Criminal Procedure Redemption

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Abstract

From the early 1970s onward, the United States Supreme Court has narrowed the constitutional protections of criminally accused persons and immunized the criminal judicial system and its actors from legal accountability. This legal trend is a part of the "Second Redemption" that followed the Civil Rights Movement, akin to the First Redemption that marked the end of Reconstruction. It appears pretty evident that the Court's post-civil rights approach to constitutional criminal law was primarily driven by racism. However, existing scholarly works that examine the Court's "criminal procedure counterrevolution" as a whole fail to include American racism in the discussion of underlying motives.

This article connects anti-Black racism to the criminal procedure counterrevolution. To do so, it first develops a novel theory of racial redemption, or the white supremacist backlash and overthrow of the two national racial equality projects: Reconstruction and the Civil Rights Movement. It highlights the two main areas of law that feature in racial redemptions: constitutional civil rights law and criminal law. It then identifies three components of racial redemption: citizen redemption, political redemption, and judicial redemption. Finally, it uses this theory to examine racial redemptions from the civil rights lens.

This article applies this theory to racial redemptions through the lens of criminal law. It demonstrates how the white citizenry, the white political class, and the Supreme Court collaborated to racialize crime and criminal law during the Reconstruction Era. This racialization eased somewhat in the early to mid-twentieth century before intensifying after the 1960s. By situating the criminal procedure counterrevolution against this backdrop, the link between American racism and the counterrevolution becomes evident.

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Introduction

The Reconstruction Era ushered in America's first experiment in racial equality, producing the post-Civil War amendments and civil rights legislation. Many African Americans built communities, businesses, and schools; they voted and were elected to political offices at local, state, and federal levels of government; and they fought to make real the Constitution's newfound promise of racial equality.[1] Eventually, however, efforts to enfranchise and confer rights upon African Americans gave way to America's addiction to racism. As the political will to promote racial equality waned in the latter years of Reconstruction, white society "redeemed" the country from the racial justice agenda of the Radical Republicans. In the final years of the Reconstruction Era and for decades thereafter, the white citizenry, white politicians, and the U.S. Supreme Court collaborated to fully restore white supremacy and racialized subjugation.[2] This period is popularly known as "Redemption."[3]

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[1] *See* Carol Anderson, Ph.D., White Rage: The Unspoken Truth of Our Racial Divide 37-38 (2016); Richard Wormser, The Rise and Fall of Jim Crow 26-27 (1st ed. 2003).

[2] *See* Anderson, *supra* note 1, at 32-38.

[3] *See Reconstruction in America: Racial Violence After the Civil War, 1865–1876*, Equal Just. Initiative (2020), https://eji.org/report/reconstruction-in-america [https://perma.cc/F7P8-DD9P] (last visited Oct. 4, 2025).

The Civil Rights Movement was America's second racial equality experiment, led by Black activists in the streets and the courts. Though it yielded no constitutional amendments, it produced additional legislation and the most racially progressive decisions the Supreme Court had ever issued.[4] However, America's addiction to racism produced another backlash to the Civil Rights Movement.[5] Like the first backlash, the second backlash had the desired effect: The momentum for racial justice was dulled, rights acquired were gutted and rolled back, and the pursuit of some semblance of racial egalitarianism gave way to a new system of racialized subjugation. The second backlash also featured a collaboration between the same forces involved in the first redemption: the white citizenry, the mainly white political class, and the Supreme Court.[6] Thus, some scholars have called this backlash a "Second Redemption."[7]

Both redemptions[8] mainly featured two areas of law. The first one should be obvious: civil rights law. In the First Redemption, following Reconstruction, white America physically, legislatively, and jurisprudentially rendered the Fourteenth and Fifteenth Amendments meaningless. Equality under the law was a myth for Black Americans, and the right to vote was elusive. The Second Redemption enabled white supremacy in the

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[4] The most obvious example is the Court's venerated decision in Brown v. Board of Education. Brown v. Board of Education, 347 U.S. 483 (1954).

[5] *See* Anderson, *supra* note 1, at 99-137.

[6] *Id.*

[7] *See, e.g.*, S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 Vand. L. Rev. 291, 292 (1997) ("[T]he reasons for a potential Second Redemption bear a haunting resemblance to the explanations offered for the First. Again, we have an exhaustion of the national commitment to economic and racial justice for [B]lacks; again, 'progressives' are suggesting that attention to race has diverted us from more important issues; again, we have a Supreme Court that is hostile to minority political empowerment."); *see also* Eric Foner, *Redemption II*, N.Y. Times (Nov. 7, 1981), https://www.nytimes.com/1981/11/07/opinion/redemption-ii-by-eric-foner.html [https://perma.cc/U7M5-ZGHE] (last visited Oct. 4, 2025); Susan D. Carle, *Reconstruction's Lessons*, 13 Colum. J. Race & L. 734, 736 (May 2023); Kermit Roosevelt III & Patricia Stottlemyer, *The Fight for Equal Protection: Reconstruction-Redemption Redux*, 83 U. Chi. L. Rev. Online 36, 47-48 (2016).

[8] I recognize that the term "redemption" normally has a positive valence and connotation. Many legal scholars, for example, have written about "constitutional redemption" and "redemptive constitutionalism," using "redemption" to signify the Constitution's potential usefulness for promoting racial and social egalitarianism. *See, e.g.*, Jack M. Balkin, Constitutional Redemption (2011). Perverse as it might seem, however, my use of the term "redemption" to describe the restoration of white supremacy has historical roots dating back over 150 years and is more consistent with America's constitutional history. *See generally* Ruth Colker, *The White Supremacist Constitution*, 2022 Utah L. Rev. 651 (2022). Some scholars have also invoked the term "redemption" to describe recent iterations of white rebellion against any perceived manifestations of racial equality. *See*, *e.g.*, Anthony M. Kreis, *The New Redeemers*, 55 Ga. L. Rev. 1483, 1488-89 (2021) ("The incited crowd that ransacked Congress' halls in 2021 was not fueled by some new American political phenomenon but by a festering Lost Cause ideology. That ideology, like its nineteenth-century progenitor, equates whiteness with respectable citizenship and was reinvigorated in the Trump Era through multiple streams of discourse. After four years, the American right's full-throated embrace of grievance politics at the behest of Donald Trump created a tinderbox. This period was nothing short of a slow burning Second Redemption.").

name of formal equality, and Black suffrage rights once again came under constant assault. In the first racial redemption, civil rights legislation was invalidated; in the second, civil rights legislation was either watered down or inverted into protections for white Americans against nonwhites, especially Black people.

The second area of law is perhaps less obvious but nevertheless evident: criminal law. In the First Redemption, criminal law harmed African Americans and benefitted white supremacists. States used criminal law to reestablish racialized enslavement, taking advantage of the Thirteenth Amendment's so-called "punishment clause." White politicians and media cast African Americans as criminals in need of government control.[9] The Supreme Court rejected the federal government's efforts to criminalize white supremacist violence.[10] It rendered the Constitution's strong protections for defendants inapplicable to Black people facing criminal charges in state courts. Consequently, criminal law played a significant role in producing the first wave of racialized re-enslavement from the 1870s to the mid-twentieth century.[11]

The Second Redemption featured less overt racism, but the rhetoric and emphasis on racialized criminalization remained. White citizens supported tough-on-crime policies and exaggerated Black criminality in scholarship and media.[12] In response to growing racialized hysteria about crime, state and federal politicians enacted harsh penal laws, empowered law enforcement, and waged wars on crime, primarily against Black communities.[13]

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[9] *See infra*, Part II.A.

[10] *See infra*, Part II.B.3.

[11] *See* Zamir Ben-Dan, *Slavery's Constitutional Endurance: The Antebellum States' Rights Principle*, 105 B.U. L. Rev. 163, 202-09 (2025).

[12] *See infra*, Part II.D.1 & 2.

[13] In recent years, an emerging body of scholarship has focused on some Black people's and political figures' support for tough-on-crime policies in the post-Civil Rights era. *See, e.g.*, James Forman, Locking Up Our Own: Crime and Punishment in Black America (1st ed. 2017). It would be a serious mistake, however, to assert that the hyper-criminalization of Black Americans after the Civil Rights Movement occurred *because of* Black support rather than *in spite of* Black support. Such an assertion overlooks the fact that African Americans have always been vastly underrepresented in politics and governance, and they have always lagged behind white Americans in wealth and economic power. If African Americans truly had the political power to meaningfully influence local, state, and national policy, other longstanding grievances in the Black community, such as police brutality, would have been resolved. *See* Report of the National Advisory Commission on Civil Disorders 4, 5 (1968) [hereinafter Report on Civil Disorders]; *see also* Otis B. Grant, *Rational Choice or Wrongful Discrimination? The Law and Economics of Jury Nullification*, 14 Geo. Mason U. C.R. L. J. 145, 179-81 (2004). Police brutality remained—and remains—a salient problem because white Americans have always supported "an institution of policing deeply linked to racial subordination." *See* Emmanuel Mauleón, *Legal Endearment: An Unmarked Barrier to Transforming Policing, Public Safety, and Security*, 112 Calif. L. Rev. 755, 813 (2025).

Such an assertion also obscures the motives behind the national focus on crime. White politicians' cry for "law and order" was not about helping Black people; it served as a rejoinder to civil rights activism a decade before crime was a national concern. The real goal behind white politicians' campaign for hyper-criminalization was to hinder the civil rights project and

With the Bill of Rights made applicable to the states, the post-Civil Rights Era Supreme Court took a new path: shrinking the constitutional rights of criminally accused persons and immunizing judicial systems and their players from legal accountability.[14] Given that the Court's expansion of rights in the 1960s has been termed the "criminal procedure revolution,"[15] some scholars have termed the subsequent contraction of rights as the "criminal procedure counterrevolution."[16] This counterrevolution contributed to the second wave of racialized re-enslavement: the mass incarceration epidemic that has plagued the United States since the 1970s.[17]

The notion that American racism served as a primary motivation for the criminal procedure counterrevolution following the Civil Rights Movement seems quite apparent. Indeed, I've alluded to it in my work.[18] Yet, there is a surprising dearth of legal scholarship acknowledging this connection. To be clear, many scholars have written about aspects of the counterrevolution; Devon Carbado, for example, brilliantly chronicles the Court's racialized assault on the Fourth Amendment after the Civil Rights Movement.[19]

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disadvantage Black people. Richard Nixon's former aid John Ehrlichman admitted as much, confessing that the War on Drugs was a ruse to persecute Black people. *See* Tom LoBianco*, Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies,* CNN (Mar. 24, 2016, 3:14 PM), https://www.cnn.com/2016/03/23/politics/john-ehrlichman-richard-nixon-drug-war-blacks-hippie/index.html [https://perma.cc/32VR-7KR6]. Thus, while white politicians were certainly willing to highlight Black calls for harsher punishments as a way to deny their own racist motivations, the historical record—which includes the discriminatory enforcement of criminal law in the decades since—makes clear that the post-Civil Rights hyper-criminalization was chiefly the workings of the white citizenry and political class.

[14] *See infra,* Part II.D.3; *see also* Anderson, *supra* note 1, at 132-33; Norman Dorsen, *The United States Supreme Court: Trends and Prospects*, 21 Harv. C.R.-C.L. L. Rev. 1, 13 (1986) ("The counterrevolution consisted of many of the cases just discussed, including…those reducing the rights of persons charged with crimes.").

[15] *See*, *e.g.*, Craig M. Bradley, The Failure of the Criminal Procedure Revolution (1993); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. Pa. L. Rev. 1361, 1363-64 (2004).

[16] *See*, *e.g.*, Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466, 2468-70 (1996); Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 Am. Crim. L. Rev. 1, 11 n. 86 (2002) (quoting Donald E. Wilkes, Jr., State Post-Conviction Remedies and Relief 123 (1996)); Justin F. Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 Hastings L.J. 1, 64-65 (2010); Katharine Goodloe, *Study in Unaccountability: Judicial Elections and Dependent State Constitutional Interpretations*, 35 N.Y.U. Rev. L. & Soc. Change 749, 789 (2011)*; see also* Scott E. Sundby, *Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen*, 94 Colum. L. Rev. 1751, 1763 (1994) ("Although a 'counterrevolution' to the Warren Court's due process revolution has not occurred in the sense that the Court has overruled significant cases in a wholesale fashion, little doubt can exist that the original revolutionaries' muskets largely have been silenced.").

[17] *See* Ben-Dan, *Slavery's Constitutional Endurance*, *supra* note 11, at 231-40.

[18] *See*, *e.g.*, *id.* at 155-66; Zamir Ben-Dan & Rigodis Appling, *Breaking the Backbone of Unlimited Power: The Case for Abolishing Absolute Immunity for Prosecutors in Civil Rights Lawsuits*, 73 Rutgers U. L. Rev. 1373, 1421-23 (2021).

[19] *See* Devon W. Carbado, Unreasonable: Black Lives, Police Power, and the Fourth Amendment (2022).

However, most of the scholars that have discussed and acknowledged the criminal procedure counterrevolution as a whole completely leave out any discussion of racism's role in effectuating it.[20] Only one scholar, Frank Rudy Cooper, has referred to the Supreme Court's assault on the rights of accused persons as a "redemption,"[21] though his discussion is confined to a brief footnote in which he says: "Following the Civil War, Southern whites referred to reestablishment of white domination of Blacks as 'redemption.'"[22] The implication is that the Supreme Court fully reinstated white domination over Blacks through its criminal procedure jurisprudence.

This article confirms Professor Cooper's proposition. The Supreme Court's jurisprudence on criminal procedure constructed the judicial foundation of the Second Redemption. Its precedent contributed to the wars on drugs and crime, enhanced the powers and capabilities of government actors to surveil and control African Americans, and shielded the criminal justice system from accountability. Even the Court's own justices acknowledged its active role in enabling governmental authority to impose criminal punishment. The late Justice John Paul Stevens made this clear in a dissenting opinion in 1991:

> "No impartial observer could criticize this Court for hindering the progress of the war on drugs. On the contrary, decisions like the one the Court makes today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime."[23]

Thus, the Court's criminal law precedents provided juridical support for the second wave of racialized re-enslavement.

To most effectively substantiate this argument (and Professor Cooper's assertion), this article innovates on a grander scale: it offers the first legal theory of the racial redemption. While scholars have written about the first racial redemption,[24] and fewer have recognized the existence of a second redemption, there has been no attempt in legal scholarship to define what a racial redemption is, to identify and describe its relevant components, or to explain completely the intersections between racial redemptions and

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[20] *See infra* Part III.

[21] *See* Frank Rudy Cooper, *Dicta, Pretext, and Excessive Force: Toward Criminal Procedure Futurism*, 112 Calif. L. Rev. 101, 107 (2024) ("Indeed, the *Robinson* opinion ushered in criminal procedure redemption—*a concerted and systematic effort at undoing civil liberties, especially with respect to racial minorities*—by expanding police powers through search-incident-to-arrest doctrine.") (emphasis added).

[22] *See id.* at 107, n. 17.

[23] California v. Acevedo, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting).

[24] *See*, *e.g.*, Daniel Farbman, *Redemption Localism*, 100 N.C. L. Rev. 1527 (2022); Tolu Lawal & Al Brooks, *Character and Fitness in America's Neo-Redemptive Era*, 27 CUNY L. Rev. 143 (2024); Brian Sawers, *Race and Property After the Civil War: Creating the Right to Exclude*, 87 Miss. L.J. 703 (2018); *See also*, *e.g.*, Daniel Farbman, *Reconstructing Local Government*, 70 Vand. L. Rev. 413 (2017).

American law.[25] The theory this article devises shows historical continuity with respect to the uses of crime and constitutional criminal law as tools of racial regression. It also lays the necessary contextual groundwork by which the criminal procedure counterrevolution can be logically viewed as an integral piece of the second racial redemption.

Thus, this piece makes two timely interventions. First, it helpfully defines and explores the elements of racial redemption in the context of white supremacy. Second, this article firmly establishes the criminal procedure counterrevolution as an integral piece of the second racial redemption. This article explores the racialization of American criminal law that began during the Reconstruction Era, extended well into Old Jim Crow, slightly lessened from the 1920s to the late 1960s, and then intensified from the 1970s onward. This article showcases the Court's antipathy to racial justice in the traditional civil rights arena, and it situates the criminal procedure counterrevolution alongside citizen and political redemptions predicated on fears of Black criminality. All of this reveals that the counterrevolution was a judicial redemption, or at least an integral part of the judicial redemption.[26]

With these two interventions, this article firmly establishes a connection between the Court's criminal procedure jurisprudence and its civil rights precedents in the post-Civil Rights Era. Professor Louis Bilionis notes a disturbing tendency amongst constitutional law scholars to treat the Court's criminal law and procedure precedents as a species of law unrelated to the larger constitutional picture; scholars "set criminal justice aside as a contrastingly unremarkable and presumably steady-state phenomenon that is divorced from all the rest."[27] Consequently, the message from the legal scholarship that acknowledges the criminal procedure counterrevolution is reduced to a largely context-less conclusion: "Criminal justice, the story goes, has been stuck in a pro-prosecution, conservative 'retrenchment' that began when Chief Justice Earl Warren retired more than a generation ago."[28] This article adds the context that explains *why* criminal justice (as Bilionis defines it)[29] has been stuck in this rut.

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[25] Definitions of "redemption" in existing scholarship are circumscribed to the First Redemption that ended Reconstruction. *See* Carle, *supra* note 7, at 736; Farbman, *Redemption Localism, supra* note 24, at 1533-35.

[26] The counterrevolution is judicial; it consists of the Court interpreting the Fourth, Fifth, Sixth, and Eighth Amendments in a manner that disadvantages Black people. The redemption, however, is broader than the counterrevolution. First, the redemption itself involves two other strands: citizen and political. Second, the judicial redemption features more than just criminal law; it features civil rights law as well.

[27] Louis Bilionis, *Conservative Reformation, Popularization, and the Lessons of Reading Criminal Justice as Constitutional Law*, 52 UCLA L. Rev. 979, 984-85 (2005).

[28] *Id.* at 985.

[29] Bilionis uses the term "criminal justice" to include "not simply criminal procedure jurisprudence under the Bill of Rights, but all the doctrinal areas where the Constitution and criminal law regularly meet." *See id.* at 984.

This article proceeds in three parts. Part I sets forth the theory of racial redemption. The constitutional order of 1789 was one of white supremacy; the framers of the Constitution did not intend to include meaningfully people of African ancestry into the American polity. Efforts during Reconstruction and the Civil Rights Movement to uplift and enfranchise Black people deviated from the legal order the framers envisioned, necessitating white society's need for "redemption." This Part identifies the three historical strands of a racial redemption—citizen redemption, political redemption, and judicial redemption—and examines how these strands combined to produce both racial redemptions in the context of civil rights law. Part I focuses exclusively on civil rights outside of the criminal law context.

Part II examines the redemption strands through the lens of criminal law to argue that the criminal procedure counterrevolution qualifies as a judicial redemption and an integral part of the second racial redemption. First it tracks the racialization of crime that intensified after the Civil War. It then establishes the racialization of criminal law administration, examining the three strands of the first racial redemption through a criminal law lens. Next, this Part examines the consequent racialization of criminal justice, showing how racial justice advocacy blended with criminal justice advocacy through Black American activism as well as Supreme Court interventions in the early and mid-twentieth century. As a result, the white backlash was not merely limited to civil rights; white Americans rebelled against the Court's criminal procedure revolution as well. At the center of the backlash was an aggressive racialization of criminal law administration after the Civil Rights Movement. This Part closes with an examination of the three strands of the second racial redemption, once again through a criminal law lens.

Part III briefly remarks on the dearth of scholarly recognition in legal academia that the counterrevolution as a whole was—and *is*—significantly if not primarily motivated by racism. It challenges existing justifications for the counterrevolution and existing explanations for the alleged failure of the criminal procedure revolution, and it addresses the fantastical idea that criminal law is solely about truth-seeking and bears no relation to larger social issues. One of the foremost practical functions of criminal law, from the Reconstruction Era to the present, has been to racially subjugate Black people. It is through recognizing this historical fact that the connection between the counterrevolution and American racism becomes apparent.

One more point deserves mention here. Throughout American history, from before the founding to the present, there have always been people who fought against whatever systems of oppression existed in their time. There were abolitionists who opposed chattel slavery; there were people who fought during Reconstruction to realize citizenship for African Americans; there were Americans who denounced lynchings, fought for racial justice and equity during the Jim Crow and Civil Rights Eras, and have resisted mass incarceration and current iterations of American racism. Those who resisted oppression were not just Black; white Americans and people of

other racial backgrounds resisted as well. This article should not be read as a dismissal of those efforts. However, the institutions that represent power in the United States—the political class, the business class, and the courts (especially the Supreme Court)—have consistently promoted and effected white dominance, and enough white citizens have supported those institutions of power to warrant speaking generally.

I. Defining "Redemption"

Dictionary definitions of the term "redeem" include "to get or win back,"[30] to "repair" or "restore,"[31] "to get something back,"[32] and "to make somebody/something seem less bad."[33] Redemption can also have a religious connotation; to redeem is to "save somebody from sin"[34] or to "save somebody from the power of evil."[35] In the 1870s, white Southerners called the process of reversing the gains of Reconstruction and eliminating Black people from political leadership "redemption." This process was the product of both massive violence and political mobilization by white citizens and politicians. The Supreme Court's jurisprudence complemented the political and civilian aspects of the redemption.

What was redeemed? Redeemed from whom or what? This Part answers these questions. Section A examines the constitutional order the framers established and intended to endure. The founders of this nation sought to create a white supremacist country that subjugated and excluded African Americans from meaningful participation in American society. Section B analyzes the two historical deviations from that intent: the Reconstruction Era and the Civil Rights Movement. Section C identifies three components of the two racial redemptions: citizen redemption, political redemption, and judicial redemption.

A. The Societal and Constitutional Order the Framers Intended

Chattel slavery predated the founding by over 100 years. It was a system of racialized social control as well as a system of economic exploitation. It was the product of wealthy planters seeking to sow divisions between working class whites and Black people so as to prevent multiracial coalitions

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[30] *Redeem*, Mirriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/redeem [https://perma.cc/WF9K-3FH7] (last visited Oct. 4, 2025).

[31] *Id.*

[32] *Redeem*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/redeem [https://perma.cc/5HAA-CQN7] (last visited Oct. 4, 2025).

[33] *Redeem*, Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/english/redeem [https://perma.cc/2JNC-ARK6] (last visited Oct. 4, 2025).

[34] *Redeem*, Cambridge Dictionary, *supra* note 32.

[35] *Redeem*, Oxford Learner's Dictionaries, *supra* note 33.

opposing their interests.[36] Race was the basis by which persons were either enslaved or deemed free; only Black people could be enslaved, and even free Black persons were seen as the denizens of society.[37] Slavery socially and psychologically uplifted all white Americans and bestowed upon them power over the lives and bodies of Black people.[38] As Professor Cheryl Harris notes, chattel slavery "linked the privilege of whites to the subordination of Blacks through a legal regime that attempted the conversion of Blacks into objects of property."[39] Slavery, coupled with the colonization of Native Americans, instilled in white Americans a property interest in whiteness,[40] and it created feelings and thoughts of superiority and inferiority that could never simply go away.

In drafting and ratifying the Constitution in the late 1700s, the founding fathers intended to create, in the words of Malcolm X, a government and nation "by whites for the benefit of whites, and to the detriment of [B]lacks."[41] Chattel slavery existed in most of the young country at the time of the founding, and the drafters took various steps to protect the peculiar institution.[42] Some protections, like the three-fifths clause,[43] the fugitive slave clause,[44] and the ban on federal export taxes,[45] were substantive; other features of the Constitution, such as states' rights federalism, were structural.[46] In the first few years of the Constitutional Era, Congress passed laws that further confirmed that the fruits of Americanism were for white people only.[47]

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[36] *See* Cheryl Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709, 1717, 1720-21; 1726 (1993).

