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COLORBLINDNESS: AFFIRMATIVE ACTION AND BEYOND

ALSO FEATURING

Editors' Note on the Theme

Prompted by the U.S. Supreme Court's decision to grant the petition for writ of certiorari in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,[1] we at the Harvard Law & Policy review dedicated this issue to "colorblindness." Our aspiration with the articles in this issue is to shed light on the doctrinal areas where and how the law permits consideration of race and the doctrinal areas where it does not. We also hope that the articles in this issue help readers develop their views about the doctrinal areas where and how the law *should* permit consideration of race and where it *should not*.

The first two articles in this issue directly address the pending *Students for Fair Admissions* case. The issue opens with Christopher J. Ryan, Jr.'s empirical analysis of the past, present, and future of federal court deference to race-conscious university admissions policies.[2] His predictive models reveal that affirmative action jurisprudence is likely to undergo a sea change, starting with *Students for Fair Admissions*. Elijah McDonnaugh places this data in its historical context.[3] Doing so lays bare the normative and conceptual problems with ruling in favor of Students for Fair Admissions.

The next three articles in this issue explore other areas of the law, beyond affirmative action, that implicate "colorblindness." William J. Aceves charts the history of the term 'people of color' and its legal significance.[4] The legal history of term informs his assessment that use of 'people of color' should be embraced. Tina Al-Khersan and Azadeh Shahshahani scrutinize the "colorblind" implications of the plenary power doctrine in the context of immigration policy.[5] They succeed in showing how plenary power doctrine upholds white supremacist immigration policies, which have deep roots in U.S. history. Guyora Binder and Ekow N. Yankah expose the racially disparate outcomes that flow from an ostensibly "colorblind" rule: the felony murder rule.[6] They urge legislatures to abolish felony murder on these grounds and caution against using an expansive version of the rule to check excessive police violence.

Determining the proper place for "race consciousness" in the law is a vital step toward establishing a healthy multiracial democracy. In publishing this issue, we hope to contribute to that determination.

—Editors of the Harvard Law and Policy Review,
Students of Harvard University

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[1] 142 S. Ct. 895 (2022).

[2] Christopher J. Ryan Jr., *Affirmatively in Peril: Predicting Federal Judicial Decision Making in University Admissions Cases*, 17 HARV. L. & POL'Y REV. 1 (2022).

[3] Elijah McDonnaugh, *The Limits of Equality: A People's History of Affirmative Action*, 17 HARV. L. & POL'Y REV. 43 (2022).

[4] William J. Aceves, *On the Meaning of Color and the End of White(ness), 17* HARV. L. & POL'Y REV. 79 (2022).

[5] Tina Al-Khersan & Azahdeh Shahshahani, *From the Chinese Exclusion Act to the Muslim Ban: An Immigration System Built on Systemic Racism*, 17 HARV. L. & POL'Y REV. 131 (2022).

[6] Guyora Binder & Ekow N. Yankah, *Police Killing as Felony Murder*, 17 HARV. L. & POL'Y REV. 157 (2022).

Affirmatively in Peril: Predicting Federal Judicial Decision Making in University Admissions Cases

*Christopher J. Ryan, Jr.**

The evolving federal jurisprudence on the use of race in university admissions places judges in the role of policymaker, given that their decisions have direct bearing on how universities conduct admissions. No one knows this better than those who bring test cases, and in a modern context, data analytics on judicial decision making can be used for good or ill in preparing for litigation in cases involving the use of race in university admissions. Using an empirical lens, I test the extent to which existing theoretical frameworks about judicial decision making can explain federal decisions in cases involving the use of race in university admissions policies—a highly politicized area of the law. Specifically, I seek to determine whether a judge's background and socialized characteristics of the judge, idiosyncrasies of the court, or elements unique to the era in which the decision is made can predict a judge's decision to afford deference to a policy involving the use of race in university admissions.

The results of my analysis indicate that race-conscious university admissions policies—also called "affirmative action"—are in peril. In addition, I interrogate the theoretical frameworks upon which the judicial decision-making literature relies. The results I present in this paper do not indicate strong support for the two frameworks that have drawn the most attention in the judicial decision-making literature: the "attitudinal" or "political cultures" theoretical frameworks. Instead, I find mixed support for the "behavioral" framework based on a moderate but statistically significant effect of the judge's gender on the decision, suggesting greater deference among women judges to university admission policies. More importantly, I find significant and large effects for the era in which the Court decides each case, supporting evidence of a punctuated equilibrium and legalistic theoretical framework in my sample of cases. Finally, I cross-validate the model, using data points from multiple cases, removing them, and then predicting how the Supreme Court would have decided each case under the model. This analysis includes a prediction of how the 2022 Supreme Court is likely to decide Students for Fair Admissions, Inc. v. President and Fellows of Harvard College *and* Students for Fair Admissions v. University of North Carolina. *This empirical inquiry provides insight into important questions about individual and organization decision making in the federal judiciary as well as how race-conscious admissions policies will fare before judicial decision makers. My analysis has direct implications for how the Supreme Court could ultimately decide the* Harvard *and* UNC *cases.*

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* Associate Professor of Law, University of Louisville Louis D. Brandeis School of Law; Affiliated Scholar, American Bar Foundation. I would like to extend my most sincere gratitude to Clay H.W. Francis, who was instrumental in the early stages of this paper, for his many contributions to this Article. I would also like to thank Kenneth Dau-Schmidt (Indiana University), Alicia Dowd (Penn State University), Amy Gajda (Tulane University), Dara Purvis (Penn State University), and the attendees of the Penn State – University of Houston Law & Governance in Higher Education Roundtable for their generous and insightful comments that shaped this Article in its formative stages.

INTRODUCTION

Owing to the common law traditions of the American legal system, the federal courts are uniquely bound by and free to create precedent.[1] Increasingly, federal judges have taken leading roles in making decisions with important social and policy implications, especially those affecting the provision of education.[2] This is a marked shift from earlier positions taken by the federal courts, which historically refrained from making decisions affecting higher education institutions through a doctrine known as academic abstention.[3] Now, the federal courts have begun to do more than merely wade into the higher education arena. Today, they are responsible for determining and defining permissible and impermissible uses of race in university admissions policies.[4] As courts have trended toward involvement in resolving these disputes, new methods have emerged to anticipate how they might resolve

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[1] *See, e.g., The Common and Civil Law Traditions*, U.C. BERKELEY SCH. L., https://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf [https://perma.cc/YF7V-SPUD] (last visited Apr. 29, 2022); Maurice Rosenberg, *Anything Legislatures Can Do, Courts Can Do Better*, 62 AM. BAR ASS'N J. 587, 587-90 (1976); Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMPARATIVE L. 419, 435 (1967).

[2] *See*, *e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that segregated schools were unconstitutional because they violated the Equal Protection Clause of U.S. CONST. amend. XIV); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) (upholding the use of busing of students to promote racial integration in public primary and secondary schools as constitutional); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (invalidating race-based quotas in university admissions, but opening the door for other permissible uses of race in university admissions); Grutter v. Bollinger, 539 U.S. 306 (2003) (permitting the narrowly-tailored use of race as a "plus-factor" in university admissions, and recognizing that a diverse student body was compelling state interest).

[3] *See* Terrence Leas, *Higher Education, the Courts, and the Doctrine of Academic Abstention*, 20 J.L. & EDUC. 135, 165 (1991).

[4] *See* Robert M. O'Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept?*, 36 J.C. & U.L. 729, 767 (2009).

these controversies. Thus, the study of judicial decision making in this domain is ripe for study using empirical methods.

Although judicial decision making has captured the interest of empirical legal scholars for decades,[5] modeling and explaining judicial decision making has become a complex process, even with the help of increasingly more available data analytics.[6] This complexity is due, in part, to the way that judicial precedent evolves over time. For example, the way in which the courts have interpreted the use of race in university admissions policies has undergone considerable change. Early cases challenging the use of race in university admissions sought to desegregate institutions of higher education but were largely unsuccessful. A number of these cases failed because state and federal courts, interpreting higher education institutions' policies of segregation under the precedent of *Plessy v. Ferguson*,[7] gave broad deference to university policies, including discriminatory admission policies.[8] Several Supreme Court decisions in this era of jurisprudence recognized that state actors in the higher education arena were not adequately providing to all citizens separate and equal access to and provision of higher education but made little to no effort to change the underlying separate-but-equal policies.[9]

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[5] *See, e.g.*, Michael Heise, *The Past Present and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 820, 850 (2002); Howard Gilman, *What's Law Got to Do with It?: Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465, 504 (2001); Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 38 (1998).

[6] Judge Posner offers insight, perhaps merely from his perspective, into the process of how judges make decisions: "Occasional legislators, judges are motivated by political considerations in a broad and sometimes a narrow sense of that term. In that open area, most American judges are legal pragmatists." RICHARD A. POSNER, HOW JUDGES THINK 78–92 (2008).

[7] 137 U.S. 587 (1896).

[8] *See, e.g.*, Missouri *ex rel.* Gaines v. Canada, 11 S.W.2d 783 (Mo. 1938) (upholding Missouri's public policy of providing separate-but-equal education for black citizens was not prohibited by the United States or Missouri constitutions); Sipuel v. Bd. of Regents of Univ. of Okla., 180 P.2d 135 (Okla. 1947) (maintaining that the systems of separate schools in the states was lawful under OKLA. CONST. art. 13, § 3, other statutory provisions pertaining to education in state law, and not offensive to U.S. CONST. amend. XIV); Sweatt v. Painter, 210 S.W.2d 442 (Tex. Civ. App. 1950) (affirming the decision of the lower court and holding that the state had effectively accomplished the mandates of separate-but equal-constitutional requirements by its "enormous outlay both in funds and in carefully and conscientiously planned and executed endeavor, in a sincere and earnest bona fide effort to afford every reasonable and adequate facility and opportunity guaranteed to [plaintiff] under the 14th Amendment, within the State's settled policy of race segregation in its public schools"); McLaurin v. Okla. State Regents of Higher Educ., 87 F. Supp. 528 (W.D. Okla. 1949) (upholding the policy that black students were subject to separate learning conditions, as recognized and enforced by the university, rested upon a reasonable basis with foundations in the public policy of the state and did not operate to deprive black students of the equal protection of the laws). *But see* Wichita Falls Junior Coll. Dist. v. Battle, 204 F.2d 632 (5th Cir. 1953) (invalidating a race-based admission policy which required black junior college entrants to go to more expensive colleges located hundreds of miles away, outside of their local junior college district, although they met the entrance requirements to their local junior college district).

[9] *See, e.g.*, Missouri, *ex rel.* Gaines v. Canada, 347 U.S. 483 (1938) (holding that when the state provides legal training, it must provide it to every qualified person to satisfy equal protection and cannot send citizens to other states to receive legal training on the basis of the citizen's race); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948) (maintaining that the state, operating a law school for whites only, must provide the same for blacks); Sweatt v.

Eventually, the federal courts' interpretation of separate-but-equal higher education policies ceded to Equal Protection precedent; after the *Brown v. Board of Education*[10] decision, other contemporaneous desegregation cases before the federal courts were construed in the light of *Brown*, which overruled *Plessy*.[11] In the wake of *Brown*, federal courts became both enactors and enforcers of sweeping changes that introduced racial diversity in higher education and prohibited discrimination on the basis of race.[12]

Following these decisions, policymakers and universities began to construct race-conscious admissions policies to pursue equity—instead of segregation—in the admission of underrepresented minorities to universities. Often, these policies relied on the premise that diversity leads to an increase in a variety of measures of student success for all students—not simply for those students admitted under what came to be called "affirmative action."[13]

Painter, 339 U.S. 629 (1950) (invalidating a newly-established state law school for black students did not provide the equivalent educational opportunities offered to white students, denying black students' rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution); McLaurin v. Okla. State Regents of Higher Educ., 339 U.S. 637 (1950) (maintaining that requiring a student to attend class, sit, eat, and study apart from the other students because of his race impaired and inhibited his ability to study, to engage in discussions, exchange views with other students, and, in general, to learn his profession, in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution).

[10] 347 U.S. 483 (1954).

[11] *See, e.g.*, Bd. of Sup'rs of La. State Univ. v. Tureaud, 225 F.2d 434 (5th Cir. 1955) (vacating and remanding the case for findings consistent with the Court's holding in *Brown*); Whitmore v. Stilwell, 227 F.2d 187 (5th Cir. 1955) (finding that a junior college district's refusal to admit student on the basis of their race was unlawful under the Fourteenth Amendment of the United States Constitution); Lucy v. Adams, 350 U.S. 1 (1955) (enjoining the state flagship university from denying black students admission on the basis of their race).

[12] *See, e.g.*, Booker v. Tennessee Bd. of Educ., 240 F.2d 689 (6th Cir. 1957); Bd. of Sup'rs of La. State Univ. & Agr. & Mech Coll. v. Ludley, 252 F.2d 372 (5th Cir. 1958); Gannt v. Clemson Agr. Coll. 320 F.2d 611 (4th Cir. 1963) (rejecting a state college's admission policy to deny admission to applicants on the basis of their race); Meredith v. Fair, 313 F.2d 532 (5th Cir. 1962) (adjudging Mississippi's governor in civil contempt for conduct taken with the deliberate purpose of preventing compliance with federal court orders requiring a black student's admission to a state university); Guillory v. Adm'rs of Tulane Univ., 306 F.2d 489 (5th Cir. 1962) and Hammond v. Univ. of Tampa 344 F.2d 951 (5th Cir. 1965) (preventing private universities—which based on the circumstances of their founding, the court found to be public institutions for purposes of the cases—from discriminating in admissions on the basis of race).

[13] In lieu of using the term "affirmative action," this article employs the use of the term "race-conscious admission policies" to refer to all university admission policies that recognize a student's race. Prior research indicates that "affirmative action" race- conscious admission plans have indeed increased the probability of acceptance for underrepresented minorities. *See, e.g.*, Mark C. Long, *Race and College Admissions: An Alternative to Affirmative Action?*, 86 REV. OF ECON. & STATS. 1020, 1033 (2004). Studies in this area have found that a diverse university population increases interaction among different racial and ethnic groups and ultimately leads to higher levels of student persistence. *See, e.g.*, Mitchell J. Chang, *Does Racial Diversity Matter?: The Educational Impact of a Racially Diverse Undergraduate Population,* 40 J. C. STUDENT DEV. 377, 395 (1999). Several studies have found that having a diverse student body benefits not only educational outcomes, but also measures related to good citizenship and critical thinking skills. Patricia Gurin, Eric Dey, Sylvia Hurtado & Gerald Gurin, *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARVARD EDUC. REV. 330, 367 (2002); Anthony Lising Antonio, Mitchell J. Chang, Kenji Hakuta, David A. Kenny, Shana Levin & Jeffrey F. Milem, *Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCH. SCI. 507, 510. (2004). These benefits can be realized through informal interactions

However, legal challenges to the use of race in university admissions intending to privilege minority racial groups began to mount in the 1970s, marked by a flurry of cases filed by non-minority and male plaintiffs, which redefined the very meaning—that is, the political valence—of the use of race in admissions.[14] The Supreme Court's 1978 landmark decision *Regents of the University of California v. Bakke*[15] provided the first set of guidelines to clarify the permissible and impermissible uses of race in admissions policies.[16] While the Supreme Court's decision in *Bakke* invalidated the use of quota-based systems to admit minority applicants, it also upheld diversity in higher education as a compelling state interest.[17] Since *Bakke*, federal courts have prohibited certain uses of race in admissions—such as allocating a set number of points to applicants on the basis of their race[18]—while largely deferring to policies involving the use of race in university admissions to achieve a diverse student body.[19]

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among students as well as programmatic endeavors at the university and classroom level. However, promoting race-conscious admission plans without attending to the needs of underrepresented students once they are admitted can produce negative outcomes for minority students in predominately white-institutions. Sylvia Hurtado, Adriana Ruiz Alvarado & Chelsea Guillermo-Wann, *Thinking About Race: The Salience of Racial Identity at Two- and Four-Year Colleges and the Climate for Diversity*, 86 J. HIGHER EDUC.127, 155 (2015); Shaun R. Harper and Sylvia Hurtado, *Nine Themes in Campus Racial Climates and Implications for Institutional Transformation*, 120 NEW DIRECTIONS FOR STUDENTS SERVS. 7, 24 (2007).

[14] Defunis v. Odegaard, 416 U.S. 312 (1974) (declining to address the merits of a case, on mootness grounds, in which the Washington Supreme Court upheld a university admission policy considering for the purposes of furthering diversity); Krohn v. Harvard L. Sch. 552 F.2d 21 (1st Cir. 1977) (holding that a law school applicant failed to allege any connection between the school's allegedly discriminatory admissions policy and any activity on the part of the Commonwealth of Massachusetts for state action and equal protection to apply); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (9th Cir. 1978). *But see* Gonzalez v. S. Methodist Univ., 536 F.2d 1071 (5th Cir. 1976) and Henderson v. Fl. Bd. of Regents, 569 F.2d 1309 (5th Cir. 1978) (rejecting minority applicants' claim that their applications for admission to a private and public university law school, respectively, were denied on the basis of their race).

[15] 438 U.S. 265 (1978).

[16] *Id.* at 314.

[17] *Id.* Specifically, the Court's decision in *Bakke* shifted the permissible rationales from remedying past wrongs to advancing the benefits of educational diversity.

[18] *See* Gratz v. Bollinger, 539 U.S. 244 (2003).

[19] *See, e.g.*, Doherty v. Rutgers Sch. of L., 651 F.2d 893 (3d Cir. 1981); Hall v. State, 791 F.2d 759 (9th Cir. 1986); Davis v. Halpern, 813 F.2d 37 (2d Cir. 1987); Hopwood v. Univ. of Tex., 78 F.3d 932 (5th Cir. 1996); Texas v. Lesage, 528 U.S. 18 (1999); Wooden v. Bd. of Regents of the Univ. of Ga., 247 F.3d 1262 (11th Cir. 2001); Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001); Farmer v. Ramsay, 43 Fed.Appx. 547 (4th Cir. 2002); Weser v. Glen, 41 Fed.Appx. 521 (4th Cir. 2002); Grutter v. Bollinger, 539 U.S. 306 (2003); Smith v. Univ. of Wash. L. Sch., 392 F.3d 367 (9th Cir. 2004); Su v. Eastern Ill. Univ., 565 Fed.Appx. 520 (7th Cir. 2014). Importantly, in all but *Su*, these cases arise from challenges brought by white plaintiffs who were denied university admission and sought to overturn the admissions decision on the claim that their race was the motivating reason for their being denied admission. In essence, this is a reversal of the Civil Rights Era cases involving the use of race in university admissions listed at notes 8 and 9, *supra*. *But see* Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997) and Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291 (2014). In *Wilson* and *Schuette*, the courts held that state constitutional amendments banning the use of race from consideration in decisions by state entities, including state universities, did not violate the Equal Protection Clause.

Thus, with and without intending to do so, federal courts have indelibly shaped higher education policy through their jurisprudence in the evolving body of precedent that encompasses race-conscious university admissions cases.[20] In December 2015, the Supreme Court again heard oral arguments in a case—having remanded it once before on procedural grounds[21]—involving the use of race in university admissions. The Court's decision in the *Fisher v. University of Texas*[22] [hereinafter *Fisher II*] case from June 2016, a narrow 4-3 outcome upholding the University of Texas' admissions policy that considered race as a plus factor for only those students not admitted under the top 10 percent rule, permitted the continuation of a policy allowing in-state students whose high school grades placed them in the top 10 percent of their class to be admitted to a state university of their choice. Many expected *Fisher II* to potentially change the legal status quo, but ultimately, it had little effect other than to preserve precedent of cases like *Grutter v. Bollinger* that held race to be a permissible consideration as a nonbinding factor in admissions.[23] However, much has changed since that decision.

Consider the composition of the Court. The Court has four new justices: Justice Ketanji Brown Jackson, who filled Justice Stephen Breyer's seat following his retirement; Justice Amy Coney Barrett, who was confirmed

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[20] Largely, state policymakers have responded to federal court rulings to enact changes to policies impacting race-conscious admissions regimes. At present, eight states have enacted laws through legislative action (New Hampshire), executive order (Arizona, California, Michigan, Nebraska, Oklahoma, and Washington) or public referenda (Arizona, California, Michigan, Nebraska, Oklahoma, and Washington) that place an outright ban on the use of race-conscious university admission policies. For instance, in 1996, the U.S. Court of Appeals for the Fifth Circuit effectively banned the use of race as an admitting factor in Texas universities. Hopwood v. Univ. of Tex., 78 F.3d 932 (5th Cir. 1996). However, this ruling was effectively struck down by the United States Supreme Court in 2003. *See* Grutter, 539 U.S. 306 (2003). Researchers investigating these bans have found that the number of minority students attending postsecondary education does not significantly decrease, but minority students are more likely to attend less selective institutions and less likely to graduate from selective institutions. Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 94 REV. OF ECON. & STATS. 712, 722 (2012); Peter Hinrichs, *Affirmative Action Bans and College Graduation Rates*, 42 ECON. OF EDUC. REV. 43, 43-52 (2014). Similarly, other researchers have found that race-conscious bans chill the rate of minority enrollment in the states listed above. (*See* Grant H. Blume and Mark C. Long, *Changes in Levels of Affirmative Action in College Admissions in Response to Statewide Bans and Judicial Rulings*, 36 EDUC. EVALUATION & POL'Y ANALYSIS 228, 252 (2014)). However, at least one study—from the University of California system— found no substantial change in enrollment after California's race-conscious admission plan was banned. K. L. Antonovics and R. H. Sander, *Affirmative Action Bans and the 'Chilling Effect'*, 15 AM. L. & ECON. REV. 252, 299 (2012). In response to the legal challenges presented by affirmative action bans, some states have moved toward a "top X percent" program whereby universities guarantee admission to some percentage of in-state students based on a predetermined set of criteria. However, research indicates that these programs are ineffective because not enough minority students score in the top tier of high schools to makeup the difference. Long, *supra* note 13, at 1033. Notably, this is the type of plan reviewed in *Fisher v. University of Texas,* 579 U.S. 365 (2016) [hereinafter *Fisher II*].

[21] Fisher v. Univ. of Tex., 570 U.S. 297 (2013) [hereinafter Fisher I].

[22] 579 U.S. 365 (2016).

[23] *Id.*

following the death of the late Justice Ruth Bader Ginsburg; Justice Brett Kavanaugh, who assumed Justice Anthony Kennedy's seat on the Court after the contentious confirmation hearings; and Justice Neil Gorsuch, following a protracted process to fill the seat of the late Justice Antonin Scalia.[24]

Presidential administrations have also changed twice since *Fisher II*. The last presidential administration indicated its intention to redirect the Justice Department's resources to investigate and sue universities that it perceived to discriminate against white applicants,[25] despite the fact that Black and Hispanic students were more underrepresented at elite universities in 2015 than they were in 1980.[26]

Thus, with the Court agreeing to hear arguments in the *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (hereinafter "*Harvard*") and the *Students for Fair Admissions v. University of North Carolina* (hereinafter, "*UNC*") cases, federal courts will once again take up the issue of the use of race in university admissions, solidifying the role of the courts as policymakers in higher education.

This article considers the evolving federal jurisprudence on the use of race in university admissions through an empirical lens. Specifically, it analyzes whether judicial decisions in these highly politicized cases can be modeled, explained, and predicted. I tested four theoretical frameworks from the literature about judicial decision making to determine the extent to which federal judicial decisions in these cases can be explained by several background characteristics of the judge, information about the courts handling the case, and the era in which the decision is made, among other indicators. Part I outlines the literature surrounding the theoretical frameworks developed to explain judicial decision making. Part II describes the following in detail: the motivations and research questions used in my analysis; the data, models, and variables utilized to test the four theoretical frameworks; and the limitations of my data and models. Part III introduces the results and findings from my analysis, which are bifurcated into sections on substantive and procedural court decisions. Part III also discusses a cross-validation of the model, using it to predict how the Supreme Court justices

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[24] *See, e.g.,* Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR, (Oct. 26, 2020, 8:07 PM), https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court [https://perma.cc/XZ8N-U8GK]; Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html [https://perma.cc/GL95-MU7H]; Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES, (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html [https://perma.cc/2Z9L-PVLV].

[25] Charlie Savage, *Justice Department to Take on Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html [https://perma.cc/EHU6-XH2A].

[26] Jeremy Ashekenas, Haeyoun Park & Adam Pearce, *Even with Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago*, N.Y. TIMES (Aug. 24, 2017), https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html [https://perma.cc/L89T-YAFT].

might decide the *Harvard* and *UNC* cases. I conclude with a summary of this article's contribution to the understanding of judicial decision making in the cases constituting my sample.

I. Theories of Judicial Decision Making

Empirical legal scholarship—in particular, a subset of empirical legal scholarship known as New Legal Realism—aims to leverage quantitative data to investigate, among other things, how judges make decisions in the cases before them.[27] To elucidate factors impacting judicial decisions, empirical legal scholars have tested theoretical frameworks of judicial decision making against a set of actual cases.[28] The majority of studies employing these methods attempt to reconcile the extent to which a judge's decision in a select sample of cases can be said to fit within the "behavioralist" or "attitudinal" theoretical frameworks.[29] To a lesser extent, the literature also considers whether the "sociological decision-making" or "political culture" and "punctuated equilibrium" theories can account for judicial decision-making patterns.[30] Other scholars have posited additional theories that are far more difficult to measure quantitatively, such as "psychological," "phenomenological," and "legalist" approaches.[31] Since the latter theories are nearly impossible to measure with available data, this article focuses instead on the utility of the behavioralist, attitudinal, political culture and punctuated equilibrium theories to explain judicial decision making.

The behavioralist and attitudinal theories express the idea that decision makers draw on their beliefs and values, whether firmly held or evolving, in

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[27] Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. Chi. L. Rev. 831, 851 (2008).

[28] *See e.g.*, Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972) (offering an early, descriptive application of this method to a non-random selection of tort cases spanning the late nineteenth and early twentieth centuries); Tracey George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 Ohio St. L.J. 1635 (1998) (testing attitudinal and strategic decision making theoretical frameworks to en banc cases heard by the U.S. Court of Appeals for the Fourth Circuit over three decades).

[29] *See id. See also* Isaac Unah & Ange-Marie Hancock, *US Supreme Court Decision Making, Case Salience, and the Attitudinal Model*, 28 L. & Pol'y 295 (2006); Cass R. Sunstein, Lisa Michelle Ellman & David Schkade, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 1–36 (John M. Olin Program in Law and Economics, Working Paper No. 198, 2003).

[30] *See, e.g.*, James L. True, Bryan D. Jones, & Frank R. Baumgartner, *Punctuated-equilibrium Theory: Explaining Stability and Chance in Public Policymaking*, in Theories of the Policy Process (Paul Sabatier, ed., 2019); Brian Z. Tamanaha, Realistic Socio-legal Theory: Pragmatism and a Social Theory of Law (1997); Joel B. Grossman & Austin Sarat, *Political Culture and Judicial Research*, 1971 Wash. U. L.Q. 177 (1971).

[31] *See, e.g.*, Lee Epstein, William M. Landes & Richard A. Posner, The Behavior of Federal Judges (2013); *see also* Richard A. Posner, How Judges Think 20–36 (2008).

making policy determinations.[32] The behavioralist theoretical perspective also holds that background characteristics, such as race and gender, influence decision making. The attitudinal theoretical perspective suggests that later-developed characteristics, such as political ideology, often proxied empirically by the political party of an Article III judge's appointing president, indicate the partisan directionality of a judicial decision.[33] Relatedly, political culture theorists maintain that decision makers are influenced by the political cultures of their immediate environment; that is, the tenor of a political culture—or the institutional cultures attendant to associated groups like courts comprising a federal circuit—impacts decision making.[34] An alternate decision making theory, known as punctuated equilibrium theory, places a decision in the context of its era and, in this way, converges on a legalist approach.[35] This is not to say that punctuated equilibrium theory would suggest that a decision made in the context of an era is stagnant. Rather, punctuated equilibrium theory holds that after a period of stability, durable shifts occur to disrupt this stability, and after the change is taken up by the institutions of the era, it becomes a source of stability until the next durable shift disrupts the newfound stability.[36]

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[32] *See* Gilman, *supra* note 5, at 504; Charles A. Johnson, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*, 21 L. & SOC'Y REV. 325, 340 (1987).

[33] It has been argued that there are really only two existing measures of the judicial ideology of Article III judges: (1) the political party of the appointing president and the Judicial Common Space Score. Corey Yung, *What is Judicial Ideology and How Should We Measure It?*, CONCURRING OPINIONS, (June 8, 2010); Judicial Common Space Scores rely upon "the norm of senatorial courtesy by integrating the voting records, based upon a standardized scale [from -1 to 1] of the nominating party . . . of the home state Senators of the judge nominated. . . . [and] use the President's party to determine the direction of the ideology." *Id. See* Lee Epstein, Andrew D. Martin, Jeffrey A. Segal & Chad Westerland, *The Judicial Common Space*, 23 J. L. ECON. & ORGS. 303, 325 (2007); *see also* Christina L. Boyd, *The Hierarchical Influence of Courts of Appeals on District Courts*, 44 J. LEGAL STUD. 113, 141 (2015) (using Boyd's Federal District Court Judge Ideology Data, http://clboyd.net/ideology.html [https://perma.cc/2MNH-ZJSA]).

[34] *See, e.g.*, Karen S. Louis, Karen Febey & Molly F. Gordon, *Political Cultures in Education at the State and Local Level: Views from Three States*, *in* HANDBOOK OF EDUCATION POLITICS AND POLICY 52, 69 (Bruce Cooper, James Cibulka, Lance Fusarelli, eds. 2008) (ascribing political cultures to states and cities); Grossman & Sarat, *supra* note 30 (suggesting ways in which political cultures can be used to "sensitize and guide judicial research to a better understanding of environmental influences" in judicial decision making); GABRIEL A. ALMOND AND G. BINGHAM POWELL, JR., COMPARATIVE POLITICS: A DEVELOPMENTAL APPROACH 52 (1966) (defining political cultures as connecting "individual tendencies to system characteristics," especially those in governmental institutions, such as the judiciary); Sidney Verba, *Comparative Political Culture*, *in* POLITICAL CULTURE & DEVELOPMENT 513 (Lucian W. Pye & Sidney Verba eds., 1965) (situating a political culture as "the system of empirical beliefs, expressive symbols, and values which defines the situation in which political action takes place," which applies cleanly to milieu of the judiciary).

[35] Frank Baumgartner, Brian Jones & Peter Mortensen, *Punctuated Equilibrium Theory: Explaining Stability and Change in Public Policymaking*, in THEORIES OF THE POLICY PROCESS 59, 103 (Paul Sabatier & Christopher Weible, eds., 2014); KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT (2004).

[36] Elaine Romanelli & Michael L. Tushman, *Organizational Transformation as Punctuated Equilibrium: An Empirical Test*, 37 ACAD. MGMT. J. 1141, 1166 (1994).

While much of the existing research that uses a theoretical framework to explain judicial decision making is undermined by conflicting results, the literature examining judicial decisions from a behavioralist theoretical framework—i.e., whether background characteristics, such as race and gender, influence judicial decisions—provides mostly consistent results. For example, multiple studies in this area have found that differences in gender and race produce a meaningful difference in judicial outcomes.[37] Yet, while a few studies using this framework to review decisions found statistically significant effects of race and gender on judicial decisions, most concern general judicial decision making, and none considers cases related to race-conscious admissions policies.[38]

To explain judicial decision making, several studies have applied the attitudinal framework. This maintains that socialized characteristics, such as educational experience and political ideology, impact decision making. The results from these studies indicate that judges appointed by Democratic presidents tend to vote according to a more liberal ideology while their colleagues whom Republican presidents appointed tend to favor a more conservative ideology.[39]

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[37] *See id.* (discussing a bevy of cases that support behaviorist theory). Because data on socioeconomic upbringing, parental income, and first-generation status is slim to non-existent, data on a judge's race, among other characteristics are imperfect but decent proxies for such personal factors about judges in the sample and my employment of these data are consistent with the literature in the field, especially the literature engaging the behavioralist framework. *See also* Gillman, *supra* note 5, at 504 (2001) (applying, with fidelity, a behavioralist model to a broad set of cases).

