system to maintain cheap labor.¹⁶⁵ With the direct link between antebellum slavery and the new penal system that essentially created slavery by another name, the definition of the phrase “previous condition of servitude” cannot only apply to emancipated slaves. The phrase “previous condition of servitude,” as provided in the Constitution,¹⁶⁶ should also apply to returning citizens or individuals convicted of felonies who have served their prison sentence and finished their probation.

III. FLORIDA SENATE BILL 7066 VIOLATES THE FIFTEENTH AMENDMENT

Florida Senate Bill 7066 violates the Fifteenth Amendment to the United States Constitution because it abridges the right of returning citizens to vote. Federal law allows a civil action when any “person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”¹⁶⁷ To prevail on a civil action for the deprivation of right under 42

159. *Id.*

160. Sawers, *supra* note 149, at 739.

161. William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 57 (1976).

162. *Id.*

163. *Id.* at 58 tbl.2.

164. Sawers, *supra* note 149, at 728.

165. See Roback, *supra* note 162, at 1163–66. (providing an extensive overview of the kind of laws passed after Reconstruction and into the early twentieth century); Examples of vagrancy laws during this period include the following: Act of Sept. 22, 1903, No. 229, 1903 Ala. Acts 244; Act of May 6, 1905, No. 283, 1905 Ark. Acts 702; Act of May 29, 1905, No. 48, 1905 Fla. Laws 97; Ga. Code vol. III, § 453 (1895); Act of July 8, 1908, No. 205, 1908 La. Acts 308; Act of Feb. 29, 1904, ch. 144, 1904 Miss. Laws 199; Act of Mar. 4, 1905, ch. 391, 1905 N.C. Sess. Laws 41; Act of Dec. 22, 1893, No. 348, 1893 S.C. Acts 521; Act of Mar. 24, 1875, § 1, 1875 Tenn. Pub. Acts 188; Act of Mar. 17, 1909, ch. 59, 1909 Tex. Gen. Laws 111; Act of Jan. 2, 1904, ch. 548, § 884, 1902-04 Va. Acts 876.

166. U.S. CONST. amend. XV, § 1.

167. 42 U.S.C. § 1983.

U.S.C. § 1983, a plaintiff must show (1) “the defendant has deprived him of a right secured by the ‘Constitution and laws’ of the United States” and (2) “the defendant deprived him of this constitutional right . . . ‘under color of law.’”¹⁶⁸ Returning citizens disenfranchised by Senate Bill 7066 have a claim under federal law because they meet the burden of proof for both elements.

Returning citizens meet the first element because they are a class protected under the Fifteenth Amendment whose right to vote is being abridged by virtue of their status as returning citizens. In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,¹⁶⁹ the Supreme Court provided a mechanism to prove discriminatory intent even if a law appears facially neutral. To identify discriminatory intent, a court may consider the following factors: (1) whether the law disproportionately affects one race over another; (2) the historical background of the law; (3) the specific event sequence leading to the law; (4) departure from normal procedural sequence; and (5) the legislative history, including “contemporary statements by members of the decision[-]making body, minutes of its meetings, or reports.”¹⁷⁰ Returning citizens also meet the second element under 42 U.S.C. § 1983 given that the named defendants in the federal case are state officials working in their official capacities.

To succeed in proving a Section 1983 claim under the Fifteenth Amendment, returning citizens can show discriminatory intent based on race, color, and previous condition of servitude. These classes are protected under the Constitution, and Florida Senate Bill 7066 disenfranchises individuals for belonging to those classes. Without litigation, returning citizens can show two of the *Arlington Heights* factors: the disproportionate impact and the discriminatory history of the law.