[37] *Id.*

[38] *See* Zamir Ben-Dan, *White Comfort and the Constitution*, 72 UCLA L. Rev. 330, 356, 358 (2025).

[39] *See* Harris, *supra* note 36, at 1721.

[40] *Id.*

[41] *See* Reelblack One, *Malcolm X–Interview at Berkeley (1963)*, at 32:46-33:30, 34:31-40 (YouTube, June 11, 2018), https://www.youtube.com/watch?v=FZMrti8QcPA [https://perma.cc/U8AP-M6Q2] (last visited at Oct. 4, 2025).

[42] *See* Zamir Ben-Dan, *"Today, the Constitution Prevails": A History and Legacy of Constitutional Racism*, 45 Cardozo L. Rev. 1653, 1661-68 (2024).

[43] U.S. Const. art. I, § 2, cl. 3.

[44] U.S. Const. art. IV, § 2, cl. 3.

[45] U.S. Const. art. I, § 9, cl. 5.

[46] *See* Ben-Dan, *supra* note 42, at 1665-66. *See also* Craig Green, *Beyond States: A Constitutional History of Territory, Statehood, and Nation-Building*, 90 U. Chi. L. Rev. 813, 865 (2023).

[47] For example, Congress' Naturalization Acts of 1790, 1795, and 1798 conditioned citizenship for immigrants on proof that the person petitioning was white. *See* Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790) (amended by ch. 20, 1 Stat. 414 (1795)); Naturalization Act of 1795, ch. 20, 1 Stat. 414 (1795) (repealed by ch. 28, 2 Stat. 153 (1802)); Naturalization Act of 1798, ch. 54, 2 Stat. 566 (1798) (repealed by ch. 28, 2 Stat. 153 (1802)). As another example, only white people could serve in the federal militia under the Militia Act of 1792. *See* Militia Act of 1792, ch. 33, 1 Stat. 271 (1792) (repealed by ch. 196, 32 Stat. 775 (1903)).

Throughout American society, Black people were excluded from meaningful participation in American life. Most Black people in the South were enslaved. Most Northern states gradually abolished chattel slavery within their borders,[48] but they nonetheless subjugated African Americans. Even within the abolitionist movement, white Americans were staunchly opposed to racial equality.[49] Racial segregation existed in the North long before the Civil War, and Black people were barred from voting, sitting on juries, or attending white public schools.[50] Black Northerners were relegated to the most menial and lowest-paying jobs.[51] Some states, like Oregon, passed laws prohibiting Black people from migrating to them.[52] Be it through enslavement, segregation, or exclusion, white Americans reinforced the social and constitutional racial order envisioned by the founders in 1789.

The intellectual community in the late 1700s and early-to-mid 1800s produced scholarship justifying the racialized subjugation of Black people. These intellectuals included some founders, like Benjamin Franklin, who claimed that Black people were "dark, sullen, malicious, revengeful and cruel in the highest [d]egree,"[53] and Thomas Jefferson, who theorized that Black people were "inferior to the whites in the endowments both of body and mind."[54] In the 1800s, scholars made names for themselves producing major works that rationalized the peculiar institution.[55] Additionally, even amongst academics that opposed chattel slavery, the idea of racial equality was soundly rejected.[56] Black inferiority was a maxim in antebellum America's academic tradition.[57]

The Supreme Court affirmed the constitutional racial order in its antebellum jurisprudence. Most of its decisions on issues directly related to

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[48] *See*, *e.g.*, An Act for the Gradual Abolition of Slavery, 1799 N.Y. Sess. Laws 388; An Act for the Gradual Abolition of Slavery, 1780 Pa. Laws 282. In New Jersey, however, slavery persisted until the Civil War. *See* Stuart Gold, *The "Gift" of Liberty: Testamentary Manumission in New Jersey - 1791-1805*, 15 Rutgers Race & L. Rev. 1, 7-8 (2014).

[49] *See* Ben-Dan, *supra* note 38, at 356, 358.

[50] *See* Peter Kolchin, American Slavery: 1619-1877, 82 (2003); *see also* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 884-85 (1994).

[51] Kolchin, *supra* note 50, at 82.

[52] *See* Greg Nokes, *Black Exclusion Laws in Oregon*, Or. Encyclopedia (May 7, 2024), https://www.oregonencyclopedia.org/articles/exclusion_laws [https://perma.cc/VJR8-ZRU6] (last visited Sep. 30, 2025).

[53] *See* Claude-Anne Lopez & Eugenia W. Herbert, The Private Franklin: The Man and his Family 305 (1975) (citing Benjamin Franklin, A Conversation on Slavery 41 (William B. Willcox, Dorothy W. Bridgwater, Mary L. Hart, Claude A. Lopez, C. A. Myrans, Catherine M. Prelinger, and G. B. Warden, eds., 1973) (1770)).

[54] *See* Thomas Jefferson, Notes on the State of Virginia 155 (J.W. Randolph ed., 1853) (1785).

[55] *See* Zamir Ben-Dan, *"Hold Your (Un)scholarly Tongue": Dismantling Sir Racism's 'Academic Freedom' Shield*, 33 S. Cal. Rev. L. & Soc. Just. 159, 184-85 (2024).

[56] *Id.*

[57] *Id.*

slavery were decided in favor of slaveholder interests.[58] Moreover, the Court deployed federalism as a means of constricting federal power; this had the effect of protecting slaveholder interests even in cases that were not directly related to chattel slavery.[59] The Court's most infamous antebellum decision, *Dred Scott v. Sandford*, reaffirmed this characterization of how the founding fathers envisioned the relationship between African Americans and the Constitution: "They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . ."[60] Throughout America, white supremacy was both the law and the public policy of the land.

In sum, the framers of the Constitution envisioned a nation in which Black people lacked citizenship rights, were devoid of any real political power, and were subservient to the interests of white people. This was the constitutional racial order of 1789. Thus, movements or efforts to bestow citizenship rights on Black people, grant them meaningful political power, and/or end their subservience to white interests are deviations from the constitutional racial order.

B. Historical Deviations from the Framers' Intentions

The two major historical events that exemplify deviations from the constitutional racial order of 1789 are Reconstruction and the Civil Rights Movement. This Section examines each in turn. The redemptions that followed each deviation will be examined in the next Section as well as in Part II.

1. The Reconstruction Era

Following the Civil War, the Radical Republican—led Congress was on a mission to effectuate a limited racial equality in America.[61] The Thirteenth Amendment, passed during the Civil War and ratified afterwards, ended chattel slavery in America.[62] The Fourteenth Amendment conferred

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[58] *See* Zamir Ben-Dan, *Deeply Rooted in American History and Tradition: The U.S. Supreme Court's Abysmal Track Record on Racial Justice and Equity*, 15 Ala. C.R. & C.L. L. Rev. 45, 70-76 (2024). Exceptions to the Court's proslavery slant are United States v. The Amistad, 40 U.S. (15 Pet.) 518, 597 (1841) (enslaved parties) (holding Sierra Leone nationals illegally shipped to Cuba before being captured by United States must be declared free), and Norris v. Crocker, 54 U.S. (13 How.) 429, 441 (1851) (holding lawsuit filed pursuant to Fugitive Slave Act of 1793 void because slaveowner filed suit after passage of the Fugitive Slave Act of 1850).

[59] *See* Ben-Dan, *supra* note 11, at 178-88.

[60] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

[61] *See* Ben-Dan, *supra* note 58, at 76-78.

[62] U.S. Const. amend. XIII.

civil rights upon African Americans,[63] and the Fifteenth Amendment prohibited express racial discrimination in voting.[64] African Americans took full advantage of their newfound freedom; they erected schools, built wealth, and were elected to public office at all levels of government.[65] At one point during Reconstruction, Black Americans constituted a majority in the South Carolina legislature.[66] Further, in response to widespread white supremacist violence throughout the South, Congress enacted legislation permitting federal intervention to protect Black citizenship rights, such as the three Enforcement Acts.[67]

The deviation that Reconstruction represented was far from thorough; Congress' racial equality experiment was limited. The Fourteenth Amendment granted only civil equality, i.e., the right to make and enforce contracts, to access the courts, and to be subject to like pains and punishments as white Americans; social equality was outside of the Amendment's purview.[68] The Fifteenth Amendment was similarly limited; its wording served not to grant an affirmative right to vote, but to prohibit states from overtly disenfranchising Black people because they were Black.[69] This language was adopted because most Republicans, like most of white America, were opposed to giving African Americans the right to vote; however, they wanted to protect the *Southern* Black vote from Democratic disenfranchisement efforts since it tended to favor their party.[70] Thus, the language of the Amendment left open the ability to disenfranchise Black voters using facially race-neutral means.

Nonetheless, much of white society resisted *any* deviation from the 1789 constitutional racial order. Like Chief Justice Roger Taney before the Civil War, white Americans after the war could not fathom the thought of Black Americans having rights worthy of respect.[71] Neither could Southern states;

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[63] U.S. Const. amend. XIV.

[64] U.S. Const. amend. XV.

[65] *See* Anderson, *supra* note 1, at 29; Wormser, *supra* note 1, at 26-27.

[66] *See The African American Odyssey: A Quest for Full Citizenship*, Library of Congress, www.loc.gov/exhibits/african-american-odyssey/reconstruction.html#obj12 [https://perma.cc/2G3L-YQGR] (last visited Oct. 4, 2025).

[67] *See*, *e.g.*, Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870) (current version at 42 U.S.C. § 1981); Enforcement Act of 1871, ch. 99, 16 Stat. 433 (1871) (repealed *See* Civil Rights Repeal Act 28 Stat. 36 (1894); Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (1871) (current version at 42 U.S.C. §§ 1983, 1985).

[68] *See* Keith E. Sealing, *The Myth of a Color-Blind Constitution*, 54 Wash. U. J. Urb. & Contemp. L. 157, 198-99 (1998); Raoul Berger, *The "Original Intent"—As Perceived by Michael McConnell*, 91 Nw. U. L. Rev. 242, 250-51 (1996); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 58 (1955).

[69] *See* Taunya Lovell Banks, *Trampling Whose Rights? Democratic Majority Rule and Racial Minorities: A Response to Chin and Wagner*, 43 Harv. C.R.-C.L. L. Rev. 127, 135-36 (2008).

[70] *Id. See also* William Gillette, The Right to Vote: Politics and the Passage of the Fifteenth Amendment 31 (1965).

[71] *See* Anderson, *supra* note 1, at 13; *see also* David M. Oshinsky, "Worse Than Slavery": Parchman Farm and the Ordeal of Jim Crow Justice 13 (1996).

almost immediately after passage of the Thirteenth Amendment, Mississippi led the way in reproducing slavery through Black Codes.[72] President Andrew Johnson, sympathetic to the former Confederacy and hostile to Black people, assailed Reconstruction as an attempt to effect "negro domination" of the South and did everything in his power to thwart Congress' efforts to promote racial equality.[73] In the 1870s, amid the Panic of 1873[74] and a growing disgruntlement amongst Northern white citizens, the political tide would turn.[75] The first racial redemption was on the horizon.

2. The Civil Rights Era

The Civil Rights Era was also a deviation from the framers' intended constitutional order. After World War II, the federal government promoted formal equality as a means of beautifying its image on the global stage in the midst of the emerging Cold War.[76] In response to sustained Black protest,[77] Congress passed several pieces of civil rights legislation for the first time since Reconstruction.[78] The Supreme Court, despite having been a longtime adversary of racial justice, invalidated formal racial segregation and upheld Congress' civil rights legislation against vigorous legal challenge.[79] Both the executive and judicial branches of government forced racial integration through desegregation orders as well as the use of U.S. Marshals and federal troops.[80] Once again, Black Americans took full advantage; they broke

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[72] *See* Anderson, *supra* note 1, at 19-20.

[73] *Id.* at 30-31.

[74] The Panic of 1873, a collapse of major banks in the United States, caused an economic depression that lasted from 1873 to 1879. *See The Panic of 1873*, PBS, https://www.pbs.org/wgbh/americanexperience/features/grant-panic/ [https://perma.cc/FUX9-TBNW] (last visited Sep. 30, 2025).

[75] Wormser, *supra* note 1, at 28-29.

[76] *See* Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 524-25 (1980).

[77] *See* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 35-40 (2010). For a detailed treatment of the Civil Rights Movement, *see generally Eyes on the Prize: America's Civil Rights Years 1954-1965* (PBS television broadcast, aired 1987).

[78] *See, e.g.*, Civil Rights Act of 1957, Pub. L. 85-315, 71 Stat. 634; Civil Rights Act of 1964, Pub. L. 88-352, Title IV, § 401(b); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

[79] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[80] *See*, *e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Alexis Clark, *Why Eisenhower Sent Federal Troops to Little Rock After Brown v. Board*, History (Sep. 13, 2023), https://www.history.com/articles/little-rock-nine-brown-v-board-eisenhower-101-airborne [https://perma.cc/F28Q-QZAY] (last visited Oct. 4, 2025); *Deputy U.S. Marshals Escort Ruby Bridges to School in 1960*, U.S. Marshals Service (Nov. 14, 2024), https://www.usmarshals.gov/news/stories/deputy-us-marshals-escort-ruby-bridges-school-1960 [https://perma.cc/X933-W699] (last visited Oct. 4, 2025).

barriers, diversified professional fields, excelled in higher education, and won election to political offices at all levels of government.[81]

Like with Reconstruction, the deviation that the Civil Rights Movement represented was also significantly incomplete. The Supreme Court voided "separate but equal," but not much else; the white supremacist architecture erected in the latter years of Reconstruction remained largely untouched, and systemic racism went entirely unaddressed by the Warren Court despite its opportunity to speak to it.[82] Moreover, the Court enabled defiance of *Brown v. Board of Education* with its "all deliberate speed" command in *Brown v. Board of Education II*.[83] As with the Fifteenth Amendment, the Civil Rights Act of 1964 was drafted in a way that targeted Southern racism while leaving Northern racism intact.[84] The Fourteenth Amendment remained a weak protection against anti-Black racism.

Nonetheless, even this limited equality spawned a massive backlash. Politicians publicly lambasted *Brown v. Board of Education* and state governments rebelled against it both subtly and openly.[85] Congressional debate during the Civil Rights Act of 1957 produced the longest individual filibuster in American history,[86] and legislative debate during the Civil Rights Act of 1964 produced the longest collective filibuster in American history.[87] White citizens mobilized across the country to resist desegregation. Some groups, like the Ku Klux Klan, resisted through violence;[88] other groups, like the White Citizens Council, chose other means such as social and economic retaliation against all who promoted and pursued integration.[89] Moreover,

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[81] *See* Anderson, *supra* note 1, at 99, 103.

[82] *See* Ben-Dan, *supra* note 42, at 1690-97.

[83] *See* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955). Several scholars have argued that *Brown II*'s command of "all deliberate speed," as opposed to demanding immediate compliance, invited defiance and delay of *Brown I*. *See, e.g.*, Harris, *supra* note 36, at 1755 ("[W]hen *Brown II* directed the schools to desegregate 'with all deliberate speed' rather than immediately, it articulated a new and heretofore unknown approach to rectifying violations of constitutional rights – an approach that invited defiance and delay."). As states dragged out and delayed desegregation efforts over the next ten years (and beyond), the Warren Court started losing its patience. *See, e.g.*, Bradley v. School Bd., Richmond, 382 U.S. 103, 105 (1965) ("[M]ore than a decade has passed since we directed desegregation of public school facilities 'with all deliberate speed….' Delays in desegregating school systems are no longer tolerable.").

[84] For example, northern congressmen wrote a loophole into the Civil Rights Act of 1964 that exempted northern cities from having to desegregate deeply segregated schools in their jurisdictions, rightfully drawing the ire of the South for behaving hypocritically. *See* Jeanne Theoharis, A More Beautiful and Terrible History: The Uses and Misuses of Civil Rights History 46-47 (2018).

[85] *See* Anderson, *supra* note 1, at 75-97; Ben-Dan, *supra* note 38, at 403-04.

[86] *See On This Day, Filibuster Fails to Block the Civil Rights* Act, National Constitution Center (Jun. 19, 2024), https://constitutioncenter.org/blog/on-this-day-congress-passes-the-civil-rights-act [https://perma.cc/TUG7-JBX7] (last visited Oct. 4, 2025).

[87] *Id.*

[88] *See* Jared A. Goldstein, *The Klan's Constitution*, 9 Ala. C.R. & C.L. L. Rev. 285, 345-46 (2018).

[89] *See id.* at 352, 356-57. *See also On This Day – Jul 11, 1954: First White Citizens' Council Forms to Oppose School Integration*, Equal Just. Initiative, calendar.eji.org/racial-injustice/jul/11 [https://perma.cc/TUG7-JBX7] (last visited Oct. 4, 2025).

the Supreme Court's public image took a nosedive: "Accused of protecting [B]lacks…and other perceived threats to white, middle-class America, the Warren Court was quite possibly the most vilified Supreme Court in United States history."[90] In the 1970s, an economic downturn and growing white disgruntlement once again helped to usher in a second racial redemption.

C. The Three Historical Strands of Racial Redemptions

In light of this history, *redemption* in the context of American racism means to restore the 1789 constitutional racial order.[91] This is certainly what it meant to white supremacists throughout the South during the latter half of Reconstruction. Through the use of violence, intimidation, and the vote, they eradicated multiracial state governments and firmly established anti-Black governance.[92] They slaughtered Black people as well as white Republicans allied to them.[93] Black institutions were systematically destroyed.[94] Those who acted accordingly were called "Redeemers" because, through violent resistance to Reconstruction, they fully restored white supremacy in the South and successfully undermined the national experiment in racial equality.[95]

Based on this history, *redemption* refers to the process of returning, as close as possible, to an America where the rights of Black people go unrecognized by the dominant society. The most committed adherents to white supremacy seek to "take back" national power from those that attempt to undermine it, and they seek to replicate past systems of racialized subjugation to the extent that is socially acceptable in the given era. Redemptions come after "Reconstructions," or deviations from the framers' intended constitutional order, and they are designed to undo those deviations and return as close as possible to the framers' intended constitutional order. A racial redemption is white society's attempt, following a period of social uprising

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[90] Lain, *supra* note 15, at 1363.

[91] Aliza Cover defines "redemption" as "reinstating in practice the racial caste system that had been prohibited by law." *See* Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 Brook. L. Rev. 1141, 1160 (2014). With both redemptions, reinstatement required the erection of new legal regimes to replace the outlawed regimes. The first racial redemption created workarounds to the three Reconstruction Amendments and related legislation. *See* A.E. Dick Howard, *Who Belongs: The Constitution of Virginia and the Political Community*, 37 J.L. & Pol. 99, 111 (2022) ("The Redeemers could not bring back [chattel] slavery – the 13th Amendment stood in the way of that – but they could set out to restore white supremacy."). The second racial redemption circumvented the legislation of the Civil Rights Era as well as the incorporation of the Bill of Rights.

[92] *See* Ben-Dan & Appling, *supra* note 18, at 1403.

[93] *See id.* at 1388, 1391.

[94] *See id.*

[95] *See Reconstruction in America: Racial Violence After the Civil War, 1865-1876*, Equal Just. Initiative (2020), https://eji.org/report/reconstruction-in-america/ [https://perma.cc/F7P8-DD9P] (last visited Oct. 4, 2025).

coupled with the federal government's pursuit of racial equality, to reverse the gains of Black Americans and fully restore white dominance to the extent permissible in the newly constructed legal and societal landscape.[96]

This article defines the first racial redemption as occurring from 1870 to the early 1920s, and it defines the second racial redemption from the 1970s to the present. The second redemption, in the words of Professor Kermit Roosevelt III, "continues to this day."[97] With respect to the first redemption, this article largely adopts Professor Michael Perman's timeline for the first redemption, but extends it beyond Perman's endpoint of 1908. Perman dates what he calls "Redemption" as having occurred from the 1870s to the 1890s while dating "Restoration" from 1890-1908.[98] However, as defined above, restoration *is* redemption; it is inherent in redemption in the context of American racism. Redeeming is not just about white racists seizing political power; it is about the actualization of that power to return America as close as possible to what existed before. Consequently, the early 1920s seems the appropriate endpoint since by that time, World War I had ended, the federal government began considering national anti-lynching legislation, lynchings started to die down, and the Supreme Court began to interrupt the charade that passed as criminal justice in the South.[99]

Each of the two racial redemptions included three smaller strands of redemption interwoven into one whole. Each featured a *citizen redemption*, in which the white citizenry and the police rose up and took action that helped to reverse any civil rights gains achieved by Black people.[100]

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[96] While the focus of this article is on the relationship between criminal law and anti-Black racism, scholars have noticed how the criminal law has been weaponized against other racial groups in the post-Civil Rights Era, such as Latino/a Americans. *See, e.g.*, Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. Rev. 1543 (2011) (arguing that Fourth Amendment cases related to Latino/a noncitizens have watered down the Fourth Amendment); *see also* Evelyn M. Rangel-Medina, *Citizenism: Racialized Discrimination by Design*, 104 B.U. L. Rev. 831, 875-78 (2024) (arguing the same). Given that other nonwhite groups agitated during, and benefitted from, the Civil Rights Movement (*see, e.g.*, El Movimiento, or the Latino/a American Civil Rights Movement), racial redemptions can also be envisioned as the white backlash against nonwhite groups generally.

[97] Kermit Roosevelt III, *Reconstruction as Revolution: The Fourteenth Amendment and the Destruction of Founding America*, 25 U. Pa. J. Const. L. 1073, 1095 (2023).

[98] *See* Michael Perman, Struggle for Mastery: Disenfranchisement in the South, 1888-1908 10-11 (2001).

[99] *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48, 50-58 (2000).

[100] Here, I use the word "citizen" not in terms of its legal construct, but in terms of its practical construct, as described by human rights activist Malcolm X during an interview at UC Berkeley: "If white people really passed meaningful laws, it would not be necessary to pass any more laws. There are already enough laws on the law books to protect an American citizen. You only need additional laws when you're dealing with someone who's not regarded as an American citizen." *See supra* 41, at 9:55-10:22. Here, "American citizen" refers to a person belonging to a class in America that enjoys all the rights that are becoming of Americans. Based on this conception, Black people are practically not American citizens because they do not enjoy the full fruits of Americanism. Thus, I generally use the term "citizen" in this article only when I am talking about white Americans.

Each featured a *political redemption*, in which racist politicians within and without local court systems exploited white citizen backlash to maximize electoral success, pass laws to stymie racial progress, and operate judicial systems to ensure white domination.[101] Finally, each featured a *judicial redemption*, in which the Supreme Court issued precedents that undermined racial justice and empowered the white backlash.[102] This Section concludes with an examination of each redemption strand from the lens of traditional civil rights law and practice. It details how the white citizenry, the white political class, and the white Supreme Court acted to fully restore white supremacy *outside of the criminal law context.*[103] The relationship between criminal law and the racial redemption is analyzed in detail in Part II.

1. Citizen Redemption

The citizen redemption that began during Reconstruction took two main forms. The first was violence. The South was a bloodbath for the first few years of Reconstruction, but Congress and President Ulysses Grant worked diligently to curb the violence in the early 1870s.[104] However, once the executive branch of the federal government abandoned the enforcement of civil rights legislation in 1873, white supremacist violence surged.[105] One of the chief catalysts for violence was Black suffrage; African Americans who tried to vote, as well as white Republicans who enabled and supported them, were frequent targets for murder.[106]

The second main form of citizen redemption was white participation in electoral politics. White citizens went to the polls and voted in leadership

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Also, I include police as participants in the citizen redemption as opposed to political because of the close relationship between citizens and the police as well as their similarities in white supremacist functions. For example, citizens were empowered to make arrests just like law enforcement, and they violently exercised that power against Black people during and after slavery. *See* Ira P. Robbins, *Citizen's Arrest and Race*, 20 Ohio St. J. Crim. L. 133, 139-50 (2022). This association has roots; from the antebellum period onward, the white citizenry collaborated closely with law enforcement to punish Black people. *See generally* Taja-Nia Y. Henderson, *Property, Penalty, and (Racial) Profiling*, 12 Stan. J. Civ. Rts. & Civ. Liberties 177 (2016). Citizens and police are mainly actors on the street.