[38] *See* Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749, 751 (2001) (finding nominal differences between judges of different races in terms of sentencing patterns but that non-white judges tended to impose harsher sentences on criminal defendants at statistically significant levels); Jennifer L. Perisie, *Female Judges Matter: Gender and Collegial Decision Making in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1786–87 (2005) (finding significant gender effects in judicial decisions for the plaintiff in sexual harassment or sexual discrimination cases).

[39] *See, e.g.*, Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decision Making*, 71 JUDICATURE 277, 280 (1988) (linking a judge's affiliation with the Democratic party to voting in favor of equal protection claims); ROBERT A. CARP & C. K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS 7 (1983); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-1964*, 60 AM. POL. SCI. REV. 374 (1966) (finding Democratic affiliation was a statistically significant predictor of judicial voting patterns on politically liberal issues); Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 174 (1983); Joel B. Grossman, *Social Backgrounds and Judicial Decision Making*, 79 HARV. L. REV. 155, 15591 (1966); William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 55 (1991) (comparing Reagan appointees to Carter appointees and finding the former to decide more conservatively in antitrust cases); Stuart S. Nagel, *Unequal Party Representation on the State Supreme Courts*, 45 JUDICATURE 62 (1961); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J., 219, 254 (1999); GLENDON A. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR (1959); Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1167–81 (1992) (analyzing employment discrimination cases and finding significant correlations between political party, appointing president, and judicial decisions); John R.

One particularly salient study, conducted by Professors Sunstein, Ellman, and Schkade, found that federal appeals court judges appointed by Democratic presidents are more likely to uphold affirmative action policies compared to judges appointed by Republican presidents.[40] Yet, this effect was minimized when a judge appointed by Democratic presidents sits on a three-judge panel with two other judges appointed by Republican presidents—what the authors of the study call "ideological dampening," in which party differences are "leveled," or wiped out.[41] However, other researchers investigating the decision behaviors of federal appeals court judges have found that political ideology and party affiliation are not always directly correlated and in some cases are not useful predictors of voting behavior.[42]

Nonetheless, studies correlating Supreme Court justices' political ideologies and "voting" behavior have found that "partisanship and appointing president . . . are probably best considered surrogates for judicial attitudes, not causes of them—and, as such, are at least potentially independent of social background."[43] Also, although no empirical attention has been paid to

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Schmidhauser, *Stare Decisis, Dissent, and the Background of Justices of the Supreme Court of the United States*, 14 U. TORONTO L.J. 194 (1962); Donald R. Songer, *The Policy Consequences of Senate Involvement in the Selection of Judges in the United States Courts of Appeals*, 35 W. POL. Q. 107, 119 (1982); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355 (1981); S. Sidney Ulmer, *The Political Party Variable in the Michigan Supreme Court*, 11 J. PUB. L. 352 (1962).

[40] Sunstein et al., *supra* note 29. Sunstein, et al., follow cases from 1978 to 2002, including a total of 155 cases involving affirmative action issues. The vast majority of these cases are outside the realm of my focus on race-conscious admission policies at universities. For example, besides a Lexis search of "affirmative action and constitution or constitutional," the authors built their case universe using a Westlaw Key Cite of United Steelworkers v. Weber, 443 U.S. 193 (1979), a case involving affirmative action in the context of hiring processes. Also, while they do examine a number of cases involving race-conscious university admissions policies, their analysis begins with *Bakke*, and thus misses four decades of development in case law and political cultures related to these policies. Finally, to distinguish the analysis of Sunstein, Ellman, and Schkade from my own, theses authors examined only the voting patterns of three-judge panels at the federal court of appeals level.

[41] *Id.* at 3.

[42] Frank B. Cross, *Decision Making in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1457–1515 (2003); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 496 (1975) (finding Democratic affiliation was only a statistically significant predictor of judicial voting patterns on politically liberal issues in certain cases but not all, and instead finding that age was the most significant predictor of deciding a case on politically liberal grounds); Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961); Kenneth N. Vines, *Federal District Judges and Race Relations Cases in the South*, 26 J. POL. 337, 357 (1964); David W. Adamany, *The Party Variable in Judges' Voting: Conceptual Notes and a Case Study*, 63 AM. POL. SCI. REV. 57 (1969) (analyzing judicial decision making in the state court context of the Wisconsin Supreme Court); Orley Ashenfelter, Theodore Eisenberg, & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 281 (1995); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1190 (1991) (examining race-based equal protection cases and finding no significant correlation between a judge's political affiliation, appointing president, and the outcome).

[43] JEFFREY A. SEGAL AND HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL, 232 (1993); *see also* Charles A. Johnson, *Law, Politics, and Judicial Decision*

the subject to date, Professor Amar observes that the justices sitting on the Supreme Court today have nearly identical resumes. This includes a common educational experience. With the exception of Justice Amy Coney Barrett, each sitting justice graduated from Harvard or Yale, both of which are firmly within the time-invariant top 14 law schools.[44]

Although the literature is fairly robust in examining the explanatory effect of the behavioral and attitudinal theoretical frameworks, considerably less is known about the explanatory applications of political culture and punctuated equilibrium theories to judicial decision-making. The first approach, political culture theory, posits that institutional cultures, particularly those comprising a political institution like a court, impact decision making. This approach tends to focus on specific levels of the court, such as the composition of the Supreme Court or a three-judge appeals court panel, as opposed to court systems more broadly. There is a paucity of research about the institutional influence of the court on judicial decision making. However, previous studies have considered the impact of prior judicial experience on appellate court decision making—with mixed results.[45] Some studies in this area seem to indicate that previous federal judicial experience has little impact on voting behavior.[46] Others find that prior judicial experience indeed predicts how a judge will decide a case involving civil rights issues at marginal but statistically significant levels.[47] Finally, these studies implicitly confirm that the link between judicial decisions and their temporal or cultural context—which lies at the heart of punctuated equilibrium theory—requires greater and more deliberate study to fill this gap in the literature. That link also provides a coarse proxy for determining the legalist approach to judicial decision making based on the controlling precedent of the given moment in which a case is decided.

Broadly speaking, each of these theoretical frameworks explains whether a judge's unique background and socialized characteristics influence

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Making: Lower Federal Court Uses of Supreme Court Decisions, 21 L. & SOC'Y REV. 325, 340 (1987).

[44] *See* Akhil Reed Amar, *Clones on the Court*, ATLANTIC (Apr. 2015), http://www.theatlantic.com/magazine/archive/2015/04/clones-on-the-court/386252/ [https://perma.cc/B4MJ-TJ3L]. Amar notes that "all went on to study law at Harvard or Yale (though [Justice] Ruth Bader Ginsburg defected to Columbia for her final year)." Often referred to as the "T14," these schools have consistently ranked in the top 14 since the inception of the *U.S. News and World Report* rankings in 1987 (in alphabetical order): University of California, Berkeley, Boalt Hall School of Law; Columbia Law School; Cornell Law School; Duke University School of Law; Georgetown University Law Center; Harvard Law School; New York University School of Law; Stanford Law School; University of Chicago Law School; University of Michigan Law School; University of Pennsylvania Law School; University of Virginia School of Law; Yale Law School. *See also*, Christopher J. Ryan, Jr., *A Value-Added Ranking of Law Schools*, 29 FLA. J. L. & PUB. POL'Y 285, 308 (2019).

[45] *See*, *e.g.*, George, *supra* note 28; Aliotta, *supra* note 39; Schmidhauser, *supra* note 39; Johnson, *supra* note 43; Sunstein, Ellman, & Schkade, *supra* note 29.

[46] Ashenfelter et al., *supra* note 42.

[47] *See, e.g.,* HOWARD J. WOODFORD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS (1981).

how that judge will decide a case.[48] The findings on which of these characteristics matter most in effectuating a judge's ultimate decision to resolve a given controversy are mixed—depending on the jurisdiction, structural makeup of the court, the type of case under review, and the era in which the decision is made—not to mention somewhat outmoded. Especially in a time of fixation on, availability of, and litigants' devotion to data analytics, the methods these studies employ are ripe for reassessment and new application. This study provides such a reassessment and novel application. That is, these foregoing studies offer an instructive theoretical foundation for this study's primary inquiry and analysis.

II. Empirical Analysis

A. Motivations and Research Questions

To help strengthen the sparse research in some areas and conflicting findings in other areas of the empirical legal literature on judicial decision making, this study endeavors to contribute to the understanding of judicial decision making through an applied approach to a particular set of cases at the nexus of the university and the law, politics, and race. Principally, I seek to investigate the ways in which judges afford deference to universities and their race-conscious admissions policies, and how, if at all, theoretical frameworks of decision making explain or predict the outcome of these cases. The primary reason for examining deference to an admissions policy—as an outcome—is due to the fact that a decision to uphold or reverse a given admissions policy changes in meaning over time; to wit, before *Brown*, upholding an admissions policy had a racially discriminatory effect, while after *Bakke*, upholding an admissions policy had largely the opposite effect. Thus, in this study, I test four theoretical frameworks: the behavioralist, attitudinal, political culture, and punctuated equilibrium theories of decision making in cases involving the use of race in university admissions. However, it may be fairly assumed that the legalist approach to decision making is bound up with the punctuated equilibrium theory, given that the legalist theory of judicial decision making relies on gradual evolution, followed by durable stasis, in legal precedent.

This study unpacks judicial decision making to its simplest attributes in order to determine which theory best explains judicial decision making in the federal cases involving the use of race in university admissions. It focuses on characteristics of the case, judge, and time in which the decision was made. To test behavioralist, attitudinal, political culture, and punctuated equilibrium theories, I ask and answer the question:

> *To what extent do a judge's background characteristics and prior experiences, as well as the institutional culture of the court on which they sit*

[48] Heise, *supra* note 5.

and the era in which a decision is made predict how that judge would decide a case involving the use of race in university admissions?

While other scholars have begun to test these theories around the margins, this study intends to contribute to the literature in four significant ways. Unlike previous works, this study bifurcates judicial decisions along the lines of their substantive and procedural bases; examines the voting behaviors of federal judges at all levels, and not merely at the Supreme Court or Circuit Court of Appeals levels; applies the Judicial Common Space Scores to a unique context; and provides a comprehensive consideration of all federal cases involving the use of race in university admissions which received at least an appellate court decision.

B. Data

This study employs an empirical framework using an original dataset to answer the research questions outlined above. To create this dataset, I used the Westlaw search platform, utilizing several searching terms and connectors in an attempt to yield every case in the database involving the use of race in university admissions that received an opinion at the federal circuit court of appeals level or, higher still, and opinion by the Supreme Court.[49] The initial results yielded 1,283 opinions, many of which were irrelevant to my analysis, because this total included an overwhelming number of cases and decisions that did not involve the use of race in university admissions. Ultimately, I pared down the results to decisions from 102 courts across all levels of a case—from the court of first impression to the final appellate decision—comprising 314 unique judge observations, and accounting for individual voting decisions in 39 case groups.[50] I further bifurcated these decisions into

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[49] I attempted 14 search terms and connectors in total. Examples of these terms and connectors search include: "'affirmative action' & university & admission!"; "race & university & admission!"; and "'equal protection' & admission!". To focus on consequential cases, I searched for all cases involving the use of race which received an opinion by a federal circuit court of appeals. I then vertically imputed the federal district court decisions in the cases, as well as the Supreme Court decisions in these cases, where applicable.

[50] By "case groups," I refer to all component decisions in a case "tree": decision(s) at a district court level; decision(s) at a court of appeal level; and, where applicable, decision(s) by the Supreme Court. Each case group is listed below by the citation for the highest court that reviewed the case and issued an opinion; however all opinions across the trajectory of the case were observed for analysis: Missouri, *ex rel.* Gaines v. Canada, 59 S.Ct. 232 (1938); Sipuel v. Bd. of Regents of Univ. of Okla., 68 S.Ct. 299 (1948); Sweatt v. Painter, 70 S.Ct. 848 (1948); McLaurin v. Okla. State Regents for Higher Educ., 70 S.Ct. 851 (1950); Wichita Falls Junior Coll. Dist. v. Battle, 204 F.2d 632 (5th Cir. 1953); Board of Sup'rs of La. State Univ. v. Tureaud, 74 S. Ct. 783 (1954); Whitmore v. Stilwell, 227 F.2d 187 (5th Cir. 1955); Lucy v. Adams, 76 S.Ct. 33 (1955); Booker v. Tenn. Bd. of Educ., 240 F.2d 689 (5th Cir. 1957); Bd. of Sup'rs of La. State Univ. v. Ludley, 225 F.2d 372 (1958); Meredith v. Fair, 313 F.2d 532 (5th Cir. 1962); Guillory v. Adm'rs of Tulane Univ., 306 F.2d 489 (5th Cir. 1962); Gannt v. Clemson Agr. Coll., 320 F.2d 611 (4th Cir. 1963); Hammond v. Univ. of Tampa, 344 F.2d 951 (5th Cir. 1965); DeFunis v. Odegaard, 94 S.Ct. 1704 (1974); Gonzalez v. S. Methodist Univ., 536 F.2d 1071 (5th Cir. 1976); Krohn v. Harvard L. Sch., 536 F.2d 1071 (1st Cir. 1976); Regents of the Univ. of Cal. v. Bakke, 98 S.Ct. 2733 (1978); Henderson v. Fl. Bd. of

substantive and procedural decisions on the basis of the court holding and judicial review. The 194 cases decided on substantive grounds form the analytical sample of my primary analysis. Original variables pertaining to my research question were hand-coded into a dataset, which I merged with the Federal Judicial Center's Biographical Directory of Federal Judges (BDFJ) dataset.[51] The BDFJ contains a rich set of biographical information on presidentially appointed judges who have served since 1789 on the U.S. District Courts, the U.S. Courts of Appeals, the Supreme Court of the United States, the former U.S. Circuit Courts, and the federal judiciary's courts of special jurisdiction. Ultimately, the observation total was further reduced by removing 29 observations for state court judges, who were not subject to the same appointment processes as the federal judges in the sample and for whom I have no equivalent biographical information. Finally, I allocated the observations by decision category, counting 224 substantive judicial decision observations and 190 procedural judicial decision observations, after accounting for overlapping decisions pertaining to both decision categories.

C. Variables

Because of the mixed findings in the literature on judicial decision making, I selected an array of variables for analysis that correspond with the attitudinal, behavioralist, political culture, and punctuated equilibrium theories. The variables used in this analysis are categorized by characteristics of the judge, time period, court, and case. The majority of the variables in this analysis are observed at the judge level and coded as binary, including gender[52] and race.[53] I also coded a binary variable for whether a judge graduated

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Regents, 569 F.2d 1309 (5th Cir. 1978); Doherty v. Rutgers Sch. of L., 651 F.2d 893 (3rd Cir. 1981); Hall v. State, 791 F.2d 759 (9th Cir. 1986); Davis v. Halpern, 813 F.2d 37 (2nd Cir. 1987); Hopwood v. Univ. of Tex., 95 F.3d 53 (5th Cir. 1996); Hopwood v. Univ. of Tex., 236 F.3d 256 (5th Cir. 2000); Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997); Texas v. Lesage, 158 F.3d 213 (5th Cir. 1998); Smith v. Univ. of Wash. L. Sch., 194 F.3d 1045 (9th Cir. 1999); Wooden v. Bd. of Regents of the Univ. of Georgia, 208 F.3d 1313 (11th Cir. 2000); Tracey v. Bd. of Regents of the Univ. of Ga., 247 F.3d 1262 (11th Cir. 2001); Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001); Farmer v. Ramsay, 43 Fed.Appx. 547 (4th Cir. 2002); Weser v. Glen, 43 Fed.Appx. 547 (2d Cir. 2002); Grutter v. Bollinger, 123 S.Ct. 2325 (2003); Gratz v. Bollinger, 123 S.Ct. 2411 (2003); Coal. to Defend Affirmative Action v. Granholm, 501 F.3d 775 (6th Cir. 2006); Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 701 F.3d 466 (6th Cir. 2012); Schuette v. Coal. to Defend Affirmative Action, 134 S.Ct. 1623 (2014); Fisher v. Univ. of Tex., 133 S.Ct. 2411 (2013); Coal. to Defend Affirmative Action v. Schwarzenegger, 2010 WL 3340577 (N.D. Calif. 2010); Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128 (9th Cir. 2012); Su v. E. Ill. Univ., 565 Fed.Appx. 520 (7th Cir. 2014); Fisher v. Univ. of Tex. [Fisher II], 579 U.S. 365(2016); Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128 (9th Cir. 2012); and Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020).

[51] *Biographical Directory of Federal Judges*, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/judges.html [https://perma.cc/V2EG-QTHX] (last visited Apr. 29, 2022).

[52] I coded men as 0 and women as 1. I recognize that gender is non-binary, but the data afforded me no possibility of accounting for this.

[53] Similarly, I coded white judges as 0 and non-white judges as 1.

from one of the time-invariant top 14 law schools, as a measure of a common educational experience between judges, which may reflect a sort of educational and even a political conditioning, according to the attitudinal model traditions.[54] Federal district court experience is also binary, where prior or current federal district court experience is coded as 1, including active federal district court judges at the time the case was heard, federal district court judges sitting on a federal appellate panel by designation, and federal appellate judges who had previous presidential appointments to a federal district court. I also selected binary indicators of the facts underlying the cases in my dataset to establish controls on that basis for each case. In the models below, these controls are represented as a vector for the facts underlying each case. For example, like judges, plaintiffs are themselves coded by their gender[55] and race.[56] Lastly, non-institutional policies challenged by the plaintiff are coded as a binary indicator challenging a state law, constitutional provision, referendum or other policy that is not specific to a particular university is coded as 1, while challenges to institution-specific policies are coded as 0.[57]

I coded a number of variables in my analysis either categorically or continuously as raw number counts. Because political ideology is a nuanced concept, I employed a continuous variable to represent a judge's political ideology, using the Judicial Common Space Scores, which place a judge's "political ideology on a continuum, bounded by -1 and 1."[58] However, to fit with the scale of the dependent variable, I transformed the Common Space Scores, multiplying each by -1, so that a score below zero roughly comports with the expected ideology for judges nominated and confirmed by "liberal" presidents and above zero for judges nominated and confirmed by "conservative" presidents, given that much of the case sample takes place in the modern political era in which party affiliations have remained relatively stable indicators of political ideology.[59] The negative and positive values used to code the judge's political ideology can be read to correspond with the likelihood of the judge upholding or overturning, respectively, a university's admission policy in the modern context. Additionally, the number of years between the judge's first day of service on the federal bench and the date the

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[54] I coded judges with an LL.B. or J.D. degree from a top-14 law school as 1, and all other law schools as 0.

[55] Here, I coded males as 0, which comprise the overwhelming majority of my observations and females as 1.

[56] Similarly, I coded white judges, as 0 and non-white judges as 1.

[57] These controls are employed to acknowledge that, like much of the law, the legal context is subject to change. However, given that these cases represent formulaic challenges, the controls I employ make it possible to infer the functional constancy of the legal context across the sample.

[58] *See* Epstein, et al., *supra* note 33. This indicator is more nuanced than the assignment of -1 for liberal and 1 for conservative to each judge in the sample on the basis of the political party of the president who appointed the judge. Instead, it also contains components in its methodology that examine at representation from the parties comprising the House and Senate from the states from which the jurists' appointments originate, among other variables. *See id.* As such, it is a preferable variable to the binary model.

[59] *See* Orren & Skowronek, *supra* note 35.

case was heard by that judge is represented as a continuous variable. The time, or era, during which the case is heard is an original categorical variable that sheds light on differences between cases and controversies, plaintiffs' claims, and even the uses of race in admission from a historical perspective.

To measure precedent, I assigned values, from 1 to 3, to demarcate three distinct chronological eras of Supreme Court judicial precedent: pre-*Brown*, between *Brown* and *Bakke*, and post-*Bakke*.[60] This variable indicates the chronological time in which a decision was made as well as the era's landmark precedent. This era-related precedent is distinct from idiosyncratic precedent at the court of appeals level, for which I also seek to control; thus, I assign each case a value representing the court's territorial grouping by circuit, from 1 to 11, to identify the 11 circuit courts of appeals and the component district courts from which the case originated. I applied fixed effects by court grouping, because each court grouping is unique in its rules of procedure and controlling case law. While this is defensible for analysis on substantive decisions, it is the preferred model for procedural decision analysis. I also include a vector of case-specific controls, such as plaintiff characteristics and characteristics of the challenged admission policy. Then, I assign a case identification variable, from 1 to 39, given the unique properties of decisions on the same controversy; this allows me to provide conservative estimates of coefficients on the key independent variables when I cluster standard errors by case in the non-naïve models.

Finally, I bifurcated the dependent variable according to the court's decision as to whether the court decided the case on the merits or dispensed of the case on procedural grounds. For substantive decisions, which comprise the primary analytical sample, the binary variable for the judge's decision to overturn the admission policy is coded as 1, while upholding the policy is coded as 0. Cases that were not decided on the merits were given a missing value under the substantive decision variable. In the event that the court dispensed with the case on procedural grounds, the decision receives a value of 1 if the judge upheld the lower court's decision and 0 if the decision was overturned. Unlike the studies preceding this analysis, I operationalized the dependent variable in my analysis as the deference to which the court affords a university's admission policy.[61] Again, this is because the meaning of a judicial decision to overturn or uphold a race-conscious admission policy has

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[60] I gave those cases in which plaintiffs sought to have equal or desegregated access to higher education prior to the *Brown* decision a value of 1. I gave the cases decided after *Brown* which sought to enforce *Brown*'s holding in the context of higher education a value of 2. Beginning with *Defunis*, from which *Bakke* famously followed, I gave a value of 3 to the cases in which the use of race in admissions to promote a desegregated and diverse learning environment was challenged. Originally, I gave the cases following *Grutter* a separate value of 4, but in the final analysis, I collapsed this class of cases into 3. Thus, the eras comprise: (1) challenging racially discriminatory policies; (2) desegregating the higher education landscape; and (3) challenging the use of race in admissions as a tool to promote diversity based on the Equal Protection Clause. Additionally, this variable serves as an indicator of the controlling precedent upon which later cases in an era relied.

[61] *See* Unah & Hancock, *supra* note 29; Segal & Spaeth, *supra note 43*.

fundamentally changed multiple times in the last century. As such, my analysis focuses on the relationship between the federal courts and the university—vis-à-vis university admissions policies—over time, regardless of what these relationships mean from a political perspective.

D. Regression Model

The full model, below, combines elements from each of the above referenced theories, looking within circuit court group, to account for idiosyncratic precedent affecting judicial decision making:

EQUATION 1: FULL MODEL

$$DECISION_i = b_0 + b_1 RACE_i + b_2 GENDER_i + b_3 T14_i + b_4 JCS_i + b_5 DISTCRT_i + b_6 BENCHYRS_i + b_7 CRTGRP(FE)_i + b_8 ERA_i + b_9 CASE_j + e_i$$

I built incrementally toward this full model, testing each theoretical framework in turn, through naïve modeling processes. First, I modeled the behavioralist approach by specifying a judge's decision as a function of background characteristics—such as race and gender—specific to that judge, controlling for a vector of case-specific characteristics, collapsing variables about the litigants and the underlying policy being challenged.

EQUATION 2: BEHAVIORALIST MODEL

$$DECISION_i = b_0 + b_1 RACE_i + b_2 GENDER_i + b_3 CASE_j + e_i$$

Next, I specified an attitudinal model, which considered the "political" affiliations of a judge as indicators of the judge's decision, including the educational conditioning of the judge and the judge's ideology. To do this, I proxy the judge's ideology by using the Judicial Common Space score of the judge, along with a vector of case-specific characteristics.

EQUATION 3: ATTITUDINAL MODEL

$$DECISION_i = b_0 + b_1 T14_i + b_2 JCS_i + b_3 CASE_j + e_i$$

Then, I modeled the judge's decision as a function of the judge's engagement with the institutional subcultures of the federal bench, such as whether the judge had experience as a district court judge, the number of years the judge had served on the federal bench—in order to apply more precisely a political culture framework to my sample—also controlling for a vector of case-specific characteristics.

EQUATION 4: POLITICAL CULTURE MODEL

$$DECISION_i = b_0 + b_1 DISTCRT_i + b_2 YRSBENCH_i + b_3 CRTGRP(FE)_i + b_4 CASE_j + e_i$$

Lastly, to test the punctuated equilibrium theory, I specified a model in which a judicial decision is a function of the era in which it was made, controlling for case variables.

EQUATION 5: PUNCTUATED EQUILIBRIUM THEORY MODEL

$$DECISION_i = b_0 + b_1 ERA_i + b_2 CASE_j + e_i$$

In Part III, I describe my analysis of these models using ordinary least squares (hereinafter "OLS"), with fixed effects, and logistic regression, with fixed-effects specifications.

E. Limitations

When I began this study, I endeavored to create a sample representing every case that received an appellate judicial opinion and arose from a race-conscious admissions controversy. It is possible, but unlikely, that some cases involving the use of race-conscious admission policies are not included in the analysis. However, I consider this sample to be the most complete collection of cases, composed of the most important cases—those which received an appellate court decision—involving the use of race in university admissions.

Yet, this is not the only potential limitation of this study. The very method of analysis has only relatively recently gained acceptance in the legal academic community. Critics of legal empiricism argue that complex legal decisions cannot be condensed into a binary decision code based on whether judges sided with the majority or the dissent. Nevertheless, this analysis focuses on whether courts defer to university policies regardless of the nature of the policy, and quantitative analyses offer substantive insight into the specific climate in the eras in which these decisions are made.

A legitimate concern with this sample, however, is that it contains limited representation of judicial subgroups, such as non-white and women judges. This fact reflects a non-diverse judiciary writ large, and future research should investigate and clarify how race and gender influence voting behavior. Additionally, the ways in which individual appellate judges are assigned to three-judge panels—a subset of the decisions in the sample—may involve influences that are non-random. I have attempted to mitigate these non-observable factors by controlling for the background characteristics, like race and gender, that might lead to non-random assignments in the data. Other scholars have argued that this process, much like the case assignment

process at lower court levels, is effectively random and poses no problem for assumptions of independence.[62]

III. Findings

A. Descriptive Statistics

Descriptively, the data paint an unsurprising, although stark, portrait of the American judiciary—at least with respect to the Article III judges who have presided over cases involving the use of race in university admissions. It is predominately white and male. Only 13.77% of the 334 unique judges in the sample are women, while 8.68% are non-white.[63] Of the substantive decision analytic sample, 9.80% of the 204 judges comprising this sample are women and 8.33% are non-white. The 39 case groups, which constitute the analytic sample, occur in the three eras approximately corresponding to the following timeline: pre-*Brown*, *Brown* to *Bakke*, and post-*Bakke*. Approximately 14.44% of the cases occur in the first era (before *Brown*), 20.71% occur in the second era (between *Brown* and *Bakke*), and the remaining 64.85% occurred in the third era (after *Bakke*).[64] Judges' decisions from my analytic sample of cases decided on substantive grounds adhere to the following distribution: 21.08% from the first era, 19.61% from the second era, and 59.31% from the third era. Finally, the judges in the full sample and substantive decision analytic sample are relatively evenly balanced on the following: the political party of the judge's appointing president; whether the judge received legal education from a top-14 law school (a proportion which has only grown over time); and whether the judge has district court experience.

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[62] Sunstein, Ellman & Schkade, *supra* note 29.
[63] *See* Table 1.
[64] *See id.*

TABLE 1: DESCRIPTIVE DEMOGRAPHY OF JUDGES

Entire Sample		**Substantive Analytical Sample**	
Judge Gender		*Judge Gender*	
Male	86.33	Male	90.20
Female	13.77	Female	9.80
Judge Race		*Judge Race*	
White	91.32	White	91.67
Nonwhite	8.68	Nonwhite	8.33
All values are reported as percentages. All values are statistically significant below the p<0.01 level.			

Looking at conditional means, by decision, of each variable, I also observe that judges who are men are less likely than judges who are women to give deference to race-conscious admissions policies.[65] More often than not, white judges decided to overturn race-conscious admissions policies, while non-white judges decided almost evenly for and against those policies. Judges appointed by liberal presidents may give less deference to these policies than their colleagues appointed by conservative presidents. And, judges who attended an elite law school may be more likely than not to give deference to thse policies; however, results on this variable are not statistically significant.[66] That said, judges with federal district court experience are more likely to defer to a university's admission plan than judges without federal district court experience.[67] Finally, and most notably, the decisions in the first two eras of cases—that is, decisions made before *Bakke*—overwhelmingly overturn a university's use of race as a factor in admission, which corresponds with the massive litigation associated with the desegregation of higher education in the second era.[68] However, in the third and latest era, the judges in the sample are much more likely to defer to the university's use of race in admissions, reflecting support of affirmative action policies.[69]

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[65] *See* Table 2.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *See id.* Note that the majority, or 70.2%, of the cases in my sample arose from challenges to institutional policies. From the cases in my sample, white plaintiffs comprise just over half—or 53.3%. Last, 73.5% of the cases in my sample contain at least one male plaintiff, while just 49.3 percent of the cases in my sample contain at least one female plaintiff. Most of the cases in my sample—36.4%—were heard before the Supreme Court, which was more likely to overturn than uphold race-conscious university admissions policies. 24.9% of cases in my sample arose through Fifth Circuit jurisdictions, and an additional 7.2% came from Eleventh Circuit jurisdictions. Both of those courts were more likely to overturn race-conscious admissions policies. However, in the Ninth Circuit, where 7.2% of the cases were heard, the judges were more likely to defer to institutions. Jurisdictions in the Sixth Circuit heard 14.6% of the cases in my sample, and were only marginally to overturn than uphold race-conscious admissions policies.

TABLE 2: DESCRIPTIVE MEANS

Entire Sample		**Substantive Analytical Sample**	
Judge Gender	Mean of Decision	*Judge Gender*	Mean of Decision
Male	0.65	Male	0.588
Female	0.19	Female	0.423
Judge Race		*Judge Race*	
White	0.62	White	0.575
Nonwhite	0.40	Nonwhite	0.522
Presidential Appointing Party		*Presidential Appointing Party*	
Conservative	0.59	Conservative	0.491
Liberal	0.63	Liberal	0.646
T-14 Law School Graduate		*T-14 Law School Graduate*	
Yes	0.58	Yes	0.535
No	0.64	No	0.614
District Court Experience		*District Court Experience*	
Yes	0.49	Yes	0.502
No	0.72	No	0.693
Decision Era		*Decision Era*	
1st Era (1938-53)	0.86	1st Era (1938-1953)	0.884
2nd Era (1953-73)	0.88	2nd Era (1953-73)	0.814
3rd Era (1973-Present)	0.41	3rd Era (1973-Present)	0.349
All values are reported as conditional means on the decision: 0 for uphold and 1 for overturn. All values are statistically significant below the p <0.01 level, except for T-14 Law School Graduates.			

Finally, once in a while, patterns emerge that require further exploration. One such curiosity is that the reporter page counts of recent opinions were substantially longer than their pithier, older counterparts. As shown in Table 3 below, the length of the judicial opinions in these cases increases at a statistically significant rate over time. Perhaps modern jurists have taken the adage that the pen is mightier than the sword a bit too literally.[70]

[70] *See* Table 3.