Before Amendment Four passed in the 2018 general election, more than ten percent “of Florida’s voting population—nearly 1.7 million as of 2016”—could not vote.¹⁷¹ More than twenty percent of all eligible Black Floridian voters were disenfranchised because of the restrictions placed on returning citizens.¹⁷² In 2016, sixteen percent of Florida’s population was Black.¹⁷³ Black people also made up thirty-three percent of returning citizens that were disenfranchised.¹⁷⁴ Black Floridians face disproportionate disenfranchisement because they are “more likely to be

168. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970).

169. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

170. *Id.*

171. *Hand v. Scott*, 285 F. Supp. 3d 1289, 1310 (N.D. Fla. 2018).

172. *Id.*

173. Complaint at 30, *Gruver v. Barton*, No. 1:19-cv-121 (N.D. Fla. filed June 28, 2019).

174. *Id.*

arrested, charged, convicted, and face harsher sentences than white Floridians.”¹⁷⁵

The disparity in the Florida prison population can be explained by multiple factors. One historical explanation links the labor laws of the late-nineteenth and early-twentieth centuries.¹⁷⁶ Florida is one of the states that enacted a series of labor laws in 1865.¹⁷⁷ The state engaged in convict leasing until the 1920s.¹⁷⁸ As in other states, Florida’s enforcement of labor laws disproportionately affected individuals of African descent.¹⁷⁹

Before Senate Bill 7066, disenfranchising returning citizens violated the Fifteenth Amendment. The provision requiring returning citizens to pay fines and fees before regaining the right to vote further violates the Fifteenth Amendment because it disproportionately affects Black returning citizens.¹⁸⁰ In an expert study done to analyze the current system of monitoring and recording payment of fines and fees, Dr. Daniel A. Smith found eighty-two percent of individuals subject to Senate Bill 7066 would be disenfranchised.¹⁸¹ Of that percentage, Black returning citizens would be disproportionately impacted by the law as compared to their white counterparts.¹⁸² Regardless of this disparity, if courts can agree that there is a direct link between the current system of mass incarceration and the end of antebellum slavery, then the entire class of returning citizens can claim protection under the Fifteenth Amendment.

CONCLUSION

In 2018, voters made a bold statement by passing Amendment Four in Florida’s general election. This statement was a clear declaration that the right to vote and participate in the political process is precious. This statement was bipartisan and clear. Current attempts to limit the power of Amendment Four through Senate Bill 7066 and subsequent measures currently being considered mimic the strategies used after the ratification of the Reconstruction Amendments to limit and shape their interpretation.

Though federal courts generally defer to state law when it comes to voting rights, Senate Bill 7066 cannot be ignored because it violates the Fifteenth Amendment. The Fifteenth Amendment protects voting rights based on race, color, and previous condition of servitude. To understand

175. *Id.*

176. Roback, *supra* note 162, at 1161 n.1.

177. Roback, *supra* note 162, at 1165.

178. *Id.*

179. Sawers, *supra* note 149, at 738–39.

180. Complaint at 30, *Gruver v. Barton*, No. 1:19-cv-121 (N.D. Fla. filed June 28, 2019).

181. Expert Report of Daniel A. Smith at 5, *Jones v. DeSantis*, No. 4:19-cv-300 (N.D. Fla. filed Aug. 2, 2019), ECF No. 98-3.

182. *Id.* at 6–7.

these protections is to understand how Southern society was established and maintained on a racial hierarchy. To protect the rights of all returning citizens is to imagine a new path to a democracy that does not uphold historical prejudices. Federal courts today can choose a new path. They can choose to understand and accept how the disparities that impact Black communities due to the system of mass incarceration are a continuation of the racial hierarchy of the antebellum south. To find that Senate Bill 7066 violates the Fifteenth Amendment is to take a step forward in protecting the rights for all citizens to access democracy.

“Well, why did that lady say those things?”

“Because she’s never really been thirsty.”

“Oh.”

And that’s how I, a little girl of mixed race (White and Native American) toeing the poverty line and reaching up for a sip, learned that a sign that says “Whites Only” or a sign that says “Coloreds Only” is to be ignored.