[101] For purposes of this article, my use of the term "politician" includes persons acting in official positions and utilizing their powers to formally create and carry out law in organized legal fora. Legislators create the law in legislatures, and executive officers enforce the law through implementation of whatever legal mechanisms are at their disposal. Within local criminal judicial systems, judges and prosecutors create and carry out law within the courthouses and drive the court processes.

[102] I separate the Supreme Court from local courts because the Court's function goes far beyond administering local judicial processes; the Court is the self-appointed designer of the constitutional structures to which all other courts must adhere.

[103] There will obviously be some overlap, as white citizen violence against Black voters is indicative of unpunished crime. What I do not discuss here is the white supremacist use of criminal law and state criminal judicial processes as a means of fully restoring racialized subjugation.

[104] *See* Ben-Dan & Appling, *supra* note 18, at 1387-93.

[105] *Id*. at 1402-03.

[106] *See* Anderson, *supra* note 1, at 38-40.

that promised to end Reconstruction, restore white supremacist rule, and deprive Black people of citizenship rights.[107] Violence and white suffrage went hand in hand. In 1875, for example, white Democrats in Mississippi implemented a "Mississippi Plan" in which they voted and then defrauded, intimidated, and slaughtered Black people that tried to vote.[108] This led to the "redemption" of Mississippi; white Democrats—the party of the Klan—seized control of the state government.[109] Through violent suppression of the vote, other southern states would be "redeemed" from white or possibly multiracial Republican rule.[110] White citizen anger was the reason both candidates in the 1876 presidential election promised to end Reconstruction.[111]

For decades after Reconstruction ended, white citizens continued the restoration of the 1789 constitutional racial order. They lynched Black people that tried to vote or otherwise transgressed the socioracial order.[112] They destroyed Black communities that were prospering, wiping out, in a matter of days, wealth that took years and even generations to build.[113] In Wilmington, North Carolina, white citizens overthrew the elected, multiracial city council and chased out or killed Black people that lived in the area.[114] White citizens organized and segregated the country through homeowners' associations and the use of racially restrictive covenants.[115] White intellectuals justified racialized subjugation both within the academy and in

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[107] *See* Ben-Dan & Appling, *supra* note 18, at 1403.

[108] *See Tue. 11.02.1875: The Mississippi Plan is Enacted*, African American Registry, https://aaregistry.org/story/the-mississippi-plan-political-deviance/ [https://perma.cc/H2PG-NZHK] (last visited Sept. 30, 2025); Jerry Mitchell, *On this day in 1875*, Mississippi Today (Nov. 2, 2024), https://mississippitoday.org/2024/11/02/on-this-day-in-1875/ [https://perma.cc/LSN9-GP54]; *see also* MaryKatherine Klaybor, "The Policy of Intimidation Had Been So Successfully Managed that Many Colored Men Kept Away From the Polls": Violence in the Reconstruction Era South (2020) (B.A. Thesis, Butler University) (Digital Commons @ Butler University).

[109] *Id*.

[110] *See Reconstruction in America: Racial Violence After the Civil War, 1865–1876*, Equal Justice Initiative (2020), https://eji.org/report/reconstruction-in-america [https://perma.cc/6UPW-24B9].

[111] Wormser, *supra* note 1, at 29-30.

[112] *See* David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 Law & Soc'y Rev. 793, 811 (2005); James Allen, Hilton Als, Congressman John Lewis & Leon F. Litwack, Without Sanctuary: Lynching Photography in America 8-15 (2000).

[113] *See* James Loewen, Lies My Teacher Told Me: Everything Your American History Textbook Got Wrong, Second Edition 166 (2007); *see e.g.*, USA Today, *Tulsa race massacre of 1921: The painful past of 'Black Wall Street'*, at 0:20 (YouTube, Jan. 15, 2020), https://www.youtube.com/watch?v=3sorCAFQOqc.

[114] *See* Wormser, *supra* note 1, at 85; *Nov. 10, 1898: Wilmington Massacre*, Zinn Education Project, https://www.zinnedproject.org/news/tdih/wilmington-massacre-2/ [https://perma.cc/R9HM-4EWT] (last visited Oct. 4, 2025). For a fuller treatment of the coup, see Sandra L. Rierson & Melanie H. Schwimmer, *The Wilmington Massacre and Coup of 1898 and the Search for Restorative Justice*, 14 Elon L. Rev. 117 (2022).

[115] *See* Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 78-81 (2017).

the public discourse.[116] In sum, the first citizen redemption helped to segregate America and complemented political and judicial efforts to deprive Black people of their citizenship rights.

White citizen violence lost its effectiveness as a tool of redemption in the 1960s; aside from Black vigilance in the face of racial brutality, white citizen violence spawned federal civil rights legislation and aggressive enforcement of desegregation decrees.[117] Thus, the citizen redemption in response to the Civil Rights Movement looked different. White suffrage was a major part of the second citizen redemption; white citizens voted for the candidates that promised (in dog whistle language) to resist racial integration and dial back on federal enforcement of civil rights.[118] White citizens publicly ridiculed civil rights protests, especially those that occurred in the North, and blamed the plights of Black people on their own moral failings.[119] They enrolled their children in private schools and academies to subvert *Brown v. Board of Education*.[120] They fled from neighborhoods that were diversifying racially and moved to the suburbs, where most Black folks couldn't afford to live.[121]

In the decades after the Civil Rights Movement, white citizens once again persisted in redeeming the nation from supporters of the Black freedom struggle. They continued to support covertly (and in the case of Donald Trump, overtly) racist politicians and undermine efforts to racially integrate through white flight and advocacy.[122] White citizens have also acquired a novel replacement tool for white violence: the civil rights lawsuit. White citizens started suing to dismantle any efforts to remedy the effects of past and present racism, classifying such efforts as "racial discrimination."[123]

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[116] *See* Ben-Dan, *supra* note 55, at 187-94, 198-202.

[117] *See* Ben-Dan, *supra* note 38, at 394-410.

[118] *See* Ian F. Haney Lopez, Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class, 22-27, 55-59, 107-11 (2014).

[119] *See* Theoharis, *supra* note 84, at 37-68.

[120] *See* Anderson, *supra* note 1, at 73-74, 82, 83.

[121] *See* Leah Platt Boustan, Competition in the Promised Land: Black Migrants in Northern Cities and Labor Markets 107, 110 (2017).

[122] *See, e.g.*, Jim Heaney, *The numbers behind the vote for president*, Investigative Post (Nov. 10, 2024), https://www.investigativepost.org/2024/11/10/the-numbers-behind-the-vote-for-president/ [perma.cc/U8PV-6B9Z]; Linda Zou, *Diversifying neighborhoods and schools engender perceptions of foreign cultural threat among White Americans*, 151J. Experimental Psychol. Gen. 1115-31 (2022); Rigodis Appling Diana Nevins, Olayemi Olurin, & Jason Wu, *When the School Segregation Dog Whistle Becomes a Bullhorn*, Gotham Gazette (2020), https://www.gothamgazette.com/columnists/other/130-opinion/9673-school-segregationist-dog-whistle-becomes-bullhorn-new-york-city [http://perma.cc/G64R-JP8V].

[123] *See, e.g.*, Allan Bakke's lawsuit in Regents of California v. Bakke, 438 U.S. 265, 293-94 (1978); *see also* Harris, *supra* note 36 at 1769-73. Some might argue that the phenomenon of white Americans filing civil rights lawsuits should fall under "judicial redemption" instead of "citizen redemption." I think it belongs here, however, because as the Supreme Court itself suggested, citizens (and their attorneys) have to raise the claims before a court can adjudicate them. *See* Legal Services Corp. v. Velazquez, 531 U.S. 533, 545-46 (2001) ("An informed, independent judiciary presumes an informed, independent bar…. By seeking to prohibit the analysis of

In the decades since the 1970s, white citizens have been the most successful civil rights plaintiffs before the Supreme Court.[124] Because of their efforts, affirmative action and race-conscious remedial measures were on life support by 1995,[125] and they functionally died in 2023.[126]

In sum, the second citizen redemption helped to keep white supremacy entrenched in society by prohibiting affirmative efforts to reverse its effects.

2. Political Redemption

The political redemption that began during Reconstruction favored the Democratic Party, the more overtly racist political party at the time. Throughout Reconstruction, white Democrats opposed passage of the Reconstruction Amendments and accompanying legislation, denied that racialized carnage was occurring in the South, and thwarted Republican efforts both to reduce the violence and to give meaning to Black citizenship rights.[127] With growing white citizen disgruntlement over Reconstruction, Democrats stood to gain. By January 1875, the party had fully captured five southern state governments and also the Florida legislature.[128] They had also won a majority of seats in the House of Representatives and greatly narrowed their deficit in the U.S. Senate.[129] This electoral success ensured the death of congressional Reconstruction in March 1875.

The Democratic Party's successes forced the Republican Party to lessen their public support for racial justice and equality to woo back voters. Republican president Ulysses Grant abandoned civil rights enforcement efforts and refused to intervene in southern state elections despite growing white supremacist violence.[130] As noted before, both presidential candidates

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certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which *courts must depend for the proper exercise of the judicial power.*") (emphasis added). Thus, the white citizen plays a role in getting the case in front of courts in general and the Supreme Court in particular; otherwise, courts cannot rule on them.

[124] *See* Haney Lopez, *supra* note 118, at 86-87 ("Under the Court's approach to discrimination against nonwhites, only a bullheaded bigot who publicly vows to harm minorities should worry; no one else need fret. Since the Supreme Court adopted the malice test in 1979, it has never found discrimination against nonwhites under that approach, not even once."). By contrast, the Court found anti-white discrimination in several cases, including in Shaw v. Reno, 509 U.S. 630, 650-51, 657 (1993), Gratz v. Bollinger, 539 U.S. 244, 270 (2003), and Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 745-48 (2007).

[125] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223-27 (1995).

[126] *See* Students for Fair Admissions v. President and Fellows of Harvard College, 600 U.S. 181, 230 (2023).

[127] *See, e.g.*, Ben-Dan & Appling, *supra* note 18, at 1400 (citing Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 St. Louis U. L.J. 331, 333-34, 336, 341, 345 (1967)).

[128] *See* Wormser, *supra* note 1, at 29-30.

[129] *Id.*

[130] *Id.* at 29-32.

in the 1876 election promised to end Reconstruction if elected president.[131] As the decades wore on, the Republican Party continued to distance itself from the Black freedom struggle. Nonetheless, the Democratic Party would portray the Republican Party as the political party that favored Black people, much to the success of the former and to the chagrin of the latter.[132] In 1892, the Democratic Party won the presidency and majorities in both houses of Congress.[133] By this time, the Republican Party was just as disinterested in advancing civil rights causes as the Democrats were.[134] The Democrats controlled the southern state governments for the better part of a century, from Reconstruction until the 1960s, after which northern Democrats passed the Civil Rights Act and Voting Rights Act.[135]

While in power, white politicians at all levels of government worked to reimplement racialized subjugation to the extent allowable under current constitutional law. In 1894, the Democratic Congress repealed most of the three Enforcement Acts.[136] Southern states adopted economic policies that directly or indirectly harmed Black people, including "tax cuts for the wealthy," the cutting of social programs, the closing of government-funded institutions, and the dismantling of public education.[137] They ignored white supremacist violence within their jurisdictions.[138] They passed Jim Crow

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[131] *Id.* at 30.

[132] *See, e.g.*, *1892 Democratic Party Platform*, American Presidency Project (June 21, 1892), https://www.presidency.ucsb.edu/documents/1892-democratic-party-platform [https://perma.cc/7G4T-859G].

[133] *See The Progressive Era: 5. The Democratic Triumph of 1892*, Mises Institute, https://mises.org/online-book/progressive-era/5-democratic-triumph-1892 [https://perma.cc/3YL5-9TN6] (last visited Sep. 30, 2025); *The Election of 1892 (November 8, 1892)*, UCLA College of Social Sciences, https://www.sscnet.ucla.edu/history/waughj/classes/gildedage/private/gilded_age_politics/history/election_of_1892.html (citing Paul F. Boller, Jr., Presidential Campaigns 162-64 (2004)); John M. Cunningham, *United States presidential election of 1892*, Britannica, https://www.britannica.com/event/United-States-presidential-election-of-1892 [https://perma.cc/X6FL-GAMU] (last visited Sep. 30, 2025).

[134] The Republican Party's 1892 platform, for example, made no reference to promoting civil rights for Black people (despite the Democratic Party's accusations to the contrary). The closest it came to doing so was noting that it "has always been the champion of the oppressed and recognizes the dignity of manhood, irrespective of faith, color, or nationality; it sympathizes with the cause of home rule in Ireland, and protests against the persecution of the Jews in Russia." *See Republican Party Platform of 1892*, American Presidency Project (June 9, 1892), https://www.presidency.ucsb.edu/documents/republican-party-platform-1892 [https://perma.cc/7G25-RE8H]. Its 1896 platform, which was announced one month after *Plessy* was decided, made no reference whatsoever to race. *See Republican Party Platform of 1896*, American Presidency Project (June 18, 1896), https://www.presidency.ucsb.edu/documents/republican-party-platform-1896 [https://perma.cc/K7H2-LTBD].

[135] *See* Dewey W. Grantham, The Life and Death of the Solid South xii, 58 (1988); *see also The Solid South*, PBS, https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-solid-south/ [https://perma.cc/LAP4-7WV5] (last visited Sept. 30, 2025).

[136] *See* Repeal Act of February 1894, ch. 25, 28 Stat. 36 (1894).

[137] *See* Elijah McDonnaugh, *The Limits of Equality: A People's History of Affirmative Action*, 17 Harv. L. & Pol'y Rev. 43, 52 (2022); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 Calif. L. Rev. 1923, 1936 (2000).

[138] *See* Zamir Ben-Dan, *American Nightmare: A Story of Lynch Law Terrorism in the Twenty-First Century*, 16 Ne. U. L. Rev. 433, 478-81 (2024).

laws that segregated Blacks from whites in all walks of life. Southern states rewrote their state constitutions to exclude Black suffrage, utilizing poll taxes, literacy tests, and other means.[139] They gerrymandered their respective voting districts to dilute and destroy Black voting power.[140] Both state and federal politicians worked with private white citizens to segregate America, passing and administering legislation to deprive Black people of the opportunities to own homes and build wealth.[141] States gave the eugenics movement the force of law through the passage of compulsory sterilization statutes.[142] The first political redemption, in short, complemented the citizen redemption and helped to restore racialized subjugation in America.

Like the second citizen redemption, the second political redemption was different than the first. With changes in the rules of public discourse, politicians could no longer be openly racist and reasonably realize electoral success.[143] Thus, as Ian Haney Lopez brilliantly demonstrates, right wing politicians—now belonging to the *Republican Party*—adopted dog whistle politics.[144] They opposed racial integration and federal enforcement of civil rights, but they did so in racially coded terms.[145] Nonetheless, with white citizen anger growing across the country, presidential candidate Richard Nixon found electoral success with a campaign strategy that targeted the disenchanted white voter.[146] In 1972, nearly every state in the union voted Republican.[147] As southern white voters fled the Democratic Party, the

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[139] *See, e.g.*, *Nov. 1, 1890: Mississippi Constitution*, Zinn Education Project, https://www.zinnedproject.org/news/tdih/mississippi-constitution [https://perma.cc/YPX6-QPSW] (last visited Sep. 30, 2025); *Sep. 10, 1895: South Carolina Constitutional Convention Convened*, Zinn Education Project, https://www.zinnedproject.org/news/tdih/sc-constitutional-convention [https://perma.cc/A3K9-SDUL] (last visited Sep. 30, 2025); *see North Carolina Votes to Disenfranchise Black Residents*, Equal Just. Initiative, https://calendar.eji.org/racial-injustice/aug/02 [https://perma.cc/X8YM-DHS7] (last visited Sep. 30, 2025); Sarah A. Warren, *Alabama Constitution of 1901*, Encyclopedia of Ala. (Sep. 9, 2025), http://encyclopediaofalabama.org/article/h-3030 [https://perma.cc/QH5E-W276].

[140] *See* Travis Crum, *Reconstruction Racially Polarized Voting*, 70 Duke L.J. 261, 310 (2020); Joel Heller, *Shelby County and the End of History*, 44 U. Mem. L. Rev. 357, 366-67 (2013).

[141] *See* Ben-Dan, *supra* note 42, at 1682-84.

[142] *See* Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty, 60-64, 69 (1997); *see also* Virginia Sterilization Act of 1924, ch. 394, 1924 Va. Acts 569 (repealed 1968).

[143] *See* Rick Perlstein, *Exclusive: Lee Atwater's Infamous 1981 Interview on the Southern Strategy*, The Nation (Nov. 13, 2012), https://www.thenation.com/article/archive/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy// [https://perma.cc/5F2N-44PB]. In this interview, Republican strategist Lee Atwater summed up the Republican Party's electoral strategy in the post-Civil Rights Era. As Lopez identifies, Atwater's career "traced the rise of GOP dog whistle politics." *See* Haney Lopez, *supra* note 118, at 57.

[144] *See* Haney Lopez, *supra* note 118, at 3-4, 13-24. Lopez identifies Republican Barry Goldwater as the first politician to use dog whistle politics on the campaign trail, and Republican Richard Nixon as the first presidential candidate to successfully deploy dog whistle politics.

[145] *Id.*

[146] *Id.* at 18-19, 25-27.

[147] *See 1972 Presidential Election*, 270toWin, https://www.270towin.com/1972_Election/ [https://perma.cc/RT75-X8WX] (last visited on Sep. 30, 2025).

Republican Party became the more racist party. Their appeals to racism translated to victories at the polls.

The Republican Party's successes forced the Democratic Party to rethink their support for civil rights causes. Indeed, when Jimmy Carter successfully ran for president in 1976, he embraced dog whistle politics and expressed his support for *preserving* segregated neighborhoods and schools.[148] Through the 1980s, the Republican Party dominated the executive branch of government; Ronald Reagan won two terms as president, both in landslide victories, and his vice president George H.W. Bush became the first candidate to be elected president as a sitting vice president in over 150 years.[149] When the Democratic Party finally recaptured the White House in 1992, it did so with a candidate who had largely adopted the Republican Party's rightwing platform. Bill Clinton was anti-big government, believed that African Americans' troubles were the products of their own moral failings, and embraced the tough-on-crime rhetoric and stances of the right wing.[150]

Once again, white politicians worked to restore racialized subjugation, to the extent socially acceptable in the post-Civil Rights Era. Many of the economic policies adopted during the first racial redemption—tax cuts for the wealthy, the shuttering of social programs, the closing of government-funded institutions, the dismantling of public education—were adopted in the decades following the Civil Rights Movement.[151] The Civil Rights Division of the Justice Department did not simply become useless in the 1980s; it was destructive. It ceased to properly investigate African Americans' claims of racial injustice, and it undermined racial integration efforts, Black voting rights, and affirmative action.[152] Many states continued to encumber Black suffrage rights, and those efforts have increased since 2013.[153] More recently, many states and municipalities have banned

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[148] Haney Lopez, *supra* note 118, at 55-56.

[149] The last sitting vice president to be elected president before George H.W. Bush was Martin Van Buren, the eighth president of the country, in 1836.

[150] Haney Lopez, *supra* note 118, at 107-11.

[151] *See e.g.*, Anderson, *supra* note 1, at 118-23; Anthony E. Cook, *The Moynihan Report and the Neo-Conservative Backlash to the Civil Rights Movement*, 8 Go. J. L. & Mod. Crit. Race Persp. 1, 7 (2016) ("Politics indeed made for strange bedfellows. These divergent constituencies put their differences aside and united around three core values—limited government, national security, and tax cuts—values interpreted by each constituent group in different ways. Just as cultural framing was an important dimension of the counterhegemonic Civil Rights Movement, which played on fundamental notions of fairness, constitutionalism, and the American Dream, cultural framing would be no less important in the hegemonic backlash to that very same movement."); Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 Harv. L. Rev. 1, 140-41 (2020).

[152] *See* William R. Yeomans, *The Politics of Civil Rights Enforcement*, 53 Washburn L. J. 509, 522-26 (2014). The Equal Employment Opportunity Commission (EEOC), under the "leadership" of future Supreme Court Justice Clarence Thomas, also became destructive during the 1980s. *See* Haney Lopez, *supra* note 118, at 140.

[153] *See, e.g.*, Barrington M. Salmon, *Jim Crow 2.0: As U.S. Elections Near, New Efforts to Suppress Black Votes*, Al Jazeera (Mar. 12, 2024), https://www.aljazeera.com/news/2024/3/12/

the teaching of America's racial history.[154] Since 2023, rightwing state and federal officials have sought to squash "diversity, equity, and inclusion" initiatives and have reached out to private companies demanding that they stop "discriminating" against white people.[155]

In short, the second political redemption complemented the second citizen redemption and ensured the continuation of white dominance in the late twentieth and the twenty-first centuries.

3. Judicial Redemption

Finally, the judicial redemption that began during Reconstruction did two things regarding civil rights: (1) it narrowed the scopes of the newly ratified Reconstruction Amendments; and (2) it invalidated civil rights legislation as exceeding the scope of Congress's federal power. In 1873, it narrowed

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jim-crow-2-0-as-us-elections-near-new-efforts-to-suppress-black-votes [https://perma.cc/2S-GM-NSSV] (last visited Oct. 4, 2025); Kira Lerner, *A timeline of voting restrictions passed by US states since 2013*, Guardian (Jun. 20, 2024, 2:45 PM ET), https://www.theguardian.com/us-news/2023/jun/25/voting-rights-act-2013-timeline-state-voter-restriction-map-registration-id-absentee-mail [https://perma.cc/T6FU-3NMH]; *How Shelby County v. Holder Broke Democracy*, Legal Defense Fund, https://www.naacpldf.org/shelby-v-holder-impact/ [https://perma.cc/TGL9-QJZM] (last visited Sept. 30, 2025).

[154] *See* Katharina Buchholz, *Anti-CRT Measures Adopted by 28 States*, Statista (Apr. 19, 2023), https://www.statista.com/chart/29757/anti-critical-race-theory-measures/ [https://perma.cc/7SLX-Z5JK]. For detailed information on the abundance of anti-CRT measures adopted, see CRT Forward, UCLA Law School's tracker for such activity. *See* "CRT Tracker," UCLA Sch. L., https://crtforward.law.ucla.edu/map/ [https://perma.cc/L6SF-G3ZP].