TABLE 3: OPINION LENGTH (BY REPORTER PAGE COUNT) OVER TIME

Entire Sample		**Substantive Analytical Sample**	
First Era	3.25	First Era	2.85
Second Era	3.91	Second Era	4.38
Third Era	23.18	Third Era	26.93
All values are reported as means of page count lengths as appearing in the cited reporter. All values are statistically significant below the p <0.01 level.			

B. Substantive Decision Model and Results

1. Regression Specifications

To provide conservative estimates of the effects of the variables of interest on a judicial decision, I report robust or clustered standard errors and apply within-court fixed effects in the following regression specifications. Also, given that the dependent variable is a binary variable, I initially fitted this model to a logistic regression specification, where I observed the same effects as the fixed-effect OLS regression results reported below.[71] However, I do not present the estimates from the logistic regression analysis here for two principal reasons: (1) OLS results, indicating marginal probabilities of changes to a judge's decision by each covariate coefficient, are more accessible for interpreting estimates across models than logistic regression, which uses logged odds ratios; and (2) the directionality and magnitude of the logistic regression coefficients, as well as the standard errors and statistical significance, are nearly identical to the OLS regression models.[72] As such, and for the convenience of the readers, I present OLS regression estimates, with court grouping fixed effects, in the regression tables below.

In the first regression model, I regress the judge's substantive decision on the judge's race and gender. I find that this model is split in terms of statistical significance. The effects are both negative in directionality—suggesting that women or non-white judges are more likely to uphold race-

[71] Although I report my results using my OLS models, I note that my logit model coefficients are substantially the same as my OLS models up to hundredth decimal point. Additionally, because the logit models are more difficult to interpret, I chose to report the OLS models, which describe the predicted probability of the coefficients at predicting the judicial deference to university admission policies.

[72] I also specified a probit model with a variable combining female and non-white to comprise a minority category and the statistical significance on the covariates remained same as featured in the OLS and fixed effects results below in Tables 4 and 5.

conscious admission policies—only the coefficient on gender is statistically significant under the behavioralist model specification; however, the magnitude of the effect on gender, controlling only for characteristics of the case and the judge's race, is substantial, implying mixed success for the naïve specification of the behavioral model.[73] Moreover, the coefficient on a judge's gender not only maintains directionality and relative magnitude of effect across all models in which it is included, but it is also statistically significant to at least the $p<0.01$ level.

In the second model, the attitudinal covariates—legal education and judicial ideology—are both marginally negative and statistically significant in this model. Thus, a judge that attended an elite law school would, on average, have a slightly larger marginal probability of upholding the admissions policy. Similarly, the judge's ideology, according to the Judicial Common Space Score, is negatively correlated with a decision to overturn a race-conscious policy. Although these results are statistically significant, the magnitude of the coefficients is minimal, suggesting that the attitudinal model, on its own, is a poor predictor of judicial decision making for cases in the sample.

The third model, based on the political culture theory, presents dubious explanatory ability. The coefficient on a judge's federal district court experience indicates that a judge with district court experience is almost 10 percent more likely to uphold a race-conscious admission policy, but this effect is not statistically significant either on its own or in the full model. Similarly, the number of years for which the judge has served on the federal bench before hearing a case in the sample seems not to be a significant predictor of a judge's substantive decision in the sample. This result indicates that the political culture theory framework is not suitably explanatory of substantive judicial decisions in the sample.

The fourth model, testing punctuated equilibrium theory, is the sparsest of the four specifications, though large in effect and statistical significance. It also yields the predictor variable with the greatest magnitude of effect in the full model. Its coefficients are also among the most challenging to interpret, requiring elucidation based on decisional history. Prior to *Brown*, federal courts overturned race-conscious admissions policies in the light of *Plessy* on the basis that they did not provide separate and equal higher education accommodations for minorities. Between *Brown* and *Bakke*, federal courts largely overturned admissions policies because universities did not adopt or sought to circumvent the precedent of *Brown*. And finally, after *Bakke*, the federal courts have clarified the permissible and impermissible use of race in

[73] One notable finding in my analysis along these lines is visible in the full specification of the naïve model: that judges included in my analysis whose race is non-white were more likely to overturn race-conscious admissions policies, but just outside of the statistically significant threshold level. *See e.g.*, Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (Thomas, J., dissenting in relevant part); Fisher v. University of Texas, 631 F.3d 213, 247 (5th Cir. 2013) (Garza, J., concurring). This finding is roughly equivalent to the tokenism finding presented by Steffensmeier and Britt, *supra* note 38.

admissions, overturning policies in the latter cases. The coefficient on the era variable compares the present era to the era of cases before *Bakke*; thus, the coefficient can be interpreted as comparing a judge's decision in its corresponding era to the first and second eras of cases—the most active era to date in substantive judicial decisions to overturn race-conscious admission policies. Because these eras are inextricably linked to judicial precedent, it may be fairly stated that this coefficient represents the effect not only of the era in which the decision is made but also of the controlling precedent of the day. This coefficient indicates that judges in post-*Bakke* era were more than 44 percent more likely to uphold a race-conscious admission policy than were judges in the earliest cases in the sample—remembering that many of the policies in the latest era were created in service of promoting the admission of minority university applicants. Additionally, the statistical significance is a remarkable $p<0.001$. This result strongly supports the explanatory power of the punctuated equilibrium theory and of legalist decision making.

In the full model, I stack all of the foregoing model specifications vertically to control for iteratively greater groups of judicial characteristic covariates. Here, I report robust standard errors but offer a superior model with standard errors clustered by case in the second sensitivity specification. This is because cases arising from the same controversy have the same intrinsic properties, which is an appropriate requirement for clustering to ensure conservative effect estimates. For these reasons, and because it explains more of the variance in the substantive judicial decisions in the sample, the sensitivity analysis focuses on the specification with court fixed effects and standard errors clustered by case group.

Each of the covariates described above, apart from era, attempts to capture the background and socialized characteristics of a judge, testing the behavioralist, attitudinal, and political culture theories against judges in the sample. The results from these specifications show that the attitudinal and political culture frameworks do not fully explain the judicial decisions in the sample at statistically significant levels. Their inability to explain substantive judicial decisions is particularly noticeable upon inclusion in the full model, where only gender survives statistical significance thresholds.

Thus, the behavioral framework remains mixed, and the punctuated equilibrium theory framework explains substantive judicial decisions at statistically significant levels, even when using attitudinal and political culture framework model specifications as controls. These results seem to indicate that: (1) one element of the judge's lived experiences, their gender, influences judicial decision-making patterns; and (2) the modern era of judicial decision making in race-conscious cases may not be characterized by judicial self-indulgence, as popular narratives suggest. More importantly, these results underscore the fact that the era—and the precedent—in which a decision is made matters and would support the underlying tenets of punctuated equilibrium and legalist theories, the former of which holds that judges render decisions to advance policy in a saltatory fashion, after which the decision becomes the mode, as characterized by policy stasis. But this fact means that

durable shifts that upend standing precedent can lurk around the corner, as my predictive model, described in the next section of this article suggests.

TABLE 4: OLS REGRESSIONS WITH SUBSTANTIVE DECISION AS OUTCOME AND COURT-GROUP FIXED EFFECTS

	(1) Full	(2) Behavioralist	(3) Attitudinal	(4) Political Culture	(5) PET
Judge Race (Non-white)	-0.06	-0.21			
	(0.11)	(0.11)			
Judge Gender (Female)	-0.35***	-0.55***			
	(0.10)	(0.13)			
T-14 Graduate	-0.09		-0.17*		
	(0.07)		(0.08)		
Judicial Ideology (JCS)	-0.17		-0.15**		
	(0.09)		(0.05)		
District Court Experience	-0.06			-0.09	
	(0.07)			(0.08)	
Years on the Federal Bench	-0.00			-0.01	
	(0.00)			(0.00)	
Post-*Baake* vs. Pre-*Baake*	0.36***				0.44***
(3rd Era vs. 2nd and 1st Eras)	(0.06)				(0.03)
Constant	0.51*	0.68***	0.73***	0.39	0.84***
	(0.23)	(0.08)	(0.10)	(0.25)	(0.09)
Observations	201	201	201	201	201
Adjusted R^2	0.45	0.29	0.24	0.30	0.38

Note: 0 = Uphold, 1 = Overturn; Robust standard errors in parentheses.
* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

TABLE 5: PREFERRED OLS REGRESSION SPECIFICATION WITH SUBSTANTIVE DECISION AS OUTCOME

	(1) Court Fixed Effects	(2) Court Fixed Effects with SE Clustered by Case
Judge Race (Non-white)	-0.0628	-0.0628
	(0.106)	(0.102)
Judge Gender (Female)	-0.352***	-0.352***
	(0.103)	(0.0690)
T-14 Graduate	-0.0851	-0.0851
	(0.0674)	(0.0506)
Judicial Ideology (JCS)	-0.1699*	-0.1699
	(0.0846)	(0.0942)
District Court Experience	-0.0600	-0.0600
	(0.0661)	(0.0943)
Years on the Federal Bench	-0.00392	-0.00392
	(0.00315)	(0.00412)
Post-*Baake* vs. Pre-*Baake*	-0.361***	-0.361***
(3rd Era vs. 2nd and 1st Eras)	(0.0643)	(0.0976)
Observations	201	201
Adjusted R^2	0.449	0.449

Note: 0 = Uphold, 1 = Overturn; Robust standard errors in parentheses.
$^{*}p < 0.05$, $^{**}p < 0.01$, $^{***}p < 0.001$

2. Sensitivity Tests

I employed a variety of methods to further test the sensitivity of the results from the naïve model specifications. First, to account more precisely for previously unexplored relationships in the political culture model, I interacted the years of service on the federal bench term with the court-grouping term. The coefficients produced from these interactions demonstrate that an additional year of service has a marginal effect in a particular court-grouping on substantive judicial decisions in the sample. I also used higher-order polynomial specifications of year to model nonlinear relationships between this interaction and the outcome of interest. I also interacted the binary components of the behavioralist model with one another and with the components of the attitudinal model to analyze subgroup effects. However, none of the interaction terms yielded statistically significant results. Because of the model fit that the non-interacted models provide, I believe that the parsimo-

nious model specifications are ideal for the analysis of substantive judicial decisions involving the use of race in university admissions.

C. Procedural Decision Results

Given that judicial decisions do not always touch the merits of the case at bar and are sometimes confined to procedural precedent instead, I initially bifurcated the judicial decisions in the sample into two categories: substantive and procedural. In this section, I separate the procedural decisions—those based solely on procedural precedent—from the sample for analysis.[74] I employ the same analytical methods used in the naïve models for substantive decisions above. As in the substantive decision analysis, I report OLS results with robust standard errors for the procedural decision analysis below.

Tested against procedural decisions, I see that none of the indicators and model specifications in my substantive decision analysis predict a judge's procedural decision at a statistically significant level, except for the political cultures theory. I find mixed results for the explanatory framework of the political cultures theory in the context of procedural judicial decision making. Although a judge's experience on the district court is not a statistically significant predictor of procedural judicial decision making in the sample, I observe that a judge's years on the federal bench is a marginal predictor of deference to the lower court's holding. And certain court groupings, like the Ninth Circuit, are substantially more deferential to lower court holdings in the sample than comparison court groupings, such as the First Circuit. Despite the lack of statistical significance of most of the predictors of procedural judicial decisions, I also observe that while the effect sizes are often similar to those in the substantive decision regression results, the directionality here is mostly positive or close to zero. This implies that if were they statistically significant, most covariates would be positively associated with overturning a lower court's procedural decision. Notably, the only other systematically negative predictor in the OLS estimates is the comparison of the first era of cases (pre-*Brown*) to the second era of cases (between *Brown* and *Bakke*). The coefficient on this covariate, however, is not statistically significant.

As with the substantive decision model sensitivity specifications, I interacted years of judicial service with court grouping, employed a fixed-ef-

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[74] The decisions in my procedural sub-sample did not venture to discuss the merits of the case; rather they were decided on procedural grounds, such as: whether a three-judge panel district court should have heard the case instead of a single district court judge, *see* Bd. of Sup'rs, La. St. Univ. v. Tureaud, 225 F.2d 434 (5th Cir. 1955), whether a defendant should be enjoined from discriminatory action, *see* Ludley v. Bd. of Sup'rs of La. St. Univ., 150 F. Supp. 900 (E.D. La. 1957), and whether an appeal and motion for injunction should be expedited, *see* Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962). Several of the judicial decisions regarding the use of race in university admissions were decided on purely procedural grounds. While procedural decisions seem commonplace and unrelated to the ultimate considerations of my analysis regarding judicial decision making, I have attempted to analyze them in the same way as a substantive case to discern whether the same patterns hold across decision types.

fects analysis using within-court differences, and clustered standard errors by case. I used this procedure to test whether these coefficients and their directionalities changed when I examined within-group differences. The problems I observed in the naïve specifications seeking to explain procedural judicial decision making were not ameliorated by the sensitivity model specifications. The results from the sensitivity analysis indicate that directionalities remained relatively constant between the two estimating techniques. Also, all the positive predictors of procedural judicial decisions remained statistically insignificant. Notably, the one statistically significant, albeit negative, predictor—the comparison between the third era and the second era of cases—only classified as such with robust standard errors and court fixed effects, dropping out of significance when case fixed effects are employed.

In summary, the results from this analysis illustrate the difficulty associated with trying to predict a judge's procedural decision-making processes based on observable information. The amount of variance in the procedural decisions explained by each of the specifications of these models is very low. Perhaps the low predictive power of these models indicates the nuanced and binding nature of the common law and circuit specific procedural precedent. The results from the procedural judicial decision analysis show that none of the theoretical models adequately accounts for a judge's decision to overturn or uphold a lower court's procedural finding.

TABLE 6: OLS REGRESSIONS WITH PROCEDURAL DECISION AS OUTCOME

	(1) Behavioralist	(2) Attitudinal	(3) Political Culture	(4) PET	(5) Full
Judge Race (Non-white)	0.14				0.12
	(0.14)				(0.14)
Judge Gender (Female)	0.04				-0.11
	(0.12)				(0.12)
T-14 Graduate		0.12			0.06
		(0.08)			(0.09)
Judicial Ideology (JCS)		0.11			0.09
		(0.13)			(0.13)
District Court Experience			-0.02		-0.07
			(0.08)		(0.10)
Years on the Federal Bench			-0.01**		-0.01*
			(0.00)		(0.01)
Ninth Circuit vs. All Others			-1.00**		-0.99**
			(0.31)		(0.36)
Post-*Baake* vs. Pre-*Baake*				-0.24	-0.21
(3rd Era vs. 2nd and 1st Eras)				(0.22)	(0.25)
Constant	0.55***	0.52***	0.81**	0.54***	0.77*
	(0.08)	(0.09)	(0.26)	(0.08)	(0.32)
Observations	164	143	163	165	143
Adjusted R^2	0.10	0.10	0.25	0.10	0.26

Note: 0 = Uphold, 1 = Overturn; Robust standard errors in parentheses
$^{*}p < 0.05$, $^{**}p < 0.01$, $^{***}p < 0.001$

D. Predictive Decision Results

To test how well the model predicts judicial decisions, I used two cross-validation measures. First, I removed a case's data points from observation in the sample at random and re-regressed the covariates at their marginal values for each justice based on the new weighting without the case. Then, I removed another case to test the difference between the two.[75] I then applied this process iteratively, exchanging weights generated from the missing case

[75] I performed this using the leave-one-out-cross-validation, or "loocv," in Stata. This process reported high-psuedo r-squared values, exceeding 0.5, which is the square of the correlation coefficient of the predicted and observed values of the dependent variable.

observations.[76] For example, in the following cases, *Bakke*, *Grutter*, and *Fisher II*, I have taken the liberty of predicting how the Court could decide the case based on the full explanatory substantive decision model. As such, I have attempted to predict the linear probability of each justice to vote for overturning the underlying policies with which they were confronted on an individual basis, given each justice's unique values of judicial decision-making inputs relative to the controlled, constant variables of the case. These results are displayed in the figures below.

In predicting *Baake*, the model shows its vulnerability, erring on the prediction that one justice—Justice Byron White—would decide to overturn a policy he ultimately chose to uphold. However, the *Bakke* case is complex for a few reasons. First, a plurality decided the case, with Justice Powell acting as the swing vote, agreeing with both Justices Brennan, White, Marshall, and Blackmun that California's affirmative action objective was permissible, and also with Chief Justice Burger and Justices Stewart, Rehnquist, and Stephens that the policy discriminated against the petitioner. Second, the decision was unique in that *DeFunis v. Odegaard* and *Bakke* were the first of their kind brought before the federal courts that would define the era of white plaintiffs challenging race-conscious admissions policies.[77] Because they signaled a paradigm shift, it may be fairly assumed that the justices' decisions would not be predictable on matters of first impression. Still, the model correctly identifies the decision of eight of the nine justices in the case, missing Justice White's decision by a hair—under five percentage points.[78] The slim margin by which the model missed Justice White's vote in *Bakke*, as shown in Figure 1, indicates that the model works well on the whole but must ultimately encounter the human component of judging and judicial decision making, something the data like the Judicial Common Space scores cannot precisely pin down in all cases.

The model improves by correctly predicting eight of the nine justices' decisions in *Grutter*, missing Justice Souter's decision by less than two percentage points but still well within the confidence interval.[79] It may be safe to say that the near miss on Justice Souter's decision in *Grutter*, like the near miss on Justice White's decision in *Bakke*, can be attributed to fact that they were both notable for having decided many cases in a manner inconsistent with the political persuasions of the administrations that appointed them. Notably, however, the model correctly identifies the decision of the other eight justices in the case—which ultimately upheld the University of Michi-

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[76] I performed this using the k-fold cross-validation command in Stata, or "crossfold." This command splits the data randomly into *k* partitions, then for each partition it fits the specified model using the other *k*-1 groups and uses the resulting parameters to predict the dependent variable in the unused group. This process also indicated high values for measures of goodness of fit, including the root mean squared error and the mean absolute error. Each of these tests indicate a strong cross-validation of the model.

[77] *See* DeFunis v. Odegaard 94 S.Ct. 1704 (1974); Regents of the Univ. of Cal. v. Bakke, 98 S.Ct. 2773 (1974).

[78] *See id.*

[79] *See* Grutter v. Bollinger, 123 S.Ct. 2325 (2003).

gan's race-conscious admissions policy—with relative statistical ease and strength.

The model also correctly predicts six of the seven decisions of the justices who took part in the *Fisher II* decision. *Fisher II* is unique in that the decision was rendered after the passing of Justice Antonin Scalia but before his eventual replacement, Justice Neil Gorsuch, had been confirmed.[80] Additionally, Justice Elena Kagan—then, the Court's most recent appointee—recused herself from the case, leaving the decision in the case to just seven Supreme Court justices.[81] In its prediction, the model has another near miss (by less than four percentage points, and still within the confidence interval), this time on Justice Anthony Kennedy's decision in the case. Given that that Justice Kennedy authored the majority opinion in the case upholding the Texas admissions plan, the model's near miss on Justice Kennedy's voting outcome reveals once again that the model is not completely failproof.[82] However, the discrepancy between prediction and reality is another reminder of the human element present in judicial decision making, as well as a reminder of the important swing vote that Justice Kennedy wielded during his tenure on the Court.[83] The model may have missed on Justice Kennedy's opinion because of its overweighting his significant experience on the federal bench at the time the case was heard, and his status as a white man, educated at a top-14 law school, who had overturned policies previously in the dataset. For additional experimentation, I had the model provide Justice Kagan's non-existent decision in the case, even though she abstained from the decision. It seems to me that the model correctly pegs how she would have sided in *Fisher II*, although that projection is purely conjectural, given Justice Kagan's recusal in the case.

Significant changes to the Court's composition since the *Fisher II* decision highlight the fact that now, more than ever, a test case could succeed at overthrowing the longstanding precedent supporting race-conscious admissions. Much has been made of this, with respect to three of President Trump's nominees, and one of President Biden's nominees, sitting on the Court since the last major university admissions cases wound their way to the High Court. The new composition of the Court surely will affect how the current justices could decide the cases before them in the 2022-23 term.

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[80] *See, e.g.*, Kenneth W. Starr, *Gorsuch Gets Comfortable in Scalia's Chair*, WALL ST. J. (Jun. 14, 2017, 7:30PM), https://www.wsj.com/articles/gorsuch-gets-comfortable-in-scalias-chair-1497483009 [https://perma.cc/99BA-CF7K].

[81] *See, e.g.*, Ariane de Vogue, *Supreme Court Upholds University of Texas Affirmative Action Plan*, CNN (June 23, 2016, 2:19PM), https://www.cnn.com/2016/06/23/politics/supreme-court-abortion-affirmative-action-texas-immigration/index.html [https://perma.cc/CAF5-UVRK] (noting Justice Kagan's recusal from the case).

[82] *See* Fisher v. University of Texas [Fisher II], 579 U.S. 365 (2016).

[83] *See, e.g.*, Colin Dwyer, *A Brief History of Anthony Kennedy's Swing Vote—and the Landmark Cases It Swayed*, NPR (June 27, 2018, 7:00PM), https://www.npr.org/2018/06/27/623943443/a-brief-history-of-anthony-kennedys-swing-vote-and-the-landmark-cases-it-swayed [https://perma.cc/RG56-SS8H].

The two cases the Court will hear this term share commonalities. In the *Harvard* and *UNC* cases, the petitioner is the same: Students for Fair Admissions. The Court granted both cases a writ of certiorari in January 2022 and consolidated them for hearing. These cases present another opportunity for the Court to revisit the use of race in university admissions.[84] Yet, each case has its own idiosyncrasies and possibility of different outcomes.

In *Harvard*, the First Circuit Court of Appeals has already upheld the private university's admissions policy, dismissing the petitioner's claim that Harvard's policy discriminates against Asian American applicants, in violation of Title VI of the Civil Rights Act.[85] However, in *UNC*, the admission policy under the Court's scrutiny is a product of state- and institution-specific construction. In this case, the Court granted certiorari before the Fourth Circuit Court of Appeals made its ruling on the use of race in the University of North Carolina's institution-specific and public system-wide admissions policies, which the petitioner argues violates not only the Civil Rights Act but also the Equal Protection Clause of the Fourteenth Amendment.[86] Thus, the difference between public and private institutions, institution-specific and system-wide policies, and even lower court decisions will almost certainly have bearing on the cases' outcomes, despite their consolidation.

But is it a foregone conclusion that "affirmative action" is in peril? And may these cases open the door to the next durable shift that punctuated equilibrium theory portends? Or might the human element of judging and judicial decision making reveal another Justice White, Justice Souter, or Justice Kennedy—a justice that bucks expectation and sides with his or her conscience? The answer will be revealed in time, but the model anticipates that this is unlikely.

According to the model, in *Harvard*, it is unlikely that the case would be decided on anything less than a 5-3 majority, in favor of rejecting the admissions policies. A 6-2 majority rejecting the policy seems more likely and is borne out by the model, which predicts the same majority-minority distribution to overturn the admissions policy in both *Harvard* and *UNC*. The primary reason the model for *Harvard* is based on an 8-justice composi-

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[84] Adam Liptak & Anemona Hartacollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html [https://perma.cc/ESL8-HPKX].

[85] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020).

[86] Students for Fair Admissions, Inc. v. Univ. of N.C., No. 1:14CV954, 2021 U.S. Dist. LEXIS 255358 (M.D.N.C. Oct. 18, 2021). Because the *UNC* case has only received a ruling from the United States District Court for the Middle District of North Carolina, in a decision by Judge Loretta C. Biggs, the case was not eligible for the dataset, given that the Fourth Circuit Court of Appeals has yet to issue a ruling on the case, even before the Supreme Court granted it a writ of certiorari upon consolidation with the *Harvard* case. *See, e.g.,* Scott Jaschik, *Supreme Court Takes Affirmative Action Cases*, INSIDE HIGHER ED (Jan. 31, 2022), https://www.insidehighered.com/admissions/article/2022/01/24/supreme-court-will-hear-harvard-and-unc-affirmative-action-cases [https://perma.cc/9TUF-GU72].

tion is due to the recent announcement of Justice Stephen Breyer's retirement and his replacement's, Justice Ketanji Brown Jackson's, likely recusal in the case.[87] Thus, without Justice Brown Jackson's support and presence on the Court, a 6-2 majority appears the most probable result in this case. Even if Justice Amy Coney Barrett were to side with her more "liberal" colleagues—as the model suggests could be possible[88]—it would still not be enough to overcome a 5-3 majority in favor of rejecting Harvard's admission policy.

In *UNC*, Justice Brown Jackson's likely vote supporting North Carolina's admissions policy would not be enough to overcome the 6-3 majority that appears likely to overturn in that case. Taken together, the Court's decisions in these cases are more likely than not to chip away at, or altogether to rewrite, what race-conscious admissions policies lawfully entail. Given the real possibility of these results, and without any genuine hope for any other justice's defection from the model's predictions, the model seems to offer a glimpse, if bleak, of the future of race-conscious admissions policies.

Like any prediction, however, this one is speculative. Yet, the relative accuracy of the model provides a statistically reliable method for explaining and even predicting judicial decision making in cases involving the use of race in university admissions over time. But beyond using the model to predict judges' decisions against a theoretical backdrop, the primary purpose of making these data-based predictions is not to tell testcase conjurers what they already know. Rather, the importance of these predictions lies in affording universities the time they need to innovate by alerting them to the likelihood of a decision that changes the legal landscape in university admissions policies in the very near future.

It has been over forty years since Justice Powell's concurrence in *Bakke* articulated the prevailing purpose of the use of race in university admissions: to provide justifiable educational benefits to all.[89] And twenty years have passed since Justice O'Connor's decision in *Grutter*, which started the clock running on a re-examination of the use of race in university admissions.[90]

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[87] *See, e.g.*, Pete Williams, *Justice Stephen Breyer to Retire from Supreme Court, Paving Way for Biden Appointment*, NBC NEWS (Jan. 26, 2022, 4:59PM), https://www.nbcnews.com/politics/supreme-court/justice-stephen-breyer-retire-supreme-court-paving-way-biden-appointment-n1288042 [https://perma.cc/G7BJ-FDAR]; and Lauren Camera, *Jackson Will Recuse Herself from Harvard Affirmative Action Case if Confirmed to Supreme Court*, U.S. NEWS & WORLD REP. (Mar. 23, 2022, 4:38PM), https://www.usnews.com/news/politics/articles/2022-03-23/jackson-will-recuse-herself-from-harvard-affirmative-action-case-if-confirmed-to-supreme-court [https://perma.cc/3JX6-ZTSP] (noting that Justice Brown Jackson plans to recuse herself in the case, given her service on the Harvard Board of Overseers).

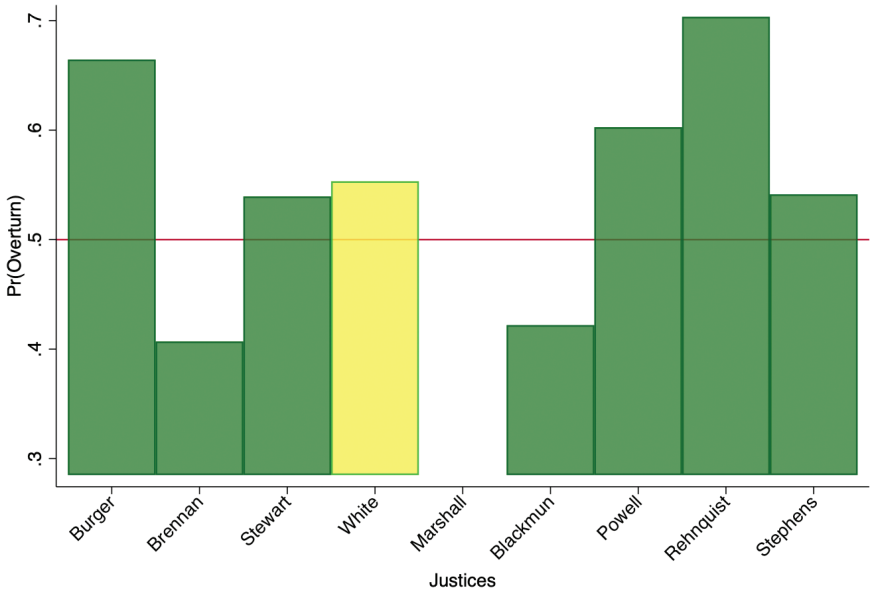
[88] The model for the *UNC* case suggests that Justice Coney Barrett is within nine percentage points of a decision to uphold the public institution's admissions policy, falling outside of the confidence interval. However, in the *Harvard* case, the model predicts that Justice Coney Barrett would overturn the private university's admissions policy by a smaller margin, just seven percentage points, suggesting the same result as UNC but a closer case for affirming the policy. *See* Figures 4 and 5.

[89] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[90] In the majority opinion, Justice O'Connor controversially stated that racial preferences would no longer be necessary in twenty-five years. *See* Grutter v. Bollinger, 539 U.S. 306, 310

Thus, more than 40 years of judicial precedent has clearly established what many studies have as well—that the benefits of a diverse learning environment are manifold for all who participate in academic settings. Race-conscious admissions policies, particularly those that are individualized and evaluate prospective students on a case-by-case basis, only further the goal of promoting diversity and equity in postsecondary education. To undo this precedent is to undo the progress that universities across the country have worked toward for more than four decades. Yet, it would seem that this progress will hit a roadblock, sooner or later, if universities cannot pivot to new strategies, such as a move toward class or income-based affirmative action, to ensure diverse and equitable learning environments for their students. This is the challenge universities face, no matter the Court's decision in *Harvard* or *UNC*, for the Court seems primed to change the playing field, yet again.

FIGURE 1: PROBABILITY OF OVERTURN: *BAKKE V. REGENTS* (1974)



(2003); and Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in* Grutter, 67 OHIO ST. L.J. 83 (2006).

FIGURE 2: PROBABILITY OF OVERTURN: *GRUTTER V. BOLLINGER* (2003)

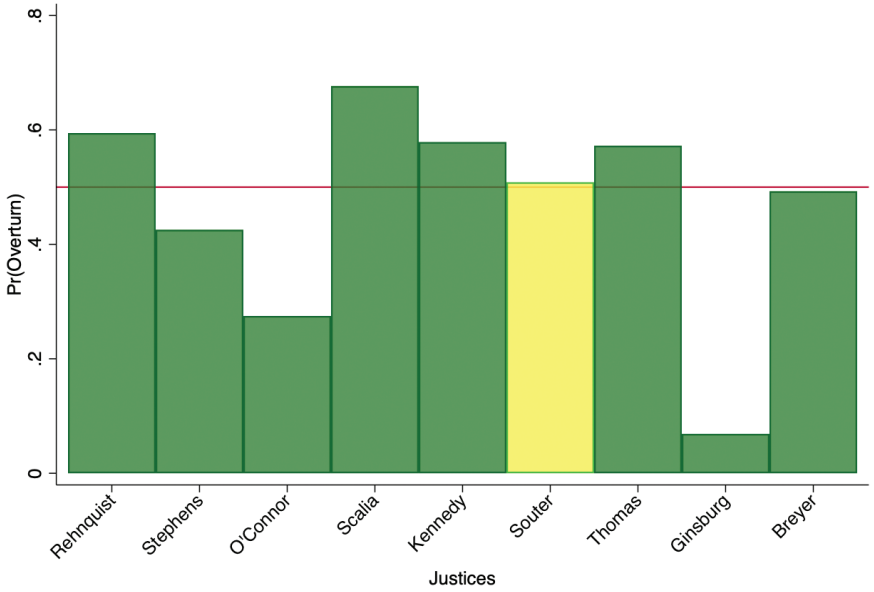


FIGURE 3: PROBABILITY OF OVERTURN: *FISHER V. TEXAS* (2016)

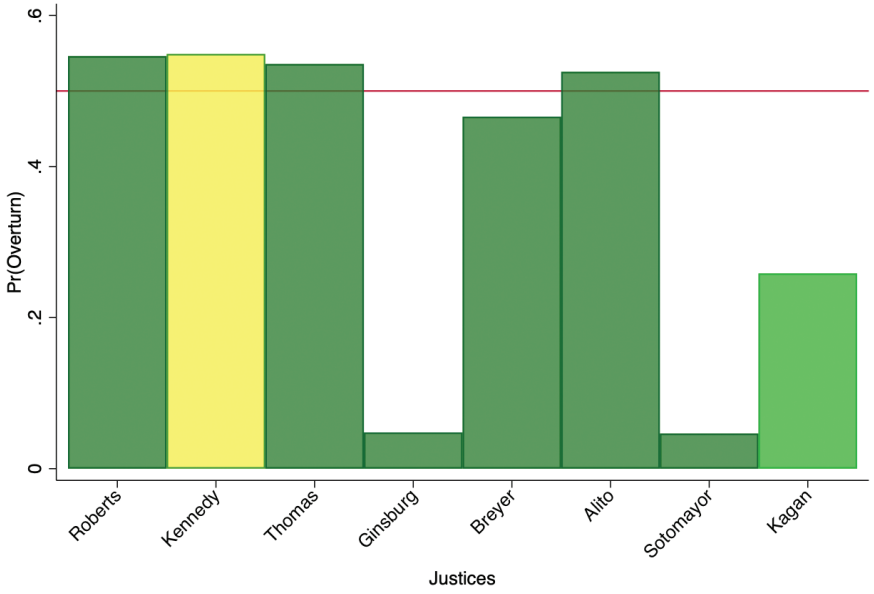


FIGURE 4 PROBABILITY OF OVERTURN: *SFFA v. HARVARD* (2022)

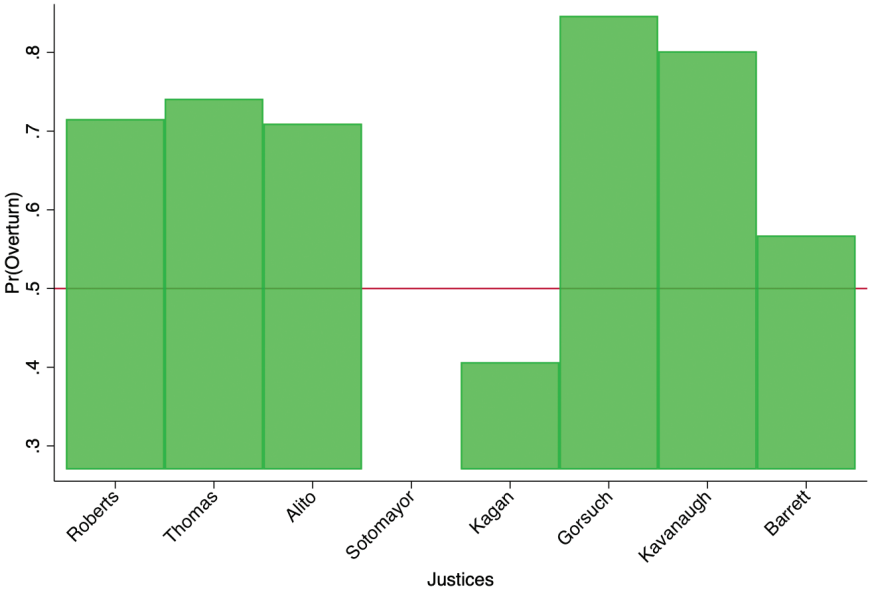
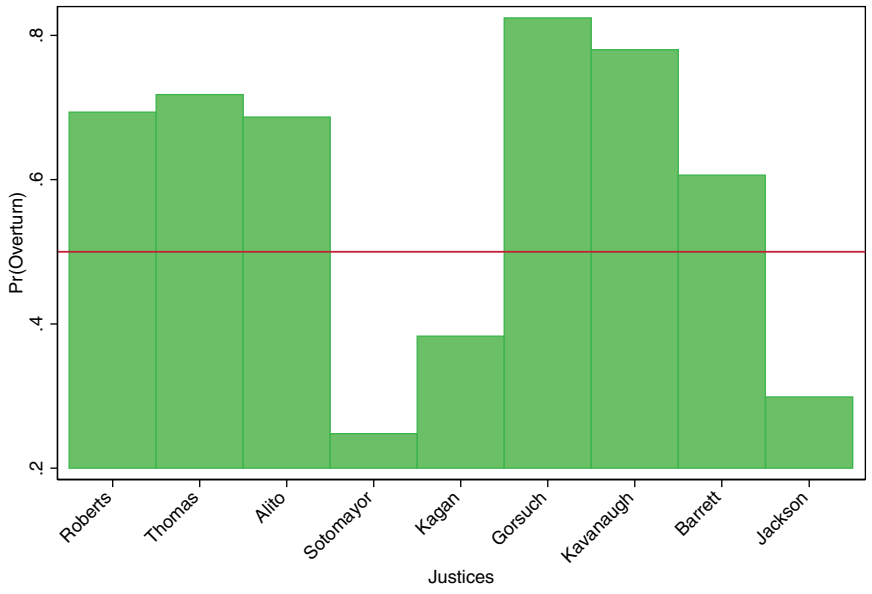


FIGURE 5 PROBABILITY OF OVERTURN: *SFFA (2022)*



Conclusion

Federal judges occupy significant roles in policymaking. Until relatively recently, the federal judiciary did not venture into the domain of determining the validity of the policies of higher education institutions. Cases brought to the federal courts under claims arising from the Equal Protection Clause of the 14th Amendment have provided federal judges with the necessary constitutional hook to be able to affect higher education policy by clarifying, proscribing, and affirming the uses of race in university admissions. Sustained and increasing interest in data analytics has put members of the judiciary in the spotlight, as attempts to predict their decision-making patterns have captured the interest of potential litigants and academics alike.[91] Yet, the inputs to judicial decision making in cases regarding the use of race-conscious policies in higher education has heretofore been unexplained.

This study tested whether a judge's substantive decision to afford deference to a policy involving the use of race in university admissions could be predicted from background and socialized characteristics of the judge, idiosyncrasies of the court, or elements unique to the era in which decisions are made. The results do not indicate strong support for the attitudinal or political cultures theoretical frameworks, which have drawn much attention in the judicial decision-making literature, to explain substantive or procedural decisions. Instead, I find mixed effects supporting behavioral decision-making theory when examining substantive judicial decisions. The key element of this framework rests on the statistically significant effect found in a judge's gender, suggesting a stronger deference to university policy among women judges in the sample that permeates substantive judicial decision making.

Last, and perhaps most importantly, I find significant and large effects for the era in which a decision is made, particularly in substantive decisions. This result supports evidence of a punctuated equilibrium theoretical framework, as well as the legalist decision-making theory, in the sample of cases. This is particularly true in the modern era in which judge-made substantive decisions since *Bakke* are much more likely to uphold these policies than any other previous era, suggesting a possible return to the academic abstention doctrine.[92] The Supreme Court has also consistently narrowed the ways that universities may use race in admissions policies, including in *Fisher II*, with

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[91] *See, e.g.,* Peter A. Hook, *A Framework for Understanding, Using, & Teaching Litigation Analytics*, AALL SPECTRUM 20-23 (Nov./Dec. 2021); and Lance B. Eliot, *Legal Judgment Predictions and AI*, Master Class Series Paper L007 (2021).

[92] *See* Julee T. Flood, *Judicial Influence on Academic Decision-Making: A Study of Tenure Denial Litigation Cases in which Higher Education Institutions Did Not Wholly Prevail* (May 2012) (unpublished dissertation, University of Tennessee at Knoxville), http://trace.tennessee.edu/utk_graddiss/1293 [https://perma.cc/X3KW-ADS5] (last visited Apr. 29, 2022). "Traditionally deferential to academia, courts have usually sided with institutional autonomy and have been reluctant to interfere with matters of academic concern." *Id.* at 6 (citing William Kaplin and Barbara Lee, The Law of Higher Education, 4 (2006); Terry L. Leap, Tenure, Discrimination, and the Courts (1995); J. Douglas Toma, Managing the Entrepreneurial University: Legal Issues and Commercial Realities (2011)).

some justices arguing for a shorter timeline to end such policies than that which Justice O'Connor proposed in *Grutter*.[93] Thus, given the Court's current composition and the last executive administration's scrutiny of affirmative action policies, the way that race is used in admissions policies could be changed drastically by the next test case. This model presents a viable method of predicting how the Court will decide.

Though the findings of this article suggest that rulings in the post-*Bakke* era are more likely to defer to a university's race-conscious admissions policy, the practical implications of those decisions are more complex.[94] This empirical inquiry provides insight into questions about judicial use of academic abstention and deference, as well as how race-conscious admissions policies will fare before judicial decision makers given the temporal context of the cases and controversies involving race-conscious university admissions policies. However, as the predictive models in my analysis reveal, the landscape in university admissions—whether at private or public institutions—will more than likely undergo a significant change and perhaps durable shift away from the policies that have defined the last twenty or even forty years. It is my hope that the future of race-conscious university admissions practices predicted by my models catalyzes universities and policymakers to square admissions policies with the federal courts' interpretation of the constitutional requirements of the Equal Protection Clause, while supporting underrepresented minority student access to higher education and promoting strong communities that value diversity, equity, and inclusion.

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[93] *See* Grutter v. Bollinger, 539 U.S. 306, 310 (2003).

[94] Hurtado, Alvarado & Guillermo-Wann, *supra* note 13; Angela M. Locks, Sylvia Hurtado, Nicholas A. Bowman & Leticia Oseguera, *Extending Notions of Campus Climate and Diversity to Students' Transition to College*, 31 REV. OF HIGHER EDUC., 257–85 (2008).

Appendix

Table A1: Cases by Highest Court Decided

Case Name (by Date Originated)	*Rep. Cite*
Missouri ex rel. Gaines v. Canada	59 S.Ct. 232 (1938)
Sipuel v. Board of Regents of the University of Oklahoma	68 S.Ct. 299 (1948)
Sweatt v. Painter	70 S.Ct. 848 (1950)
McLaurin v. Oklahoma State Regents for Higher Education	70 S.Ct. 851 (1950)
Wichita Falls Junior College District v. Battle	204 F.2d 632 (5th Cir. 1953)
Board of Supervisors of Louisiana State University v. Tureaud	74 S.Ct. 783 (1954)
Whitmore v. Stilwell	227 D.2d 187 (5th Cir. 1955)
Lucy v. Adams	76 S.Ct. 33 (1955)
Booker v. Tennessee Board of Education	240 F.2d 689 (6th Cir. 1957)
Board of Supervisors of Louisiana State University v. Ludley	252 F.2d 372 (5th Cir. 1958)
Meredith v. Fair	305 F.2d 343 (5th Cir. 1962)
Guillory v. Administrators of Tulane University	306 F.2d 489 (5th Cir. 1962)
Gannt v. Clemson Agricultural College	320 F.2d 611 (4th Cir. 1963)
Hammond v. University of Tampa	344 F.2d 951 (5th Cir. 1965)
DeFunis v. Odegaard	94 S.Ct. 1704 (1974)
Regents of the University of California v. Bakke	98 S.Ct. 2733 (1978)
Gonzalez v. Southern Methodist University	536 F.2d 1071 (5th Cir. 1976)
Krohn v. Harvard Law School	552 F.2d 21 (1st Cir. 1977)
Henderson v. Florida Board of Regents	569 F.2d 1309 (5th Cir. 1978)
Doherty v. Rutgers School of Law	651 F.2d 893 (3rd Cir. 1981)
Hall v. State of Hawaii	791 F.2d 758 (9th Cir. 1986)
Davis v. Halpern	831 F.2d 37 (2nd Cir. 1987)
Hopwood v. University of Texas (I)	78 F.3d 932 (5th Cir. 1996)

Case Name (by Date Originated)	*Rep. Cite*
Hopwood v. University of Texas (II)	236 F.3d 256 (5th Cir. 2000)
Coalition for Economic Equity v. Wilson	122 F.3d 692 (9th Cir. 1997)
Smith v. University of Washington Law School	392 F.3d 367 (9th Cir. 2004)
Texas v. Lesage	120 S.Ct. 467 (1999)
Wooden v. Board of Regents of the University of Georgia	247 F.3d 1262 (11th Cir. 2001)
Johnson v. Board of Regents of the University of Georgia	263 F.3d 1234 (11th Cir. 2001)
Gratz v. Bollinger	123 S.Ct. 2411 (2003)
Grutter v. Bollinger	123 S.Ct. 2325 (2003)
Farmer v. Ramsey	43 Fed.Appx. 547 (4th Cir. 2002)
Weser v. Glen	41 Fed.Appx. 521 (2nd Cir. 2002)
Schuette v. Coalition to Defend Affirmative Action	134 S.Ct. 1623 (2014)
Fisher v. University of Texas (I)	133 S.Ct. 2411 (2013)
Fisher v. University of Texas (II)	136 S.Ct. 2198 (2016)
Coalition to Defend Affirmative Action v. Brown	674 F.3d 1128 (9th Cir. 2012)
Su v. Eastern Illinois University	566 Fed.Appx. 520 (7th Cir. 2014)
Students for Fair Admissions v. President & Fellows of Harvard Coll.	980 F.3d 157 (1st Cir. 2020)

The Limits of Equality: A People's History of Affirmative Action

Elijah McDonnaugh[*]

> *"A racist is one who despises someone because of his color, and an Alabama segregationist is one who conscientiously believes that it is in the best interest of Negro and white to have a separate education and social order."*[1] *Governor of Alabama, George Wallace, 1964*

> *"[I]t does not benefit African-Americans to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school . . . a slower-track school where they do well . . . Maybe [the University of Texas] ought to have fewer [Black students] . . . I don't think it stands to reason that it's a good thing for the University of Texas to admit as many blacks as possible."*[2]
> *Justice of the Supreme Court, Antonin Scalia, 2015*

[*] New York City-based attorney. I would like to express my sincerest gratitude to Grace Hauser, Zoe Lo, Joseph Digirolamo, Michele St. Julien, and Marc Szczepaniak for their support during the pandemic, and to give a special thanks to Professors H. Timothy Lovelace and Kimberly J. Robinson.

[1] Diane Bernard, *How a Failed Assassination Attempt Pushed George Wallace to Reconsider His Segregationist Views*, SMITHSONIAN MAGAZINE (May 12, 2022), https://www.smithsonianmag.com/history/how-a-failed-assassination-attempt-pushed-george-wallace-to-reconsider-his-segregationist-views-180980063/ [https://perma.cc/JNF3-C3UD].

[2] Transcript of Oral Argument at 67, Fisher v. University of Texas at Austin, 579 U.S. 365 (2016) (No. 14–981).

INTRODUCTION

In *Black Reconstruction in the South*, W.E.B. Du Bois explained that the persistence of racial hierarchy after the Civil War is best understood in terms of its value to American elites who derive power from a divided working class. He wrote:

> [T]he theory of race was supplemented by a carefully planned and slowly evolved method, which drove such a wedge between the white and black workers that there probably are not today in the world two groups of workers with practically identical interests who hate and fear each other so deeply and persistently and who are kept so far apart that neither sees anything of common interest.[3]

Du Bois believed that rich whites had secured the consent of poor whites to their own economic exploitation in exchange for the "public and psychological wage" of whiteness.[4] This "wage" took many forms in society, including the exclusion of Blacks from public goods like education, to which poor whites were entitled.[5] Indeed, while "[w]hite schoolhouses were the best in the community, and . . . cost anywhere from twice to ten times as much per capita as colored schools," for racial minorities (Blacks, in particular) "the doors of wisdom [were] . . . shut tight and designed to remain that way . . . [through the use of an] ideology of race inferiority to justify that situation and ensure that it would stand firm."[6]

The institutions responsible for producing these racial disparities rest their claims to legitimacy on compliance with the law, while simultaneously

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[3] W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880, 700-701 (1935).

[4] *Id.*

[5] *Id.* ("It must be remembered that the white group of laborers, while they received a low wage, were compensated in part by a sort of public and psychological wage. . .They were admitted freely with all classes of white people to public functions, public parks, and the best schools."); *see also* MICEHLLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, 15, 21 (2011) (following Bacon's Rebellion, elite whites "[d]eliberately and strategically . . . extended special privileges to poor whites in an effort to drive a wedge between them and black slaves . . . . [t]hese measures effectively eliminated the risk of future alliances . . . [because] poor whites suddenly had a direct, personal stake in the existence of a race-based system of slavery . . . .[Then, in that late 1800s], alarmed by the . . . apparent potency of the alliance between poor and working-class whites and African Americans, the conservatives raised the cry of white supremacy and resorted to . . . [tactics] including fraud, intimidation, bribery and terror"); MICHAEL PARENTI, BLACKSHIRTS AND REDS: RATIONAL FACISM AND THE OVERTHROW OF COMMUNISM, 134 (1997) ("[R]acist organizations and sentiments are often propagated by well-financed reactionary forces seeking to divide the working populace against itself, fracturing it into antagonistic ethnic enclaves.").

[6] DU BOIS *supra* note 3; *in* LINDA DARLING-HAMMOND, THE FLAT WORLD AND EDUCATION: HOW AMERICA'S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE 28 (2010) (citing LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE COLONIAL EXPERIENCE 1607-1783, (1970)).

mystifying the law's function as an instrument of oppression.[7] Typically, this mystification results from a widespread belief in "hegemonic ideologies," meaning, a set of beliefs that presents the "parochial interests [of the ruling class] as representative of the interests of all social groups."[8] In the context of judicial decision-making, judges often rely on these ideologies as their premise; that is to say, the "facts [which] are assumed . . . that are not true, but serve as the basis to guide judicial decisions," while in turn, the law itself serves as a powerful medium for disseminating and legitimizing such ideologies.[9] For example, although segregation under Jim Crow "harm[ed] blacks and benefit[ted] whites in ways too numerous and obvious to require citation," the Supreme Court relied on eugenics and the biological race myth to attribute the inferiority of Black institutions to the purported biological in-

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[7] Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 328-29 (2013) (Thomas J., concurring) ("Slaveholders argued that slavery was a "positive good" that civilized blacks . . . . A century later, segregationists similarly asserted that segregation was not only benign, but good for black students"); *see also* HUGH COLLINS, MARXISM AND THE LAW 58, 74 (1982) ("One way to obscure this purpose of the law is to insist upon law's traditional origins and stable content . . . [which] suggests a connection with basic conceptions of justice rather than the contingent interests of the ruling class.").

[8] COLLINS, *supra* note 7, at 50 ("The ruling class uses its position to disseminate its own world-views and values throughout a society. If it is successful . . . then everyone's commonsense ideas about right and wrong . . . will be formed by the assimilation of ideas supplied by agents of the ruling class. The pervasiveness of this ideological hegemony will prevent the development of alternative political perspectives within the working class, and thus ensure" the continuation of class domination.); Douglas Litowitz, *Gramsci, Hegemony, and the Law*, B.Y.U L. REV. 515, 519–23 (2000) (noting that "the most effective kind of domination" occurs through the "dissemination of the dominant group's [ideology] as universal and natural," to the extent that both the exploiter and the exploited come to see the world from the former's point of view, i.e., in terms that justify existing hierarchies); *see also* Robert W. Gordon, *New Developments in Legal Theory*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281 (David Kairys ed., 1982) ("Antonio Gramsci's notion of 'hegemony,' *i.e.* that the most effective kind of domination takes place when both the dominant and dominated classes believe that the existing order . . . represents the most that anyone could expect, because things pretty much have to be the way that are."); W.E.B. DU BOIS, *The Souls of White Folk*, *in* DARKWATER: VOICES FROM WITHIN THE VEIL 933 (1920) ("Everything great, good, efficient, fair, and honorable is 'white'; everything mean, bad, blundering, cheating, and dishonorable is 'yellow'; a bad taste is 'brown'; and the devil is 'Black.'").

[9] NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION 217, 219 (1975); *see generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND ATTITUDINAL MODEL REVISITED (2002) (explaining that the likelihood of judges behaving consistently with the attitudinal model depends on institutional incentives, which are strongest at the Supreme Court level, wherein there is a strong relationship between ideology and liberalism of aggregate voting behavior); *see also* COLLINS, *supra* note 7 at 50, 68 ([T]he legal framework of rules and doctrines provides a comprehensive interpretation and evaluation of social relationships . . . which is in tune with the main themes of the dominant ideology. Because the legal system is encountered frequently in daily life, its systematic articulation and dissemination of a dominant ideology are some of the chief mechanisms for the establishment of ideological hegemony. . . . [T]he dominant ideology produces the basic standards of justice, the underlying categories and values of the legal system . . . ."); ANTONTIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 246–47 (1971) ("If every State tends to create and maintain a certain type of civilization and of citizens . . . and to eliminate certain customs and attitudes and to disseminate others, then the Law will be the instrument for this purpose . . . .").

feriority of Black people, while portraying the flagrantly discriminatory Jim Crow regime as "equal."[10]

History shows that the Court's most backward decisions are rendered discursively rational through an implicit reliance on hegemonic ideologies that frame discriminatory laws as "equal" or "meritocratic," and the resultant inequalities as the result of "social and legal practices that recognize innate differences."[11] This thinly veiled social-Darwinism has evolved alongside the nature of hierarchy itself, in form but not substance.[12] Most recently, this evolution has given rise to a new "racial bourgeois," which forms a mirror image of poor whites by accepting the "wages" of *class* domination in exchange for their willing consent to the superexploitation of racialized groups.[13] Recent anti-affirmative action lawsuits filed by Students for Fair Admissions (hereinafter "SFFA")[14] and the Department of Justice for the Trump Administration ("Trump DOJ") rely on a corollary of this structural evolution, the "model minority" myth, to attribute the mass exclusion of

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[10] Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522 (1980); *see also, e.g.*, Sweatt v. Painter, 339 U.S. 629, 633–34 (1950) ("[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library . . . . [And,] those qualities which are incapable of objective measurement but which make for greatness in a law school."); Plessy v. Ferguson, 163 U.S. 537 (1896).

[11] Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 996 (2007); *see, e.g.*, DU BOIS *supra* note 8 at 39–40 (citing *The Atlanta Daily Intelligencer* (Jan. 9, 1860)) ("This matter of . . . emancipation [is] . . . bad for the master, worse for the slave"); *Fisher*, *supra* note 7.

[12] *See* López, *supra* note 11, at 996 ("By the late nineteenth century, the earlier American belief that racial hierarchy reflected a divine order made manifest by the continental separation of races and by their obvious branding with different colors had largely given way to the certainty that racial stratification reflected a natural ordering of myriad human groups measurable through the techniques of scientific empiricism.").

[13] Mari Matsuda, *Are Asian-Americans the Racial Bourgeoisie?*, *in* WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW 149 (1996); *see also* KWAME NKRUMAH, CLASS STRUGGLE IN AFRICA (1972) ("It is the indigenous bourgeoisie who provide the main means by which international monopoly finance continues to plunder and to frustrate the purpose of the African [people]"); *See also* ROSALIND S. CHOU & JOE R. FAGIN, MYTH OF THE MODEL MINORITY: ASIAN AMERICANS FACING RACISM 14 (2015 ed. 2008) ("In spite of much data contradicting their commonplace view, numerous social scientists and media commentators have regularly cited the educational and economic 'success' of a particular Asian American group, one typically described as the 'model minority,' as an indication that whites no longer create significant racial barriers."); *see also* Transcript of Oral Argument at 67, Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013) (Scalia J.) ("[I]t does not benefit African-Americans to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school . . . a slower-track school where they do well. . .Maybe [the University of Texas] ought to have fewer [Black students] . . . I don't think it stands to reason that it's a good thing for the University of Texas to admit as many Blacks as possible.").

[14] SFFA is a nonprofit organization that was founded by Edward Blum, an anti-affirmative action activist, anti-voting rights activist, and stockbroker, to solicit Asian plaintiffs. *See* Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707, 716 (2019) ("Edward Blum, who financed the *Fisher* litigation and founded SFFA, began openly recruiting Asian-American plaintiffs for a potential suit against Harvard.").

poor and non-white students from elite universities to innate racial differences rather than systemic inequality.[15] These lawsuits have been accompanied by a steady drumbeat of misinformation that attributes the views of segregationists to the leaders of the Civil Rights Movement, thereby obfuscating the clear parallels between SFFA's recent lawsuit and the legal maneuverings of the infamous pro-segregation "Massive Resistance" Movement after *Brown*.[16]

This paper was written in response to increasing engagement with and citation of such misinformation in the legal academy[17] and the media at large.[18] Although "fake news" has only recently become a popular topic of conversation, the far right has always and everywhere lied to enact its political agenda.[19] In order to address such misinformation, this paper highlights the timeless features of the modern discourse surrounding affirmative action, beginning with Reconstruction. This paper traces the evolution of the

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[15] *Id.* at 716–18 ("[SFFA's] strategy was, in many respects, predictable . . . . [This is due to] the rise and entrenchment of the 'model minority' myth, which constructs Asians as a monolithic block of 'superminorities' whose success is rooted in a culture that prioritizes hard work and education . . . . mask[s] intra-racial [Asian] diversity . . . [and] facilitates countervailing negative stereotypes about other groups of color . . . [which in turn] perpetuate[s] existing 'racial lay theories' about who does, and does not, belong in elite institutions of higher education.").

[16] *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (2007) (Roberts C. J., declaring the judgment of the court) ("[T]he position of the plaintiffs in *Brown* . . . could not have been clearer: [T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.")(internal quotations omitted); Mark Tushnet, *Parents Involved and the Struggle for Historical Memory*, IND. L.J. 493, 494–95 (2016) ("The surviving lawyers, by then elderly, who had participated in the *Brown* litigation immediately responded . . . . [calling] Chief Justice Robert's characterization of the plaintiffs' position in *Brown* . . . . 'preposterous' . . . . and '100 percent wrong.'").

[17] *See* Cory R. Liu, *Affirmative Action's Badge of Inferiority on Asian Americans*, 22 TEX. REV. L. & POL., 317, 317 (Spring 2018) ("[By using affirmative action] schools demean [the accomplishments of Asian Americans] and stamp them with a badge of inferiority as to their status in the community.").

[18] *See, e.g.,* Alan M. Dershowitz, *Harvard Needs Merit-Based Admissions,* WALL ST J. (June 1, 2022) ("The time has come, however, for universities to abandon their efforts to achieve superficial, artificial diversity based on race . . . . Martin Luther King Jr. admitted that his goal [was] 'that one day my four children will live in a nation where they will not be judged by the color of their skin, but by the content of their character.'"); Jason L. Riley, *Asian-Americans Fight Back Against School Discrimination,* WALL ST J. (Mar. 1, 2022) ("[T]he school board in Fairfax County, Va., altered the admissions standards . . . in an effort to deny slots to Asian-Americans and boost enrollment among blacks and Hispanics.").

[19] *See, e.g.*, Kit O'Connell, *There is No Legitimate 'Debate' Over Gender-Affirming Healthcare*, TEXAS OBSERVER (July 22, 2022) ([Anti-trans activists claim] that exposure to transgender kids, education about trans people, and trans ideas on the internet could spread transness to others who might otherwise never have questioned their gender . . . contagion and child recruitment are the oldest tropes in the right-wing book . . . similar rhetoric has been used against Jewish people, immigrants, and other marginalized groups."); Tom Phillips, *Bolsonaro vowed to show a new Brazil but 'lie-filled' UN speech cuts little ice*, THE GUARDIAN (Sep. 21, 2021) ("Bolsonaro insisted his government had long championed Covid vaccination, even though he has personally undermined efforts to immunize citizens against a disease that has killed almost 600,000 Brazilians. . .'which other country in the world has a policy of environmental protection like ours?' asked Bolsonaro, who has been accused of encouraging environmental crime and under whom deforestation has soared to 12-year highs.").

methods the wealthy use to guard access to elite educational institutions, including the crucial role played by the Supreme Court. It also highlights the parallels between SFFA's and the Trump DOJ's recent admissions lawsuits and the legal maneuvers of the Massive Resistance Movement after *Brown*.

I. "Equality" and "Freedom" under Reconstruction and Redemption

Although once ubiquitous, the notion that judges are impartial in their application of the law has been supplanted by empirical scholarship showing that personal beliefs, rather than rationality, reason, or the law itself, often determine rulings.[20] This is especially true in the context of the Equal Protection Clause, which has been interpreted in drastically different ways depending upon the political beliefs of the Justices charged with its construction.[21] This section provides a brief overview of the ideological differences between the politicians, judges, and scholars who were charged with interpreting the Equal Protection Clause during Reconstruction and Jim Crow. It also explains the practical and legal consequences of these conflicting views.

A. "Freedom," "Equality," and the Fourteenth Amendment

The undisputed "one pervading purpose" of the Equal Protection Clause— and by extension the Civil Rights Act of 1964[22]—was to secure the "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[23] On freedom, Christine Sypnowich writes:

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[20] *See, e.g.*, *Fisher*, *supra* note 7.

[21] Bell, *supra* note 10, at 523 ("[T]he availability of [14]th amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks of the quantum of liability proved against whites. Racial remedies may instead be the outward manifestations of unspoken and perhaps sub-conscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites. . . . Racial justice—or its appearance—may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers.").

[22] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (Powell J., declaring the judgment of the court) ("In view of the clear legislative intent, Title VI [of the Civil Rights Act of 1964] must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."); Griggs v. Duke Power Company, 401 U.S. 424, 431 (1971) ("Congress has now provided [with the Civil Rights Act of 1964] that tests or criteria . . . may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox . . . . [T]he posture and condition of the jobseeker [must] be taken into account.").

[23] Slaughter-House Cases, 83 U.S. 36 (1872); *See also, e.g.*, *Bakke*, 438 U.S. at 287 (1978) (Powell J., declaring the judgment of the Court) ("In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.").

> When an individual is said to be free under the law, he is considered unencumbered in the exercise of his abilities, opportunities, and powers. Whether or not he is capable of exercising these faculties, however, will depend on social conditions; effective freedom from constraints may require that society intervene to ensure that all can make use of their negative freedom.[24]

This conception of freedom is reflected in the right to substantive equality, which aspires to produce more equal outcomes by safeguarding one's capacity to exercise negative freedoms.[25] The right to own private property, for example, is a negative freedom, which "inevitably denies those who do not own property the freedom to dispose or make use of it."[26] Thus, substantive equality permits unequal treatment to the extent necessary to ensure that underlying inequalities do not expand negative freedom for some at the expense of others.[27]

Substantive equality stands in contrast to formal equality, which emphasizes equal treatment over equal outcomes, and adheres to the principle that "once characteristics such as race, sex, etc. are disregarded, individuals can be treated entirely on their merit."[28] In reality, however, these same characteristics often serve as the basis for majoritarian discrimination, which tends to disadvantage vulnerable minority groups through abuses of the political process.[29] Further, "where there is antecedent disadvantage, 'like' treatment may in practice entrench difference, [and] unequal treatment may be necessary to achieve genuine equality."[30] For these reasons, among others,

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[24] CHRISTINE SYPNOWICH, THE CONCEPT OF SOCIALIST LAW 81 (1990).

[25] Sandra Fredman, *Substantive equality revisited*, 14 INT'L J. CON. L. 712, 720 (2016); Lyndon B. Johnson, To Fulfill These Rights, Commencement Address at Howard University (June 4, 1965) (transcript on file at https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights [https://perma.cc/96RD-5BEU]) ("We seek . . . not just equality as a right and a theory, but equality as a fact and *equality as a result*.") (emphasis added)

[26] SYPNOWICH *supra* note 24, at 81–82;

[27] Fredman, *supra* note 25, at 718; *see also* ANATOLE FRANCE, LE LYS ROUGE (1984) ("The poor must work. . . .in presence of the majestic quality of the law which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and stealing bread . . . under the pretense of making all men equal."); Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32 (1982) ("The legal system as a hegemonic system operates at different levels and for different groups. . .play[ing] different parts in the lives of different social classes.").