[155] *See* Ja'han Jones, *After gutting affirmative action, Republicans target minority scholarships*, MSNBC (Jul. 4, 2023, 6:00 AM), https://www.msnbc.com/the-reidout/reidout-blog/republicans-minority-scholarships-wisconsin-rcna92426 [https://perma.cc/2Q9Y-YRZH]; *See* Jessica Guynn, *Affirmative action wars hit the workplace: Conservatives target 'woke' DEI programs*, USA Today (Sep. 8, 2023), https://www.usatoday.com/story/money/2023/09/08/affirmative-action-republicans-target-diversity-programs/70740724007/ [https://perma.cc/6L9W-VAPV]; *see also* Letter from Attorney General of Missouri Andrew Bailey (Jun. 29, 2023), https://ago.mo.gov/wp-content/uploads/2023-06-29-equal-protection-clause-letter.pdf [https://perma.cc/W726-7EZH]; Corporate Racial Discrimination Multistate Letter (Jul. 13, 2023), https://s.wsj.net/public/resources/documents/AGLetterFortune100713.pdf [https://perma.cc/3M5D-U6S9]; Senator Cotton Letters to Law Firms (Jul. 17, 2023), https://www.cotton.senate.gov/imo/media/doc/Senator%20Cotton%20Letters%20to%20Law%20Firms%20re%20DEI.pdf [https://perma.cc/ND83-PGBF]; *Trump's Executive Orders on Diversity, Equity, and Inclusions, Explained*, Leadership Conference on Civil and Human Rights (Feb. 12, 2025), https://civilrights.org/resource/anti-deia-eos/ [https://perma.cc/K4R6-9CPL]; Dear Colleague Letter SFFA v. Harvard (Feb. 14, 2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf [https://perma.cc/K98C-T8AD]. Recently, the Trump administration has gone to war with Harvard University, slashing federal funding and interfering in their recruitment operation. A major part of the administration's hostility towards Harvard stems from its claim that Harvard "continues to engage in race discrimination, including in its admissions process and in other areas of student life." *See* Letter Re: Review for Termination or Transition of Harvard University Contracts (May 27, 2025), https://static01.nyt.com/newsgraphics/documenttools/51635d048e5b12f9/7b8d9102-full.pdf [https://perma.cc/Q8UD-MDY3]; *see also* Zachary Schermele, *Trump-Harvard clash heats up. Here's what to know*, USA Today (May 27, 2025, 4:08 PM), https://www.usatoday.com/story/news/politics/2025/05/27/trump-harvard-feud-what-to-know/83875002007/ [https://perma.cc/S5S6-85U3].

the Fourteenth Amendment's Privileges and Immunities Clause, proclaiming that it only protects the privileges and immunities of national citizenship.[156] In 1876, the Court invalidated a portion of one of the Enforcement Acts and declared that the Fifteenth Amendment solely prohibited voter discrimination expressly based on race.[157] Also in 1876, the Court invalidated another piece of Enforcement legislation and limited the Fourteenth Amendment's reach to state action; racism by white citizens was beyond the Amendment's scope.[158] In 1883, the Court invalidated the first two sections of the Civil Rights Act of 1875, reaffirming the Fourteenth Amendment limitation while casting the Thirteenth Amendment as having only ended chattel slavery.[159]

These precedents enabled much of the citizen and political redemptions. The Court's Fifteenth Amendment decisions paved the way for state governments to disenfranchise Black people using poll taxes, literacy tests, bans on felons being able to vote, and other means. The Court's Fourteenth Amendment decisions put white citizens on notice that the federal government was prohibited from punishing them for assaulting and killing Black people. With southern state governments in the hands of the party of the Klan at the time of the Court's decision, white citizens now had no legal restraint from killing Black people. Nor were they impeded in any way from thoroughly discriminating against Black people. The era of lynchings and racial massacres that came to define late nineteenth and twentieth century America was the natural result of the Court's jurisprudence.

And the Court did not stop there. In the ensuing decades, it would fully develop the "discriminatory intent" rule, making it impossible for African American litigants to prove racial discrimination where the government admits of no racist purpose in the challenged action.[160] It hinted its approval at racial segregation in two Commerce Clause cases, one in 1877 and the other in 1890.[161] Then in 1896, the Court officially sanctioned "separate but

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[156] *See* Slaughter-House Cases, 83 U.S. 36, 74-77 (1873).

[157] *See* United States v. Reese, 92 U.S. 214, 215 (1876).

[158] *See* United States v. Cruikshank, 92 U.S. 542, 554-55 (1876).

[159] *See* Civil Rights Cases, 109 U.S. 3, 10-19, 22-25 (1880).

[160] *See*, *e.g.*, Cruikshank, 92 U.S. at 554 ("There is no allegation that this was done because of the race or color of the persons conspired against."); Virginia v. Rives, 100 U.S. 313, 320-21 (1880) ("The law made no discrimination against them because of their color, nor any discrimination at all. The complaint is that there were no colored men in the jury that indicted them, nor in the petit jury summoned to try them. The petition expressly admitted that by the laws of the State all male citizens twenty-one years of age and not over sixty, who are entitled to vote and hold office under the Constitution and laws thereof, are made liable to serve as jurors. And it affirms (what is undoubtedly true) that this law allows the right, as well as requires the duty, of the race to which the petitioners belong to as jurors. It does not exclude colored citizens"); Williams v. Mississippi, 170 U.S. 213, 225 (1898) ("[T]he constitution of Mississippi and its statutes . . . do not on their face discriminate between the races, and it has not been shown that their actual administration was evil; only that evil was possible under them").

[161] Compare Hall v. DeCuir, 95 U.S. 489, 488-90 (1877), with Louisville, New Orleans & Texas Railway Co. v. Mississippi, 133 U.S. 587, 591 (1890). In *DeCuir*, the Court struck down a Louisiana statute prohibiting racial discrimination in common carriers partly because it would pose a burden on carriers going from a jurisdiction that banned racial segregation to one that

equal" as a permissible arrangement under the Fourteenth Amendment.[162] Two years later, it approved of poll taxes and other race-neutral mechanisms for depriving Black people of the right to vote.[163] The following decade, the Court invalidated more civil rights legislation, once again making clear that the Thirteenth Amendment prohibited chattel slavery and nothing more.[164] The first judicial redemption complemented the other two smaller redemptions, and vice versa.

Like the political and citizen redemptions, the second judicial redemption was both similar and different from the first judicial redemption in certain respects. As Sumi Cho notes: "The elevation of Warren Burger to Chief Justice of the Supreme Court in 1969 furthered the racial-redemptive project and aided the transformation to a new form of white supremacy under formal equality."[165] On the one hand, the Court continued to provide cramped readings of the Fourteenth Amendment.[166] It upheld its Reconstruction Era precedents regarding state action and the discriminatory intent rule.[167] While the Civil Rights Era Court got creative with the doctrines, it never overruled them.[168] The Court also undermined *Brown* in the 1970s.[169] On the other hand, unlike the first judicial redemption, the post-Civil Rights Court found credence in white plaintiffs' claims of reverse discrimination. In 1978, it drastically limited the constitutionality of state-sanctioned affirmative action: its only permissible use was now to promote diversity in higher education.[170]

The Court's rollbacks of civil rights gains continued in the decades since the Civil Rights Movement.[171] The Court's jurisprudence regarding suffrage has consistently advantaged white Americans and disadvantaged

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required it. However, no states had a law mandating racial segregation in common carriers in 1877. *See* William Joseph Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1396 (1996). *Louisville* had very similar facts, but the law in question *required* segregation. The Court found no similar Commerce Clause violation.

[162] *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

[163] *See* Williams v. Mississippi, 170 U.S. 213, 225 (1898).

[164] *See* Hodges v. United States, 203 U.S. 1, 16-19 (1906).

[165] Sumi Cho, *Post-Racialism*, 94 Iowa L. Rev. 1589, 1613 (2009).

[166] *See* Ben-Dan, *supra* note 42, at 1690-97.

[167] *Id.*

[168] With the state action doctrine, for example, the Court created the "entanglement test" in Burton v. Wilmington Parking Authority, 365 U.S. 715, 722-725 (1961) and the "public function test" in Evans v. Newton, 382 U.S. 296, 299-302 (1966) to allow constitutional challenges against private parties to proceed. However, the state action doctrine itself remained. *See* Ben-Dan *supra* note 42, at 1691-92.

[169] With decisions like San Antonio Independent School Dist. v. Rodrigues, 411 U.S. 1 (1973) and Milliken v. Bradley, 418 U.S. 717 (1974), the Court blinded itself to racial discrimination in education where the state did not admit to it. *See* Ben-Dan *supra* note 42, at 1697-99.

[170] *See* Bakke, 438 U.S. at 315-18.

[171] *See* Cedric Merlin Powell, Post-Racial Constitutionalism and the Roberts Court 58-159, 184-09 (2023).

Black people.[172] In 2013, the Court struck down a portion of the Voting Rights Act in the name of federalism, paving the way for states to enact prohibitive legislation designed to adversely impact Black voters.[173] To date, the Court has never developed the Thirteenth Amendment to mean anything other than a prohibition against chattel slavery.[174] In 1995, the Court officially deemed race conscious remedial measures racial discrimination, equating affirmative action with America's history of invidious anti-Black racism.[175] In 2023, the Court did not just kill affirmative action; for the first time, it prohibited *private parties* from using race conscious remedial measures.[176] The Court's war against anti-racism is likely far from over.

As this Section demonstrates, the three smaller redemptions strands—the political, citizen, and judicial strands—are integral parts of the whole racial redemption. They complement each other. The violence that defined the First Redemption era, for example, was the work of private citizens who lynched Black people, state officials who refused to punish those citizens, and Supreme Court caselaw that prohibited federal government interference despite state indifference. As a more recent example, the assault on race conscious remedial measures in recent decades was made possible by private white citizens filing lawsuits, the Court siding with those plaintiffs, and politicians only caring about the kind of racism that affects those plaintiffs.[177]

II. The Criminal Procedure Counterrevolution Qualifies as a Judicial Redemption

This Part expounds on Part I by exploring the use of criminal law during both racial redemptions to scale back the gains of Black folks and to reincarnate racialized enslavement. Part A discusses how crime became racialized after slavery. Part B analyzes the interplay between criminal law and the three smaller strands of the first racial redemption. Part C reviews the relationship between civil rights activism and calls for criminal justice reform. Finally, Part D builds off the three preceding parts and argues that the Supreme Court's narrowing of rights is indeed a judicial redemption that occurred—and still occurs—in tandem with the citizen and political strands of the second racial redemption.

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[172] Since the 1970s, the Court's jurisprudence has undermined the Voting Rights Act, prohibited the creation of majority-minority districts, and permitted racist gerrymandering. In 1991, Professor Pamela Karlan identified the Court's growing antipathy to voting rights as a "judicial redemption" of the Voting Rights Act. *See* Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 Va. L. Rev. 1, 2, 39-45 (1991).

[173] *See* Shelby County, Ala. v. Holder, 570 U.S. 529, 557 (2013).

[174] *See* William M. Carter, *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. Davis L. Rev. 1311, 1313-15 (2007).

[175] *See* Adarand, 515 U.S. at 227.

[176] *See* Students for Fair Admissions, 600 U.S. at 230-31, 198 n.2.

[177] *See* Wendy Parker, *Recognizing Discrimination: Lessons from White Plaintiffs*, 65 Fla. L. Rev. 1871, 1873-74 (2013).

A. Racializing Crime After Slavery

The framers of the Thirteenth Amendment of the Constitution intended to forever ban chattel slavery in the United States. The chosen language of the Amendment resembled verbiage that had been used time and again to ban slavery in various parts of the country before the Civil War.[178] Yet unlike prior occasions, the prohibition of enslavement in America "except as a punishment for crime whereof the party shall have been duly convicted" gave southern states a grand idea: by enlarging their criminal penal codes and selectively prosecuting Black people for those crimes, those states could re-enslave Black people. In other words, criminal law became the vehicle by which southern states could make America a slaveholding country again.[179]

Within the first few years after the Thirteenth Amendment was ratified, southern states almost immediately reimplemented slavery under the new constitutional guidelines. Mississippi pioneered the Black Codes, a set of racially explicit laws that regulated the behavior of Black people through drastic expansions of substantive criminal law.[180] With new offenses like vagrancy and trespassing added to the books, Black people were convicted of petty crimes and subsequently condemned to re-enslavement as punishment for their convictions.[181] Historian David Oshinsky notes that "thousands of ex-slaves were being arrested, tried, and convicted for acts that in the past had been dealt with by the master alone. . . . An offense against [a former slaveowner] was an offense against the state."[182] Soon, other states in the South followed suit and passed Black Codes of their own.[183]

White society justified re-enslavement by alluding to allegedly widespread Black criminality that emancipation brought about. Granted, the practice in white society of equating Blackness and criminality began long before Reconstruction was ever a thought.[184] However, such associations intensified after the Civil War, ironically during a period when white Americans were committing barbaric violence against Black people.[185] President Andrew Johnson was supportive of the Black Codes and publicly

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[178] *See* Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2039-40 (2009).

[179] *See* Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371, 383 (2022) ("Instead, southern states continued to use criminal law to construct racial hierarchy, despite the ratification of the Thirteenth Amendment").

[180] *See* ANDERSON, *supra* note 1, at 10.

[181] *Id*.

[182] OSHINSKY, *supra* note 71, at 32.

[183] *See* ANDERSON, *supra* note 1, at 19-20.

[184] *See* William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 20 (2004) ("The myth of innate [B]lack criminality served both to dehumanize African Americans during slavery and to justify the brutal means of social control needed to maintain white dominance after the end of slavery").

[185] *See* Ben-Dan & Appling, *supra* note 18, at 1387-92.

linked emancipation with a rise in Black criminality.[186] Newspapers in both the North and the South "informed" and "reminded" white readers that liberated Black Southerners were given over to crime.[187] One white planter in South Carolina verbalized the dominant white sentiment about Black people: "All the men are thieves, and all the women are prostitutes. It's their natur' to be that way, and they never'll be no other way."[188]

At the political level, circumstances changed with the ratification of the Fourteenth Amendment. Congress, which was under the control of the Radical Republicans in the late 1860s, combatted southern efforts to so obviously resurrect the peculiar institution. In April 1866, Congress passed the Civil Rights Act of 1866, which voided the Black Codes, over President Johnson's veto.[189] It then constitutionalized the Act in the form of the Fourteenth Amendment, and forced southern states to ratify the new provision as a condition of full reentry into the union.[190] The Amendment made politicians slightly shrewder in terms of how they utilized criminal law; instead of associating Black people and crime in the language of the statute, such associations had to come through penal law enforcement.

The consequence of the Fourteenth Amendment was a modification in what Dorothy Roberts calls the "racial construction of crime."[191] The racial construction of crime in antebellum America "was formally written into law."[192] In postbellum America, however, the racial construction of crime "was accomplished less explicitly through the definition of crimes."[193] The effect of this construction was, as Brianna Banks notes, the "coloring [of] the criminal justice system as 'white' and the criminal as '[B]lack.'"[194] Racial constructions of crime were essential in effecting the first racial redemption.

B. Criminal Law and the First Racial Redemption

During the first racial redemption, the white citizenry, white politicians, and the U.S. Supreme Court refashioned criminal law's role in society. From the mid-1870s to the twentieth century, these three forces set bounds on criminal law, permitting white racial violence and subjugation against Black

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[186] *See* Anderson, *supra* note 1, at 14.

[187] *Id.* at 20-21.

[188] *See* Leon F. Litwack, Trouble in Mind: Black Southerners in the Age of Jim Crow 248 (1998).

[189] *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866); History, Art & Archives, United States House of Representatives, The Civil Rights Bill of 1866, https://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Bill-of-1866/ (last visited Oct. 4, 2025).

[190] *See* Steven G. Calabresi, *On Liberty, Equality, and the Constitution: A Review of Richard A. Epstein's* The Classical Liberal Constitution, 8 N.Y.U. J.L. & Liberty 839, 895-96 (2014).

[191] Dorothy E. Roberts, *Crime, Race and Reproduction*, 67 Tul. L. Rev. 1945, 1945 (1993).

[192] *Id.* at 1954.

[193] *Id.* at 1955.

[194] Brianna N. Banks, *The (De)valuation of Black Women's Bodies*, 44 Harv. J. L. & Gender 329, 352 (2021).

people while discouraging and prohibiting efforts to hold the purveyors of said violence and subjugation legally accountable. The white citizenry perverted criminal judicial systems and centered Black criminality in public and scholarly discourse.[195] White politicians at the state level wielded criminal law to re-enslave, surveil, and exclude Black people from meaningful participation in society.[196] Finally, the Supreme Court set limits on criminal law that functionally disqualified white supremacists from criminal prosecution while reaffirming the state power to criminally punish Black people.[197]

This white supremacist trifecta successfully produced *criminal law racialization* in the United States. Criminal law racialization is the process by which criminal law and its administration is designed to target "socially undesirable persons" in society, with social undesirability being based on race.[198] The racialization of criminal law was both the natural consequence and the legal manifestation of postbellum America's racial construction of crime. During Reconstruction, American criminal law was fashioned into a vehicle of racial subjugation through aggressive enforcement against Black people, lax enforcement (or nonenforcement) against whites, the vanquishing of rights for criminal defendants, and the immunization of criminal judicial systems against legal challenge. This fashioning was brought about by the white citizenry, the white political class, and the Supreme Court.

1. The Citizen Redemption

As noted above, savage white violence against Black people was an integral part of the citizen redemption.[199] Violence was effective because it went unpunished, as white citizens operated the criminal judicial systems in their respective southern jurisdictions to ensure impunity. When criminal cases were brought against white people for assaulting or murdering African Americans, white grand jurors refused to indict, and white petit jurors refused to convict.[200] Historian Leon Litwack described the existence of an unwritten "gentleman's agreement" among white people never to cooperate with authorities when one of their own committed crimes, especially against Black people.[201] Moreover, white prosecutors that sought to hold white murderers accountable were coerced into abandoning those efforts. For example, the Louisiana state prosecutor that indicted 140 white men for their

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[195] *See infra* Part II.B.1.

[196] *See infra* Part II.B.2.

[197] *See infra* Part II.B.3.

[198] *See* Luis Chiesa, *The Model Penal Code, Mass Incarceration, and the Racialization of American Criminal Law*, 25 Geo. Mason L. Rev. 605, 608 (2018).

[199] *See infra* Part II.C.1.

[200] *See* Robert J. Kaczorowski, The Politics of Judicial Interpretation 22 (2005).

[201] *See* Leon F. Litwack, Been in the Storm So Long: The Aftermath of Slavery 285-86 (1979).

involvement in the Colfax Massacre in April 1873 eventually dropped the charges when credible threats were made on his life.[202] The white citizenry's operation of criminal judicial processes empowered the white vigilante to continue committing unchecked violence on Black people.

Meanwhile, Black people became the predominant targets of southern criminal judicial systems. African Americans were arrested en masse for "the most trivial offenses," offenses that white Americans were rarely ever charged with.[203] Black arrestees were then siphoned through the criminal judicial process with few protections and adjudged guilty of whatever they were charged with, regardless of what evidence might have existed to support a criminal conviction.[204] After conviction, they were given far harsher sentences than white convicts for the same crimes.[205] Finally, thanks to the Thirteenth Amendment loophole that permitted enslavement for those duly convicted of a crime,[206] Black convicts were shipped off to convict lease camps, where they were worked in all the ways they were during chattel slavery and physically treated worse than enslaved Black people were treated.[207]

Matters only worsened after Reconstruction. Litwack noted that "nowhere was the reassertion of power over [B]lack lives more evident than in the machinery of the police and the criminal justice system."[208] Fair trials by impartial juries were nonexistent for Black people; white jurors assumed guilt regardless of what evidence existed.[209] Black people were excluded from jury service, and their testimony was never admitted as they were either intimidated from testifying or had their testimony dismissed. Black people were prohibited from participating in the criminal judicial system as anything other than defendants.[210] Litwack notes how "[t]he entire machinery of justice—the lawyers, the judges, the juries, the legal profession, the police—was assigned a pivotal role in . . . exercising social control, in underscoring in every possible way the subordination of [B]lack men and women of all classes and ages."[211] The machinery of justice was strongly dependent

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[202] *See* James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 410 (2014).

[203] *See* LITWACK, *supra* note 201, at 284.

[204] *See* LITWACK, *supra* note 188, at 248.

[205] WORMSER, *supra* note 1, at 54.

[206] *See* U.S. CONST. amend. XIII.

[207] WORMSER, *supra* note 1 at 54-57; *see also* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 8 (2008).

[208] *See* LITWACK, *supra* note 188, at 247-48.

[209] *Id*.

[210] *Id*. at 247-49.

[211] *Id*. at 249.

on white citizen participation; thus, the white citizenry played a crucial role in the racialization of crime and the subjugation of Black people.

Associations of Black people with criminality crystallized with the advent of crime statistics in the late nineteenth century. As Dr. Khalil Gibran Muhammad brilliantly documents, white academics in the 1890s pioneered the collection and use of statistics as a means of "objectively" demonstrating Black criminality and, by logical implication, inferiority.[212] White academic denials of racism as a contributor to the decrepit conditions of Black America accompanied the validation of statistical data as proof of Black predisposition to crime.[213] This use of statistics was one of many manifestations of the eugenics movement in the late nineteenth and early twentieth centuries.[214] From the 1890s onward, "the statistical rhetoric of the 'Negro criminal' became a proxy for a national discourse on [B]lack inferiority."[215] Dr. Muhammad notes how:

> notions about [B]lacks as criminals materialized in national debates about the fundamental racial and cultural differences between African American and native-born whites and European immigrants. . . . [T]o friend and foe alike, [B]lack criminality offered both a discursive and a practical solution to healing the sectional divisions of a war-torn nation. For white Americans of every ideological stripe—from radical southern racists to northern progressives—African American criminality became one of the most widely accepted bases for justifying prejudicial thinking, discriminatory treatment, and/or acceptance of racial violence as an instrument of public safety.[216]

This rhetoric certainly manifested in academic discourse. For example, Professor Charles Carroll claimed in his popular work, *The Negro A Beast*, that the efforts to uplift African Americans during Reconstruction resulted not only in high rates of crime amongst Black people but also produced a culture of "law-abiding Negroes. . .sheltering and encouraging color line law-breaking at the woeful sacrifice of reputation."[217]

Furthermore, as Professor David Garland argues, white participants in lynchings saw these barbaric acts as alternative manifestations of criminal "justice" and punishment in the South, reserved primarily for African Americans.[218] Moreover, Black criminality was consistently cited as the

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[212] Khalil Gibran Muhammad, The Condemnation of Blackness 42-45 (2010).

[213] *Id*.

[214] *See* Isabel Jones, *Reproductive Control as a Carceral Tool of the State – Understanding Eugenics in a Post-Roe Society*, 112 Calif. L. Rev. 969, 982-84 (2024); *see also* Ben-Dan, *supra* note 55, at 198-02.

[215] Muhammad, *supra* note 212, at 8.

[216] *Id*. at 4.

[217] *See* Charles Carroll, The Negro A Beast 294 (1901).

[218] *See* Garland, *supra* note 112, at 809-12.

cause of lynchings. Brown University sociologist Lester Ward, for example, declared that Black men raping white women acted within their "racial nature," and white mobs were spurred by their "racial nature" to lynch the Black rapists in retaliation.[219] Additionally, some white people blamed the inefficiency of criminal judicial systems for lynchings. Attorney and future Attorney General Charles Joseph Bonaparte was one such person; he argued for changes that would streamline judicial processes and make it easier for states to criminally punish.[220] Either way, racialized crime lay at the heart of the public discourse on lynchings.

Law enforcement played a special part in the racialization of crime. Dubbed "the enforcers of white supremacy"[221] by historian Litwack, police selectively surveilled and brutalized Black people in the service of capitalism and systemic racism. Litwack notes how the police, "[o]perating in the spirit of the antebellum slave patrols, . . . kept an eye on [B]lack movement and group meetings and enforced an unofficial curfew on [B]lack strangers and residents alike."[222] The police also "enforce[d] vagrancy laws to solidify control of [B]lack labor," and "by virtue of their arrests they helped to swell the [B]lack labor force exploited by local and state governments…."[223] Police joined white supremacist organizations like the Klan and often colluded with white civilians to commit violence against Black people.[224] Excessive force by police against Black people was a constant and necessary means of reinforcing white dominance and Black inferiority, and Black people that challenged these norms were singled out for severe brutality.[225] Litwack explained:

> The violence meted out by the police and sheriffs was no aberration but stemmed from ideological conviction—the still commonly accepted antebellum belief that [B]lacks understood only force, that they worked and behaved best under the threat of the lash, and that their uncontrolled impulses required a special quality of discipline.[226]

In sum, white citizens helped to racialize crime and criminal law during the first racial redemption. Through their active participation in the criminal judicial process, their savage violence against Black people, and their

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[219] *See* Ibram X. Kendi, Stamped from the Beginning: The Definitive History of Racist Ideas in America 296 (2016).