[28] Fredman, *supra* note 25, at 718.

[29] *See, e.g.*, Randy T. Lee, Amanda D. Perez, C. Malik Boykin & Rodolfo Mendoza-Denton, *On the prevalence of racial discrimination in the U.S.*, PLOS ONE, Jan. 10, 2019, at 8 Tab. 3, 13 (finding that roughly 70% of Blacks, 57% of Asians and 45% of Latinos living in the U.S. had experienced identity-based discrimination and that "there is evidence that discrimination prevalence rates may be even higher than what is shown in our results"); United States v. Carolene Products Company, 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. . . .").

[30] Fredman, *supra*, note 25; *see also* KARL MARX, CRITIQUE OF THE GOTHA PROGRAM 15 (1972) ("[T]he application of an equal standard . . . [is] a right to *inequality*," when applied to individuals in unequal circumstances) (emphasis added).

the international legal community has observed and acknowledged the limitations of formal equality with increasing frequency.[31]

B. Building Jim Crow: Government Intervention during Reconstruction and Redemption

Following the conclusion of the Civil War, the freedmen faced unique obstacles; slavery had left them maimed, impoverished, and largely illiterate, while widespread belief in the ideology of white supremacy restricted their access to public institutions including healthcare, education, and the protections of the political process.[32] Although Du Bois attributed the source of racial animus to class warfare, he also knew that racism had taken on an independent significance, describing whites as "a people imprisoned and enthralled, hampered and made miserable for . . . [the] phantasy" of white supremacy.[33] Additionally, Southern legislators did not resign themselves to accepting the spirit of abolition, but rather openly conspired "to make Negroes slaves in everything but name."[34] Thus, in light of the law's original purpose, it follows that the Framers of the Reconstruction Amendments conceived of "equality" in both race-conscious and substantive terms.[35] The subsequent passage of laws like the 1866 Freedmen's Bureau Act and the Civil Rights Act of 1875—which provided benefits exclusively to Blacks to

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[31] SYPNOWICH, *supra* note 24, at 66–67 ("Through its preoccupation with the formal conditions for making and applying rules, it distracts attention from the power relations instantiated in the content of the rules . . . [but] the idea that legality can be kept separate from all power relationships is a myth, since in reality, the judicial process is inescapably normative and political . . . . Neutrality in the application of the law is impossible, and legal formalism masks this inescapable fact."); *see, e.g.*, Withler v. Canada (Attorney General), [2011] SCR 396 (Can.) (holding that substantive equality is the "animating norm" of the right to equality embedded in the Canadian Charter); *Brink v. Kitshoff* 1996 SA 197 (CC) at 23–24 para. 42 (S. Afr.) (holding that the right to equality in South Africa exists to remedy patterns of disadvantage); S.T.F., Arguição de Descumprimento de Preceito Fundamental no. 186, Relator: Min. Ricardo Lewandowski, 26.04.2012, 205, D.J.e. 20.10.2014 (holding that the Constitutional right to dignity and equality in Brazil justified the use of racial quotas in higher-education for the purposes of overcoming historical social disadvantage and racial inequality and rejecting the myth of "racial democracy").

[32] DU BOIS *supra* note 3 at 117-20.

[33] DU BOIS, *supra* note 8, at 926; *see also* Fredman, *supra* note 20, at 730 ("Stigma, stereotyping, humiliation and violence on grounds of gender, race, disability, sexual orientation, or other status can be experienced regardless of relative disadvantage.").

[34] DU BOIS *supra* note 3, at 41, 67 ("The ability of the slaveholder and landlord to sequester a large share of the profits of slave labor depended upon his exploitation of that labor, rather than upon high prices for his product in the market . . . . But there was another motive which more and more strongly as time went on compelled the plantar to cling to slavery. His political power was based on slavery . . . . [T]he economic power of the planter waned [due to industrialization], [and] his political power became more and more indispensable to the maintenance of his income and profits.").

[35] Cong. Globe, 39th Cong., 1st Sess., 544 (1866) (remarks of Rep. Phelps) ("The very discrimination [the Fourteenth Amendment] makes between 'destitute and suffering' negroes, and destitute and suffering white paupers, proceeds upon the distinction that . . . civil rights and immunities are sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection.").

provide remedies for and protections against majoritarian discrimination—further reflects a substantive understanding of "equality."[36]

The Reconstruction Era brought rapid improvements in the lives of Black Americans, some of which have not yet been repeated.[37] However, the promise of substantive equality was "strangled in its infancy" by the efforts of southern legislators, who were enabled by a reactionary judiciary that "sacrificed the substance and spirit of the [Fourteenth Amendment]. . . by a subtle and ingenious verbal criticism."[38] In *The Civil Rights Cases*,[39] Justice Joseph P. Bradley, writing for the majority, gutted the Reconstruction Amendments and struck down the Civil Rights Act of 1875, which restricted public-facing institutions from adopting laws that would discriminate against vulnerable minorities.[40] In order to find the law unconstitutional, Bradley adopted an artificially narrow construction of "state action," and perversely framed the freedmen as "the special favorite of the laws" a mere 12 years after the formal end of chattel slavery in the United States.[41] Bradley's holding paved the way for Jim Crow by articulating a type of race-conscious formal equality, which permitted the formal recognition of race, but not its attendant disadvantages or benefits.[42]

Following the *The Civil Rights Cases* in the late 1870s, Southern legislators passed Jim Crow laws at all levels of government for the purpose of

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[36] Hina B. Shah, *Radical Reconstruction: (Re) Embracing Affirmative Action in Private Employment*, 48 U. BALTIMORE L. REV., 203, 206 (2019) ("From the Freedman's Bureau during Reconstruction to the executive orders mandating affirmative action in federal agencies and federal contracting, the federal government recognized affirmative action . . . [as a] mechanism[ ] to achieve equality").

[37] *See, e.g.*, ALEXANDER, *supra* note 4, at 18 ("In 1867 at the dawn of the Reconstruction Era, no Black man held political office in the South, yet three years later, at least 15 [%] of all Southern elected officials were Black. This is particularly extraordinary in light of the fact that fifteen years after the passage of the Voting Rights Act of 1965—the high water mark of the Civil Rights Movement—fewer than 8[%] of all Southern elected officials were Black").

[38] The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan J., dissenting); J. MICHAEL MARTINEZ, A LONG DARK NIGHT: RACE IN AMERICA FROM JIM CROW TO WORLD WAR II 61–63 (2016) ("One after another, the cases came to the high court, and the justices eviscerated the Reconstruction regime. . .Justice John Marshall Harlan questioned the court's reasoning . . . [he] could not understand how the court reached markedly different conclusions in factually analogous circumstances . . . [however, when viewed] through a prism of racial bias, the opinions suddenly appear remarkably consistent . . . . [Indeed, by] this time, the US Supreme Court was dependably an agent of white supremacy.").

[39] 109 U.S. 3 (1896).

[40] *Civil Rights Cases,* 109 U.S at 26 (Bradley J., writing for the Court).

[41] *Id.* at 25; *see also* Derrick Bryson Taylor, *So You Want to Learn About Juneteenth?*, N.Y. TIMES (June 20, 2022) ("On June 19, 1865 . . . Gordon Granger, a Union general, arrived in Galveston Texas, to inform enslaved African Americans of their freedom . . . . [This] put into effect the Emancipation Proclamation which had been issued more than two and a half years earlier on Jan. 1, 1863. . . .").

[42] *Civil Rights Cases*, 109 U.S. at 25 ("[T]here must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected . . . . [N]o one at that time thought that it was any invasion of [the equal protection rights of Blacks] because [they were] not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement.").

recreating, as closely as possible, the system of racialized economic exploitation that existed in the South before the Civil War.[43] A precursor of things to come, these "Redeemers" adopted extreme fiscal austerity as a means of countering the perceived excesses of Reconstruction, declaring that "[l]ower taxes and less government intrusion into individual lives would allow citizens to escape the yoke of government oppression."[44] However, in practice, this meant tax cuts for the wealthy, reduced or eliminated aid for those rendered poor and disabled by the war, and the closing of public parks, universities, and libraries, such that "poverty would remain the South's predominant regional feature until well into the next century."[45] Public education was hit especially hard, as many states completely dismantled the educational systems established during Reconstruction; illiteracy became rampant among Blacks and poor whites alike.[46] Simultaneously, legal segregation became commonplace, as the courts refused to acknowledge that Southern legislators deliberately used formal equality as a pretext for vicious anti-Black discrimination.[47]

The Redemption government enjoyed broad—although not unanimous—support among poor whites who came to see themselves as allies of the Redeemers winning the war against the racial "other," rather than acting as traitors in a class war they were badly losing.[48] Indeed, as the gap between rich white landowners and the working poor rapidly grew, the condition of life for Blacks in the South approached, and in some instances surpassed, the evils of slavery.[49] The Supreme Court's insistence that Jim Crow was "equal"

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[43] DU BOIS, *supra* note 3, at 167.

[44] MARTINEZ, *supra* note 38, at 45.

[45] ERIC FONER, RECONSTRUCTION 589 (2002 ed. 1988) ("Fiscal [austerity] went hand in hand with a retreat from the idea of an activist state meeting broad social responsibilities").

[46] *Id.*

[47] MARTINEZ, *supra* note 38, at 63 ("*Plessy v. Ferguson* . . . related to a public accommodations matter arising out of Louisiana [wherein] [a] state statute enacted in 1890 provided for separate accommodation for Blacks and whites on railroads if he accommodations were 'equal.' The law did not define the term 'equal' . . . [but] no one was blind to the cynical meaning of the law, for segregated railroad accommodations were anything but equal in quality.").

[48] *Id.* at 46 ("Throughout the 1880s, class resentments festered. Upland whites who had never owned slaves clashed with the planter elite of the low country. Redeemers, with good reason, recognized that a populist backlash could drive them from power [and adopted divisive measures to] stave off the threat."); DU BOIS, *supra* note 3, at 130 ("[Though] impoverished, maimed and discouraged, victims of a war fought largely by the poor white for the benefit of the rich plantar, [poor whites] sought redress by demanding unity of white against Black, and not unity of poor against rich, or of worker against exploiter.").

[49] DAVID M. OSHINSKY, WORSE THAN SLAVERY (1997) ("However these men may have regarded the negro slave, they hated the negro freeman. However, kind they may have been to negro property, they were virulently vindictive against a property that had escaped from their control."); Letter, Webb's Ranch, Issaquena County, Mississippi, Nov. 13, 1865 *cited in* CHARLES SUMNER; HIS COMPLETE WORKS 88–89 (1900) ("I must give it as my deliberate opinion, that the freedmen are to-day, in the vicinity of where I am now writing, worse off in most respects than when they were held as slaves."); ALEXANDER, *supra* note 5 ("Constitutional amendments guaranteeing African Americans 'equal protection of the laws' and the right to vote proved. . . . impotent . . . . [O]nce a white backlash against Reconstruction gained steam . . . Black people found themselves yet again powerless and relegated to convict leasing camps that were, in many ways worse than slavery.").

lent further legitimacy to this system. As Justice Henry Billings Brown articulated in *Plessy v. Ferguson*:[50]

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if . . . the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position.[51]

Like Bradley, Justice Brown overlooks the fact that whether formal equality is *inherently* unequal, it is *actually* unequal when, for example, one group has been unjustly enriched through the impoverishment of the other.[52] For example, contrary to Justice Brown's assertion, Black Americans sought integrated schooling because "[w]hite schools offered better opportunities on many levels . . . more resources, higher graduation and college attendance rates, more demanding courses, and better facilities and equipment."[53] However, Justice Brown relied not on history, but the biological race myth to frame the subordination of Blacks under Jim Crow as the result of biological rather than structural differences among races.[54] Brown held that "the enforced separation of the races" does not deny Blacks "the equal protection of the laws . . . [and legislation] is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences."[55]

II. A History of Two Movements

The Supreme Court's 1954 decision to overturn *Plessy* in *Brown v. the Board of Education*[56] was not the result of a commitment to race-consciousness, colorblindness, or any other "neutral principle" of law.[57] Rather, *Brown* is best understood in terms of its value to white liberals as a policy response

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[50] 163 U.S. 537 (1896).

[51] *Plessy*, 163 U.S. at 55.

[52] *See* W.E.B. Du Bois, *Does the Negro need Separate Schools*?, 4 J. Negro Educ. 328, 329 (1935) ("[T]he Negro needs neither segregated schools nor mixed schools. What he needs is Education.").

[53] Darling-Hammond, *supra* note 6, at 38.

[54] Martinez, *supra* note 38, at 53 ("One popular view suggested that dark-skinned peoples representing a missing link between the noble white man and lesser animals. This bastardized Darwinism justified unequal treatment of Blacks and became a convenient pretext for practicing disparate legal treatment").

[55] *Plessy*, 163 U.S. at 552 (emphasis added).

[56] 347 U.S. 483 (1954).

[57] Bell, *supra* note 10, at 523 ("[I]t is possible to discern . . . the outline of a principle . . . . Translated from judicial activity in racial cases both before and after Brown, this principle of 'interest convergence' provides: The interest of Blacks in achieving racial equality only when it converges with the interests of whites.").

to the "intense ideological struggle" between the U.S. and the Soviet Union wherein "American racism [had suddenly taken] on international significance as an effective propaganda weapon of the Communists."[58] Indeed, following World War II, the wildly popular American Eugenics movement—the most virulent expression of the biological race myth—had become toxic to American foreign policy efforts because of its affiliation with the defeated and despised Nazi fascists.[59] Thus, Justice Earl Warren's holding in *Brown*—that governmental segregation of schoolchildren by race violates the Equal Protection Clause—stood for the broad repudiation of Jim Crow laws and the racial caste system that it perpetuated.[60]

While the Warren Court emphasized the psychological harms that segregation imposed on Black children, many Black Americans conceived of school integration as a means of addressing the *material* harms as well, by tying "the fate[s] of poor and minority students . . . [to that] of their advantaged and white peers."[61] However, virtually no integration actually oc-

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[58] *Id.* at 522; *see also* Brief for the United States as Amicus Curiae at 6, Brown v., 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10)("It is in the context of the present world struggle between [capitalism] and [communism] that the problem of racial discrimination must be viewed . . . . [D]iscrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.").

[59] Miriam H. Markfield, *A More Perfect Union: Eugenics in America*, NAELA NEWS J., (Apr. 2019), https://www.naela.org/NewsJournalOnline/NewsJournalOnline/OnlineJournal Articles/OnlineApril2019/Eugenics.aspx?subid=1063 [https://perma.cc/U2H3-ZK6G] ("[B]y the mid-20th century, two-thirds of American states had passed laws authorizing the sterilization of 'unfit' citizens. . .the definition of who was unfit varied across jurisdictions and became intertwined with racism, sexism, and other prejudices. . . ."); MEREDITH L. ROMAN, OPPOSING JIM CROW: AFRICAN AMERICANS AND THE SOVIET INDICTMENT OF RACISM, 1928-1937, 1–2 (2007) ("Before the Nazis came to power in Germany, U.S. racism was identified in the Soviet Union as the most egregiously horrific aspect of capitalism, and the United States was represented as the most racist nation in the world . . . . Notwithstanding the considerable propagandistic value . . . Soviet antiracism challenged the prevailing white supremacist notion—dominant throughout Europe and the globe—that Blacks were biologically inferior and unworthy of equality with whites.").

[60] Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 867 (2007) (Breyer, J., dissenting) ("[S]egregation policies did not simply tell schoolchildren 'where they could and could not go to school based on the color of their skin,'[ ]; they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination . . . . Brown held out a promise . . . . [It was] embodied in three amendments designed to make citizens of slaves.").

[61] *Brown*, 349 U.S. at 494 ("[T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group . . . . [This] affects the motivation of a child to learn . . . .to deprive them of some of the benefits they would receive in a racial(ly) integrated school system."); JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 107 (2010) ("[T]he [Milliken] plaintiffs believed, with justification, that inter-district busing would lead eventually to the elimination of gross financial disparities between districts. The reason was straightforward: if suburban students were bused into [urban] schools, suburban parents would have a reason to care about funding levels in [urban] schools."); *see also* Du Bois, *supra* note 52; Bell *supra* note 10, at 522 ("To doubt that racial segregation is harmful to Blacks, and to suggest that what Blacks really sought was the right to associate with whites, is to believe in a world that does not exist now and could not possibly have existed then.").

curred between Brown and the Civil Rights Act of 1964, due to the efforts of the Massive Resistance Movement and inadequate federal enforcement.[62] Indeed, following *Brown* it was clear to both civil rights leaders and segregationists that without race-conscious government intervention, overturning *Plessy* would do nothing more than convert *de jure* segregation into *de facto* segregation.[63] Thus, while Thurgood Marshall, Martin Luther King Jr., and other progressives supported race-conscious affirmative action, the Massive Resistance Movement opposed it using bad-faith appeals to colorblindness and "freedom-of-choice."[64] This section explains how a shifting network of group alliances driven by the pressures of the Cold War opened and then rapidly closed the window of educational opportunity for poor and non-white students in the late 1970s and early 1980s.[65]

A. Substantive Colorblindness and the Return of Reconstruction

The Civil Rights Act of 1964 was passed by an overwhelmingly liberal congress elected in a landslide rebuke of Barry Goldwater's conservative extremism in the election of 1964.[66] Section 402 of the Civil Rights Act authorized the now famous Coleman Report, which found that the primary cause of the racial "achievement gap" was not inequitable schools themselves, but rather family characteristics that were closely tied to class and race, such as parental education level and the socioeconomic composition of a student's peer group (hereinafter the "Coleman factors").[67] Further, the report found

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[62] DARLING-HAMMOND, *supra* note 6, at 35 ("[B]y 1964 . . . 98% of African American students in Southern schools [remained] enrolled in all-Black schools and over 70% of Northern Black students were still enrolled in predominantly minority schools . . . . Progress [towards integration] made after the passage of the 1964 Civil Rights Act was steady for only about a decade."); Bell, *supra* note 10, at 518 ("Demographic patterns, white flight, and the inability of the courts to effect the necessary degree of social reform render further progress in implementing Brown almost impossible.").

[63] López *supra* note 11 at 1004 ("By the end of the 1960s, colorblindness had become a favored argument among those attempting to protect segregation. Simultaneously it had lost much of its attractiveness to those striving for racial progress.").

[64] Max *Brantley, Freedom of Choice, the segregation battle cry of the 60s, is now Arkansas law*, ARK. TIMES (Mar. 9, 2018), https://arktimes.com/arkansas-blog/2018/03/09/freedom-of-choice-the-segregation-battle-cry-of-the-60s-is-now-arkansas-law [https://perma.cc/SHH8-JPFF] ("Freedom of Choice was a well-understood code for segregated neighborhoods and schools in the 1950s and 1960s"); GROVER J. (RUSS) WHITEHURST, BROOKINGS, NEW EVIDENCE ON SCHOOL CHOICE AND RACIALLY SEGREGATED SCHOOLS (2017) ("The principal finding of this report] is a substantive positive correlation between how friendly districts are to school choice and the degree to which their high schools are racially imbalanced for Blacks and whites.").

[65] Bell, *supra* note 10 at 524.

[66] RICK PERLSTEIN, BEFORE THE STORM 512–513 (2001) ("[T]he commentaries were published that the pundits had begun writing in their heads in July, as soon as Barry Goldwater declared that extremism in defense of liberty was no vice . . . Goldwater won only sixteen congressional districts outside the South . . . . Lyndon Johnson would enjoy a 195 to 140 majority in the House, and a 68 to 32 majority in the Senate with which to build his Great Society.").

[67] JAMES S. COLEMAN, ET AL., NAT'L CTR. FOR EDUC. STAT., EQUALITY OF EDUCATIONAL OPPORTUNITY 325, 514 (1966) ("[T]he social composition of [a school's] student

that, while improving resource disparities at majority-minority schools lead to marginal improvements, the only way to close the racial achievement gap was to "improve socioeconomic conditions for black families, and implement integration not only by race, but by social class."[68] Despite liberals remaining lukewarm towards the prospect of wealth redistribution, the Civil Rights Act authorized widespread, race-conscious, affirmative action programs, including cross-district busing to integrate schools, while many Colleges and Universities voluntarily adopted race-conscious affirmative action policies out of a shared "sense, pure and simple, that universities had to do their part to help integrate higher education."[69] Consequently, during the 1970s and early 1980s, Asian Americans made massive gains in employment and education,[70] while Black and Latino students began "attending college at rates comparable to those of Whites," for the first and only time in American history.[71]

Prior to *Brown*, legislators exclusively used the concept of race to deny equal opportunity to Blacks; as a result, many of the speeches, lawsuits, and other efforts made by advocates for racial justice were couched in rhetorical and legal appeals to colorblindness.[72] Today, the modern opponents of affirmative action routinely quote these same advocates out-of-context for the

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body is more highly related to student achievement, independent of the student's own social background, than is any school factor . . . . One indicator of the socioeconomic status of a family is the education of the parents.").

[68] Richard Rothstein, *For Public Schools, Segregation Then, Segregation Since*, ECON. POL'Y INST. (Aug. 27, 2013), https://www.epi.org/publication/unfinished-march-public-school-segregation/ [https://perma.cc/2J8W-DWR6] ("[T]he Office of Education . . . released only a summary downplaying the [Coleman Report's] main finding about the importance of family characteristics and social class integration and exaggerating the minor finding that school resource differences were associated—barely—with the achievement gap.").

[69] Anemona Hartocollis, *50 Years of Affirmative Action: What Went Right, and What It Got Wr*ong, N.Y. TIMES (Mar. 30, 2019), https://www.nytimes.com/2019/03/30/us/affirmative-action-50-years.html [https://perma.cc/4BTR-XC48] (in response to uprisings and student strikes in more than 100 cities Universities adopted race-conscious affirmative action policies and the number of Black students admitted to Ivy League universities the next year more than doubled).

[70] *Why I support affirmative action: An open letter to Chinese America*, REAPPROPRIATE (Mar. 13, 2014) http://reappropriate.co/2014/03/why-i-support-affirmative-action-an-open-letter-to-chinese-america-noliesnohate-edu4all/ [https://perma.cc/K26A-CELA] ("40 years ago, Asian Americans (and particularly Chinese Americans) were huge beneficiaries of affirmative action programs—in college and the work force . . . . Affirmative action has been historically critical for Asian Americans, including Chinese Americans. . . .").

[71] DARLING-HAMMOND, *supra* note 6, at 18 ("By the mid-1970s . . . gaps in educational attainment had closed substantially . . . . Improvements in educational achievement for students of color followed. In reading, large gains in Black students' performance throughout the 1970s and early 1980s reduced the achievement gap considerably, cutting it nearly in half in just 15 years. The achievement gap in mathematics also narrowed sharply . . . . For a brief period in the mid-1970s, Black and Hispanic students were attending college at rates comparable to those of Whites, the only time this has happened before or since.").

[72] Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES (June 29, 2007), https://www.nytimes.com/2007/06/29/us/29assess.html [https://perma.cc/TZF3-WPZC]; *See, e.g.*, Brief for Petitioner at 27, Sipuel v. Bd. Of Regents of Univ. of Okla., 332 U.S. 631 (1948) (No. 369) ("Classification and distinctions based on race or color have no moral or legal validity in our society.").

purpose of legitimizing their efforts to disenfranchise racial minorities.[73] For example, SFFA's website reads "[o]ur mission is to support and participate in litigation that will restore the original principles of our nation's civil rights movement."[74] But colorblindness, like "equality," can be interpreted in significantly different ways.[75] The substantive colorblindness that animated the Civil Rights Era was best articulated by Justice Wisdom in *United States v. Jefferson County*,[76] who wrote that the Constitution is "color blind . . . [in the sense that] a classification [which] denies a benefit, causes harm, or imposes a burden must not be based on race . . . [b]ut . . . color conscious to prevent discrimination being perpetuated *and to undo the effects of past discrimination*."[77]

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[73] *See, e.g.*, Hua Hsu, *The Rise and Fall of Affirmative Action*, NEW YORKER (Oct. 8, 2018), https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action [https://perma.cc/G6DQ-NPE7] ("Blum saw the Harvard Case as . . . . restor[ing] what the nineteen-fifties and sixties civil-rights movement was all about . . . . [He saw the case as]saying that affirmative action was 'against Dr. Martin Luther King's famous words, right?' He said, 'I want my children to be judged by the content of their character, not by their skin color.'"); *but* s*ee, e.g.*, STEPHEN OATES, LET THE TRUMPET SOUND: A LIFE OF MARTIN LUTHER KING, JR., 426 (2013 ed. 1982) (Dr. Martin Luther King Jr. speaking) ("A society that has done something special against the Negro for hundreds of years must now do something special for him, in order to equip him to compete on a just and equal basis.").

[74] *About*, STUDENTS FOR FAIR ADMISSIONS, https://studentsforfairadmissions.org/about/ [https://perma.cc/DW8D-PF3R] (last visited Dec. 24, 2020).

[75] López, *supra* note 11, at 995 ("[Colorblindness] as a method . . . lacks a transcendent moral quality, and instead takes on political and social significance only by virtue of its instant application.").

[76] United States v. Jefferson County Bd. of Ed., 372 F.2d 836, 876 (5th Cir. 1966) (Wisdom, J.)

[77] *Id.* at 877 ("[D]isestablishing segregation among students, distributing the better teachers equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation must necessarily be based on race."); Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 207 (Nov. 2008) ("During the Brown litigation, lawyers advocating a blanket prohibition of racial classifications never put forth these arguments in isolation from other, more context-based, color-conscious arguments relating to the meaning of the Fourteenth Amendment . . . [C]ivil rights advocates easily moved back and forth between making [colorblindness] arguments and claims based on what has come to be known as 'anti-subordination' principles . . . based on 'the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.'"); *see, e.g.*, 110th Cong. Rec. 1510 (1964) (Senate Majority Leader Hubert Humphrey explaining that the purpose of Title VI "is to give fellow citizens – Negroes – the same rights and opportunities that white people take for granted. . .It is no more than what our constitution guarantees."); *Id.* at 1519 (Representative Emanuel Cellar explaining that Title VI "would . . . assure Negroes the benefits now accorded only white students in programs of high[er] education."); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 864 (2007) ("[S]ince this Court's decision in Brown, the law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures to combat segregated schools. The Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races.").

B. Reactionary Colorblindness and the "New Right"

This section will discuss the origins of the Court's modern framework of affirmative action—accurately described by Professor Kermit Roosevelt III as "wildly, almost absurdly, wrong,"—in the Massive Resistance Movement and corresponding formation of the New Right.[78] As integration progressed, whites increasingly fled to suburban neighborhoods while Blacks and other racial minorities were isolated in cities.[79] Consequently, the fight for educational equity came to be waged in terms of if and when neighborhood lines could be crossed to integrate schools.[80] Unlike their liberal counterparts, white conservatives never wavered in their commitment to uphold segregation, but confrontations with the Civil Rights Movement forced them to "abandon their traditional, populist, and often starkly racist demagoguery and [create] a new conservatism predicated on a language of rights, freedoms, and individualism."[81] This "New Right" enabled white Americans throughout the U.S., led by Virginia Senator Harry Byrd, the White Citizens Council, and the Ku Klux Klan, to resist cross-district busing under the banner of federalism, states' rights, and the protection of individual liberties.[82] Noncompliant school districts didn't proclaim their allegiance to white supremacy, but rather adopted "freedom-of-choice" plans that were colorblind, and for that reason, completely ineffective toward integration.[83] For the courts, the pattern was the same; rather than demanding a return to *de jure* segregation under Jim Crow, segregationists argued for what Ian Haney López calls "reactionary colorblindness," a formal interpretation of the Equal Protection Clause which treats all laws that use racial classifications with

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[78] Kermit Roosevelt III, *The Ironies of Affirmative Action*, 17 U. PENN J .CON. LAW 729, 730 (2015).

[79] *See, e.g.*, KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM 8 (2005) ("Ultimately, the mass migration of whites from cities to the suburbs proved to be the most successful segregationist response to the moral demands of the civil rights movement and the legal authority of the courts.").

[80] RYAN, *supra* note 61, at 99 ("[T]he only issue in southern desegregation cases after 1954 concerned the proper remedy. In northern cases, by contrast, a remedy would be available if-and only if—plaintiffs succeeded in demonstrating that school officials engaged in de jure segregation.").

[81] KRUSE, *supra* note 79, at 6; *see also* RYAN, *supra* note 61, at 75 (2010) ("Opponents of busing portrayed children as the victims of meddlesome federal courts . . . protesting that . . . 'the collar of governmental control has tightened around my neck so that I am about to strangle . . . [g]ive me liberty or give me death.'").

[82] MICHEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 320 (2006) ("[The] Southern Manifesto on Integration—a pact made among southern lawmakers to resist racial integration . . . was formally entitled the "Declaration of Constitutional Principles."); Press Release, United States Commission on Civil Rights, Announcing Release of Southern School desegregation, 1966-67 (Aug. 8, 1967), https://www2.law.umaryland.edu/marshall/usccr/documents/pressrel67.pdf [https://perma.cc/YAC3-FC72] ("[V]iolence against Negroes continues to be a deterrent to school desegregation.").

[83] Bell *supra* note 10 at 530 ("[S]ome pupil assignment schemes, [including] 'freedom-of-choice' plans, and similar 'desegregation plans,' were in fact designed to retain constitutionally condemned dual school systems.").

extreme hostility, regardless of whether they contribute to or ameliorate the subordination of vulnerable minority groups.[84]

The segregationists of the New Right favored reactionary colorblindness because it provided for a return to the "equal" protection standard under Jim Crow, through the rhetorical and ideological lens of the New Right. In other words, while reactionary colorblindness is "colorblind" and Jim Crow laws are distinctly race-conscious, both standards represent a type of formal equality that precludes the government from intervening "to ensure that all can make use of their negative freedom."[85] Indeed, after *Brown* it was clear to both segregationists and civil rights leaders, that whether race-conscious or colorblind, mere formal equality would perpetuate racial hierarchy to the extent that racism and the racial inequalities produced by slavery, Redemption, and Jim Crow, remained unremedied.[86]

Prominent segregationists and members of the New Right like Frederick T. Gray unsuccessfully argued for reactionary colorblindness by conflating race-consciousness with formal equality as the feature of equal protection law that enabled the evils of Jim Crow.[87] In other words, the New Right sought to emphasize the shared characteristics of substantive equality and Jim Crow (race-consciousness) while downplaying the similarities between Jim Crow and reactionary colorblindness (formal equality and unequal outcomes), and arguing that the Court's holding in *Brown* abolished race-consciousness, while leaving formal equality intact.[88] However, the federal courts repeatedly rejected this argument because it lacked a coherent justification and the lessons of *Plessy* and the *The Civil Rights Cases* had not yet been

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[84] López, *supra* note 11, at 985.

[85] Sypnowich, *supra* note 24, at 81.

[86] *See, e.g.*, Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 38 (1942) ("[T]he many minority groups in this country are by definition viewed with an irrational suspicion and disfavor by the majority and therefore cannot so effectively use the regular channels of group pressure . . . ."); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387 (1978) (Marshall, J., concurring in part and dissenting in part) ("The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro."); Lee, *supra* note 29.