[220] *See* Charles J. Bonaparte, *Lynch Law and its Remedy*, 8 Yale L.J. 335, 335-42 (1899).

[221] Litwack, *supra* note 188, at 263.

[222] *Id*. at 263-64.

[223] *Id.* at 264.

[224] *See* Allen et al., *supra* note 112 at 21; *see also* James W. Loewen, Sundown Towns: A Hidden Dimension of American Racism (2005).

[225] Litwack, *supra* note 188, at 263.

[226] *Id*.

burgeoning "scholarship" on Black inferiority, white citizens converted Blackness into a proxy for criminality.

2. The Political Redemption

Politicians did the most of the three forces (political, societal, and judicial) to equate race and crime in society by drafting the criminal statutes that served to ensnare Black people in state criminal judicial systems. Even before the first racial redemption, southern lawmakers turned to criminal law as a means of regulating the conduct of African Americans. Following the Fourteenth Amendment's ratification, white Democrats passed race-neutral replacements for penal laws that were struck down. The myriad of criminal statutes southern states enacted included vagrancy laws, which were defined "so vaguely…that virtually any freed slave not under the protection of a white man could be arrested for crime."[227]

As white Democrats redeemed southern state governments, they used criminal law to oppress Black people. As one example, the Mississippi legislature that convened after the success of the Mississippi Plan in 1875 passed a major crime bill in 1876, "aimed directly at the Negro."[228] The law led to a massive increase in Black convicts within the first year of its enactment.[229] Other southern states enacted laws criminalizing Black people for actions as innocent as choosing to leave the planter they worked for to labor for another one without prior permission.[230]

Importantly, for a racialized enslavement system built around criminal law to work most effectively, the victims of that system must be deprived of their rights. Thus, in Mississippi, "[a]s the legislature increased the penalties for minor property crimes, the local courts moved to weaken the protections only recently afforded [B]lack defendants."[231] Due process did not exist for Black defendants; African Americans in the South "found themselves in jail for months without a trial, denied the right to competent counsel (lawyers feared losing their white clients), charged exorbitant legal fees, and sentenced as much for their race as for the nature of their crime."[232] With expansive state penal codes and empty protections for accused persons, the practice of convict leasing took off during the latter end of Reconstruction in Mississippi and elsewhere.[233]

The state criminalization of Black people continued in the decades after Reconstruction. Blackmon notes how "every southern state enacted an

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[227] *See* Blackmon, *supra* note 207, at 53.

[228] *See* Oshinsky, *supra* note 71, at 40.

[229] *Id*.

[230] *See* Blackmon, *supra* note 207, at 53-54.

[231] Oshinsky, *supra* note 71, at 40.

[232] *See* Litwack, *supra* note 201, at 284.

[233] Oshinsky, *supra* note 71, at 41-42.

array of interlocking laws essentially intended to criminalize Black life."[234] States continued to expand their penal codes, criminalizing behaviors that included "using 'obscene language,'" gambling, juggling, "selling cotton after sunset," and being "common railers or brawlers."[235] One of the most popular offenses Black people were charged with was concealed carry of firearms; there were few things white people feared more than Black people bearing arms.[236] The deprivation of Black defendants' criminal procedure rights continued in the decades after Reconstruction. Moreover, having redrafted their constitutions to eradicate Black suffrage, states functionally excluded Black people from serving on juries by linking juror qualifications to voter qualifications.[237]

Criminal law was also the conduit by which state officials deprived Black people of other citizenship rights. Felony disenfranchisement laws, for instance, were implemented to strip Black convicts of the right to vote. In some states, felony disenfranchisement provisions were defined broadly and applied in racially biased ways.[238] In other states, like Mississippi, the loss of the right to vote was conditioned on the conviction of certain crimes white legislators believed that Black people were more likely to commit.[239] Either way, criminal law was racialized to the end that Black people would be deprived of political power in the South.

Politicians at both the state and federal levels blamed Black criminality for lynchings and white violence. Some politicians, like President Theodore Roosevelt, repeated the claims of racist white academics.[240] Others, like future president and Supreme Court justice William Howard Taft, argued that the inefficiencies of criminal judicial processes produced lynchings: "[E]very man of affairs who has studied the subject [of lynchings] at all knows that if men who commit crime were promptly arrested and convicted there would be no mob for the purpose of lynchings."[241] Either way, racialized crime also lay at the heart of the *political* discourse on lynchings in the late nineteenth and early twentieth centuries. Moreover, politicians gave lynchings their stamp of approval through affirmative collaboration as well as through inaction. Professor Garland notes: "These lynchings may

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[234] *See* Blackmon, *supra* note 207, at 53.

[235] *Id*. at 99; *see also* Papachristou v. City of Jacksonville, 405 U.S. 156, 156 n.1 (1972).

[236] *See* Blackmon, *supra* note 207, at 81-82.

[237] *See*, *e.g.*, "Louisiana Officially Disenfranchises Black Voters and Jurors," Equal Just. Initiative., https://calendar.eji.org/racial-injustice/may/12 [https://perma.cc/6Y4D-4V88] (last visited on Nov. 11, 2025).

[238] *See* Jaime M. Hawk & Breanne M. Schuster, *"We are Still Citizens, Despite Our Regrettable Past": Why a Conviction Should Not Impact Your Right to Vote*, 18 Seattle J. Soc. Just. 75, 80-81 (2019).

[239] *Id*.; *see* Miss. Const. art. 12, § 241; Harness v. Watson, 143 S.Ct. 2426, 2426 (2023) (Jackson, J., dissenting).

[240] *See* Kendi, *supra* note 219, at 296; Idus A. Newby, Jim Crow's Defense: Anti-Negro Thought in America, 1900-1930, at 9-10 (1965).

[241] *See* William H. Taft, *The Administration of Criminal Law*, 15 Yale L.J. 1, 16 (1905).

have violated the letter of state law, but they were not violations that were ever liable to be sanctioned…. The fact is that the lynchers' conduct…was tolerated (and often applauded) by local politicians and law officers."[242]

White politicians also contributed to the racialization of crime and criminal law during the first racial redemption. As government officials, they could operationalize criminal law more directly than white citizens. Through the widening of substantive criminal law, aggressive selective arrests and prosecutions, and vigorous exploitation of the Thirteenth Amendment's punishment clause, white politicians made criminal law a sword almost exclusively reserved for Black Americans.

3. The Judicial Redemption

Potentially disturbing the societal association of Black people and crime were Congress' three Enforcement Acts, which were enacted to enforce the new amendments.[243] The Enforcement Acts represented Congress' attempt to use criminal law as a weapon against violent white supremacists in the South. The problem, as historian Charles Lane points out, is that criminal law had long been recognized at that time as the legal province of states and not the federal government.[244] Thus, there were questions about whether the acts were indeed constitutional. Nonetheless, the three Enforcement Acts were effective in combatting Klan violence when the federal government enforced them in the early 1870s. [245] Criminal law, therefore, served vital functions during Reconstruction both as a force for racial good and racial evil. At the federal level, criminal law was a force for racial good, deployed—for the first time in America's history—to combat white supremacist violence. Moreover, federal courts widely understood the Fourteenth Amendment to make the Bill of Rights, which included numerous criminal law protections, applicable to the states.[246]

The Supreme Court's role in racializing crime was to make the application of criminal law off-limits to white supremacists and to reaffirm state power to criminally punish. Put another way, the Court sought to void the use of criminal law as a force for racial good. The Court first eradicated prosecutions of violent white supremacists with its decision in *United States v. Cruikshank*.[247] In *Cruikshank*, the Court invalidated Section 6 of the First Enforcement Act, which imposed criminal penalties for either violating the

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[242] Garland, *supra* note 112, at 810.

[243] *See* Ben-Dan, *supra* note 58, at77, 79-80.

[244] *See* Charles Lane, The Day Freedom Died 4 (2008).

[245] *See* Ben-Dan & Appling, *supra* note 18, at 1402.

[246] *See* Robert J. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866-1876, at 16-17, 19, 106-07 (2005).

[247] 92 U.S. 542 (1876).

constitutional rights of others or preventing others from exercising their rights.[248] The Court's rationale rested on its conclusion that general criminal law enforcement was outside the government's constitutional authority: "It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder."[249] The Court doubled down on this position in *United States v. Harris*, quoting directly from the lower court opinion in *Cruikshank* to declare that Congress's power under the Fourteenth Amendment "does not extend to the passage of laws for the suppression of crime within the states."[250]

The Court later declared federal criminal prosecutions of white citizens for "mere discriminations on account of race or color" unconstitutional as well.[251] It struck down the first two sections of the Civil Rights Act of 1875, which prohibited private businesses from racially discriminating and set forth criminal penalties for those in violation.[252] The Court's opinion further clarified the functional scope of criminal law: criminal law did not exist for the federal government to use against white racists. By commanding victims of racism to "resort to the laws of the State for redress,"[253] the Court emphasized that general criminal law enforcement was the province of the states—the same entities that both ruthlessly prosecuted Black people and permitted private racial discrimination and violence against Black people.

The Court also justified the discriminatory practices of states and immunized criminal judicial systems from constitutional challenge from Black defendants. In *Cruikshank*, the Court reiterated its antebellum teaching that the Bill of Rights, including all the criminal procedure protections contained in the Fourth, Fifth, Sixth and Eighth Amendments, placed no constraint on states.[254] Consequently, it posed no constitutional problem that due process in state courts was a myth for Black people in the decades following Reconstruction. The Court shut down several Black defendants' Fourteenth Amendment challenges to their state convictions.[255] It sanctioned states' exclusions of Black people from grand and petit juries as long as states did not admit to doing so.[256] Meanwhile, the Court continued to shut

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[248] *Id*.; Enforcement Act of 1870, 16 Stat. 140-146 § 6 (1870) (current version at 42 U.S.C. § 1981).

[249] *See Cruikshank*, 92 U.S. at 553-54.

[250] United States v. Harris, 106 U.S. 629, 638 (1883) (quoting U.S. v. Cruikshank, 25 F.Cas. 707, 710 (1874)).

[251] *See* Civil Rights Cases, 109 U.S. 3, 25 (1883).

[252] *Id*. at 4, 26.

[253] *Id*. at 17.

[254] *See Cruikshank*, 92 U.S. at 552 (citing Barron v. Baltimore, 32 U.S. 243 (1833)).

[255] *See* Ben-Dan, *supra* note 58, at 96 n.367.

[256] *Id*. at 92-94.

down Congress' attempts to criminalize white racists for acts of violence against Black people.[257]

The Court's contribution to the racialization of crime and criminal law rests in its jurisprudence placing the criminal-law-related actions of the white citizenry and white politicians out of legal reach. The Court supported the strong aversion of white citizens and politicians to subjecting white racists to the whims of criminal judicial systems. White citizens generally refused to indict and convict their own; white politicians generally refused to arrest and prosecute white citizens; the Supreme Court generally refused to permit the federal government to criminally punish white racists. With the white citizenry, white politicians, and the Supreme Court working together, Blackness and criminality were made synonymous. Racialized criminal law became a common language of white supremacy during the first racial redemption.

C. Racializing Criminal Justice

Because criminal law was such a central component of the postbellum re-enslavement and subjugation of Black Americans, aspirations of making criminal law more racially equitable became an important rallying cry for racial justice advocates. From Reconstruction onward, African Americans denounced various aspects of crime racialization, be it the selective targeting of Black people for prosecution, the unfairness of criminal judicial processes, or the inability to hold white perpetrators accountable for the crimes against Black people.[258] Thus, the racialization of crime and criminal law integral to the first racial redemption led to the racialization of criminal justice advocacy and calls for reform. This advocacy partly led to Supreme

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[257] *See*, *e.g.*, Hodges v. United States, 203 U.S. 1, 18 (1906) (the Thirteenth Amendment does not empower Congress to punish "whitecappers" for intimidating Black workers into quitting their jobs). Whitecappers were poor white farmers who committed acts of violence and intimidation against Black landowners and workers to coerce them to abandon their lands and their jobs so that they could have both. *See* Lizzie Presser*, Their Family Bought Land One Generation After Slavery. The Reels Brothers Spent Eight Years in Jail for Refusing to Leave It.,* ProPublica & New Yorker (Jul. 15, 2019), https://features.propublica.org/black-land-loss/heirs-property-rights-why-black-families-lose-land-south [https://perma.cc/AUF4-4PXV].

[258] *See*, *e.g.*, Herbert Aptheker, Charles H. Wesley & William Patterson, A Documentary History of the Negro People in the United States 601–02 (1990) (in a memorial to Congress, the State Convention of Alabama Negroes observed: "[T]he main reasons for this failure of justice is that the sheriffs, probate judges and clerks of courts have almost universally, throughout the State, in plain violation of State laws, failed or refused to put men of our race on grand and petit juries in most of the counties in Alabama, and it has followed, as a consequence, that the lives, liberties, and property of [B]lack men have been decided by grand and petit juries composed exclusively of white men who are their political opponents. In controversies between our race and white men, and in criminal trials where the accused or the injured is a [B]lack man, it is almost if not quite impossible for a [B]lack man to obtain justice. . . . Our lives, liberties, and properties are made to hang upon the capricious, perilous, and prejudiced judgments of juries composed of a hostile community of ex-slaveholders who disdain to recognize the colored race as their peers in anything, who look upon us as being *by nature an inferior race*, and by right their chattel property.").

Court jurisprudence in the twentieth century that produced moments of *criminal law deracialization*—the interruption of criminal law as a vehicle for racial subjugation—through the bestowal of rights for Black criminal defendants.

This Section examines three historical developments that illustrate the racialization of criminal justice advocacy and the partial deracialization of criminal law: the birth of modern criminal procedure, activism in the Black freedom struggle, and the criminal procedure revolution of the 1960s.

1. The Origins of Modern Criminal Procedure

The birth of modern criminal procedure—that is, the origins of Supreme Court review of state court convictions—is invariably tied to race. Before the Fourteenth Amendment became a constitutional command, the nation's founding charter placed virtually no limitations on the states' power to criminally punish. The antebellum Court held in *Barron v. Baltimore* that the Bill of Rights, including the criminal procedure protections, were not binding on the states.[259] In the first few decades after the Fourteenth Amendment was ratified, as Professor Michael Klarman notes, the Court only reversed state convictions where the state expressly discriminated in jury selection.[260] The Court otherwise extended the rationale of its *Barron* holding in its criminal procedure jurisprudence throughout the first racial redemption.[261] Black defendants in state court had no due process rights the Court was bound to respect, and their appeals of their state convictions to the Court found no success.

Beginning in the 1920s, however, the Court began expanding criminal procedure protections for criminal defendants. The Court's jurisprudence was likely in part a response to national pressure the NAACP and other entities brought to bear on the federal government to address lynchings in the South.[262] Leading up to the 1920s, what passed as criminal justice in southern states was a farce. Black defendants charged with serious crimes against white people were often killed extrajudicially; trials were infrequent.[263] More Black people started to receive trials in the early twentieth century, but the trials were mere formalities, conducted in haste and replete with abuses that shocked the white public outside of the South.[264] It is therefore unsurprising that a majority of the landmark criminal procedure cases the

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[259] *See* Barron v. Baltimore, 32 U.S. 243, 247 (1833).

[260] *See* Klarman, *supra* note 99, at 52.

[261] *Id.* at 52-53; *see*, *e.g.*, Twining v. New Jersey, 211 U.S. 78, 93 (1908).

[262] *See* Klarman, *supra* note 99, at 60-61.

[263] *See* Garland, *supra* note 112, at 798 ("[T]hese lynchings were not undertaken in the absence of a functioning criminal justice system. Public torture lynchings were a preferred alternative to 'official' justice, not a necessary substitute for it.").

[264] *See* Klarman, *supra* note 99, at 53-58.

Court decided between 1920 and 1940 involved southern state criminal convictions of Black defendants for serious crimes against white Americans.[265] Professor Klarman points out additional similarities:

> All three sets of defendants nearly were lynched before their cases could be brought to trial. In all three episodes, mobs comprised of hundreds or even thousands of whites surrounded the courthouse during the trial, demanding that the defendants be turned over for a swift execution…. Lynchings were avoided only through the presence of state militiamen armed with machine guns surrounding the courthouse. There was a serious doubt—not just with the aid of historical hindsight, but at the time of the trial—as to whether any of the defendants was in fact guilty of the crime charged. The defendants in *Moore* and *Brown* were tortured into confessing. In all three cases, defense lawyers were appointed either the day of or the day preceding trial, with no adequate opportunity to consult with their clients, to interview witnesses, or to prepare a defense strategy. Trials took place quickly after the alleged crimes in order to avoid a lynching less than a week afterward in *Brown*, twelve days in *Powell*, and a month in *Moore*. The trials were completed within a matter of hours (forty-five minutes in Moore), and the juries, from which blacks were intentionally excluded in all three cases, deliberated for only a matter of minutes before imposing death sentences.[266]

Thus, the Court's reversal of the four convictions on Fourteenth Amendment due process grounds marked an important transition in the use of American criminal law. Southern states' criminal law practices typically reserved for Black people—the mob-dominated trial,[267] the extreme last-minute assignment of counsel in capital cases,[268] the physical torturing of criminal defendants to extract confessions[269]—were outlawed. The Court's decisions placed new constraints on how white politicians, and to an

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[265] *Id.* at 48. Klarman notes that four of the six landmark cases featured African American defendants. "The Court began challenging less extreme forms of coercion in" Chambers v. Florida, 309 U.S. 227 (1940), in which the Court reversed a capital conviction and held that coerced confessions violated due process. *Chambers* has almost all the same features as the four cases Klarman profiles: Black defendants, white victim, serious criminal accusations (murder), the forming of a lynch mob, questions about the defendants' innocence, and judicial impositions of death sentences. Of great significance, legendary civil rights attorney Thurgood Marshall represented the Black youths before the U.S. Supreme Court—his first case before the nation's highest tribunal—and successfully won a reversal. *See* Shianne Salazar, *Museum Showcases Little-Known Broward Case That 90 Years Ago Paved the Way for* Miranda *Rights*, WLRN (Mar. 2, 2023, at 11:21 ET), https://www.wlrn.org/arts-culture/2023-03-02/museum-showcases-little-known-broward-case-that-90-years-ago-paved-the-way-for-miranda-rights [https://perma.cc/R5EX-P5QF].

[266] *Id.* at 52.

[267] Moore v. Dempsey, 261 U.S. 86 (1923).

[268] Powell v. Alabama, 287 U.S. 45 (1932).

[269] Brown v. Mississippi, 297 U.S. 278 (1936).

extent how white citizens, utilized criminal law. These decisions produced moments of criminal law deracialization; the white supremacist use of criminal law to subjugate Black people was hindered by the imposition of new rights for criminal defendants. Of course, these moments were ephemeral; as Professor Klarman correctly cautions, these decisions had minimal direct impact on the administration of criminal law in the South, and the constitutionally prohibited criminal law practices persisted.[270] Nonetheless, it is significant that these practices no longer had the Court's approval.

Also, of significance is how the same entities that favored larger racial justice efforts pushed for reversals in these cases. The NAACP, for example, was a leading voice in the fight against lynchings, and the NAACP also financed or partly financed the appellate litigation of the defendants in two of the four cases.[271] The Communist International Labor Defense (ILD), established in 1925 as an opponent to organizations like the Klan,[272] represented the "Scottsboro Boys" defendants in the other two Supreme Court cases the NAACP did not finance.[273] The ILD "immediately converted Scottsboro into a national and international cause célèbre…" by portraying "white Alabamians as 'lynchers' for their treatment of the Scottsboro defendants."[274] The criminal justice advocacy of these groups was inseparable from their racial justice advocacy because racism caused the injustices in those criminal cases. Put another way, the racialization of criminal law occasioned the racialization of criminal justice advocacy.

2. Activism in the Black Freedom Struggle

In the decades leading up to the Civil Rights Movement, activists pushed for change on several issues directly related to criminal law. Policing was perhaps the most prominent problem for activists, because police were, "the enforcers of white supremacy."[275] This was true in the North as well as the South; in New York City, for example, the white press religiously racialized crime through sensational proclamations of Black "crime waves," and white New Yorkers saw police as the front line of defense against "criminals," i.e., Black people.[276] In the eyes of the white public, police brutality against

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[270] *See* Klarman, *supra* note 99, at 77-88.

[271] *Id.* at 84.

[272] *See International Labor Defense Records*, N.Y. Pub. Libr.: Archives & Manuscripts, https://archives.nypl.org/scm/20647; *The International Labor Defense*, PBS, https://www.pbs.org/wgbh/americanexperience/features/scottsboro-international-labor-defense/ [https://perma.cc/5E7Q-LVNC] (last visited Sep. 22, 2025).

[273] *See* Klarman, *supra* note 99, at 72, 84.

[274] *Id.* at 72.

[275] Litwack, *supra* note 188, at 263.

[276] *See* Shannon King, *A Murder in Central Park: Racial Violence and the Crime Wave in New York in the 1930s and 1940s*, *in* The Strange Careers of the Jim Crow North: Segregation and Struggle Outside of the South 43-45, 51-55 (Brian Purnell, Jeanne Theoharis & Komozi Woodard ed., 2019).

Black people was deemed "adequate policing."[277] It is therefore unsurprising that, by the 1960s, many African Americans believed that the police came "to symbolize white power, white racism, and white repression."[278]

Police brutality against Black people was an enduring struggle for decades. The NAACP and other racial justice organizations complained about and mobilized against police brutality in New York City, Los Angeles, Detroit, and other cities across the country.[279] Unjustified police killings of Black people also spawned civil rights demonstrations and strong denunciations by leaders of the Black freedom struggle, including Nation of Islam spokesperson Malcolm X.[280] Many Black public figures, ranging from James Baldwin to Malcolm X, compared the police to an occupying army.[281] Dr. Martin Luther King called out police brutality on several occasions, including in his famous so-called "I Have a Dream" speech during the March on Washington in August 1963.[282] Ending police brutality was one of the Black Panther Party's demands in their Ten Point Program.[283] The Black Panthers were the original "Cop Watchers:" they armed themselves and monitored the behavior of the Oakland police to reduce brutality against Black people.[284]

Abusive policing was one of the major causes of civil unrest and urban explosions throughout the country, particularly in the 1960s. Malcolm X accurately predicted the increase in urban rebellions in response to abusive policing.[285] Official reports by governmental commissions explaining the causes of urban rebellions in various cities routinely identified abusive policing as a major spark plug.[286] The Kerner Commission Report, published in 1968, identified police practices as the first of "at least 12 deeply held grievances" of African Americans interviewed as part of the commission's

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[277] *Id.* at 58-59.

[278] *See* Report on Civil Disorders, *supra* note 13, at 5.

[279] *See* King, *supra* note 276, at 47; Theoharis, *supra* note 84, at 69-70, 75-76.

[280] *Id.*; *see also* Spowertube, *Malcolm X in Los Angeles May 5, 1962, Who taught you to hate yourself? full speech* at 19:42-21:53, YouTube (Nov. 25, 2013), https://www.youtube.com/watch?v=kboP3AWCTkA [https://perma.cc/YRF9-E3Y8].

[281] *See* King, *supra* note 276, at 43; Ntwadumela, MALCOM X THE MILITANT LABOR FORUM (MAY 29, 1964) at 3:50-4:10, 6:28-57, YouTube (May 29, 1964), https://www.youtube.com/watch?v=Ux_zQnD0WfY.

[282] *See Read Martin Luther King Jr.'s "I Have a Dream" Speech in its Entirety*, NPR, at 10:32 (Jan. 16, 2023), https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety [https://perma.cc/4YPJ-HK5W].

[283] *See (1966) The Black Panther Party Ten-Point Program,* Black Past (Oct. 15, 1966), https://www.blackpast.org/african-american-history/primary-documents-african-american-history/black-panther-party-ten-point-program-1966/ [https://perma.cc/V62M-6EEL] (last visited Sep. 22, 2025).

[284] *See "Policing the Police": How the Black Panthers Got Their Start*, WBUR (Sep. 23, 2015), https://www.wbur.org/npr/442801731/director-chronicles-the-black-panthers-rise-new-tactics-were-needed [https://perma.cc/TC6J-5RE4].

[285] *See* William Strickland, Malcolm X Make It Plain 160 (1994).

[286] *See* Report on Civil Disorders, *supra* note 13; *see also, e.g.*, Ramsey Clark, Andrew F. Brimmer & Jack T. Conway, Report of the President's Task Force on the Los Angeles Riots, August, 1965 (Sep. 17, 1965); King, *supra* note 276, at 44, 46-47.

investigation into the causes of rebellions in those cities.[287] Along with long-standing racial inequities in housing, education, economic opportunities, and other areas, incidents of police abuse served as the match for the existing racial powder keg.[288]

An interrelated issue racial justice advocates struggled with was police under-protection of Black victims of crime, especially when the perpetrators were white.[289] From the torture lynchings of Black people throughout the late nineteenth and early twentieth centuries to the rape of Recy Taylor by six white men in 1944 to the horrific murder of teenager Emmett Till by two white men in 1955 to the murder of civil rights activists through the 1950s and 1960s, racial justice advocates and organizations like the NAACP called out law enforcement and white society for its failure to hold wrongdoers accountable.[290] Advocates across the country also lambasted the local police forces for their mishandling of intraracial crime; when Black people committed violent offenses against other Black people, the police under-investigated and took no interest in protecting African Americans.[291] Police indifference to intraracial crime existed in the North as well as the South.[292] Black people criticized the white media as well for their depictions of Black people as only criminals and never victims in need of protection.[293]

One reason African Americans lacked faith in American criminal judicial systems in twentieth century America was because law enforcement had outsized influence and control over the process. Contrary to popular myths of judicial independence, judges relinquished authority to police officers and prosecutors.[294] Historian Say Burgin explains:

> Judges enacted unequal justice every time they acted on the assumption that they should take their cues from and act in the interests of the police, what [Judge George W.] Crockett referred to as "the old habit of *accommodating* the police and the prosecutor's office." Thus, Jim Crow justice was enacted precisely *through* relinquishing judicial autonomy and becoming the enforcement arm of the police.[295]

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[287] *See* Report on Civil Disorders, *supra* note 13,at 4.

[288] *Id*. at 5, 8.

[289] Theoharis, *supra* note 84, at 128-29.

[290] *See, e.g.*, Wormser, *supra* note 1, at 128-30; *Recy Taylor, Rosa Parks, and the Struggle for Racial Justice*, National Museum of African American History & Culture, https://nmaahc.si.edu/explore/stories/recy-taylor-rosa-parks-and-struggle-racial-justice [https://perma.cc/QCN9-SU6T] (last visited Nov. 17, 2025); Joy-Ann Reid, Medgar & Myrlie 68-81 (2024).

[291] *See* King, *supra* note 276, at 49-50, 56-58.

[292] *Id.* at 4; *see also* Litwack, *supra* note 201, at 264-65.

[293] *See* King, *supra* note 276, at 49-50, 56-58.

[294] *See* Say Burgin, *"The Shame of Our Whole Judicial System": George Crockett Jr., the New Bethel Shoot-In, and the Nation's Jim Crow Judiciary*, *in* The Strange Careers of the Jim Crow North: Segregation and Struggle Outside of the South 236 (Brian Purnell, Jeanne Theoharis & Komozi Woodard eds., 2019).

[295] *Id.* at 236-37.

Judges' collaboration with police and prosecutors—adversaries of the Black defendant—had repercussions throughout the entire criminal judicial process. Professor Burgin writes that it "meant disposing of the presumption of innocence because 'accommodating' prosecutors and police in their desires—for instance, for high bail or deference in submitting evidence—necessarily involved accommodating their efforts to demonstrate a defendant's guilt."[296] When conscientious Black judges, like George W. Crockett of Detroit, Bruce Wright of New York City, and George Leighton of Chicago, attempted to apply the law fairly, they were widely ridiculed, saddled with charges of being anti-police, and endured death threats and attempts to impeach them.[297] Racial justice advocates rushed to defend conscientious Black judges,[298] but such attacks made clear how white society viewed the role of the criminal judicial process: it existed as a means of socially controlling Black people.

Racial justice advocates also critiqued judges' deployment of their own racial biases. Professor Burgin notes how "judges across the country have leaned heavily upon—and reproduced—racist ideas that twinned criminality and [B]lackness."[299] Indeed, judges throughout the United States "ensured highly racialized outcomes in terms of key facets of the justice system, including habeas corpus, bail, sentencing, probation, and parole."[300] Conscientious Black judges resisted this as best they could.[301] Judge Crockett of Detroit stated: "There is no equal justice for [B]lack people in our criminal courts today, and what's more, there never has been…. And this is so, not because the written law says it shall be so, rather it is so because our judges, by their rulings, make it so."[302] Black activists echoed these very sentiments in rallies, speeches, and interviews.[303]

That criminal justice activism was racialized is also evident by white society's consistent response to calls for ending police abuse and inequities in the administration of criminal law. White politicians and civilians ignored the calls, blamed Black people and racial justice organizations for the injustices Black people suffered, and demanded more abusive policing.

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[296] *Id.* at 237.

[297] *Id.* at 237, 238-39, 245-47, 249-50.

[298] *See id.* at 247-48, 251-53.

[299] *Id.* at 236.

[300] *Id.* at 237.

[301] For example, Judge Crockett refused to set high bail on Black persons accused, falsely or otherwise, for participating in the Detroit riots in 1967. *See id.* at 241-43.

[302] *Id.* at 239.

[303] For example, Professor Burgin quotes the Black Panther Party's declaration that "the many Black and poor oppressed people now held in U.S. prisons and jails have not received fair and impartial trials under a racist and fascist judicial system." *See id.* at 238. It is also worth noting that the Black Panther Party's Ten-Point Program had three points related to racial equity in the administration of criminal law, including their point about police brutality. *See* "(1966) The Black Panther Party Ten-Point Program," Black Past, https://blackpast.org/african-american-history/black-panther-party-ten-point-program-1966/ [https://perma.cc/AWN6-EL7K].

In New York City in the 1940s, the white citizen rejoinder to calls for justice was making "explicit connections among juvenile crime, race, [B]lackness, and punishment," arguing that the mayor gave in to Black criminals and hamstrung law enforcement.[304] In Los Angeles in the 1960s, Mayor Sam Yorty responded to "rising Black complaints of police misconduct" by blaming the NAACP "for 'bringing about the very condition they are complaining about.'"[305] White intransigence was the response to Black advocacy, whether about traditional "civil rights" or about criminal justice.

Importantly, many of the leading voices on criminal justice issues were leading voices in the fight for racial justice. In the decades leading to the Civil Rights Movement, the NAACP led the legal charge to desegregate the country, but they were active in criminal justice causes as well, most notably as opponents of police abuse. Rosa Parks, renowned for her refusal to forfeit her seat on a Montgomery bus, was active in the fight to protect Black victims of crime, including Recy Taylor in Alabama.[306] Malcolm X and Dr. King demanded racial justice and equality in America generally, but they also had specific critiques of law enforcement and the administration of American criminal law.[307] The Black Panther Party was active on many fronts; they started dozens of social programs and clinics to address the plethora of problems Black people were facing.[308] Yet, they too denounced police abuse and the unfairness in criminal judicial systems.[309] With white society's ongoing racialization of crime and criminal law, criminal justice activism was inevitably racialized as well.

3. The Criminal Procedure Revolution

Finally, the racialization of criminal justice is evident in what scholars have called the Supreme Court's criminal procedure revolution. Between 1945 and 1970, at the same time the Court was striking down de jure segregation throughout the land, the Court expanded protections for state criminal court defendants. At the same time the Court burdened states with the

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[304] *See* King, *supra* note 276, at 53-55.

[305] *See* Theoharis, *supra* note 84, at 70.

[306] *See* Jeanne Theoharis, The Rebellious Life of Mrs. Rosa Parks 23-24, 201-03 (2013).

[307] *See*, *e.g.*, Educational Video Group, *Malcolm X Speech "Democracy is Hypocrisy,"*, at 0:18-1:07 (YouTube, Oct. 13, 2009), https://www.youtube.com/watch?v=qNfAFfu6VD0 [https://perma.cc/76HG-238M]; spowertube, *supra* note 280; Jeanne Theoharis, *Martin Luther King Knew That Fighting Racism Included Fighting Police Brutality*, The Atlantic (Sep. 15, 2021), https://www.theatlantic.com/ideas/archive/2021/09/martin-luther-king-police-brutality/619090/ [https://perma.cc/HW33-LVMY].

[308] *See The Black Panther Party: Challenging Police and Promoting Social Change*, Smithsonian: Nat'l Museum Afr. Am. Hist. & Culture, https://nmaahc.si.edu/explore/stories/black-panther-party-challenging-police-and-promoting-social-change [https://perma.cc/L458-KTTE] (last visited Oct. 4, 2025).

[309] *Id.*

task of integrating their public institutions, it also commanded states abide by most of the strictures of the Bill of Rights.[310] Naturally then, the opponents of desegregation and the enemies of the criminal procedure revolution tended to be one and the same.[311] Alabama Governor George Wallace, for example, was an ardent segregationist and a vociferous critic of the Warren Court's criminal procedure jurisprudence.[312]

This was no coincidence. Many legal scholars have recognized the relationship between racial justice and the criminal procedure revolution of the 1960s.[313] Dan Kahan and Tracey Meares identified institutionalized racism as the motivation behind the criminal procedure revolution.[314] In a 1968 law review article, A. Kenneth Pye accurately explains the logic of the relationship:

> The Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights…. Concern with civil rights almost inevitably required attention to the rights of defendants in criminal cases. It is hard to conceive of a Court that would accept the challenge of guaranteeing the rights of Negroes and other disadvantaged groups to equality before the law and at the same time do nothing to ameliorate the invidious discrimination between rich and poor which existed in the criminal process. It would have been equally anomalous for such a Court to ignore the clear evidence that members of disadvantaged groups generally bore the brunt of most unlawful police activity.
>
> If the Court's espousal of equality before the law was to be credible, it required not only that the poor Negro be permitted to vote and to attend a school with whites, but also that he and other disadvantaged individuals be able to exercise, as well as possess, the same rights as the affluent white when suspected of crime. It required that the values expressed in the Bill of Rights have meaning to the vast majority of our citizens whose contact with the criminal process is limited to local police and local judges, and for whom protections in a federal criminal trial are only slightly more relevant than the criminal

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[310] *See* Ben-Dan, *supra* note 11, at 146-47.

[311] *Id.* at 147-48.

[312] *Id.* The Court's commitment to racial justice in both civil rights and criminal procedure led Wallace to call the Court a "lousy, sorry, no account outfit." *See* Joshua Dressler & George C. Thomas III, Criminal Procedure: Principles, Policies and Perspectives 647 (6th ed. 2017); *see also* Alexander, *supra* note 77, at 44.

[313] *See*, *e.g.*, Lain, *supra* note 15, at 1389 ("After Brown gave [B]lacks equality in education, it was only a matter of time before the Supreme Court would turn to racial equality in other contexts, such as criminal procedure. Indeed, as the civil rights movement gained momentum, the notion that [B]lacks should be protected in their civil rights, but not when their liberty and lives were at stake, must have seemed patently absurd.").

[314] Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 Geo. L.J. 1153, 1156 (1998).

> procedure of Afghanistan. The principles of the Bill of Rights had to be applied to modern police, prosecutorial, and judicial practices if they were to retain their vitality in a modern age.[315]

Clearly then, the criminal procedure revolution evidences the racializing of criminal justice. Moreover, like the birth of modern criminal procedure in the 1920s, the criminal procedure revolution of the 1960s was a moment of criminal law deracialization. Once again, the white supremacist use of criminal law was hampered by newly imposed constitutional rules, but on a grander scale. The constitutional changes in the 1920s and 1930s were consequential, but more piecemeal; the changes in the 1960s were quite vast by comparison. Granted, the effects of the criminal procedure revolution were relatively ephemeral as well; state criminal judicial system actors found ways around the new protections. Nonetheless, the incorporation of most of the criminal procedure protections marked a monumental departure from the Court's jurisprudence for over a century prior to the 1940s.

D. Criminal Law and the Second Racial Redemption

If, as Professor Pye noted, the concerns underlying the Court's criminal procedure revolution "can be understood only in the context of the struggle for civil rights," then the criminal procedure counterrevolution can only be understood in the context of white American resistance to civil rights. Indeed, numerous legal scholars have used the term "counterrevolution" to describe the white backlash in the civil rights arena.[316] Scholarly use of the term "counterrevolution" to account for blowback in both arenas indicates a connection between the two. From a governmental standpoint, use of the term "counterrevolution" further strengthens Professor Bilionis's thesis that criminal law is "an integral component of American constitutional law that needs to be integrated into the narrative of our constitutional times."[317]

This section interrogates the relationship between criminal law and the second racial redemption, showing the racialization of criminal law that followed the post-Civil Rights Era. The white citizenry supported tough-on-crime politics, strongly supported and relied on racially discriminatory policing, and utilized dog whistles and crime statistics once again to center Black criminality in public and scholarly discourse.[318] White politicians at

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[315] A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 Mich. L. Rev. 249, 256 (1968).

[316] *See*, *e.g.*, Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 283-303, 308-16 (1991); Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 Drake L. Rev. 911, 961-72 (2008). Some scholars have also used the word "counterrevolution" to describe the first racial redemption. *See*, *e.g.*, Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 Harv. C.R.-C.L. L. Rev. 65, 83-84 (2008).

[317] Bilionis, *supra* note 27, at 979.

[318] *See infra* Part II.D.1.

the state and federal levels empowered carceral actors, especially the police, to pursue and criminalize Black people.[319] Finally, the Court constitutionalized governmental expansion of the powers of carceral actors while immunizing the system and its players from legal accountability.[320] Thus again, albeit in a form distinct from the first racial redemption, the white supremacist trifecta successfully reproduced *criminal law racialization*—the use of criminal law to racially oppress through aggressive enforcement against Black people, lax enforcement (or nonenforcement) against whites, the vanquishing of rights for criminal defendants, and the immunizing of criminal judicial systems against legal challenge.

1. The Citizen Redemption

With the explosion of plea bargaining and the steep decline in trials in the 1960s, the white citizenry (outside of police) became less involved in the racialization of crime through direct participation in state and federal criminal judicial systems. Yet, while rare, criminal trials did and do happen. When cases are tried, the juries generally tend to be mostly or entirely white.[321] The racial compositions of juries affect the likelihood of criminal conviction when the defendant is Black: the whiter the jury, the higher the likelihood of conviction.[322] Prosecutors know this, which is why they often target and seek to remove Black people from juries.[323] On the flip side, white jurors are more likely to acquit white defendants for crimes against Black people, especially if the accused is a police officer.[324]

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[319] *See infra* Part II.D.2.

[320] *See infra* Part II.D.3.

[321] *See* Liana Peter-Hagene, *Jurors' Cognitive Depletion and Performance During Jury Deliberation as a Function of Jury Diversity and Defendant Race*, 43 Law & Hum. Behav. 232, 233 (2019).

[322] *Id*. at 234.

[323] *See* Rosemary Scapicchio, *Peremptory Challenge Should Be Reserved for the Defendant*, 66 Bos. Bar J. 40, 40–41 (2022).

[324] *See*, *e.g.*, David Smith, *A Shock to the System: Looking Back on the 1984 New York Subway Shooting*, The Guardian (Aug. 9, 2023, 7:17 ET), https://www.theguardian.com/tv-and-radio/2023/aug/09/fiasco-podcast-leon-neyfakh-1984-subway-shooting-new-york [https://perma.cc/52VS-CZZM] (the acquittal of Bernhard Goetz of homicide in New York City); *see* Seth Mydans, *The Police Verdict; Los Angeles Policemen Acquitted in Taped Beating*, N.Y. Times (Apr. 30, 1992), https://www.nytimes.com/1992/04/30/us/the-police-verdict-los-angeles-policemen-acquitted-in-taped-beating.html [https://perma.cc/856X-YJ3X] (the acquittal of the LAPD officers in the beating of Rodney King); *see* Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting are Acquitted of All Charges*, N.Y. Times (Feb. 26, 2000), https://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html [https://perma.cc/69TM-EAD6] (the acquittal of the NYPD officers in the shooting death of Amadou Diallo); *see* Lizette Alvarez & Cara Buckley, *Zimmerman is Acquitted in Trayvon Martin Killing*, N.Y. Times (July 13, 2013), https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html [https://perma.cc/4K86-EWP8] (the acquittal of George Zimmerman of murder in the shooting death of Trayvon Martin).

White Americans supported tough-on-crime policies for decades, and this support has been rooted in fears of Black criminality. They were receptive to Richard Nixon's cries for "law and order," a dog whistle originating from, in the words of Professor Haney Lopez, "a fabricated fusion of [B]lacks and criminality that had helped a revamped form of slavery survive the Civil War…."[325] For the next few decades after Nixon's first successful election, the presidential candidates that the white public deemed the toughest on crime—Ronald Reagan and George H.W. Bush in the 1980s, Bill Clinton in the 1990s—won the White House. White voters were receptive to Ronald Reagan's dog whistling on the campaign trail about the "strapping young buck" and the "Chicago welfare queens," both references conjuring up images of Black criminality.[326] Most recently, white voters were receptive to Donald Trump's crime-related xenophobic and anti-Black rhetoric in both successful campaigns for the presidency.[327]

Unlike the nadir, white racial vigilantism in the post-Civil Rights Era was met with mixed results. White citizens accused of killing Black people have sometimes been acquitted, but sometimes they have been convicted of homicide charges.[328] For this reason, white civilians have increasingly relied

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[325] Haney Lopez, *supra* note 118, at 41.

[326] *Id*. at 58-59. The "buck" reference "has long been used to conjure the threatening image of a physically powerful [B]lack man often one who defies white authority and who lusts for white women." Id. at 59. Reagan's use of it "worked just as well to provoke a sense of white victimization." Id. Also, the "Chicago welfare queen" trope "propagat[es] the stereotypical image of a lazy, larcenous [B]lack woman ripping off society's generosity without remorse . . . ." Id. at 58.

[327] The portion of Donald Trump's campaign website that speaks to crime reads eerily similarly to law-and-order champion Richard Nixon's rhetoric on the campaign trail in 1968: "There is no higher priority than quickly restoring law and order and public safety in America. President Trump stands with the heroes of law enforcement. . . . The Harris-Biden Administration and the radical left politicians have defunded, defamed, and dismantled police forces across America. Murders spiked to all-time highs in Democrat-run cities and radical prosecutors and District Attorneys have given free rein to violent criminals who threaten our citizens. The streets of our once-great cities are now controlled by gangs and cartels and plagued with mentally ill and drug-addicted homeless. President Trump will revitalize police departments and reclaim safety, dignity, and peace for law-abiding Americans. He will deliver record funding to hire and retrain police officers, strengthen qualified immunity and other protections for police officers, increase penalties for assaults on law enforcement, put violent offenders and career criminals behind bars, and surge federal prosecutors and the National Guard into high-crime communities." *See Issues*, Donald J. Trump campaign website, https://www.donaldjtrump.com/issues (click on "Stop Crime and Restore Safety" tab) [https://perma.cc/5GS7-ZUZV].

[328] Examples of successful prosecutions of white perpetrators for homicides against Black people include the conviction of John William King, Lawrence Russell Brewer, and Shawn Berry for the murder of James Byrd, Jr. on June 6, 1998, *see* Eliott C. McLaughlin & Steve Almasy, *John William King Had No Last Words Before His Execution for the Heinous Dragging Death of James Byrd Jr*., CNN (Apr. 25, 2019, 7:27 ET) https://www.cnn.com/2019/04/24/us/james-byrd-killer-execution-john-william-king/index.html [https://perma.cc/T7ZA-XH8U]; and the conviction of Michael Dunn for the murder of 17-year-old Jordan Davis on November 23, 2012, *see* Andrew Pantazi*, Michael Dunn Convicted of Killing 17-Year-Old After Telling Teen to Turn Down Rap Music, Loses Appeal*, Fla. Times Union (Nov. 17, 2016, 10:28 ET), https://www.jacksonville.com/story/news/crime/2016/11/17/michael-dunn-convicted-killing-17-year-old-after-telling-teen-turn-down-rap-music/15732203007/ [https://perma.cc/7W7Q-DBHC].

upon the longtime "enforcers of white supremacy": the police. With wars on crime being "waged," the role of police was consequently magnified in the eyes of the white public; police officers were considered the "frontline soldiers" in this new war against crime.[329] Against the backdrop of tough-on-crime rhetoric and the accompanying fear mongering, police misconduct has generally been tolerated and excused, especially when the victims of the misconduct are Black people.[330] In recent years, no better examples exist of white citizen weaponization of police against Black people as the infamous "Karen" incidents: publicized instances where white people have called the cops on Black people for simply living.[331]

Notions of Black criminality have laid at the heart of modern policing for decades. White Americans have always constituted the majority of drug users, but the majority of persons sent to prison on drug charges during the War on Drugs were Black people.[332] African American neighborhoods—and African Americans—are the most overpoliced. Black people are more likely to be stopped, frisked, searched, and manhandled even though white citizens are more likely to possess contraband.[333] Police officers disproportionately harass Black pedestrians and Black motorists through stop-and-frisks,[334] "consent searches,"[335] "gang policing,"[336] and other tools, and they utilize them to siphon Black people—the few that have anything, and sometimes

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[329] *See* Michael W. Flamm, Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s 51 (2005).

[330] *See* Alexander, *supra* note 77, at 74-75.

[331] *See*, *e.g.*, Daniel Victor, *When White People Call the Police on Black People*, N.Y. Times (May 11, 2018), https://www.nytimes.com/2018/05/11/us/black-white-police.html [https://perma.cc/KEH2-U9W8].

[332] *See* Alexander, *supra* note 77, at 98-99.

[333] *See* U.S. Dep't of Just., Off. of Just. Programs, Bureau of Just. Stat., NCJ 251145, Contacts Between Police and the Public, 2015, 4 (2018); Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities Large-Scale A Racial D in Police Stops Across Police Stops A the United States*, 4 Nature Hum. Behaviour 736-45 (May 2020), https://www.nature.com/articles/s41562-020-0858-1.pdf; *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, The Sentencing Project (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ [https://perma.cc/K9ZN-CKPR]; Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* at 3-4 (July 2017), https://scholar.harvard.edu/files/fryer/files/empirical_analysis_tables_figures.pdf; Joscha Legewie, *Racial Profiling and Use of Force in Police Stops: How Local Events Trigger Periods of Increased Discrimination*, 122 Am. J. Soc. 379, 380-81 (2016); Ryan Gabrielson, Eric Sagara & Ryann Grochowski Jones, *Deadly Force, in Black and White*, ProPublica (Oct. 10, 2014, 11:07 ET), https://www.propublica.org/article/deadly-force-in-black-and-white?utm_source=et&utm_medium=email&utm_campaign=dailynewsletter [https://perma.cc/5HSU-NHWS].

[334] *See* Alexander, *supra* note 77, at 62-63; *see also*, *e.g.*, Sam McCann, *What is Stop-and-Frisk?*, Vera Inst. (Feb. 21, 2025), https://www.vera.org/news/what-is-stop-and-frisk [https://perma.cc/RKP2-3G6M].

[335] *Id.* at 63-68.