[87] *See* Transcript of Oral Argument at 15, Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430 (1968) (No. 695) (Frederick T. Gray for the School Board arguing that in *Brown*, "what the court has done is strike down compulsory segregation, but it has not ordered compulsory integration."); GLAZER, *supra* note 9, at 44 ("The [Civil Rights Act] could be read as instituting into law Judge Harlan's famous dissent in *Plessy v. Ferguson*: 'Our Constitution is color-blind.'"); *but see* Aiken v. City of Memphis, 37 F.3d 1155, 1172 (6th Cir. 1994) (Jones, J., dissenting) ("The Fourteenth Amendment was never intended to impose an absolute standard of color blindness upon our law to the extent that such a standard becomes a bar to the achievement of the purposes of the amendment . . . . Review of [integration] plans under a strict scrutiny standard routinely results in the invalidation of plans which are designed to achieve the vital goal of remedying our nation's history of discrimination. Such an application is clearly antithetical to the Fourteenth Amendment.").

[88] *See, e.g.*, Transcript of Oral Argument, *supra* note 87, at 15. (Frederick T. Gray for the School Board arguing that in *Brown* "I cannot conceive your Honors that *Brown* ordered compulsory integration . . . . [I]t seems to me that we are going full circle . . . .").

forgotten. *North Carolina State Board of Education v. Swann*,[89] for example, held that:

> [T]he [freedom-of-choice] statute exploited an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*. Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.[90]

As Martin Luther King Jr.'s "Freedom Campaign" set its sights on the "concentration camp life," to which Blacks had been relegated in the North, the resulting backlash among white moderates began compromising the shared purpose that sustained the alliance between the liberal establishment and the Civil Rights Movement through the 1960s.[91] Indeed, as liberal politicians like Senator Joe Biden began championing laws to restrict cross-district busing, leading neoconservative sociologist Nathan Glazer perfected the theory of ethnicity that would provide a modern and internally coherent justification for resurgent racial inequality.[92] In 1971, President Nixon made his fourth appointment to the Supreme Court—the rumored segregationist William H. Rehnquist—which brought an abrupt end to the ideological lib-

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[89] 402 U.S. 1 (1971).

[90] 402 U.S. 43, 45–46 (1971).

[91] LOÏC WACQUANT, PUNISHING THE POOR, THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY, 203 (2004) ("The same liberal whites who had praised and supported [Martin Luther] King when he led marches and organized sit-ins against segregated facilities in the South condemned his tactics as irresponsible and provocative [when he moved to confront the ghetto.]".) The shift of the civil rights campaign from the rural South to the urban North, the sudden rise of separatist Black Power groups spearheading militant demands for Black self-determination, and the rising violence associated with public protests caused white backing for African-American demands to evaporate in a matter of months. And it triggered a virulent backlash that would grow over the next two decades to fuel the . . . abandon[ment] [of] public schools, shunn[ing] [of] mixed public space, and [flight] to the suburbs by the millions to avoid mingling and ward off the specter of "social equality" in the city."); RYAN, *supra* note 61 at 96 ("It was not just conservative southerners and their northern sympathizers who opposed busing the suburbs. Antibusing legislation in the early 1970s was just as likely to come from northern moderates and "liberals" whose suburban constituents faced the prospect of busing for school desegregations."); Marjorie Hunter, *The Nation*, N.Y. TIMES (Aug. 20, 1972), https://www.nytimes.com/1972/08/20/archives/blacks-will-say-america-lied-to-us-busing.html [https://perma.cc/7YZA-YT3L] ("[N]orthern liberals, once in the forefront of the fights for civil rights, spoke feelingly of the need to halt forced busing of children in the placid suburb[s] and the teeming cities that they represent.").

[92] GLAZER, *supra* note 9, at 21-22; López *supra* note 11 at 1004 ("Contemporary color-blindness has its origins . . . in the efforts by northern opponents of affirmative action to craft a conception of racial dynamics in the United States that simultaneously embraced the moral necessity of ending de jure discrimination and yet rejected race-conscious remedies.").

eralism of the Warren Court.[93] This new conservative majority, deeply sympathetic to the arguments of the Massive Resistance Movement and freshly armed with socially acceptable political rhetoric, began the work of reinventing Jim Crow in a post-World War II America.[94]

C. Biology, Ethnicity, and the New Jim Crow

Regents of the University of California v. Bakke[95] was not the first Supreme Court opinion to invoke Glazer's theory of ethnicity, but this was the first time it was elevated to the level of a "constitutional truth." [96] Glazer's theory of ethnicity held that the path towards economic and racial integration "pioneered by white ethnic groups" was available to all, but Blacks and other racial minorities continued to fail because of their pathologically deficient cultures.[97] In this way "ethnicity erased the enormous differences in historical [and contemporary] experience between white immigrants and racial minorities and gave new legitimacy to the belief that not structural disadvantage but inability, now cultural" rather than biological, justified the subordinate position of racial minorities in the U.S.[98] Indeed, like Justice Brown relied on biological race in *Plessy*, Powell used Glazer's theory of ethnicity to reason that racial hierarchy was natural and beyond the powers of the Court, writing:

> The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above,

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[93] Memorandum from William H. Rehnquist to Justice Robert Jackson (1952) ("I realize that it is an unpopular and unhumanitarian position for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed."); 132 Cong. Rec. 23548 (1986) (testimony of Justice Robert Jackson, the man for whom Rehnquist clerked when writing his pro-*Plessy* memo, that he always instructed his clerks to express their own views); Brad Snyder & John Q. Barrett, *Rehnquist's Missing Letter: A Former Law Clerk's 1955 Thoughts on Justice Jackson and Brown*, 53 B.C. L. Rev., 631, 651 (2012) ("Rehnquist's negative views about Brown, as captured in his late 1950s writings, are strikingly similar to his 1952 pro-Plessy memo.").

[94] Alexander, *supra* note 5, at 12-13 ("Since the [founding of the U.S.], African Americans repeatedly have been controlled through institutions such as slavery and Jim Crow, which appear to die, but then are reborn in new form, tailored to the needs and constraints of the time . . . . With each reincarnation of racial caste, the new system, as sociologist Loic Wacquant puts it, 'is less total, less capable of encompassing and controlling the entire race'. . . . Moreover, as the systems of control have evolved, they have become perfected, arguably more resilient to challenge, and thus capable of enduring for generations to come.").

[95] 438 U.S. 265, 287 (1978).

[96] López, *supra* note 11, at 1043.

[97] Nathan Glazer & Daniel Patrick Moynihan, Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians and Irish of New York City 24-86 (1963); *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 n. 25 (1978) (citing John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro – The Problem of Special Treatment*, 61 Nw. U. L. Rev. 363, 398 (1966) ("[I]nsofar as we are willing to admit that the Negro has a culture, and that it has something to contribute to American life, we must recognize that the more efforts we undertake to compel integration, the more difficult it will be for this culture to survive.")).

[98] López, *supra* note 11, at 1010.

> the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment . . . for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. *There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not.*[99]

Through the use of what can fairly be characterized as sociological and political analysis to produce rankings of prejudice experienced by different groups, Powell paradoxically concludes that "[t]he kind of variable sociological and political analysis necessary to produce such rankings" are beyond the Court's capabilities.[100] Moreover, like his ideological forebears, Powell's analysis ignores how white European immigrants benefited from their participation in the "wage of whiteness."[101] Two notable examples are the Roosevelt administration's "New Deal" (which brought unprecedented prosperity to the white working class)[102] and the G.I. Bill, which allowed white veterans to attain the financial security of home ownership and the prestige of higher-education in unprecedented numbers.[103]

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[99] *Bakke*, 438 U.S. at 292 (emphasis added).

[100] *Id.*

[101] *See* Vasiliki Fouka et al., *From Immigrants to Americans: Race and Assimilation during the Great Migration* 3 (Harvard Business School BGIE Unit Working Paper No. 19-018, 2018) ("The establishment of a binary Black-white racial classification reduced the importance of ethnicity and allowed the acceptance of previously discriminated immigrants into the white majority."); Daniel O'Connell, Address to the Loyal National Repeal Association (Oct. 11, 1843) ("How can the generous, the charitable, the humane, the noble emotions of the Irish heart have become extinct amongst you? How can your nature be so totally changed as that you should become apologists and advocates of that execrable system which makes man the property of his fellow man . . . renders the slave hopeless of relief, and perpetuates oppression by law, and in the name of what you call a Constitution?").

[102] IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 85 (2005) ("The South was willing to support [the New Deal] provided these statutes did not threaten Jim Crow. So southern members [of Congress] traded their votes for the exclusion of farmworkers and maids, the most widespread Black categories of employment, from the protections offered by these statutes . . . . As a result, these new arrangements were friendly to labor but unfriendly to the majority of African Americans."); Herbert Hill, *The Problem of Race in American Labor History*, 24 REVS. IN AM. HISTORY, 189, 195 (Jun. 1996) "[R]acial discrimination by employers and white labor unions prevented [Blacks] from advancing through the workplace, the strategy that had been so effective for white ethnics.").

[103] KATZNELSON *supra* note 102 at 85–87 ("State committees appointed by Southern governors to control these schools start off with the determination that Negro soldiers shall not be trained under [the GI Bill], and they never let up . . . . [The] difference in eligibility was a good deal less significant in shaping the racial qualities of the GI Bill than the way in which its benefits were distributed by the nearly all-white decentralized apparatus charged with its administration . . . [especially] in the realm of education . . . . De facto quotas and . . . high selectivity closed these schools to the vast majority of Blacks qualified for higher education . . . . [Thus] 95 [%] of Black veterans [attended historically Black colleges] . . . . [T]he relative absence of support from southern states left most Black colleges unable to take all the [Black] veterans who qualified . . . . By contrast, 'flagship universities like . . . the University of Texas and the University of Alabama . . . were able to expand rapidly to meet the needs of returning [white] veterans under the G.I. Bill.'").

Even so, Powell's holding inverted the Warren Court's jurisprudence such that the "freedom of choice" plans the New Right used to resist *Brown* became presumptively legal, while the race-conscious affirmative action policies used to implement *Brown* would be presumptively illegal.[104] Notably, Powell's reliance on Glazer's theory of ethnicity enabled him to hold that a limited form of affirmative action was legal, exclusively for the purpose of pursuing "genuine diversity."[105] Powell went on to explain that "genuine" diversity should include "blacks," but also "musicians, football players, physicists [and] Californians."[106] Perhaps unsurprisingly, this proved to be especially controversial, drawing pointed critiques from the left for its incoherent logic and the danger it posed to the educational prospects of nonwhite students, and from the right for its deviation from the precedent set by *Korematsu v. United States*.[107] And indeed, the only plausible rebuttal to any of these critiques is found not in Powell's opinion, but in his implicit acceptance of Glazer's theory of ethnicity, which simultaneously justifies formal equality and its "genuine" diversity exception.[108] Glazer's theory does this, by arguing that culture, rather than race or class, is the most significant feature of American social life.[109] If one accepts this premise, it follows that rather than *racial* remediation, something like Powell's "genuine" diversity should be the normative end of representational justice in higher education.[110] The Supreme Court remained divided for years after *Bakke*, but ultimately Powell's holding was affirmed by a "politically conservative yet judicially activist" majority in *Richmond v. J.A. Croson Company*,[111] which currently serves as the basis of contemporary constitutional race law.[112]

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[104] *See* López, *supra* note 11, at 1061 ("As it currently stands, constitutional race law is a disaster. It approaches the problem of race in our society exactly backwards, almost invariably striking down efforts to respond to racial hierarchy while insulating from more than cursory review state policies that disproportionately harm minorities.").

[105] *Bakke*, 438 U.S. at 315, 320 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element . . . . [This] may be served by a properly devised admissions program"); *see also* López, *supra* note 11, at 1040–41 ("[Powell] rejected fostering integration or responding to societal discrimination as compelling interests, but held that encouraging racial diversity satisfied strict scrutiny. Many commentators find [the] two halves [of Powell's opinion] difficult to square . . . . No contradiction divides these two parts of Powell's opinion, however, if one accepts his vision of race as ethnicity.").

[106] *Bakke*, 438 U.S. at 437.

[107] 323 U.S. 214 (1944); *see* López, *supra* note 11, at 1040–41.

[108] *See id*; *Bakke*, 438 U.S. at 292.

[109] *See* GLAZER, *supra* note 8, at 21–22.

[110] *See* Lopez, *supra* note 11, at 1040.

[111] 488 U.S. 469 (1989).

[112] *See id.*; *see also, e.g.,* Fullilove v. Klutznik, 448 U.S. 448, 482 (1980) ([W]e reject the contention that, in the remedial context, the Congress must act in a wholly "color-blind" fashion . . . . 'In this remedial process, steps will almost invariably require that students be assigned differently because of their race. Any other approach would freeze the status quo that is the very target of all desegregation processes.'") (quoting McDaniel v. Barresi, 402 U.S. 39 (1971)).

Today, as ongoing judicial backlash to the Civil Rights Movement has virtually eliminated cross-district busing,[113] dismantled local court supervision of desegregation plans,[114] and further restricted the use of race-conscious affirmative action in all of its forms,[115] the re-segregation of American institutions, including the educational system, has progressed rapidly and shows no signs of slowing down.[116] Further, because the unjust impoverishment, segregation, and mis-education of racial minorities remains unremediated,[117] and widespread racial animus remains prevalent among whites,[118] segregation virtually always means schools characterized by "concentrated poverty" for every racial group in the U.S. besides whites.[119] "Concentrated

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[113] *See, e.g.*, Milliken v. Bradley 418 U.S. 717 (1974) (holding that district lines can only be crossed to integrate schools under extraordinary circumstances).

[114] Sean F. Reardon, Elena Tej Grewal, Demetra Kalogrides & Erica Greenberg, *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL'Y ANALYSIS & MGMT., 876, 877 (Fall, 2012) ("[O]ver half of all districts ever under court-ordered desegregation have been released . . . in the last 20 years . . . . [A]fter being released from court oversight, school districts become steadily more racially segregated.").

[115] *See e.g.,* Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291 (2014) (holding that individual states can ban affirmative action by voter referendum).

[116] Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,041 app. at 26,062 (1996) (proposed May 23, 1996) ("In the immediate aftermath of [the *Croson* decision], state and local governments scaled back or eliminated altogether affirmative action programs that had been adopted precisely to overcome discriminatory barriers to minority opportunity and to correct for chronic underutilization of minority firms. As a result of this retreat from affirmative action, minority participation in state and local procurement plummeted quickly."); Reardon et al., *supra* note 114, at 877–78.

[117] *See* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 713 (1990) ("Race is, at present, a rough but adequate proxy for connection to a subordinated community."); William Elliott, Elizabeth Burland, Briana Starks & Trina Shanks, White Americans Have a Reason to Be Mad About Wealth Inequality 19, 24 (U. Mich. Ctr. on Assets, Educ., & Inclusion, Working Paper 2019) (in the U.S. today the wealth of the average white family is roughly $444,000 while the average Black and Latino family has less than $73,000. However, the extremely high figure for average wealth among white families masks severe and worsening wealth inequality among white Americans themselves such that the median wealth among the top 20% of white families is $1,115,779 while the median wealth among the bottom 20% is $14,727); *but see generally* JOHN TATEISHI, REDRESS: THE INSIDE STORY OF THE SUCCESSFUL CAMPAIGN FOR JAPANESE AMERICAN REPARATIONS (2020).

[118] *See, e.g.*, Betsy Woodruff Swan, *DHS draft document: White supremacists are greatest terror threat*, POLITICO (Sept. 4, 2020), https://www.politico.com/news/2020/09/04/white-supremacists-terror-threat-dhs-409236 [https://perma.cc/57TV-NCWK] ("White supremacists present the gravest terror threat to the [U.S.], according to a draft report from the Department of Homeland Security."); Lee, *supra* note 29; David A. Graham, *This Is a Coup*, ATL., (Jan. 6, 2020), https://www.theatlantic.com/ideas/archive/2021/01/attempted-coup/617570/ [https://perma.cc/J63L-G3U9] ("Insurrectionists are attacking the seat of American government in an attempted coup . . . . Some carried Confederate battle flags as they got much closer to the heart of the U.S. government than any Confederate troop ever did.").

[119] GARY ORFIELD & DIANE GLASS, HARV. PROJECT ON SCH. DESEGREGATION, *Asian Students and Multiethnic Desegregation* 12, 21 (Oct. 1994) ("A basic fact of African American and Latino segregation in U.S. public schools is that segregation by race usually equals segregation by poverty. . . . . [However, Asians] have little contact in schools with [Black] students and the largest minority group they confront in their schools is other Asians. Since Asians have higher educational attainment levels than whites this form of 'segregation' often brings disproportionate exposure of Asian students to high achieving students and school not inferior edu-

poverty" in turn is shorthand for a constellation of inequalities[120] that profoundly disadvantage students at majority-minority schools in the U.S. to this day.[121] This artificially constructed disadvantage is reflected in the consistently lower "academic" ratings that are used to justify the mass exclusion of Black, Latino, Native American, and Southeast Asian students from elite universities.[122]

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cation."); Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), https://www.brookings.edu/articles/unequal-opportunity-race-and-education/ [https://perma.cc/97JL-DLMS] ("Two-thirds of [racial] minority students still attend schools that are predominantly [non-white], most of them located in central cities and funded well below those in neighboring suburban districts. . .on every tangible measure . . . schools serving greater numbers of students of color had significantly fewer resources than schools serving mostly white students."); COLEMAN, *supra* note 67, at 99 ("Since large proportions of ethnic minority groups are in the lower socioeconomic levels, one might expect proportionately more of the minority group children to need special attention to overcome educational disadvantages.").

[120] *See* Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods – A Constitutional Insult*, 7 RACE & SOC. PROBS. 21, 21 (2014) ("Social and economic disadvantage—not only poverty, but a host of associated conditions—depresses student performance. Concentrating students with these disadvantages in racially and economically homogenous schools depresses it further. Schools that the most disadvantaged Black children attend are segregated because they are located in segregated high-poverty neighborhoods . . . ."); Coleman, *supra* note 67, at 325 ("[T]he social composition of [a school's] student body is more highly related to student achievement, independent of the student's own social background, than is any school factor."); DARLING-HAMMOND, *supra* note 6, at 37 ("[S]tudents who are not low-income have lower achievement in high-poverty schools than do low-income students attending more affluent schools").

[121] Brief for 553 Social Scientists as Amici Curiae Supporting Respondents at 3, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (No. 05-908) ("More often than not, segregated minority schools offer profoundly unequal educational opportunities. This inequality is manifested in many ways, including fewer qualified, experienced teachers, greater instability caused by rapid turnover of faculty, fewer educational resources, and limited exposure to peers who can positively influence academic learning. No doubt as a result of these disparities, measures of educational outcomes, such as scores on standardized achievement tests and high school graduation rates, are lower in schools with high percentages of nonwhite students.").

[122] *See* Julie J. Park, *Interest Convergence, Negative Action, and* SFFA vs. Harvard, 17 ASIAN AM. L.J. 13, 13 (2019); *Affirmative Action and Asian Americans*, Asian-Nation: The Landscape of Asian America, (Oct. 28, 2020), http://www.asian-nation.org/affirmative-action.shtml#sthash.qPGqyi8y.JeheOivF.dpbs [https://perma.cc/UU7S-BNEW] ("[A] student's scores – academic, personal, extracurricular, athletic, and overall—are the strongest predictors of admissions."); Andrew Howard Nichols, *Segregation Forever? The Continued Underrepresentation of Black and Latino Undergraduates at the Nation's 101 Most Selective Public Colleges and Universities*, EDUC. TRUST (Jul. 21, 2020), https://edtrust.org/wp-content/uploads/2014/09/Segregation-Forever-The-Continued-Underrepresentation-of-Black-and-Latino-Undergraduates-at-the-Nations-101-Most-Selective-Public-Colleges-and-Universities-July-21-2020.pdf [https://perma.cc/MA9G-GNAU] ("[T]he overwhelming majority of the nation's most selective public colleges are still inaccessible for Black and Latino undergraduates.").

III. The Evolution of Ideology

Sociologist William Petersen coined the term "model minority" in 1966.[123] He, like Glazer, argued that the successes of Japanese Americans proved that innate cultural differences, such as attitudes towards hard work and family stability, were the primary cause of racial hierarchy in the U.S.[124] This idea gained popularity because of its utility as a response to the Soviet Union's portrayal of the U.S. as the most racist nation in the world.[125] However, Glazer's theory of ethnicity justifies both formal equality *and* its "genuine" diversity exception; SFFA's and the Trump DOJ's anti-affirmative action lawsuits rely upon the "model minority" myth to challenge the "genuine" diversity exception without encroaching upon the normative foundation of formal equality.[126] Further, while the Court has drifted away from the explicitly ethnic analysis used in *Bakke* and towards a "formal approach in which race is recognized as functioning only when explicitly invoked," both the practical consequences and ideological implications remain unchanged.[127]

Glazer's theory of ethnicity and the model minority myth are contradictory; the former centers culture and ethnicity as the primary determinants of social status in the U.S., while the latter relies upon the erasure of Asian

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[123] *See* William Peterson, *Success Story, Japanese American Style*, N.Y. Times Mag. (Jan. 9, 1966), https://www.nytimes.com/1966/01/09/archives/success-story-japaneseamerican-style-success-story-japaneseamerican.html [https://perma.cc/DQ3N-NV2N] (citing higher-educational attainment, lower crime rates, and longer life expectancy as proof of Japanese exceptionalism).

[124] *See id.*; *but see* Chou & Feagin, *supra* note 13, at 107 ("[T]he strong academic orientations and accomplishments of Japanese Americans during the 1950s and 1960s were often an intentional reaction to the *extreme* racial oppression they had recently suffered at the hands of many whites."); Robert Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 Calif. L. Rev. 1241, 1258–1264 (Oct. 1993) ("[T]he dominant culture's belief in the 'model minority' allows it to justify ignoring the unique discrimination faced by Asian Americans. The portrayal of Asian Americans as successful permits the general public, government officials, and the judiciary to ignore or marginalize the contemporary needs of Asian Americans . . . . To accept the myth of the model minority is to participate in the oppression of Asian Americans.").

[125] *See* Robert G. Lee, *The Cold War Origins of the Model Minority Myth, in* Asian American Studies Now: A Critical Reader 256 (Jean Yu-wen Shen Wu & Thomas C. Chen, eds., 2010) ("[The growing portrayal of Asian Americans as] the paragon of ethnic virtue . . . [during the 1960s] reflected not so much Asian success as the triumph of an emergent discourse of race in which cultural difference replaced biological difference as the new determinant of social outcomes."); Madeline Y. Hsu & Ellen D. Wu, "*Smoke and Mirrors": Conditional Inclusion, Model Minorities, and the Pre-1965 Dismantling of Asian Exclusion* 34 J. of Am. Ethnic History 43, 43 (2015) ("[Asians were recast] as desirable immigrants and model minorities. . .[and] the segregationist principles of Asian Exclusion unraveled with the geopolitical alliance of World War II and Cold War era immigration and racial reforms.").

[126] López, *supra* note 11, at 1051.

[127] *Id.* at 1061; *Social Darwinism*, Oxford Languages (2020) ("[T]he theory that individuals, groups, and peoples are subject to the same Darwinian laws of natural selection as plants and animals. Now largely discredited, social Darwinism . . . was used to justify political conservatism, imperialism, and racism and to discourage intervention and reform.").

ethnic and cultural diversity to the same effect.[128] However, there is no monolithic "Asian" culture, and educational outcomes do not correspond to cultural similarities among Asian Americans to the extent that they exist, but rather to structural inequality (as reflected by the Coleman factors).[129] The contradiction at the heart of these now infamous lawsuits rests upon a double standard premised upon the myth of Asian American homogeneity.[130] This section demonstrates how an analysis of Asian American educational outcomes that treats Asian and white ethnic diversity with equal regard tends to confirm rather than deny the propriety of race conscious affirmative action as a remedy for structural inequality.[131]

A. Structural Inequality, Immigration Law, and the Coleman Report

During and prior to Jim Crow, eugenicists crafted American immigration laws, seeking to maintain the "racial purity" of the U.S. by heavily restricting immigration from Eastern Europe and excluding most nonwhite immigrants entirely.[132] Like all nonwhite people living in the U.S., Asian immigrants were generally despised and seen as unintelligent foreigners who

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[128] *See* CHOU & FEAGIN, *supra* note 13, at 15 ("[T]oday Asian American groups . . . still face significant obstacles to academic success, in some cases more than in the past.").

[129] William Han, *For Asian-Americans, the Trump Administration's Attack on Affirmative Action Presents a Faustian Bargain,* S. CHINA MORNING POST (Aug. 16, 2020), https://www.scmp.com/week-asia/opinion/article/3097580/asian-americans-trump-administrations-attack-affirmative-action [https://perma.cc/7B6L-YCBG] ("Half of the world's population comes from the vast land mass called Asia. There is the Indian there is the Indonesian, there is the Korean and there is the Khmer: there is no Asian. Any similarities among them are purely in the eye of the (Western) beholder."); *see* CHOU & FEAGIN, *supra* note 13, at x ("Many of our first-generation respondents never identified as 'Asian' or 'Asian American' until they were treated as racialized 'others' during their early months in the United States."); Charles Lam, *Asian Americans Now Most Economically Divided Group in U.S., Report Finds*, NBC NEWS (July 11, 2018), https://www.nbcnews.com/news/asian-america/asian-americans-now-most-economically-divided-group-u-s-report-n890646 [https://perma.cc/5LQP-2546].

[130] *See* CHOU & FEAGIN, *supra* note 13, at 19 ("By lumping all Asian descent groups together and attributing certain distinctively 'Asian' cultural values to them . . . the model minority myth sets Asian Americans apart as a distinct racial-cultural 'other.'").

[131] United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 185 (1977) (Burger, C.J. dissenting) ("The 'whites' category consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denomination. It simply cannot be assumed that the legislative interests of all 'whites' are even substantially identical."); Complaint at 8, United States v. Yale U. ("For purposes of this Complaint, references to Asian applicants exclude racially-favored Asian applicants . . . such as applicants who identify as Cambodian, Hmong, Laotian, or Vietnamese.").

[132] *See* Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to* Loving v. Virginia, 21 U.C. DAVIS L. REV. 421, 423 (1988) ("Eugenicists were successful in promoting [racially] restrictive laws at both the state and federal levels . . . [This included the] Immigration Restriction Act of 1924 . . . . [This also included the] the Racial Integrity Act of 1924 . . . ."); *see also id.* at 424 n. 16; then quoting DANIEL KEVLES, IN THE NAME OF EUGENICS 100 (1985)) ("[E]ugenicists never launched a formal campaign" in support of legal change, but formed "part of a coalition that put the laws on the books, and they provided prior (or, at times, post hoc) biological rationalizations for what other interest groups wanted.") (quoting MARK HALLER, EUGENICS, HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT 158 (1984).

worked menial jobs for low wages.[133] Asian cultures were seen not as a harbinger of success, but as a marker of extreme difference that justified harsh treatment and legal discrimination.[134] Yet the same incentives that gave rise to *Brown* and the Civil Rights Act also facilitated the passage of the Immigration and Naturalization Act of 1965, which led to an influx of highly-educated and skilled immigrants primarily from East Asia and India.[135] Further, because the legal mechanisms that prioritize highly educated immigrants over their lesser educated peers do not apply to refugees, the Asian American community rapidly became a microcosm of structural inequality rather than a monolithic "model" minority.[136]

The evidence shows clearly that the Coleman factors (particularly, parental education and the socioeconomic class of a student's peer group), rather than culture or any other innate racial characteristic, determine educational outcomes not only between, but within racial groups.[137] Families from immigrant groups that tend to be highly educated also come "armed with the human capital and economic resources" to settle in better neighborhoods with vastly superior schools.[138] While less significant than the Coleman factors themselves, the superior teachers, facilities, and educational opportuni-

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[133] *See* CHOU & FEAGIN, *supra* note 13, at 7 ("[F]rom the 1950s onward, the first Asian Americans, the Chinese, were stereotyped by white officials and commentators as 'alien,' dangerous,' 'docile,' and 'dirty' . . . . [This] had precedents in earlier white views of African Americans and Native Americans.").

[134] *See* Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (Harlan J., dissenting) ("There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States . . . . I allude to the Chinese race."); United States v. Wong Kim Ark, 169 U.S. 649 (1898) (Harlan, J., dissenting) ("[Chinese people are]of a distinct race and religion, apparently incapable of assimilating with our own people, who might endanger good order, and be injurious to the public interests."); Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58.

[135] *See* Lee, *supra* note 124 at 148-151; Michael G. Davis, *Impetus for Immigration Reform: Asian Refugees and the Cold War*, 7 J. AM.–E. ASIAN RELS. 127, 127-129 (Winter 1998) ("The 1965 Immigration Act terminated the nation's long-standing tradition of restricting and discriminating against Asian Immigration. . .[the drafters] worried about the problems that a discriminatory immigration policy created for the prestige of the United States. . . .The dramatic increase of post-1965 Asian immigration. . .should be seen as an unintended consequence of American Cold War foreign policy").

[136] *See* Stacy Kula & Susan J. Paik, *A Historical Analysis of Southeast Asian Refugee Communities: Post-war Acculturation and Education in the U.S.*, 11 J. S.E. ASIAN AM. EDUC. & ADVANCEMENT 1, 1 (2016) ("Southeast Asian refugee immigration [occurred] following the Vietnam War . . . . [T]heir limited job skills, English language knowledge, and education upon arrival were exacerbated by overall prejudiced societal reception . . . . All groups have generally experienced low academic achievement . . . .").

[137] *See* Coleman, *supra* note 67 at 325.

[138] Jennifer Lee, *It Takes More than Grit: Reframing Asian American Academic Achievement*, SOC. SCI. RSCH. COUNCIL (Jan. 2018), https://items.ssrc.org/from-our-programs/it-takes-more-than-grit-reframing-asian-american-academic-achievement/ [https://perma.cc/GQP4-SV6Z]; *see also* Kula & Paik, *supra* note 136, at 11.; *see also* Sen Nguyen, *Asian-Americans Divided on Yale Affirmative Action Case*, S. CHINA MORINING POST (Aug. 20, 2020), https://www.scmp.com/week-asia/people/article/3098023/asian-americans-divided-yale-affirmative-action-case [https://perma.cc/78MU-6DUJ] ("Hmong, Cambodian and Laotian refugees [the groups admitted under the Indochinese Refugee Act of 1975,] 'dispersed into poor neighborhoods with low-achieving peers' and a lack of residents of the same ethnicity . . . . Government assistance focused on helping them with survival rather than advancement . . . .").

ties offered by suburban schools further compound structural inequality as reflected by common measures of educational outcomes.[139] For example, although China and Cambodia share a Confucian cultural orientation, Chinese American students achieve some of the highest educational outcomes of any racial group, while Cambodian American students attain among the lowest educational outcomes.[140] Chinese American students are disproportionately suburban, and descended from wealthy, highly educated, non-refugee immigrants, while Cambodian American students are disproportionately urban, and descended from poor, less educated, refugee immigrants.[141] Further, were race itself, rather than structural inequality, outcome determinative, we would be able to observe consistent rates of achievement among Asian immigrants to all countries, yet this is simply not the case.[142]

B. Understanding the "Asian Penalty"

In the same way that there is no one monolithic Asian culture, there is not a single type of "Asian Penalty" at American universities. While Southeast Asian Americans and Pacific Islanders tend to be excluded on the basis of artificially low academic ratings, East Asian and Indian American students tend to be excluded in spite of their disproportionately high Academic ratings; a phenomenon referred to as "Negative Action."[143] Even so, many

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[139] *See* Nguyen, *supra* note 138; Karl Alexander, *Is It Family or School?*, 2 RUSSEL SAGE FOUND. J. SOC. SCIS. 18, 19 (2016) "[I]n the tug of war between family and school in shaping children's academic development, family wins. And it is a decisive victory."); ORFIELD & GLASS, *supra* note 119, at 25 ("[C]ompared to other minority groups, Asian students have lower proportions attending high poverty schools . . . . [However,] recent immigrants from Southeast Asia[ ] . . . . are much more likely to be confronting the characteristic problems of schools with [concentrated poverty].").

[140] *See* Nguyen, *supra* note 138.

[141] *See, e.g. Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States Before the S. Committee on the Judiciary*, 102nd Congress 969–76 (Sept. 20, 1991) (Statement of William Hou) ("[The National Asian Pacific-American Bar Association's] second concern is Judge [Clarence] Thomas' portrayal of Asian Pacific [A]mericans as a minority group whose accomplishments justify opposition to affirmative action. Specifically, Judge Thomas has asserted that because Asian Pacific-Americans have 'substantially greater family income than whites,' they have 'transcended the ravages caused even by harsh legal and social discrimination.' He has also stated that Asian Pacific-[A]mericans should not be the beneficiaries of affirmative action because they are 'overrepresented.'"); *but see* Chang, *supra* note 124, at 1262 ("[R]eliance on median family income as evidence for lack of discriminatory effects is misleading. It does not take into account the fact that Asian American families have more workers per household than do white families; in fact, 'more Asian American women are compelled to work because the male members of their families earn such low wages.'"); Carlos Echeveria-Estrada & Jeanne Batalova, Chinese Immigrants in the United States, MIGRATION INFO. SOURCE (Jan. 15, 2020) (explaining that 51% of Chinese immigrants to the U.S. are college-educated compared to 28% of American adults and 4% of Chinese adults).

[142] *See* ALEJANDRO PORTES ET AL., SPANISH LEGACIES: THE COMING OF AGE OF THE SECOND GENERATION 139 (2016) (explaining that while second-generation Chinese immigrants excel in the U.S., they exhibit the lowest educational aspirations and expectations of all racial groups in Spain).

[143] Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. CIV. RTS.–CIV. LIBERTIES L. REV. 1, 3 (1996) ("[N]egative action against Asian Americans is in force if a university denies admissions to an

schools, e.g., the University of California, Berkeley,[144] continue to lump all Asian Americans into one monolithic category.[145] Some schools, however, like Yale, distinguish among Asian ethnic groups, and are thereby able to use affirmative action to compensate for the structural barriers facing many Southeast Asian applicants.[146] Indeed, affirmative action is capable of providing vital protections for Southeast Asian applicants; requiring all universities to disaggregate the category of "Asian," would immediately improve educational equity for Southeast Asian students.[147] However, nothing in SFFA's lawsuit acknowledges the connection between affirmative action and equity for Southeast Asian students, while the Trump DOJ's lawsuit actually excludes Southeast Asians from its definition of the term "Asian."[148]

C. Affirmative Action for the Rich

Today at elite universities, there are more students from families in the top 1% of the wealth hierarchy than the entire bottom 60%.[149] Indeed, re-

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Asian American who would have been admitted had that person been White . . . . [T]he fact that an Asian American would have been admitted had she been some other racial minority is irrelevant to the specific question whether negative action against Asian Americans is in place."); *see, e.g.*, Note, *The Harvard Plan that Failed Asian Americans*, 131 HARV. L. REV. 604, 606 (Dec. 7, 2017) ("[I]n order to be admitted to certain selective institutions, Asian applicants needed to score . . . 140 points higher than whites.").

[144] In 1996 California voters approved Proposition 209, a state constitutional amendment that effectively banned the use of affirmative action and thereby any consideration of race or ethnicity at all public universities. *See, e.g.*, Vinay Harpalani, *What the California Vote to Keep the Ban on Affirmative Action Means for Higher Education*, CONVERSATION (Nov. 10, 2020), https://theconversation.com/what-the-california-vote-to-keep-the-ban-on-affirmative-action-means-for-higher-education-149508 [https://perma.cc/BRZ9-6ZRA].

[145] *See* CHOU & FEAGIN, *supra* note 13, at 19; Theodora Chang, *Debunking the Myth of 'Homogeneous' Asian Students*, CTR. FOR AM. PROGRESS (2011), https://www.educationworld.com/a_admin/debunking_myth_of_homogeneous_asian_students.*shtml* [https://perma.cc/H7C4-AELD] ("Popular media would have us believe that all Asian American and Pacific Islander students are part of the 'model minority' or are parented by 'tiger moms' who push them towards overachievement in areas such as math and music. The common assumption is that Asian American and Pacific Islander students excel in school without any outside help. The fact is that these students are far from homogenous when it comes to academic achievement, and actually share [many of] the educational challenges facing other students of color".)

[146] *See* Complaint at 8, United States v. Yale, *supra* note 131 ("Yale favors some applicants because of their race . . . includ[ing] applicants who identify, at least in part, as Black, Hispanic, Native American, or Pacific Islander . . . Cambodian, Hmong, Laotian, or Vietnamese").

[147] *See* Ashley Chen, *Why Data Disaggregation Matters for Asian-Americans*, BROWN POL. REV. (Mar. 18, 2018), https://brownpoliticalreview.org/2018/03/data-disaggregation-matters-asian-americans/ [https://perma.cc/EHS2-53NL] ("Asian-Americans speak different languages, practice different religions, and come from different cultural backgrounds, and the consequences of that heterogeneity are unequal outcomes . . . . [Data disaggregation is] a necessary step towards developing public policy that acknowledges and responds to the unique needs of historically marginalized [Asian-ethnic] subgroups."); Coleman, *supra* note 67, at 99 ("Exceptional children need special services appropriate to their particular needs or talents.").

[148] *See generally* Complaint, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 308 F.R.D. 39 (D. Mass. 2015) (No. 1:14-cv-14176-DJC); Complaint, U.S. v. Yale U., *supra* note 131.

[149] T. Liam Murphy, *Scrutinizing Legacy Admissions: Applying Tiers of Scrutiny to Legacy Preference Policies in University Admissions*, 22 U. PA. J. CONST. L. 315, 316 (2019).

search shows that the ALDC factors (athletics, legacies, dean's list, and children of faculty and staff) alone artificially inflate the number of wealthy and white students at elite universities by over 30%.[150] Further, research shows clearly that the only beneficiaries of discrimination against poor and non-white applicants—including both Negative Action and structural inequality—are these same children of extreme privilege, who disproportionately populate elite American Universities.[151] The Trump DOJ and SFFA both locate the source of the "Asian Penalty" in race-conscious affirmative action, because they rely on the model minority myth in place of meaningful analysis.[152]

Ending race-conscious affirmative action as proposed by the Trump DOJ and SFFA is unlikely to have a cognizable impact on Negative Action or structural inequality, but likely *will* have a cognizable impact on the law of employment, wherein Asian Americans—Asian women in particular—tend to derive the greatest benefits from affirmative action among all minority groups.[153] One study that observed employment rates for twelve years across

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[150] Peter Arcidiacono et al., *Legacy and Athlete Preferences at Harvard*, 40 J. LAB. ECON. 133, 137–38 (June 3, 2020) (explaining that 43% of white admitted students at Harvard College are athletes, legacies, on the Dean's list or children of Harvard faculty, while less than 16% of non-white applicants receive such bonuses, and that roughly 75% of white admits would have been rejected without ALDC bonus); *see also* Murphy, *supra* note 149, at 315 ("Children of alumni, or legacy applicants, are as much as five times more likely to be admitted into prestigious universities than non-legacy applicants."); Delano R. Franklin & Samuel W. Zwickel, *In Admissions, Harvard Favors Those Who Fund It, Internal Emails Show*, HARV. CRIMSON (Oct. 18, 2018), https://www.thecrimson.com/article/2018/10/18/day-three-harvard-admissions-trial/ [https://perma.cc/KJQ2-B27X] (explaining that students on the Dean's interest list are 9 times more likely to be admitted and are overwhelmingly the white and wealthy children of donors).

[151] *Affirmative Action*, ASIAN NATION (last visited August 10, 2022) http://www.asian-nation.org/affirmative-action.shtml#sthash.W04CVLWM.dpbs [https://perma.cc/9NPN-8ZX9] ("[N]ational research showed that . . . . Asian Americans were still the targets of discrimination . . . [but] the real beneficiaries of this were not other racial/ethnic minorities, but the children of alumni at elite universities."); Feingold, *supra* note 14 at 710 ("[T]he actual beneficiaries of Harvard's Asian penalty . . . [are] Harvard's *White* students, who effectively reap a "White bonus" at the expense of their Asian-American counterparts."); ORFIELD & GLASS, *supra* note 119, at 21 ("Many of the educational inequalities connected with racial segregation are no doubt the consequences of the enormous social and economic differences—which themselves are deeply shaped by earlier discrimination against the students' parents.").

[152] *See, e.g.*, Complaint at 3, Students for Fair Admissions, Inc. v. Harvard Coll., No. 14-cv-14176-ADB (D. Mass., Nov. 17, 2014) ("Today [Harvard uses affirmative action] to hide intentional discrimination against Asian Americans . . . . It is not a lack of non-academic achievement that is keeping [Asian applicants] from securing admission. It is Harvard's dominant use of [affirmative action] to their detriment.").

[153] *See* Eric A. Tilles, *Lessons from Bakke: The Effect of Grutter on Affirmative Action in Employment*, 6 U. PA. J. BUS. L. 451, 456 (2004) (explaining that Bakke established the "parameters of permissible affirmative action programs in both admissions and employment," and the outcome of future admissions decisions "should be expected to have some cognizable impact on the jurisprudence of affirmative action in employment."); Jennifer Lee & Van C. Tran, *Asian Americans May Have an Educational Advantage, but They Face a 'Bamboo Ceiling' at Work*, L.A. TIMES (Feb. 21, 2019), https://www.latimes.com/opinion/op-ed/la-oe-lee-asian-american-attainment-gap-20190221-story.html [https://perma.cc/4WQW-U9PR] ("U.S.-born Asians have a distinct educational advantage over whites. But this competitive advantage disappears in the labor market, where we find clear evidence of an attainment gap . . . . Affirm-

four states that repealed affirmative action found that rates of employment in state and local government for Black women, Latino men, and Asian women declined on average by 4%, 7%, and 37%, respectively, while the number of white men rose by 4.7%.[154]

D. The Model-Minority Myth and the New Cold War

In an address given over thirty years ago to the Asian Law Caucus, Mari Matsuda explained that the ruling class often demonizes the "racial bourgeois" in order to shield itself from blame during times of crisis.[155] Further, from the American colony in the Philippines to the American wars in Korea, Vietnam, and Laos, American imperialism and domestic violence against Asian Americans has always been deeply connected.[156] For example, in the early 19th century, the portrayal of Asians as bearers of disease was used not only to justify the American colony in the Philippines, but also the burning of a Chinatown hamlet in Santa Ana.[157] Vietnamese who fled their

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ative action has helped women, especially white women, begin to break through the glass ceiling. It can do the same for Asian Americans . . . . [Asian Americans] find that college degrees—even ones from elite universities—do not open as many doors for them as for their white peers."); Wendy Leo Moore, *Affirmative Action Benefits White Women Most*, TEEN VOGUE (Mar. 30, 2022), https://www.teenvogue.com/story/affirmative-action-who-benefits [https://perma.cc/847H-WJVU] ("It can be difficult to measure the extent to which different groups have benefited from affirmative action . . . . But there are clear structural indicators that reveal that white women have benefited from these policies more than any other group.").

[154] Fidan Ana Kurtulus, *The Impact of Eliminating Affirmative Action on Minority and Female Employment: A Natural Experiment Approach using State-Level Affirmative Action Laws and EEO-4 Data*, (Upjohn Institute, Working Paper No. 15-221, 2013).

[155] Matsuda, *supra* note 13, at 154 ("Another classic way to use the racial bourgeoisie is as America's punching bag. There is a lot of rage in this country, and for good reason. Our economy is in shambles. Persistent unemployment is creating new ghost towns, new soup kitchens, from coast to coast. The symptoms of decay . . . . From out of this decay comes a rage looking for a scapegoat, and a traditional American scapegoat is the oriental menace.").

[156] *See, e.g.*, CHOU & FEAGIN, *supra* note 13, at 8–9 ("[T]he white view of the Chinese and of Koreans became more negative with the new conflicts that developed after World War II. With the rise of state communism in China in the late 1940s, Cold War stereotyping again positioned the Chinese, and by implication Chinese Americans, as "dangerous Orientals" in many white minds. Moreover, the U.S. intervention in Korea in 1950 was accompanied by emergency congressional legislation that gave the U.S. attorney general the authority to set up new concentration camps for Koreans, Chinese, and other Asians who might be perceived to be a domestic threat. The U.S. intervention in Korea, and later in Vietnam, further perpetuated an intensive racist stereotyping and framing of Asians and Asian Americans in the minds of many white and other non-Asian Americans.").

[157] Susan Sontag, *AIDS and Its Metaphors*, N.Y. REV. (Oct. 27, 1988) ("xenophobic propaganda has always depicted immigrants as bearers of disease"); WARWICK ANDERSON, COLONIAL PATHOLOGIES: AMERICAN TROPICAL MEDICINE, RACE, AND HYGIENE IN THE PHILIPPINES 69 (2006) ("At the end of the Spanish American War [and the acquisition of the Philippines] the United States was confronted with large responsibilities in the field of tropical sanitation . . . an entire nation had to be rehabilitated . . . so long as the Oriental was allowed to remain disease ridden, he was a constant threat to the Occidental." (quoting Victor G. Heisen)); History: SANTA ANA, Chinatown Torched in Ugly '06 Incident, L.A. TIMES (May 31, 1993), https://www.latimes.com/archives/la-xpm-1993-05-31-me-41995-story.html [https://perma.cc/F6WA-PYHS] ("'They wanted to get rid of Chinatown and they just deliberately burned it down' . . . . [Because] they concluded, the entire enclave was a threat to the public health.").

homeland during the Vietnam War were met in Texas by xenophobic locals who enlisted the Ku Klux Klan in a campaign of violence and intimidation aimed at curtailing their participation in the labor market.[158] Most recently, this phenomenon can be observed in the efforts of American politicians to blame the Communist Party of China for the preventable deaths of over 1,000,000 Americans during the COVID-19 crisis (rather than acknowledging the obvious shortcomings of for-profit health care) and the corresponding spike in anti-Asian violence in the U.S.[159] Any ruling in favor of SFFA would further perpetuate the racist myths and misinformation that are endangering the lives of Asian-Americans today and have done so throughout American history.[160]

CONCLUSION

As the relatively moderate post-war Republican administrations gave way to unbridled neoliberalism, an alliance of billionaires, powerful corporations and their political representatives enriched themselves by subjecting

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[158] *See, e.g.*, Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan, 518 F. Supp. 993 (S.D. Tex. 1981).

[159] *See, e.g.*, Alexandra Stevenson, *Senator Tom Cotton Repeats Fringe Theory of Coronavirus Origins*, N.Y. TIMES (Feb. 17, 2020), *https://www.nytimes.com/2020/02/17/business/media/coronavirus-tom-cotton-china.html* [https://perma.cc/8A9W-YG4R] ("The rumor appeared shortly after the new coronavirus struck China and spread almost as quickly: that the outbreak now afflicting people around the world had been manufactured by the Chinese government. The conspiracy theory lacks evidence . . . . But it is the sort of tale that resonates with an expanding chorus of voices in Washington who see China as a growing Soviet-level threat to the United States, echoing the anti-Communist thinking of the Cold War era."); Kurt Bardella, *Trump and the GOP Put a Bull's-Eye on the Backs of Asian-Americans*, L.A. TIMES (Mar. 17, 2021), https://www.latimes.com/opinion/story/2021-03-17/asian-americans-coronavirus-hate-assaults-bigotry [https://perma.cc/KD5D-2NPF] ("In their effort to find a scapegoat for the coronavirus, Republicans effectively put a bull's-eye on the back[ ] of [the Asian-American] community."); Countering Chinese Communist Party Malign Influence Act, H.R. 7937, 116th Cong. (2nd Sess. 2020); ArLuther Lee, *Only 14 Republicans Voted to Denounce Racism, Violence; Remainder Called Democratic Effort 'Woke Culture on* Steroids,' ATLANTA J. CONST. (Mar. 18, 2021), https://www.ajc.com/news/last-year-gop-assailed-bill-condemning-violence-against-asians/2YB75WY4QVEEFBTVMIO6EJSTOQ/ [https://perma.cc/SCY6-FUFN] ("Six months before a shooting spree . . . left eight dead, including six Asian women, House Democrats passed a resolution condemning racism and violence against Asian Americans . . . . [But most House Republicans] called the legislation an election-year effort to slam then-President Donald Trump, who regularly used inflammatory phrases like 'the China Virus,' 'Wuhan Virus,' and 'Kung Flu' to fault China for the unabated death toll in the United States."); Owain David Williams, *COVID-19 and Private Health: Market and Governance Failure*, 63 DEV. 181, 181–82 (Nov. 17, 2020) ("Neoliberal austerity and retreat of the state from health systems have eroded publicly provided health systems and capacities . . . . The private healthcare service and business model has proven disastrous for coordinated national pandemic responses in a number of countries.").

[160] *See* COLLINS, *supra* note 7, at 50; GRAMSCI, *supra* note 9, at 246-47; Arpana Gupta, Dawn M. Szymanski & Frederick T.L. Leong, *The "model minority myth": Internalized racialism of positive stereotypes as correlates of psychological distress, and attitudes toward help-seeking*, 2 ASIAN AM. J. PSYCH. 101, 109 (2011) ("The findings of this study revealed that higher levels of endorsement of positive Asian stereotypes were related to higher levels of psychological distress. . . . [Additionally they] may be related to . . . more negative attitudes toward help-seeking.").

workers to longer hours for less pay in more dangerous conditions, gutting the social safety net, lowering taxes on themselves, and slashing spending on public goods including national parks, healthcare, and education.[161] Like the Redeemers, neoliberals have relied upon the ideology of race to stifle the working class's capacity to mobilize against their own exploitation.[162] Indeed, Glazer's theory of ethnicity, the model minority myth and even biological race persist to this day,[163] not because of their legitimacy, but because of their utility to American elites as mystifying ideologies that deepen racial divisions by positioning colorblindness, rather than substantive equality, as the normative end of racial justice.[164]

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[161] *See, e.g.,*. David Jacobs & Lindsey Myers, *Union Strength, Neoliberalism, and Inequality: Contingent Political Analyses of U.S. Income Differences since 1950*, 79 AM. SOC. REV. 752, 753 (2014) ("[B]efore the politically induced decline in union strength . . . unions probably were the most effective advocate for public policies advantageous to the less affluent . . . . [N]eoliberal presidential administrations from both parties after the 1980 election of Ronald Reagan helped produce substantial decreases in union influence . . . ."); Alfredo Saad-Filho, *From COVID-19 to the End of Neoliberalism*, 46 CRITICAL SOCIO. 477, 478 (2020) ("[F]our decades of neoliberalism had depleted state capacities . . . fostered deindustrialization through the 'globalization' of production and built fragile financial structures secured by magical thinking and state guarantees, all in the name of short-term profitability.").

[162] *See, e.g.*, Cornel West, *Towards a Socialist Theory of Racism*, DEMOCRATIC SOCIALIST PERSPECTIVES (July 2017) ("[T]he Reagan administration curtail[ed] the public sector by cutting back federal transfer payments to the needy, diminishing occupational health and safety and environmental protection, increasing low wage service sector jobs, and granting tax incentives and giveaways to large corporations . . . Reagan's policies, which were often supported by the coded racist language of the religious right and secular neoconservatives, are racist in consequence. Poor women and children are disproportionately people of color").

[163] *See, e.g., Jared Kushner Says Black People Must First 'Want to be Successful*,' ASSOCIATED PRESS NEWS, (Oct. 26, 2020), https://apnews.com/article/election-2020-race-and-ethnicity-donald-trump-racial-injustice-jared-kushner-d7cf670c43a41dc941e6ac21c0e683de [https://perma.cc/RU5N-VA9K] ("President Trump's policies . . . can help people break out of the problems that they're complaining about, but he can't want them to be more successful more than they want to be successful.") (quoting Jared Kushner); Nicholas Kristof, *The Asian Advantage*, N.Y. TIMES (Oct. 10, 2015), https://www.nytimes.com/2015/10/11/opinion/sunday/the-asian-advantage.html [https://perma.cc/2RXB-LRF7] ("I'm pretty sure that one factor [explaining the success of East Asian immigrants in the U.S.] is East Asia's long Confucian emphasis on education."); Andrew Sullivan, *Why Do Democrats Feel Sorry for Hillary Clinton*, N.Y. MAG. (Apr. 14, 2017), https://nymag.com/intelligencer/2017/04/why-do-democrats-feel-sorry-for-hillary-clinton.html [https://perma.cc/8WCT-XEL4] ("Asian-Americans are among the most prosperous, well-educated, and successful ethnic groups in America. What gives? . . . [T]hey maintained solid two-parent family structures, had social networks that looked after one another, placed enormous emphasis on education and hard work, and thereby turned false, negative stereotypes into true, positive ones . . . ?"); DARLING-HAMMOND, *supra* note 6, at 30 ("[R]ecurring explanations of educational inequality among everyday people, pundits, and policymakers often implicitly or explicitly blame children and their families for lack of effort, poor childrearing, a 'culture of poverty,' or 'inadequate genes.'"). *See also* Ella Myers, *Beyond the Wages of Whiteness: Du Bois on the Irrationality of AntiBlack Racism*, Soc. Sci. Rsch. Council (Mar. 21, 2017), https://items.ssrc.org/reading-racial-conflict/beyond-the-wages-of-whiteness-du-bois-on-the-irrationality-of-antiblack-racism/ [https://perma.cc/Z3YN-VKSF] ("Political appeals in the United States routinely link whites' (legitimate) fear of economic insecurity to (illegitimate) antiblack sentiment. Racial capitalism very nearly requires that linkage.").

[164] Contemporary colorblindness is a powerful ideology directed against the awareness of racial hierarchy which simultaneously justifies and entrenches racial domination through an insistence on formal equality. *See, e.g.*, SYPNOWICH, *supra* note 19, at 67 ("[Formal equality]

Recent examples of this mystification include an official press release by the Trump DOJ claiming that Frederick Douglass—a former president of the Freedman's bank—would have opposed affirmative action, and the oft repeated lie that reactionary colorblindness is "Justice Harlan's view in *Plessy* . . . [and] the rallying cry for the lawyers who litigated *Brown*."[165] These deceptions are legitimized in part by the Supreme Court's repeated insinuations that poor and non-white students are disproportionately excluded from elite universities not because they are disadvantaged, but because they are inferior.[166] If we start instead from the animating premise of Reconstruction and the Civil Rights Movement, that "all men are created equal," the extent to which the poor and nonwhite remain absent from elite universities can only be understood as a measure of society's failure to give them a fair chance.[167]

In reality, for poor whites and the "racial bourgeois" alike, historic events like SFFA's lawsuit represent a double-edged sword, an unnecessary compromise where a better alternative for all is possible.[168] The economic

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obscures the more fundamental question of whether man has access to the resources which determine his capacity to [make use of his] formal freedoms."); *see also, e.g.*, EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 2 (6th ed. 2021) ("Whereas Jim Crow racism explained Blacks' social standings as the result of their biological and moral inferiority, color-blind racism avoids such facile arguments. Instead, whites rationalize minorities' contemporary status as the product market dynamics, naturally occurring phenomena, and Blacks' imputed cultural limitations.").

[165] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Thomas, J., concurring). *See also* Press Release, Department of Justice, Justice Department Sues Yale University for Illegal Discrimination Practices in Undergraduate Admissions (Oct. 8, 2020), https://www.justice.gov/opa/pr/justice-department-finds-yale-illegally-discriminates-against-asians-and-whites-undergraduate [https://perma.cc/V29A-WL8F] ("In 1890, Frederick Douglass explained that the 'business of government is to hold its broad shield overall and to see that every American citizen is alike and equally protected in his civil and personal rights.' The [Trump DOJ] agrees and will continue to fight for the civil rights of all people throughout our nation [by ending affirmative action]."); *but see* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 387 (1978) (Marshall, J. concurring in part and dissenting in part) ("[I]t must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a state acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitutions stands as a barrier.").

[166] *See* PARENTI, *supra* note 5 at 14 ("[According to] fascist doctrine, especially the Nazi variety . . . . one's position in the social structure is taken as a measure of one's innate nature. Genetics and biology are marshalled to justify the existing class structure, not unlike what academic racists today are doing with their 'bell curve' theories . . . ."); López, *supra* note 11.

[167] *See* Martin Luther King Jr., The American Dream (July 4, 1965) ("It wouldn't take us long to discover the substance of that dream. . .in those majestic words of the Declaration of Independence. . .'that all men are created equal' . . . . It doesn't say 'some men,' it says 'all men.' It doesn't say 'all white men,' it says 'all men,' which includes Black men . . . Jews . . . Catholics . . . humanists and agnostics.").

[168] *See Prisoner's Dilemma*, STAN. ENCYC. PHILOSOPHY, (Apr. 2, 2019), https://plato.stanford.edu/entries/prisoner-dilemma/ [https://perma.cc/SB54-CTM7] ("The 'dilemma' faced . . . is that, whatever the other does, each is better off [giving in] than [resisting]. But the outcome obtained when both [give in] is worse for each than the outcome they would have obtained had both [resisted] . . . . A group whose members pursue rational self-interest may all end up worse off than a group whose members act contrary to rational self-interest.").

exploitation of the entire working class is made possible by the maintenance of racial hierarchy; the legitimization of racism-denial in any context will legitimize more extreme attacks on minority rights in the future (or, in the words of James Baldwin, "If they take you in the morning, they will come for us that night").[169] Conversely, improving the quality of education provided to poor and nonwhite students, will pay dividends by stimulating the economy,[170] improving the quality of education for all Americans,[171] and beginning the process of mending the badly frayed social fabric of American life.[172] As wealth inequality approaches levels unseen since the eve of the Great Depression[173] and the world continues to be shaken by historically large protests against economic exploitation[174] and racist police violence,[175]

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[169] James Baldwin, *An Open Letter to My Sister, Miss Angela Davis*, N.Y. REV. (Jan. 1971), https://www.nybooks.com/articles/1971/01/07/an-open-letter-to-my-sister-miss-angela-davis/ [https://perma.cc/NWW8-2ESX]; *see also* Park, *supra* note 122, at 18 ("[T]oday there is ultimately interest divergence between the anti-affirmative action movement and the broader Asian American community, wherein the system proposed by the anti-affirmative action movement (i.e., race-neutral admissions) is at odds with the interest of Asian Americans."); PARENTI, *supra* note 5, at 134 ("[R]acism is used as a means of depressing wages by keeping a segment of the labor force vulnerable to super-exploitation."); IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 148 (1996) ("[R]acial ideology does not guarantee equality among Whites. . .[but] rather to mask and distract from gross inequalities that divide that group."); DU BOIS *supra* note 3 at 315 ("[White workers routinely] asked [Blacks] to organize separately; that is outside the real labor movement, in spite of the fact that it was a contradiction of all sound labor policy.").

[170] *See, e.g., Inequality Hurts Economic Growth, Finds OECD Research*, OECD (Sept. 12, 2014), https://www.oecd.org/newsroom/inequality-hurts-economic-growth.htm [https://perma.cc/X27G-BK82] ("Reducing income inequality would boost economic growth . . . . [A] lack of investment in education [for] the poor is the main factor behind inequality hurting growth."); Celia R. Baker, *Evidence Says Educational Inequality is Hurting the U.S. Economy*, DESERET NEWS (Dec. 27, 2012), https://www.deseret.com/2012/12/27/20511674/evidence-says-educational-inequality-is-hurting-the-u-s-economy [https://perma.cc/D9NY-3WYW].

[171] *See, e.g.*, Amy Stuart Wells, Lauren Fox & Diana Cordova-Cobo, *Racially Diverse Schools and Classrooms Can Benefit All Students*, CENTURY FOUND., (Feb. 9, 2016), https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students/?session=1 [https://perma.cc/K48A-HYK5] ("[B]uilding on Coleman's findings, a growing body of research produced a social science consensus that school integration—by race and by socioeconomic status—is good for children."); Bell, *supra* note 10, at 528 ("Nor do poorer whites gain from their opposition to the improvement of educational opportunities for Blacks: as noted earlier, the needs of the two groups differ little. Hence, over time all will reap the benefits from a concerted effort toward achieving racial equality.").

[172] *See* Karin Fischer, *The Barriers to Mobility: Why Higher Ed's Promise Remains Unfulfilled*, CHRON. HIGHER EDUC. (Dec. 30, 2019), https://www.chronicle.com/article/why-higher-ed-rsquo-s-promise-remains-unfulfilled/ [https://perma.cc/MP9R-ZN4K] ("'The only thing that mitigates intergenerational poverty is higher education' . . . . [But] the poorest Americans don't. Less than 15 [%] of students from the lowest socioeconomic bracket earn a bachelor's degree by age 24 . . . . While college-graduation rates have soared over the past 50 years for middle- and upper-income Americans, for those with family incomes of $42,000 or less, they've barely budged.").

[173] *See* Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519 (May 2016) ("The top .1% wealth share has risen from 7% in 1978 to 22% in 2012, a level almost as high as in 1929 . . . . The increase in wealth inequality in recent decades is due to the upsurge of top incomes combined with an increase in savings rate inequality.").

[174] *See* Thomas Crowley, *"This is a Revolution, Sir,"* JACOBIN MAG., (Dec. 1, 2020), https://jacobin.com/2020/12/general-strike-india-modi-bjp-cpm-bihar [https://perma.cc/T69Q-

Mari Matsuda's exhortation towards addressing Negative Action by increasing public investment in education, is worth revisiting:

> When university administrators have hidden quotas to keep down Asian admissions, this is because Asians are seen as destroying the predominantly white character of the university. Under this mentality, we cannot let in all those Asian overachievers and maintain affirmative action for other minority groups . . . because that will mean either that our universities lose their predominantly white character or that we have to fund more and better universities. To either of those prospects, I say, why not?[176]

V973] ("Workers in India last week launched a general strike that brought out an estimated 250 million people, arguably the largest in human history.").

[175] *See* Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (Jul. 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/TL4V-VFNQ] ("Four recent polls . . . suggest that about 15 million to 26 million people in the [U.S.] have participated in demonstrations over the death of George Floyd and others in recent weeks . . . . These figures would make the recent protests the largest movement in the country's history.").

[176] Matsuda, *supra* note 13, at 153.

On the Meaning of Color and the End of White(ness)

*William J. Aceves**

This Article explores the history of the term "people of color" and its current status in a country struggling to overcome its racist origins. The murders of Trayvon Martin, Michael Brown, George Floyd, Breonna Taylor, and so many other victims of state violence have generated profound anger, calls for action, and demands for dialogue. It is undoubtedly simplistic to assert that words matter. But accurate descriptions are essential for honest conversations, and words convey meanings beyond their syntax. In discussions about race and racial identity, the term "people of color" is routinely used as the antipode to the white community. Yet little thought is given to its etymology or meaning. Through the use of historical documents, including many from the colonial era, and recent data compiled from search engine queries and social media activity, this Article reveals that the term "people of color" has a rich yet complicated heritage. For centuries, "people of color" was a term with legal significance. While it no longer defines rights, its use still matters. Today, we should embrace this collective terminology because it reflects a shared history among diverse communities and generates power against hierarchy. Because the white community serves as the antipode to people of color, we must also interrogate this other example of collective terminology. To engage in honest conversations about race, power, and privilege, it is time to separate white(ness) from the white community.