[336] *See* K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 U. Denv. Crim. L. Rev. 1, 2 (2015).

innocent civilians—into state and federal criminal judicial systems.[337] When officers assault African American arrestees, they usually hit them with "contempt of cop" charges, which suggest criminality and unruliness on the part of the arrestees.[338] When an officer kills an unarmed Black person, the automatic rejoinder is that the Black person caused the officer to fear for his or her safety.[339] Fears of Black criminality, particularly of Black dangerousness, anchor policing practices to date.

White civilians also racialized criminal law in media and academic scholarship. In the media, nightly news stories "solidified to the public imagination the image of the [B]lack drug criminal."[340] Michelle Alexander notes how, despite the absence of overtly racist rhetoric, "the calls for 'war' at a time when the media was saturated with images of [B]lack drug crime left little doubt about who the enemy was in the War on Drugs and exactly what he looked like."[341] Crime statistics continue to promote narratives of Black criminality in the disguise of objectivity.[342] With respect to scholarship, a popular example of the academic racialization of crime was "Broken Windows," a theory conceived by two white professors.[343] In subsequent decades, their theory has been both debunked and criticized; part of the criticism was that it "merely furthers racist tropes about Black people in impoverished neighborhoods."[344] The theory nonetheless found a warm reception in law enforcement spaces for decades, and some academics still advocate for its continued use.[345]

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[337] The majority of persons stopped by the police are Black, and the majority of them are innocent of any crime. *See* Tonja Jacobi & Ross Berlin, *Supreme Irrelevance: The Court's Abdication in Criminal Procedure Jurisprudence*, 51 U.C. Davis L. Rev. 2033, 2036-37 (2018).

[338] *See* Bonnie Kristian, *The Obstruction Conversation We Should be Having*, The Week (Mar. 26, 2019), https://theweek.com/articles/831182/obstruction-conversation-should-having [https://perma.cc/9RMA-LBPQ] (Finley writes that common "contempt of cop" charges include offenses like "resisting arrest, disorderly conduct, failure to obey a police order, fleeing police, and obstruction of justice…"); Zamir Ben-Dan, *Reimagining Justice:* People v. Charles *and the Myth of Justice Without Police Accountability in New York City,* 45 N.Y.U. Rev. L. & Soc. Change 509, 531-33 (2022).

[339] *See* Toussaint Cummings, *I Thought He Had a Gun: Amending New York's Justification Statute to Prevent Police Officers from Mistakenly Shooting Unarmed Black Men*, 12 Cardozo Pub. L. Pol'y & Ethics J. 781, 783-85, 809-10 (2014); Delores Jones-Brown & Kwan-Lamar Blount-Hill, *Convicted: Do Recent Cases Represent a Shift in Police Accountability? A Research Note*, 56 Crim. Law Bulletin,270270-301 (2020).

[340] Alexander, *supra* note 77, at 105.

[341] *Id*.

[342] *See* Muhammad, *supra* note 212, at 1; *see also* Alexander, *supra* note 77, at 99-102.

[343] *See* George L. Kelling & James Q. Wilson, *Broken Windows*, The Atlantic (Mar. 1982), https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ [https://perma.cc/BST9-XWEK].

[344] *See* Etienne C. Toussaint, *Tragedies of the Cultural Commons*, 110 Cal. L. Rev. 1777, 1832 (2022) (citing Bench Ansfield, *The Broken Windows of the Bronx: Putting Theory in Its Place*, 72 Am. Q. 103, 104 (2020)).

[345] *See*, *e.g.*, John McMillian, *Broken Windows Policing Is Still the Best Way to Fight Crime*, City J. (Jan. 3, 2025), https://www.city-journal.org/article/broken-windows-policing-crime-malcolm-gladwell [https://perma.cc/F32R-RBBA].

In sum, the white citizenry contributed to the racialization of crime and criminal law in the post-Civil Rights Era through their support for tough-on-crime policies, their support for and affiliation with law enforcement, and their centering of Black criminality in the public and scholarly discourse. The media's incessant pictorial equating of Blackness with criminality is of particular importance, because carceral actors and politicians consumed it and acted on it. Moreover, many Black politicians and activists supported the hyper-criminalization of Black people in the late twentieth century and lived to regret it later.[346]

2. The Political Redemption

For state carceral actors, the response to the Court's criminal procedure revolution was two-fold. First, they plainly ignored the Court's command and refused to respect the rights of Black defendants. The criminal court proceedings following the Detroit riots in 1967 exemplify this well. Warrants were issued for thousands of people despite a lack of probable cause; criminal charges were filed in cases featuring bogus arrests for curfew violations; and high amounts of bail were set with no regard for whether the persons arrested posed flight risks.[347] Judge Crockett, a jurist in Detroit, noted that "the bench's actions constituted a 'wholesale denial of the constitutional rights of virtually everyone who was arrested during that disturbance.'"[348] Professor Burgin identifies the juridical treatment of the accused rioters as "perhaps the clearest example of the way judges enacted a Jim Crow judiciary—the way they perpetuated it through their protection of police brutality and prosecutorial corruption."[349]

The second reaction to the Court's criminal procedure revolution was to reinvent criminal judicial processes to "put 'efficiency' above due process rights."[350] At the same time the Court was expanding protections for accused persons, state courts "enacted what ethnographer Nicole Gonzalez Van Cleve refers to as 'due process for the undeserving'—practices that flattened due process rights like the right to a jury trial and instead emphasized plea bargaining as a way to 'efficiently' dispose of cases."[351] The Court's criminal procedure revolution coincided with the rise and eventual widespread use of plea bargaining and judicial actors (judges and eventually prosecutors) in a variety of ways to put pressure on defendants to plead

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[346] *See* Arun Venugopal, *The Shift in Black Views of the War on Drugs*, NPR (Aug. 16, 2013, 4:45 PM), https://www.npr.org/sections/codeswitch/2013/08/16/212620886/the-shift-in-black-views-of-the-war-on-drugs [https://perma.cc/H4ML-HUJN].

[347] *See* Burgin, *supra* note 294, at 242-44.

[348] *Id.* at 243.

[349] *Id.*

[350] *Id.* at 250.

[351] *Id.*

guilty and forgo their trial rights.[352] Thus, state actors remade criminal judicial systems into plea bargaining factories that produced "assembly-line justice in teeming lower courts."[353]

Meanwhile, with rises in crime and the eruption of urban rebellions in the 1960s, political opponents of racial justice successfully shunted the public discourse from civil rights to crime.[354] Alexander notes that since the 1950s, racist politicians equated civil rights activism and criminal activity.[355] Haney Lopez notes that this rhetorical connection:

> shifted the issue from a defense of white supremacy to a more neutral-seeming concern with 'order,' while simultaneously stripping the activists of moral stature. Demonstrators were no longer Americans willing to risk beatings and even death for a grand ideal, but rather criminal lowlifes disposed toward antisocial behavior.[356]

As crime rose in the 1960s, coupled with changes in "the rules of acceptable discourse," rightwing politicians and strategists developed a new dog whistle: the need to maintain "law and order."[357] Lopez explains that "the language of law and order justified a more 'quiet' form of violence in defense of the racial status quo, replacing lynchings with mass arrests for trespassing and delinquency."[358] Ironically strengthening the tough-on-crime rhetoric was a subset of Black activists that "began to join the calls for 'law and order' and expressed support for harsh responses to lawbreakers."[359] Rightwing politicians could further disclaim any racist motivations for tough-on-crime measures by highlighting Black support for hyper-criminalization.[360]

Thus, from the late 1960s and to the present, Black criminality—dubbed "law and order"—became a national obsession. Professor George Lipsitz notes how in the late 1960s, "[b]oth major political parties embraced law-and-order rhetoric at a time when crime was actually decreasing as part of an elite and popular reaction among whites against the democratic and egalitarian gains of the Civil Rights Era."[361] President Richard Nixon announced the War on Drugs, which was nothing more than a proxy war

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[352] *Id.* at 250-51; *see also* Ben-Dan & Appling, *supra* note 18, at 1376-81.

[353] *See* Report on Civil Disorders, *supra* note 13, at 157.

[354] *See* Alexander, *supra* note 77, at 43.

[355] *Id.* at 40-41.

[356] Haney Lopez, *supra* note 118, at 23-24.

[357] Alexander, *supra* note 77, at 42-43, 46; Haney Lopez, *supra* note 118, at 24.

[358] Haney Lopez, *supra* note 118, at 24.

[359] Alexander, *supra* note 77, at 42.

[360] *Id.*

[361] George Lipsitz, *"In an Avalanche Every Snowflake Pleads Not Guilty": The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. Rev. 1746, 1788 (2012).

on his political enemies, particularly African Americans.[362] Both Congress and state legislatures passed increasingly punitive statutes in the next several decades in response to the continuing hysteria about crime and the War on Drugs.[363] Some of these draconian measures included three-strike laws, mandatory minimums, and life imprisonment and death sentences for certain drug-related offenses.[364] From George H.W. Bush's Willie Horton advertisement and Bill Clinton's "super predators" rhetoric to Donald Trump's "war zones" label of African American communities, not-so-subtle references to raging Black criminality continue to dominate presidential politics.[365]

Importantly, Congress and state legislatures greatly empowered law enforcement. As the Kerner Commission Report noted, the consistent—and unfortunate—official response to urban rebellions was not to address the underlying conditions that gave rise to rioting, but to militarize the police.[366] In the decades thereafter, both Congress and state legislatures massively expanded the budgets of federal and state law enforcement agencies.[367] They also equipped local police departments with military-grade technology, including helicopters, grenade launchers, M-16 rifles, and even tanks.[368] Civil asset forfeiture laws gave the police wide latitude to steal property under color of law.[369] States have qualified immunity for police officers, and efforts to abolish it in the months following George Floyd's murder went nowhere.[370] Regarding prosecutors, "[l]egislatures across the county have expanded substantive criminal and evidentiary law to such a degree so as to provide prosecutors with a sizable arsenal at their disposal. Such expansion includes new crimes, more favorable evidentiary rules, and statutory presumptions."[371] In the ongoing wars on crime in the post-Civil Rights Era, the police and prosecutors have been white America's faithful soldiers, and Black people are largely the enemy.

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[362] *See* Ben-Dan, *supra* note 11, at 168, 232.

[363] *See*, *e.g.*, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197; Lipsitz, *supra* note 361, at 1781-82; *see also*, *e.g.*, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

[364] *See* Alexander, *supra* note 77, at 53, 56.

[365] *Id.* at 54; *see also* Kindaka J. Sanders, *The New Dread, Part I: The Judicial Overthrow of the Reasonableness Standard in Police Shooting Cases*, 6 UCLA Crim. Just. L.Rev. 21, 68-72 (2022).

[366] *See* Report on Civil Disorders, *supra* note 13, at 4.

[367] *See* Alexander, *supra* note 77, at 53, 72-73.

[368] *Id.* at 73-74.

[369] *Id.* at 77-79.

[370] *See* Kimberly Kindy, *Dozens of states have tried to end qualified immunity. Police officers and unions helped beat nearly every bill.*, Washington Post (Oct. 7, 2021), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html [https://perma.cc/4SZ4-C6K9].

[371] *See* Ben-Dan & Appling, *supra* note 18, at 1377.

Meanwhile, the reactions to the criminal procedure revolution within state and federal criminal judicial processes are still ongoing. Prosecutors—the actors Alexander identifies as "the most powerful law enforcement official[s] in the criminal [judicial] system"[372]—have wide latitude and control through plea bargaining. Plea bargaining remains the dominant mode of case resolution because of immense pressures within the system for accused persons to plead guilty, including the "crushing caseloads of public defenders," the "continued swelling of criminal case dockets," and the "trial tax" for defendants who exercise their right to trial.[373] State and federal judicial systems routinely cover up the misdeeds of the prosecutor, whether they are "suborning perjury, tampering with evidence, … perverting grand jury processes … overcharging… [or] failing to disclose evidence favorable to the defense, otherwise known as *Brady* violations."[374] They religiously validate police officers through rubber-stamped warrants and assumptions of officer credibility.[375] Moreover, they shield police officers from accountability for misconduct, be it brutality (including police killings of unarmed people), "testilying,"[376] "flaking,"[377] or other police misbehaviors. As "police brutality and prosecutorial overreach could not stand without them,"[378] the Jim Crow judiciary is alive and well in the twenty-first century.

As if the scales of criminal law administration weren't already heavily tipped in favor of the police and prosecution, the right to counsel is already tenuous for poor Black defendants given the disaster that is American public defense. States and localities across the country have, without almost any exception, established grossly deficient public defense programs in their respective jurisdictions.[379] Public defenders are notoriously overworked and underpaid, carrying massive caseloads that invariably contribute to the affirmance of plea-bargaining culture, inadequate law practice that may rise to the level of ineffectiveness or even malpractice, and, in certain jurisdictions, large numbers of accused persons going unrepresented.[380] In many

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[372] Alexander, *supra* note 68, at 87.

[373] *See* Ben-Dan, *supra* note 11, at 227.

[374] Ben-Dan & Appling, *supra* note 18, at 1379-81; *see Brady v. Maryland*, 373 U.S. 83 (1963).

[375] *See* Mark Joseph Stern, *The Police Lie. All the Time. Can Anything Stop Them?,* Slate (Aug. 4, 2020), https://slate.com/news-and-politics/2020/08/police-testilying.html [https://perma.cc/E9GC-3EXG]; *see also* Ben-Dan *supra* note 338, at 540, 558.

[376] *Id.* at 513 ("Testilying" is police vernacular for police perjury).

[377] *Id.* ("Flaking" is the practice of planting evidence on a person).

[378] Burgin, *supra* note 294, at 239.

[379] *See* Donald C. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 Wash. & Lee L. Rev. 883, 894-899.

[380] *See* Olivia Laughland, *The human toll of America's public defender crisis*, Guardian (Sep. 7, 2016), https://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system [https://perma.cc/CP9C-7B2L]; *see also* Peter A. Joy, *A Judge's Duty to Do Justice: Ensuring the Accused's Right to the Effective Assistance of Counsel*, 46 Hofstra L. Rev. 139, 148 (2017).

jurisdictions, accused misdemeanants are held sometimes for weeks without representation.[381] In these situations, police officers can exploit citizen ignorance and extract confessions out of them. Moreover, detained persons are often forced to participate in criminal proceedings without the benefit of counsel, to their own detriment.[382] This monumental failure of public defense is deliberate; inadequate public defense allows for more criminal convictions and fewer reversals.[383]

In sum, politicians (mostly white, but some Black as well) contributed greatly to the racialization of criminal law that marked the second racial redemption. Within the courts, they waged a backlash against the criminal procedure revolution that continues to this day, having functionally reduced the rights of criminal defendants to a degree comparable with the state of criminal law administration before the Warren Court. With law enforcement practices that disproportionately usher Black people into the grips of state and federal judicial systems, and with prosecutorial and juridical practices that make racial disparities starker, the white supremacist use of criminal law is evident. The post-Civil Rights Era racialization of criminal law is firmed up further through the legislative empowerment and juridical protection of police and prosecutors, as well as the legislative disempowerment of public defense.

3. The Judicial Redemption

From the late 1960s onward, the white citizenry racialized crime and criminal law through their voting patterns, their strong support for and reliance on police and the machinations of the criminal judicial system, and their promotion of Black criminality in media and in academic scholarship through dog whistle language. Law enforcement in particular racialized crime and criminal law by disproportionately funneling Black people into criminal judicial systems in several ways. Politicians racialized crime and criminal law through the legislative empowerment and juridical protection of police and prosecutors as well as through the denial of rights of accused persons, a disproportionate number of whom have consistently been African American. And, as discussed earlier, the Supreme Court colluded with the white citizenry and white politicians in effecting the civil-rights side of the second racial redemption.[384] It therefore defies logic to posit that the Court's

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[381] *See* Pamela R. Metzger & Janet Hoeffel, *Criminal (Dis)Appearance*, 88 Geo. Wash. L. Rev. 392, 397-06, 410, 411 (2020).

[382] *Id.* at 406-12.

[383] *See* Dripps, *supra*, note 379, at 902-03 ("Legislatures disinclined to fund indigent defense know that the failure to provide effective representation will lead to the reversal of few if any convictions.")

[384] *See* Part II.C.3, *supra*.

criminal procedure counterrevolution is somehow unrelated to the ongoing racial redemption.

As I've noted elsewhere, the Court took two interrelated approaches to criminal law and procedure since the 1970s: it has narrowed the criminal procedure safeguards contained in the Bill of Rights, made applicable to the states in the 1960s; and it has immunized criminal judicial systems and their players from legal accountability.[385] These approaches have crystallized the ongoing empowerment and protection of prosecutors and police that have existed for decades. Let's take prosecutors: the Court disallows civil rights lawsuits against prosecutors for any act undertaken in the scope of their quasi-judicial functions.[386] It further completely shields supervisors in the prosecutors' office from any decisions they make in the scope of their duties.[387] Suing a prosecutor's office based on a municipal liability theory offers no promise as well.[388] The Court's precedents make prosecutors virtually civilly unreachable.

Moreover, the Court's jurisprudence insulates prosecutors from racial bias challenges to their exercises of discretion. The Court rendered selective enforcement claims subject to its ill-reputed discriminatory intent rule, making said claims difficult to prove.[389] The Court used that same rule to reject the most comprehensive racial bias challenge to a state's death penalty scheme and state prosecutors' use of it, finding that there was no "constitutionally significant risk of racial bias" posed despite clear racial disparities in its use.[390] The Court barred plaintiffs from even getting access to prosecutors' files for purposes of discovery, ruling that plaintiffs must first "produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not."[391] Put another way, a person seeking to obtain the prosecution's files to see if they establish racial discrimination must first prove the very thing they need the prosecution's files to establish. Suffice it to say, this standard is virtually impossible to meet.

Additionally, the Court's precedents crystallize the prosecutor's power over state and federal criminal judicial processes. For much of Anglo-American legal history, the practice of plea bargaining was frowned upon and considered nefarious.[392] Yet with the rise of plea bargaining in the 1960s in response to the criminal procedure revolution, the Court embraced the

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[385] *See* Ben-Dan, *supra* note 11, at 164-67.

[386] *See* Imbler v. Pachtman, 424 U.S. 409, 409 (1976).

[387] *See* Van de Kamp v. Goldstein, 555 U.S. 335, 346 (2009).

[388] *See* Connick v. Thompson, 563 U.S. 51, 62 (2011).

[389] *See* Wayte v. United States, 470 U.S. 598, 608 (1985).

[390] McClesky v. Kemp, 481 U.S. 279, 313 (1987).

[391] United States v. Armstrong, 517 U.S. 456, 457 (1996).

[392] *See* Lucian E. Dervan & Vanessa A. Edkins Ph.D., *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. Crim. L. & Criminology 1, 6, 10 (2013).

practice as a necessary component of criminal law administration.[393] It then sanctioned prosecutors' exertion of pressure on defendants to plead guilty by way of threats to pursue more serious charges.[394] *Bordenkircher v. Hayes* provides a vivid illustration of the kind of pressure the Court found acceptable: the prosecutor was permitted to reindict the defendant under a habitual offender statute that exposed him to a mandatory life sentence because he refused the prosecutor's initial offer of *five years in prison.*[395] Thus, the Court approved of criminal law administration that prioritizes efficiency over justice. It also essentially constitutionalized the trial tax.

Regarding police protection, the Court has also made it difficult for victims of police misconduct to hold law enforcement accountable. In 1967, the Court granted qualified immunity to police officers;[396] in the decades since, it has enlarged the shield.[397] Despite public pressure to end qualified immunity,[398] and despite sustained academic criticism of the doctrine,[399] the Court's qualified immunity jurisprudence has not only improved but has arguably gotten worse; the defense has been utilized to absolve officers of egregious misconduct.[400] The Court's pro-police bias is further evidenced by the fact that the Court has summarily reversed denials of qualified immunity, but not the other way around.[401] Moreover, the Court has failed to check lower courts for misapplying the standard to the benefit of the police and the detriment of plaintiffs.[402] This refusal to correct lower courts only serves to protect police when the Court's own jurisprudence might demand otherwise.

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[393] *See* Brady v. United States, 397 U.S. 742, 751-52 (1970).

[394] *See* Bordenkircher v. Hayes, 434 U.S. 357, 364-65 (1978).

[395] *Id*. at 358-59.

[396] *See* Pierson v. Ray, 386 U.S. 547, 555 (1967).

[397] *See* Anderson v. Creighton, 483 U.S. 635, 641 (1987).

[398] *See*, *e.g.*, Christina Carrega, *Why Has Qualified Immunity Excused Officers' Misconduct in Lawsuits for Decades?*, Capital B News (Mar. 8, 2023), https://capitalbnews.org/qualified-immunity-explained/ [https://perma.cc/GCU3-3WDT]; Joanna Schwartz, *Qualified Immunity is Burning a Hole in the Constitution*, Politico (Feb. 19, 2023), https://www.politico.com/news/magazine/2023/02/19/qualified-immunity-is-burning-a-hole-in-the-constitution-00083569 [https://perma.cc/ER27-TB8Z]; *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, Pew Research Center (Jul. 9, 2020), https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/ [https://perma.cc/2EFB-3NDH].

[399] *See*, *e.g.*, Tilman J. Breckenridge, *Qualified Immunity: History Demands Change*, 24-Jan. NBA Nat'l B. Ass'n Mag. 12 (2021); Brandon Duke, *Confronting Qualified Immunity*, 60-Apr. Hous. Law. 10 (2023); Jared Stehle, *Ending the Qualified Immunity Nightmare*, 118 Nw. U. L. Rev. Online 36 (2023); Joanne C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018).

[400] *See*, *e.g.*, Kisela v. Hughes, 584 U.S. 100 (2018) (granting qualified immunity where officer shot woman holding a knife four times without warning).

[401] *See* Salazar-Limon v. City of Houston, 137 S.Ct. 1277, 1282-83 (2017) (Sotomayor, J., dissenting from denial of certiorari).

[402] *See* N. S., only child of decedent Stokes v. Kansas City Board of Police Commissioners, 143 S.Ct. 2422, 2424 (2023) (Sotomayor, J., dissenting) (citing Lombardo v. St. Louis, 143 S.Ct. 2419 (2023); (Ramirez v. Guadarrama, 142 S.Ct. 2571 (2022); and James v. Bartelt, 142 S.Ct. 4 (2021)).

Further, the Court's Fourth Amendment precedents encourage racialized policing. Carbado argues that Fourth Amendment law "permits police officers to force interactions with African Americans with little or no basis."[403] Indeed, Fourth Amendment law increases the possibilities of police-citizen interactions that may lead to arrest and encourages the police to exploit citizens' ignorance of their rights.[404] Pretextual searches motivated by racial animus are permissible if a court finds the existence of probable cause;[405] this consequently encourages racial profiling (which produces the risk of "violence of serious bodily injury and death" for Black people),[406] because police officers can always concoct a post-hoc justification for the stop in case they make an arrest.[407] The Court also allows police stops and frisks of people who flee from them "unprovoked" while in a "high crime neighborhood"—a known proxy for areas that are predominantly Black.[408] Using its standing doctrine, the Court "looked the other way when Los Angeles police officers engaged in obviously brutal, [plainly] racist, and at times deadly chokeholds of presumptively innocent citizens."[409] Thus, the Court's

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[403] Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Calif. L. Rev. 125, 127 (2017).

[404] For example, the Court used the definition of "search" from Katz v. United States, 389 U.S. 347 (1967) to render several kinds of government actions non-searches (and therefore outside the Fourth Amendment's restrictions), including electronic surveillance by a government informant (*see* United States v. White, 401 U.S. 745 (1971)), the acquisition of phone records (*see* Smith v. Maryland, 442 U.S. 735 (1979)), the use of drug-sniffing dogs (*see* United States v. Place, 462 U.S. 696 (1983); Illinois v. Caballes, 543 U.S. 405 (2005)), trespass into "open fields," including fenced-in yards (*see* Oliver v. United States, 466 U.S. 170 (1984)), and aerial surveillance of one's property, including their "curtilage" (*see* California v. Ciraolo, 476 U.S. 207 (1986)). As another example, Brian Puchalsky shows in the introduction of his article how the tools law enforcement has at its disposal when effectuating car stops are numerous, and the potential for an interaction that results in an arrest is quite significant. *See* Brian Puchalsky, *Weapon on Board? A Proposal to Solve the Riddle of the Nonprotective Protective Search*, 107 Colum. L. Rev. 706, 706-09 (2007). Moreover, the Court's consent doctrine encourages police exploitation of citizen ignorance by dispensing of any requirement that police inform citizens of their right to refuse a consent search. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227, 229-234 (1973); *see also* Arnold H. Loewy, *Police, Citizens, the Constitution, and Ignorance: The Systemic Value of Citizen Ignorance in Solving Crime*, 39 Tex. Tech L. Rev. 1077, 1077, 1079-88 (2007).

[405] *See* Whren v. United States, 517 U.S. 806, 813 (1996).

[406] *See* Carbado, *supra* note 403, at 129.

[407] *See* Christopher R. Dillon, Whren v. United States *and Pretextual Traffic Stops: The Supreme Court Declines to Plumb Collective Conscience of Police*, 38 B.C. L. Rev. 737, 737-38, 743-44 (1997).

[408] *See* Illinois v. Wardlow, 528 U.S. 119, 124-25, 139 (2000); *see also* Amy D. Ronner, *Fleeing While Black: The Apartheid Fourth Amendment*, 32 Colum. Hum. Rts. L. Rev. 383, 385-97 (2001).

[409] Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 Am. Crim. L. Rev. 1123, 1127 (1996) (citing Los Angeles v. Lyons, 461 U.S. 95 (1983)). I inserted the word "plainly" where Professor Amar used the word "possibly" because the facts Justice Thurgood Marshall marshals out in his dissent makes the influence of race rather evident. *See* Lyons, 461 U.S. at 115-16 (Marshall, J., dissenting) ("Although the City instructs its officers that use of a chokehold does not constitute deadly force, since 1975 no less than 16 persons have died following the use of a chokehold by an LAPD police officer. Twelve have been Negro males.");

jurisprudence more pointedly identifies Black Americans as worthy of surveillance and state control—of course, all the while disavowing any approval of racial discrimination in policing.

The Court also empowers police exploitation of citizen ignorance beyond the Fourth Amendment. The Court butchered its landmark decision in *Miranda v. Arizona*[410] by making it easier for an arrestee to waive his *Miranda* rights than to invoke them. An arrestee can waive his rights expressly or impliedly;[411] but he can only expressly and unequivocally invoke his rights.[412] Ambiguity in an arrestee's choice of words weighs in favor of waiver and against invocation.[413] The Court does not recognize *Miranda* invocations by third parties on behalf of arrestees, even if the third party is the arrestee's attorney.[414] Thus, the Court's *Miranda* progeny frees the police to take full advantage of citizens ignorant of their constitutional rights, or those who are worn down by near constant surveillance and harassment by the police. Disproportionately, those citizens are Black.

Through affirmative engagement as well as inaction, the Court has also hindered the rights of accused persons to a defense. The Court's precedents elevate state evidentiary rules above the right to present a defense,[415] and they allow state courts to preclude constitutionally proper evidence as a sanction for a defense attorney's violation of a state's discovery laws.[416] The Court's *Brady v. Maryland* progeny encourages prosecutorial defiance and not only hamstrings the ability of criminal defendants to present a defense but also interferes with defense attorneys' ability to adequately counsel their clients.[417] The Court has offered no rebuke of American public defense and has in fact contributed to its dysfunction with its "ineffective assistance

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Id. at 115-116, n.3 ("Thus in a City where Negro males constitute 9% of the population, they have accounted for 75% of the deaths resulting from the use of chokeholds.")

[410] *Id.*; 384 U.S. 436 (1966).

[411] *See* North Carolina v. Butler, 441 U.S. 369, 375 (1979).

[412] *See* Davis v. United States, 512 U.S. 452, 462 (1994) (an arrestee subject to custodial interrogation must expressly and unequivocally invoke the right to counsel); Berghuis v. Thompkins, 560 U.S. 370, 372 (2010) (an arrestee subject to custodial interrogation must unequivocally invoke the right to remain silent).

[413] *See* Davis, 512 U.S. at 458-60; Berghuis, 560 U.S. at 380-82.

[414] *See* Moran v. Burbine, 475 U.S. 412 (1986).

[415] *See*, *e.g.*, United States v. Scheffer, 523 U.S. 303 (1998); Montana v. Egelhoff, 518 U.S. 37 (1996).

[416] *See* Taylor v. Illinois, 484 U.S. 400 (1988). Making this decision all the more shameful is the Court's holding that there is no constitutional entitlement to discovery. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

[417] *See* United States v. Agurs, 427 U.S. 97 (favorable evidence is "material" only if there is a reasonable possibility that the result of the proceeding would have been different had undisclosed evidence had been turned over); United States v. Ruiz, 536 U.S. 622 (2002) (there is no *Brady* obligation in the plea bargaining context); *see also* Gerard Fowke, *Material to Whom?: Implementing Brady's Duty to Disclose at Trial and During Plea Bargaining*, 50 Am. Crim. L. Rev. 575, 580-83, 585-87 (2013); Ben Stearns, *Expanding Brady to Plea Deals: Efficiency as a Roadblock to Justice*, 57 UIC L. Rev. 149, 168-72 (2023).

of counsel" precedents.[418] The Court's failure to define "indigency" has provided another avenue for states to deprive poor Black defendants of their constitutional right to counsel.[419] Susan Klein notes that *Gideon v. Wainwright*, the case that extended the Sixth Amendment right to counsel to the states, "has become just another 'unfunded mandate' that the Court refuses to enforce…. Indigent minorities seeking criminal representation are barely better off now than they were in 1963.[420]

As explained above, Congress and state legislatures have played active roles in promoting the War on Drugs and perpetuating mass incarceration. The Court's jurisprudence has been largely supportive of these endeavors. It has deemed draconian sentences for nonviolent drug crimes and "third strike" offenses outside the purview of the Eighth Amendment.[421] Before the counterrevolution, the Court identified the purpose of bail as ensuring the return to court of a criminal defendant that posed a flight risk.[422] During the counterrevolution, however, the Court approved of congressional expansion of the purposes of bail and found that an accused person's perceived dangerousness to the community permitted his detention pretrial.[423] As scholarship has aptly noted, "perceived dangerousness" is a bail factor that has further disadvantaged Black defendants.[424]

These juridical developments highlight arguably the most important feature of the criminal procedure counterrevolution: the constitutional safeguarding of discretion.[425] Discretion is the vehicle by which carceral actors actualized their racial prejudices against Black people, and it became ensconced in the Court's criminal procedure jurisprudence.[426] William Stuntz explains that:

> constitutional law has little to say about the decisions that are most likely to be made discriminatorily, because constitutional law leaves intact a high level of discretion on the part of legislatures, prosecutors, police officers, and defense attorneys. Selection of suspects or defendants—charging [B]lack drug dealers more readily than white

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[418] *See* Susan R. Klein, *Transparency and Truth During Custodial Interrogations and Beyond*, 97 B.U. L. Rev. 993, 996 (2017) (citing Strickland v. Washington, 466 U.S. 668, 669 (1984)); *see also* Peter A. Joy, *A Judge's Duty to Do Justice: Ensuring the Accused's Right to the Effective Assistance of Counsel*, 46 Hofstra L. Rev. 139, 148 (2017).

[419] *See* Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 Ind. L.J. 571, 579-91 (2005).

[420] Klein, *supra* note 418, at 996-97.

[421] *See* Harmelin v. Michigan, 501 U.S. 957 (1991); Ewing v. California, 538 U.S. 11 (2003); Lockyer v. Andrade, 538 U.S. 63 (2003).

[422] *See* Stack v. Boyle, 342 U.S. 1, 4-5 (1951).

[423] *See* United States v. Salerno, 481 U.S. 739 (1984).

[424] *See* Cynthia L. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. Legis. & Pub. Pol'y 919, 943-44 (2013).

[425] *See* Alexander, *supra* note 53, at 104-09.

[426] *Id.* at 104-23.

> ones—is basically unregulated. The manner in which suspects are arrested—how much force the police use, and whether they tend to use more force on some kinds of suspects than others—is regulated only slightly, because police violence tends not to be tied to police evidence gathering, and only evidence gathering is likely to give rise to exclusionary rule claims. Most importantly, the definition of crimes and the fixing of sentences is constitutionally unregulated, meaning that the law of criminal procedure leaves legislatures free to adopt drug and sentencing policies that lead to massive increases in the proportion of [B]lack prisoners—as legislatures have done. If one is looking for race discrimination in the administration of criminal justice, these are the places to find it. And the law of criminal procedure has almost nothing to say about them.[427]

Many more indications of the criminal procedure counterrevolution abound, but the purpose here is to show how the Supreme Court's criminal law jurisprudence, just like the Court's criminal jurisprudence during the first racial redemption, buttressed the citizen and political strands of the second racial redemption. The white citizenry demanded tough-on-crime policies, centered Black criminality in public and scholarly discourse, and both supported and served as law enforcement, the designated army against "crime," i.e., against Black America. That army has utilized a host of tools to feed criminal judicial systems with the bodies of Black people. White politicians exalted carceral actors and carried on racialized wars on drugs and crime. The Supreme Court immunized those carceral actors and, as Justice John Paul Stevens himself intimated, became "a loyal foot soldier in the Executive's fight against crime."[428] Once again, with the white citizenry, white politicians, and the Supreme Court working together, Blackness and criminality remain synonymous, and racialized criminal law remained a common language of white supremacy during the second racial redemption.

III. A Counterrevolution Without Racism?

Numerous legal scholars have written about the criminal procedure revolution, and several of them recognize race as an important motivation behind the criminal procedure revolution.[429] Additionally, many scholars have focused on aspects of the subsequent counterrevolution.[430] I cited to

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[427] William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 50-51 (1997).

[428] *See* California v. Acevedo, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting).

[429] *See*, *e.g.*, Lain, *supra* note 15, at 1389.

[430] *See*, *e.g.*, Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 Tex. L. Rev. 1057, 1069-77, 1094-97 (2002) (counterrevolution in habeas corpus cases); C. Antoinette Clarke, *Say it Loud: Indirect Speech and Racial Equity in the Interrogation Room*, 21 U. Ark. Little Rock L. Rev. 813, 817-20 (1999) (counterrevolution in *Miranda* jurisprudence).

Carbado's work above as an example;[431] Alexander also focuses on pieces of it in her seminal work *The New Jim Crow*, specifically Fourth Amendment law and challenges to racial bias in criminal judicial systems.[432] However, there is generally less scholarship examining the criminal procedure counterrevolution as a whole. In fact, in the early decades of the counterrevolution, some scholars raised doubts about whether a counterrevolution had either happened or was even occurring. Those scholars contend that the Court's jurisprudence in criminal procedure law during the Burger and Rehnquist years was more balanced than critics of those Courts claimed.[433] As detailed above, history has proven those scholars wrong.[434]

More disturbing, however, is a reticence among scholars that have written about the criminal procedure counterrevolution to identify racism as a motivation behind the counterrevolution. Some works of legal scholarship discussing the counterrevolution do not even mention the words "race," "racial" or "racism."[435] Other articles make passing references to race but offer no connection between racism and the counterrevolution.[436] Still more articles seek to explain the logic behind the counterrevolution on

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[431] *See* CARBADO, *supra* note 19.

[432] *See* ALEXANDER, *supra* note 77, at 63-69, 108-23.

[433] *See*, *e.g.*, Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980); Stephen Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980); Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 Harv. L. Rev. 1436, 1441-42 (1987); *see also* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983). Professor Alschuler recognized that the Court, while not overruling landmark Warren-Court cases, nonetheless damaged the criminal procedure rights of accused persons, but he declined to call that a counterrevolution.

[434] Professor Seidman acknowledged in later articles that the Court's criminal procedure jurisprudence was indeed a counterrevolution. *See* Louis Michael Seidman, *Brown v. Miranda*, 80 CALIF. L. REV. 673, 719 (1992). He also acknowledged the existence of a conservative counterrevolution in a later piece. *See* Louis Michael Seidman, *Populist and Progressive Strands in American Constitutionalism*, 53 CONN. L. REV. 411, 451-52 (2021).

[435] *See*, *e.g.*, Michael D. Cicchini, *The Collapsing Constitution*, 42 HOFSTRA L. REV. 731 (2014); Charles H. Whitebread, *The Burger Court's Counterrevolution in Criminal Procedure*, 24 WASHBURN L.J. 471 (1981); *see also* Carol S. Steiker, *Counter- Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996). Steiker's article appears to be the most frequently cited work on the counterrevolution, and she argues that the counterrevolution is limited to "the Warren Court's constitutional 'remedies' of evidentiary exclusion and its federal review and reversal of convictions." *See id.* at 2470. Her article, however, completely leaves race out of the picture.

[436] *See*, *e.g.*, Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369 (1991); Mark Tushnet, *Observations on the New Revolution in Constitutional Criminal Procedure*, 94 GEO. L.J. 1627 (2006); *see also* James S. Liebman & David Mattern, *Correcting Criminal Justice Through Collective Experience Rigorously Examined*, 87 S. CAL. L. REV. 585, 589-94 (2014); *see also* Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1403-18 (2006). Professors Clayton and Pickerill identify the connection between race and crime with Richard Nixon's "law and order strategy," but they start the criminal procedure counterrevolution in the 1980s with the "New Right." Their article makes no link between the New Right's criminal law agenda and American racism.

grounds other than race. For example, George Thomas III, a prolific scholar in the areas of criminal procedure and constitutional history, asserts that the Court's primary (perhaps sole) reason for shrinking the Bill of Rights' safeguards for accused persons was to keep violent criminals off the streets.[437] Such an explanation does not, however, explain the Court's pro-government decision-making in numerous cases unrelated to violent crime.[438] More importantly, such analyses suffer from Professor Bilionis's observation of a scholarly disconnection of criminal law from the rest of constitutional law, including civil rights.[439]

This puzzling scholarly omission is frequently accompanied by deficient rationales for why the criminal procedure revolution failed. Louis Michael Seidman, for example, blamed the Warren Court for the failure of the revolution, asserting that the Court "did not have at its disposal the economic resources necessary to effect real changes in the criminal justice system."[440] Professor Thomas III acknowledges that several factors led to the failure of the revolution, but he nonetheless assigns primary blame to the Warren Court, declaring that it "did not anticipate the consequences of its revolution."[441] Craig Bradley is more charitable to the Warren Court; his conclusion is that a court-led process to revamp criminal procedure rules would fail to construct a coherent set of rules for police to follow.[442]

Completely missing from these analyses is any discussion of the same features that arguably make *Brown v. Board of Education* just as much a failure as the revolution: white intransigence as well as the Burger and Rehnquist Courts' volte-face from promoting racial egalitarianism from the 1970s onward. In more than seventy years, *Brown*'s promise has still not been fully realized; schools are segregated all over the country.[443] Yet, it is

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[437] *See* George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 174 (2001).

[438] *See*, *e.g.*, United States v. White, 401 U.S. 745 (1971) (deeming conversations relayed to law enforcement a non-search unregulated by the Fourth Amendment in upholding narcotics conviction); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (pro-government interpretation of the consent doctrine in upholding conviction for unlawfully possessing a check); Bordenkircher v. Hayes, 434 U.S. 357 (1978) (permitting threats during plea bargaining negotiations in upholding conviction for uttering a forged instrument); Michigan v. Long, 463 U.S. 1032 (1983) (extending *Terry v. Ohio* frisks to passenger compartments of vehicles in upholding marijuana conviction); United States v. Leon, 468 U.S. 897 (1984) (creation of good faith exception in upholding drug conviction).

[439] *See* Bilionis, *supra* note 27, at 984-85, 987-89.

[440] Seidman, *supra* note 433, at 440.

[441] George C. Thomas III, *Racial Justice: The Failure of the Warren Court's Criminal Procedure*, 25 U. PA. J. CONST. L. 710, 713 (2023) ("And what caused this massive disappointment? It is of course a complicated story. There are many causes. But I will argue that the main cause is that the Court did not anticipate the consequences of its revolution.")

[442] *See* BRADLEY, *supra* note 15, at 62.

[443] *See e.g.,* Juontel White & Diana Cordova-Cobo, *Racial Inequality in the U.S. Education System Post*-Brown*: An Introduction to the History and Policies that Shape Our Contemporary Context*, COLUMBIA JOURNALISM SCHOOL. (Aug. 2022) https://journalism.columbia.edu/sites/journalism.columbia.edu/files/content/Careers/Lipman/Lipman%20Education%20Report.

wholly improper to place primary blame for *Brown*'s unfulfilled promise on the Warren Court. *Brown* "failed" primarily because white society rebelled against it and subsequent Courts damaged (but did not overrule) *Brown*.[444] Why isn't the criminal procedure revolution and counterrevolution viewed in the same light? Professor Bradley argues that Congress should enact a federal criminal procedure code,[445] but the history detailed above gives ample reason to doubt the efficacy of such a proposal.

Undergirding some of the legal scholarship on the counterrevolution are fantastical ideas of the function of criminal law and procedure. In his 1983 law review article, Peter Arenella noted how, in defining the function of criminal procedure, "many American scholars have…trott[ed] out tired cliches like truth-discovery, crime control, and the protection of individual rights."[446] He aptly classified these justifications as "shallow."[447] Seidman exemplified this well in arguing that criminal law should be about the pursuit of truth and the determination of guilt and should not focus on promoting racial justice.[448] His juxtaposition of social justice and the pursuit of truth suggests that one must choose between the former and the latter; and as he tells it, the Warren Court foolishly chose the former and rejected the latter.[449]

Such a utopian vision of criminal law plainly ignores the history and reality of criminal law administration in America. With respect to reality, it is well settled that criminal judicial systems value efficiency over justice.[450] Almost all cases are pled out, without regard to whether the accused person is actually guilty of the offense he is pleading to.[451] Moreover, Tom Stacy's examination of the Court's jurisprudence during the counterrevolution ably demonstrates how many of its precedents impede rather than

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docx.pdf [https://perma.cc/QN27-NZSL]; *Racial Disparities in Education and the Role of Government*, Government Accountability Office (Jun. 29, 2020), ; Eric Torres and Richard Weissbourd, "Do Parents Really Want School Integration?", Making Caring Common Project & Harvard Graduate School of Education (Jan. 2020), https://mcc.gse.harvard.edu/reports/do-parents-really-want-school-integration [https://perma.cc/7CFK-JPGE].

[444] *See* Anderson, *supra* note 1, at 75-97, 110-16.

[445] *See* Bradley, *supra* note 15, at 144 ("Rather, what is needed, as other countries recognize, is a comprehensive, nationally applicable, statutory scheme.").

[446] *See* Peter Arenella, *Rethinking the Function of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 Geo. L.J. 185, 186 (1983).

[447] *Id*. at 186.

[448] *See* Seidman, *supra* note 434, at 442.

[449] *Id.* at 440-43-43.

[450] *See* Jonathan A. Rapping, *Grooming Tomorrow's Change Agents: The Role of Law Schools in Helping to Create a Just Society*, 12 Ohio St. J. Crim. L. 465, 466, 474-75 (2015); Ari Rosmarin, *The Phantom Defense: The Unavailability of the Entrapment Defense in New York City "Plain View" Marijuana Arrests*, 21 J.L. & Pol'y 189, 226 (2012) ("Ultimately, the pressures on defendants of a criminal justice system that often emphasizes efficiency over justice and in some cases penalizes those who seek to exercise their rights works to prevent many defendants accused of low-level misdemeanors, like MPV arrestees, from pursuing their day in court.").

[451] *See* Alexander, *supra* note 77, at 85-86, 88-89.

further any quest for truth.[452] For example, the Court's constriction of *Brady v. Maryland* by "limiting the prosecution's duty of disclosure to evidence creating a 'reasonable probability of a different outcome'" has invited prosecutorial defiance of *Brady* and a prosecutorial culture that valorizes the continued "concealment of important exculpatory evidence."[453] Such a culture undermines the idea that American criminal law is about truth-seeking.

Add the power of the history explored above, and it becomes plainly obvious that race and American criminal law administration are inseparable. As Dorothy Roberts correctly observes: "Race is built into the normative foundation of the criminal law."[454] The administration of criminal law during Reconstruction, Old Jim Crow, and the post-Civil Rights Era was not about truth-seeking, at least not as touching African Americans. The function of criminal law, from the age of convict leasing to the era of mass incarceration, has been in significant part to re-enslave and subjugate Black people. Consequently, it was racial justice advocates that sought to make truth-seeking the function of criminal law by eliminating racism within those systems.[455] In so doing, they understood what seems to elude the scholars that insist on the false dichotomy between truth-seeking and racial justice: racism perverts any ideal truth-seeking function. That white society continues to racialize criminal law in present times renders illegitimate any claim that American criminal law is about truth-seeking.

Given the use of American criminal law in the service of white supremacy, it defies logic for one to assert that American racism played no role worthy of acknowledgment in the criminal procedure counterrevolution. As Professor Arenella correctly intimated, the Court's view of criminal law "will be shaped by the historical and political context in which challenges to government authority arise."[456] In the 1960s, the context was "racial, social, and political unrest"; the following decade, the context was the hysteria surrounding crime.[457] That hysteria, as documented above, was very much racialized.[458] It was fears of Black criminality that motivated white citizen support for tough-on-crime politics, the societal empowerment of police and prosecutors, the expansion of substantive criminal law, and the enactment of harsh punishments for nonviolent drug crimes. There can be no doubt that said fears also motivated the Supreme Court to erect legal architecture endorsing this decades-long response. It was, indeed, the criminal procedure redemption.

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[452] *See* Stacy, *supra* note 436, at 1373-405.

[453] *Id.* at 1392-96.

[454] Roberts, *supra* note 191, at 1954.

[455] *See supra* Part II.C.2.

[456] Arenella, *supra* note 446, at 237.

[457] *Id.* at 237-38.

[458] *See supra* Part II.D.1 & 2.

Conclusion

The history of the two racial redemptions reflects a persistent pattern: whenever Black Americans gain modest civil or political advances, aggressive white resistance emerges in three interlocking strands: citizen redemption, political redemption, and judicial redemption. Criminal law has been a central axis of both redemptions, serving first to re-enslave Black people through convict leasing during Old Jim Crow and then to mass-incarcerate Black communities.[459] The goal of both redemptions, in criminal law as well as civil rights law, was to erode hard-fought constitutional safeguards.

The Supreme Court's criminal law jurisprudence was integral to both racial redemptions. In distinct ways, the Court's precedents accomplished three things: 1) they protected and advanced the governmental power to criminally punish; 2) they occasioned a narrowing of accused persons' rights as defendants; and 3) they immunized criminal judicial systems from legal challenge. These decisions therefore helped restore a constitutional order rooted in white supremacy. This deep entanglement of race and criminal procedure law counters the notion that the Warren Court's revolution just "failed" for lack of coherence or lack of resources. Instead, it was actively and intentionally countered by white political and citizen resistance, fortified by later Courts which abridged the very rights the Warren Court expanded. Recognizing this racial redemption pattern disrupts the illusion of a neutral "colorblind crime control" shift and instead discloses a systematic effort to maintain racial hierarchy through criminal law—an effort that will undoubtedly continue to define our legal landscape under the current presidential administration and beyond.

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[459] *See* Marvin Zalman, *The Anti-Blackstonians*, 48 Seton Hall L. Rev. 1319, 1425-26 (2018) ("The Burger, Rehnquist, and Roberts Courts have in large measure succeeded in advancing a more or less conservative doctrinal agenda in Fourth and Fifth Amendment law. This jurisprudence has enabled the mass incarceration that is plaguing in American criminal justice and society.").