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INTRODUCTION

"People of color" is a curious term.[1] It is a phrase born out of human division, and yet, it is now meant to symbolize solidarity and community. It replaces a pejorative term with more tolerant and inclusive language, and yet, the term remains controversial.[2]

Its origins can be traced to the sixteenth century, when European explorers used the phrase "of colour" to identify indigenous populations in newly discovered territories.[3] By the eighteenth century, the term "people of color" was well-established in the English-speaking world.[4] However, it is not unique to the English language, as evidenced by its foreign counterparts, such as *gens de couleur* or *gente de color*.[5] The term lacks a formal legal definition, although the word "color" presumably refers to skin color—an ethereal quality measured by pigmentation.[6] It is broadly understood to refer to indi-

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[1] Given its English origins, the term "people of colour" was also used in the United States throughout the eighteenth and nineteenth centuries. *See, e.g.*, Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110, 123 (1828) (referring to "people of colour"); Respublica v. Gaoler of City & County of Philadelphia, 2 Yeates 258 (1797) (referring to a "merchant of colour" as a "person of colour").

[2] *See generally* Fernanda Zamudio-Suarez, *Race on Campus: BIPOC, Minority, or People of Color?*, CHRON. OF HIGH. EDUC. (June 8, 2021), https://www.chronicle.com/newsletter/race-on-campus/2021-06-08 [https://perma.cc/G82M-B9B8]; Jamiyla Chisolm, *What's the Right Term: POC, BIPOC, or Neither?*, YES! MAGAZINE (Oct. 8, 2020), https://www.yesmagazine.org/social-justice/2020/10/08/poc-bipoc-or-neither/ [https://perma.cc/8DSC-Y3DQ]; Anita Kalunta-Crumpton, *The Inclusion of the Term "Color" in Any Racial Label is Racist, Is It Not?*, 20 ETHNICITIES 115 (2020); Kate Sablosky Elengold, *Branding Identity*, 93 DENV. L. REV. 1, 26 (2015); Elizam Escobar, *Language, Identity and Liberation: A Critique of the Term and Concept "People of Color,"* 2 YALE J.L. & LIB. 95 (1994); *see also* Shereen Marisol Meraji, Natalie Escobar & Kumari Devarajan, *Is It Time to Say R.I.P. to 'POC'?*, NPR: CODE SWITCH (Sept. 30, 2020), https://www.npr.org/2020/09/29/918418825/is-it-time-to-say-r-i-p-to-p-o-c [https://perma.cc/DP3Z-CGK2]; E. Tammy Kim, *The Perils of "People of Color*, NEW YORKER (July 29, 2020), https://www.newyorker.com/news/annals-of-activism/the-perils-of-people-of-color [https://perma.cc/D548-NCPH]; Jonathan Kolatch, *"People of Color" Came Out of the Blue*, WALL ST. J. (Dec. 18, 2019), https://www.wsj.com/articles/people-of-color-came-out-of-the-blue-11576713913 [https://perma.cc/WJ3X-GTRB].

[3] *See* PIETRO MARTIRE D'ANGHIERA, THE HISTORY OF TRAUAYLE IN THE WEST AND EAST INDIES, AND OTHER COUNTREYS LYING EYTHER WAY 378–82 (1577) (referring to various inhabitants as "of colour").

[4] *See, e.g.*, WILLIAM GUTHRIE, A NEW SYSTEM OF MODERN GEOGRAPHY: A GEOGRAPHICAL, HISTORICAL, AND COMMERCIAL GRAMMAR; AND PRESENT STATE OF THE SEVERAL NATIONS OF THE WORLD 618–21 (1796); JEAN-PAUL RABAUT, THE HISTORY OF THE REVOLUTION OF FRANCE 231, 233, 235, 237 (James White trans., 1792).

[5] *See* ALEJANDRO DE LA FUENTE & ARIELA J. GROSS, BECOMING FREE, BECOMING BLACK: RACE, FREEDOM, AND LAW IN CUBA, VIRGINIA, AND LOUISIANA 24 (2020) (describing *gente de color* in eighteenth century Cuba); FEDERICA MORELLI, FREE PEOPLE OF COLOR IN THE ATLANTIC: RACE AND CITIZENSHIP, 1780-1850, at 2 (2020) (referencing *libres de color*, which refers to free people of color); GENTE DE COLOR ENTRE ESCLAVOS: CALIDADES RACIALES, ESCLAVITUD Y CUIDANÍA EN EL GRAN CARIBE 127 (José Antonio Piqueras & Imilcy Balboa Navarro eds., 2019); DAVID W. COHEN & JACK P. GREENE, NEITHER SLAVE NOR FREE: THE FREEDMAN OF AFRICAN DESCENT IN THE SLAVE SOCIETIES OF THE NEW WORLD 37, 285 (1974).

[6] *See generally* RACISM IN THE 21ST CENTURY: AN EMPIRICAL ANALYSIS OF SKIN COLOR (Ronald Hall ed., 2008); Vinay Harpalani, *To Be White, Black, or Brown? South Asian*

viduals who are not white, which captures a diverse group with a multitude of distinct experiences.[7] These experiences are informed by history, politics, culture, and racism.[8] There are, in fact, several variants of the term, including persons of color, communities of color, and even citizens of color.[9] Some variants incorporate intersectionality—a concept that acknowledges the complex geometry of human identity—such as women of color, queer people of color, and disabled people of color.[10]

In this third decade of the twenty-first century, we are living in an era of profound social upheaval, where the pillars of structural racism are under siege. The murders of Trayvon Martin, Michael Brown, George Floyd, Breonna Taylor, and so many other victims of state violence have generated intense anger, calls for action, and demands for dialogue.[11] As reflected in

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Americans and the Race-Color Distinction, 14 WASH. U. GLOB. STUD. L. REV. 609 (2015); Carolyn Purnell, *Why We Think of Color When We Think of Race: A Brief History of Race as a Visual Construct*, PSYCH. TODAY (June 2, 2020), https://www.psychologytoday.com/us/blog/making-sense/202006/why-we-think-color-when-we-think-race [https://perma.cc/TA92-XVUX].

[7] EFRÉN O. PÉREZ, DIVERSITY'S CHILD: PEOPLE OF COLOR AND THE POLITICS OF IDENTITY 3 (2021); Salvador Vidal-Ortiz, *People of Color*, *in* ENCYCLOPEDIA OF RACE, ETHNICITY, AND SOCIETY 1037 (Richard T. Schaefer ed. 2008); PHILIP H. HERBST, THE COLOR OF WORDS: AN ENCYCLOPAEDIC DICTIONARY OF ETHNIC BIAS IN THE UNITED STATES 178 (1997). An entire encyclopedia is devoted to "people of color." STEWART R. KING, ENCYCLOPEDIA OF FREE BLACKS & PEOPLE OF COLOR IN THE AMERICAS (2011).

[8] *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 60, 88, 102, 196, 232 (2012).

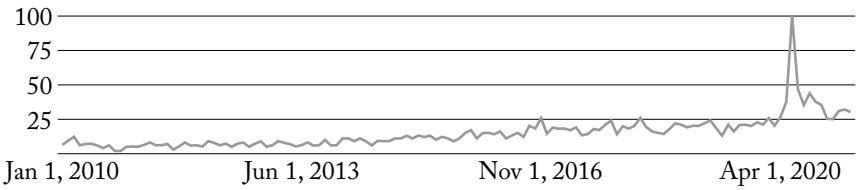
[9] *See, e.g.*, Ann Tweedy, *Uncovering the Little-Known Legacy of Suffragists of Color*, JOTWELL (Mar. 25, 2021), https://equality.jotwell.com/uncovering-the-little-known-history-of-suffragists-of-color/ [https://perma.cc/JWE8-BW9S]; Kee Malesky, *The Journey from "Colored" to "Minorities" to "People of Color,"* NPR: CODE SWITCH (Mar. 30, 2014), https://www.npr.org/sections/codeswitch/2014/03/30/295931070/the-journey-from-colored-to-minorities-to-people-of-color [https://perma.cc/3NM6-926B]; Vidal-Ortiz, *supra* note 7, at 1038.

[10] *See, e.g.*, Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139 (1989). *See generally* THE COMPLEXITIES OF RACE (Charmaine L. Wijeyesinghe ed. 2021); ANGELIQUE HARRIS, ANTONIO (JAY) PASTRANA, JR., & JUAN BATTLE, QUEER PEOPLE OF COLOR: CONNECTED BUT NOT COMFORTABLE (2018); THIS BRIDGE CALLED MY BACK: RADICAL WRITINGS BY WOMEN OF COLOR (Gloria Anzaldúa & Cherríe Moraga eds., 4th ed. 2015); Lisa M. Fairfax, *Some Reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated with Women of Color*, 79 ST. JOHN'S L. REV. 1105 (2005); Linda S. Greene, *From Tokenism to Emancipatory Politics: The Conferences and Meetings of Law Professors of Color,* 5 MICH. J. RACE & L. 161 (1999). The breadth of usage for the term is striking. *See* POCIT: PEOPLE OF COLOR IN TECH, https://peopleofcolorintech.com/ [https://perma.cc/327U-DTF7]; PEOPLE OF COLOR IN EUROPEAN ART HISTORY, https://medievalpoc.tumblr.com/ [https://perma.cc/8YXL-CCWB]. In 1804, the Haitian government referred to "men of color" in a proclamation to facilitate their return from the United States. JEAN SÉNAT FLEURY, JEAN-JACQUES DESSALINES: WORDS FROM BEYOND THE GRAVE 245 (2018).

[11] *See, e.g.*, Audra D.S. Burch, Amy Harmon, Sabrina Tavernise & Emily Badger, *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (Apr. 20, 2021), https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html [https://perma.cc/4PAD-ZMDF]; Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://

Google Trends, the term "people of color" is an essential part of this dialogue.

TABLE 1: GOOGLE TRENDS (SEARCH TERM "PEOPLE OF COLOR")[12]



Between 2010 and 2019, there was a gradual and steady increase in the number of Google search queries in the United States for the term "people of color."[13] This changed significantly in March 2020. As the racial justice movement spread across the country, there was a corresponding increase in queries about the term "people of color." There was curiosity about the term, what it meant, and who it included. Searches peaked the week of May 31–June 6, 2020, which coincides with the timing of massive protests in the United States on racial justice.[14] Related queries also peaked during this time, including "people of color definition" and "who are people of color."

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www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/RJ4J-S8Q8]; Joshua Jamerson & Warren P. Strobel, *Thousands March on National Mall Continuing Racial-Justice Push*, WALL ST. J. (Aug. 28, 2020), https://www.wsj.com/articles/protesters-pour-into-national-mall-renewing-racial-justice-push-11598615232 [https://perma.cc/SG9P-NXHH]; Deborah Netburn, *The Concerted Campaign That Got Public Health Experts to Declare Racist Policing a Crisis*, L.A. TIMES (Oct. 20, 2020), https://www.latimes.com/science/story/2020-10-20/how-police-violence-became-a-public-health-issue [https://perma.cc/2D39-F7U3].

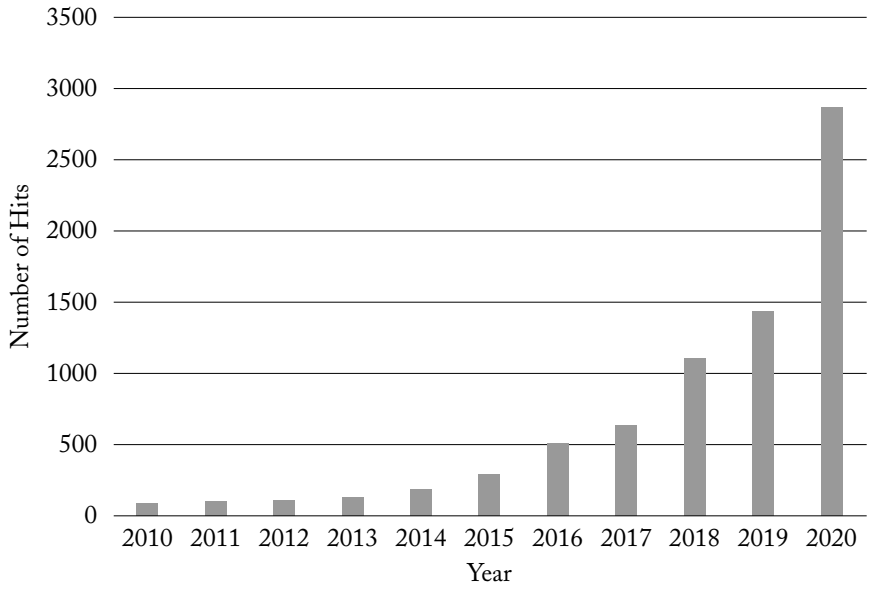
[12] Google Trends measures the number of Google search queries for a term over time. For an explanation of Google Trends, including its methodology, see FAQ ABOUT GOOGLE TRENDS DATA, https://support.google.com/trends/answer/4365533?hl=en&ref_topic=6248052 [https://perma.cc/JXZ5-2UDH].

[13] According to Google Trends, "[n]umbers represent search interest relative to the highest point on the chart for the given region and time. A value of 100 is the peak popularity for the term. A value of 50 means that the term is half as popular. A score of 0 means there was not enough data for this term." *Id.*

[14] *See, e.g.*, Meagan Flynn, Katie Shepherd, Teo Armus, Hannah Knowles, Alex Horton & Isaac Stanley-Becker, *Mass Protests and Mayhem Continue Into a Sixth Night; Thousands Nationwide are Arrested During Weekend*, WASH. POST (June 1, 2020), https://www.washingtonpost.com/nation/2020/05/31/george-floyd-protests-live-updates/ [https://perma.cc/R8QL-AVG9]; Jeremy Gorner, Madeline Buckley & Paige Fry, *Mayor Imposes Curfew After Chaotic Scenes Unfold in Loop, Near North Side as Protestors Clash with Police During Demonstration Over Death of George Floyd in Minneapolis*, CHI. TRIB. (May 31, 2020), https://www.chicagotribune.com/news/breaking/ct-loop-protests-property-damage-20200530-ncvxjtwglnfoddlyj4yuhd6lwm-story.html [https://perma.cc/A9XD-JPR2]; David Gonzalez, *New York's Days of Protest: What It Looked Like From the Streets*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/nyregion/nyc-protest-photos.html [https://perma.cc/VX39-RLHQ]; Ruben Vives & Dakota Smith, *L.A. Reels From Looting and Arrests Not Seen in Decades*, L.A. TIMES (May 31, 2020), https://www.latimes.com/california/story/2020-05-31/l-a-reels-from-looting-and-arrests-not-seen-in-decades [https://perma.cc/U3U2-4Z5R].

Media references to the term "people of color" have also grown significantly over the past ten years. In fact, this growth is remarkable. The following table illustrates the number of times the term "people of color" appeared in three major news sources (*New York Times*, *Los Angeles Times*, and *Boston Globe*) between 2010 and 2020.

TABLE 2: MEDIA REFERENCES TO PEOPLE OF COLOR[15]



While informative, this data offers little explanation.[16] When did the term "people of color" originate? What did it first mean? What does it now mean? And who is a "person of color?"

This Article explores the history of the term "people of color," and its current status in a country struggling to overcome its racist origins.[17] It is

[15] This data was compiled using LexisNexis® for Law Schools and was then recorded in Microsoft Excel. The columns represent aggregated data for the three media sources (*New York Times*, *Los Angeles Times*, and *Boston Globe*) and include the total number of hits per year.

[16] For similar measurements of the term "people of color" in various sources, see PÉREZ, *supra* note 7, at 41–63.

[17] This Article references historical documents and court opinions that include words that are racist or, at best, archaic. Such references reflect a past that is both hateful and hurtful. But in keeping with this Article's purpose—to engage in a meaningful dialogue about color, race, power, and privilege—it is necessary to include these words when exploring the meaning of color. However, some words can be modified while still retaining historical and descriptive accuracy. *See, e.g.*, Eric Zorn, *Language Matters: The Shift From "Slave" to "Enslaved Person" May Be Difficult, But It's Important*, CHI. TRIB. (Sept. 6, 2019), https://www.chicagotribune.com/columns/eric-zorn/ct-column-slave-enslaved-language-people-first-debate-zorn-20190906-audknctayrarfijimpz6uk7hvy-story.html [https://perma.cc/3N6T-XLX7]; Katy Waldman, *Slave or Enslaved Person?*, SLATE (May 19, 2015), https://slate.com/

informed by critical race theory, which examines the role of race in the United States and how law has been used to subordinate people of color for centuries.[18] Part I reviews the term's journey, from its European roots to its contemporary usage in the United States. For centuries, "people of color" was a term with legal significance, but it also served other purposes. Reflecting the influence of social and political factors, its meaning has changed throughout history. In the United States, "people of color" now describes a broad set of individuals from distinct racial and ethnic groups who are not members of the white community.[19] The term's meaning is complicated because the white community is also neither monolithic nor static. Indeed, collective terminology will always suffer from some imprecision. Human beings are unique and complex, with overlapping identities that can obfuscate categorization. Collective terminology also raises concerns about essentialism.[20] Recognizing these challenges, Part II examines the debate surrounding the term's extant meaning and use. This debate can be traced to the "names controversy" of the nineteenth century, a time of robust deliberation about collective terminology within the Black community.[21] Modern critics argue the term "people of color" marginalizes its own members and perpetuates the significance of color in society.[22] Advocates, however, recognize the truth, power, and consequences of color. They point out the common struggles faced by people of color, and the need to coalesce in response to white privilege.[23] Finally, Part III acknowledges history and celebrates the value of

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human-interest/2015/05/historians-debate-whether-to-use-the-term-slave-or-enslaved-person.html [https://perma.cc/LY55-25VB].

[18] *See generally* KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2018); DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS (3d ed. 2014); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed., 1999); CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé W. Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas. eds., 1996); Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215 (2002).

[19] The question of "who is a white person" has been asked for over a century. The answer was often framed in racist terms. *See, e.g.*, R.L.H., Jr., *Aliens: Naturalization: Who is a "White" Person?*, 11 CALIF. L. REV. 349 (1923); L.I. Shelley, *Constitutional Law: Naturalization: Who is a White Person?*, 2 CORNELL L.Q. 115 (1916–17).

[20] *See, e.g.*, Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193 (2019); Kenneth B. Nunn, *"Essentially Black:" Legal Theory and the Morality of Conscious Racial Identity*, 97 NEB. L. REV. 287 (2018); Dorothy E. Roberts, *BlackCrit Theory and the Problem of Essentialism*, 53 U. MIAMI L. REV. 855 (1999); Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERK. WOMEN'S L.J. 16 (1995); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

[21] *See generally* STERLING STUCKEY, SLAVE CULTURE: NATIONAL THEORY AND THE FOUNDATIONS OF BLACK AMERICA 224 (2013); GINA PHILOGENE, FROM BLACK TO AFRICAN AMERICAN: A NEW SOCIAL REPRESENTATION (1999); Ben L. Martin, *From Negro to Black to African American: The Power of Names and Naming*, 106 POL. SCI. Q. 83 (1991). The names controversy is not unique to the Black community and has confronted other communities. SUZANNE OBOLER, ETHNIC LABELS, LATINO LIVES: IDENTITY AND THE POLITICS OF (RE)PRESENTATION IN THE UNITED STATES (1995); IRVING LEWIS ALLEN, UNKIND WORDS: ETHNIC LABELING FROM REDSKIN TO WASP (1990).

[22] *See infra* Section III.B.

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

this collective terminology. The term "people of color" reflects a shared history among diverse communities and generates power against hierarchy. While the term no longer has legal significance, this Article argues "people of color" is a term that should be embraced.

The term "people of color" does not exist in isolation. It only exists as the antipode to the white community.[24] It is important, however, to distinguish between the white community and white(ness). In this Article, white(ness) reflects the privilege of the white community that also generates the marginalization of people of color.[25] Accordingly, this Article concludes with a provocative assertion—it is time to end the connection between the white community and white(ness).[26] Because language is easily misinterpreted or co-opted, an important clarification is necessary. The "end of white(ness)" is directed at ending the racial hierarchy that established white as the baseline and all other colors in opposition and subordination. It is targeted at ending white privilege and the corresponding burden of color. In this Article, the "end of white(ness)" serves no other purpose.[27]

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[24] *See* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 21 (rev. ed. 2006) ("[I]t is clear that White identity is tied inextricably to non-White identity as its positive mirror, its superior opposite."); TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION 52 (1993) ("Africanism is the vehicle by which the American self knows itself as not enslaved, but free; not repulsive, but desirable; not helpless, but licensed and powerful; not history-less but historical; not damned but innocent; not a blind accident of evolution, but a progressive fulfillment of destiny.").

[25] There is a long history on the study of white(ness). *See, e.g.*, STEVE GARNER, WHITENESS: AN INTRODUCTION (2008); WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM (Ashley W. Doane & Eduardo Bonilla-Silva eds., 2003); CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997); DISPLACING WHITENESS: ESSAYS IN SOCIAL AND CULTURAL CRITICISM (Ruth Frankenberg ed. 1997); France Winddance Twine & Charles Gallagher, *The Future of Whiteness: A Map of the "Third Wave,"* 31 ETHN. & RACIAL STUD. 4 (2008).

[26] There is also a long history of studies on the "end of whiteness." *See, e.g.*, MALCOLM X, THE END OF WHITE WORLD SUPREMACY (2020); Eric Kerl, *The End of Whiteness*, RAMPANT MAG. (Dec. 16, 2020), https://rampantmag.com/2020/12/the-end-of-whiteness/ [https://perma.cc/8A8U-R8WC]; Hua Hsu, *The End of White America?*, THE ATLANTIC (Jan./Feb. 2009), https://www.theatlantic.com/doc/200901/end-of-whiteness [https://perma.cc/5JCL-9AGE]; Michael Morris, *Book Review: Standard White: Dismantling White Normativity*, 104 CALIF. L. REV. 949 (2016); Such studies even extend beyond the United States. *See, e.g.*, NICKY FALKOF, THE END OF WHITENESS: SATANISM AND FAMILY MURDER IN LATE APARTHEID SOUTH AFRICA (2016).

[27] This is a controversial topic. *See, e.g.*, Ibram X. Kendi, *The Mantra of White Supremacy*, THE ATLANTIC (Nov. 30, 2021), https://www.theatlantic.com/ideas/archive/2021/11/white-supremacy-mantra-anti-racism/620832/ [https://perma.cc/DXF7-4L62]; Senator Mike Lee, *Critical Race Theory Attacks What it Means to Be an American*, DESERET NEWS (July 13, 2021), https://www.deseret.com/opinion/2021/7/13/22575354/critical-race-theory-attacks-what-it-means-to-be-an-american [https://perma.cc/6WS8-W4EH]; *Extremists See Critical Race Theory as Evidence of "White Genocide,"* ADL (June 30, 2021), https://www.adl.org/blog/extremists-see-critical-race-theory-as-evidence-of-white-genocide [https://perma.cc/UX6Y-FXQP]; Claudia Rankine, *I Wanted to Know What White Men Thought About Their Privilege. So I Asked*, N.Y. TIMES MAG. (July 17, 2019), https://www.nytimes.com/2019/07/17/magazine/white-men-privilege.html?campaign_id=9&emc=edit_nn_20220111&instance_id=49977&nl=the-morning&regi_id=71008608&segment_id=79338&te=1&user_id=5e04a0445b11014b4d78d942bb5d19b9 [https://perma.cc/PM9Y-CKB9]; Joshua Rothman, *The Origins of "Privilege,"*

It is undoubtedly simplistic to assert that words matter.[28] But accurate descriptions are essential for honest conversations.[29] And words convey meanings beyond their etymology and syntax.[30] In discussions about race and racial identity, the term "people of color" is routinely used as the antipode to white(ness). Yet little thought is given to its history or meaning. To engage in a meaningful dialogue about color, race, power, and privilege, there is value in exploring the history and meaning of the words we use.[31]

I. Exploring the History of People of Color

Perhaps reflecting the most primitive of human observations, distinctions of people based on skin color can be traced to antiquity. Yet these distinctions did not always reflect racial or ethnic superiority.[32] That associa-

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New Yorker (May 12, 2014), https://www.newyorker.com/books/page-turner/the-origins-of-privilege [https://perma.cc/5F7N-US8L].

[28] The phrase "words matter" is routinely used in conversations about race. *See, e.g.*, Noel A. Cazenave, Conceptualizing Racism: Breaking the Chains of Racially Accommodative Language ix (2016); Louis Capstick, *Why Words Matter*, Oxford Blue (June 20, 2020), https://www.theoxfordblue.co.uk/2020/06/25/why-words-matter/ [https://perma.cc/44GJ-A2DA]; Alia E. Dastagir, *"Riots," Violence," "Looting:" Words Matter When Talking About Race and Unrest, Experts Say*, USA Today (May 31, 2020), https://www.usatoday.com/story/news/nation/2020/05/31/george-floyd-riots-violence-looting-words-matter-experts-say/5290908002 [https://perma.cc/6LBK-P6KL]; Quin Hillyer, *Beyond "Racism," Let's Get Language Right*, Wash. Examiner (July 16, 2019), https://www.washingtonexaminer.com/opinion/beyond-racism-lets-get-language-right; Esther J. Cepeds, *"Black Words Matter,"* St. Louis Am. (Dec. 31, 2014), http://www.stlamerican.com/news/columnists/guest_columnists/black-words-matter/article_9ad82d76-9072-11e4-b890-f7dff6a8d6e6.html [https://perma.cc/WLX2-PFG7].

[29] *See generally* Patricia Hill Collins, *Intersectionality's Definitional Dilemmas*, 41 Ann. Rev. Socio. 1 (2015); SpearIt, *Enslaved by Words: Legalities & Limitations of "Post-Racial" Language,* 2011 Mich. St. L. Rev. 705; Karen Finlon Dajani, *Other Research: What's in a Name? Terms Used to Refer to People with Disabilities*, 21 Disability Stud. Q. 196 (2001); Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 Am. Soc. Rev. 465 (1996); Martha Minow, *Words and the Door to the Land of Change: Law Language, and Family Violence*, 43 Vand. L. Rev. 1665 (1990).

[30] Even the capitalization of words conveys a message. *See* Nancy Coleman, *Why We're Capitalizing Black*, N.Y. Times (July 5, 2020), https://www.nytimes.com/2020/07/05/insider/capitalized-black.html [https://perma.cc/2HH9-LHLZ] (describing the decision to capitalize the word "Black"); John Eligon, *A Debate Over Identity and Race Asks, Are African-Americans "Black" or "Black?*," N.Y. Times (June 27, 2020), https://www.nytimes.com/2020/06/26/us/black-african-american-style-debate.html [https://perma.cc/TS53-R9R3] (addressing the debate whether to capitalize "black"); Associated Press, *Race-Related Coverage*, AP-Stylebook (2022), https://www.apstylebook.com/race-related-coverage [https://perma.cc/8TFG-VW5G] (stating that "[o]missions and lack of inclusion can render people invisible and cause anguish.").

[31] Questions about identity and meaning of color have existed for decades, if not centuries. *See, e.g.*, F. James Davis, Who is Black? One Nation's Definition (1991). Even courts have asked the question, "[W]hat is white?" *Ex parte* Shahid, 205 F. 812, 813 (E.D. S. Car. 1913).

[32] *See* Henry Louis Gates, Jr. & Andrew S. Curran, Who's Black and Why?: A Hidden Chapter from the Eighteenth-Century Invention of Race xii (Henry Louis Gates, Jr. & Andrew S. Curran eds., 2022); Denise Eileen McCoskey, Race: Antiquity and its Legacy 8–11, 23–26 (2019); Nell Irvin Painter, The History of White People 1 (2010); Frank M. Snowden, Jr., Before Color Prejudice: The Ancient

tion came later, and is most often attributed to the European colonial era and the rise of the transatlantic slave trade. As sailing ships extended the reach of colonial powers, a new nomenclature to distinguish groups based on color became necessary for several reasons.[33] It established separation between individuals of European ancestry and other groups. It supported the racial hierarchy that would be used to justify the occupation of foreign lands and the enslavement of human beings. And, it was used to describe the growing diversity of humanity—from the discovery of new peoples around the world to the progeny of mixed-race relations, or what some referred to as miscegenation.[34] The Age of Discovery found more than just land: "It was in the making of the New World that humans were set apart on the basis of what they looked like, identified solely in contrast to one another, and ranked to form a caste system based on a new concept called race."[35]

A. 1607–1865: Slavery in America

In the United States, the term "people of color" has long been associated with slavery, segregation, and racial subordination.[36] These connections first arrived on American shores with the colonists of the Jamestown settlement in 1607, which set the foundation for the arrival of enslaved people in

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VIEW OF BLACKS 66–67 (1983); Anton L. Allahar, *When Black First Became Worth Less*, 34 INT'L J. COMP. SOC. 39 (1993). *But see* BENJAMIN ISAAC, THE INVENTION OF RACISM IN CLASSICAL ANTIQUITY (2006) (arguing that early forms of proto-racism existed in the Greek and Roman worlds).

[33] *See* Gates & Curran, *supra* note 32, at xiii–xiv; MCCOSKEY, *supra* note 32, at 3–4; ANDREW S. CURRAN, THE ANATOMY OF BLACKNESS: SCIENCE & SLAVERY IN AN AGE OF ENLIGHTENMENT (2011); Winthrop D. Jordan, *First Impressions*, *in* THEORIES OF RACE AND RACISM 37 (Les Back & John Solomos eds., 2d ed. 2009); MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE 8–9, 30–38 (1999); ST. CLAIR DRAKE, BLACK FOLK HERE AND THERE (1987); REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 3 (1981).

[34] *See* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY 10, 20, (2003). *See generally* PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA (2010); ELISE LEMIRE, "MISCEGENATION:" MAKING RACE IN AMERICA (2002); Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIA. L. REV. 1219, 1221 (1999).

[35] ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 53 (2020). In contrast, George Fredrickson argues that racism can trace its origins to religion and the rise of antisemitism in Europe. *See* GEORGE M. FREDRICKSON, RACISM: A SHORT HISTORY 19 (2002).

[36] *See* NATSU TAYLOR SAITO, SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS 1 (2020); DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 281–82 (2d ed. 1988); Ariela Gross & Alejandro de la Fuente, *The History of Slavery Remains With Us Today*, WASH. POST (Mar. 9, 2020), https://www.washingtonpost.com/outlook/2020/03/09/history-slavery-remains-with-us-today/ [https://perma.cc/LVH6-L5UB]; DANYELLE SOLOMON, CONNOR MAXWELL & ABRIL CASTRO, CTR. AM. PROGRESS, SYSTEMATIC INEQUALITY AND ECONOMIC OPPORTUNITY (2019), https://www.americanprogress.org/issues/race/reports/2019/08/07/472910/systematic-inequality-economic-opportunity/ [https://perma.cc/U5RJ-T4ZT].

1619.[37] Yet, color did not only refer to skin color; it also served as a proxy for race, class, ancestry, and national origin. On some occasions, the term "people of color" was used to designate enslaved people of African origin.[38] This reflects its most narrow definition. On other occasions, its meaning was broader and there was a clear distinction between "the African race and people of color."[39] Thus, the term included individuals who were of African or Native American ancestry, individuals who were of mixed African and European ancestry, and individuals of mixed African and Native American ancestry.[40] Over time, the term "people of color" would be used to describe an even broader swath of humanity.[41] These labels had legal consequences, and color would eventually play an integral role in the law.[42] Because of this, designating someone as a person of color was a life-altering decision.[43] The legal consequences of color were significant and would continue for centuries.[44]

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[37] *See* JAMES HORN, 1619: JAMESTOWN AND THE FORGING OF AMERICAN DEMOCRACY 85 (2018). Some scholars argue the first enslaved people arrived in the Americas in the 16th century with Spanish explorers. *See, e.g.,* MICHAEL GUASCO, SLAVES AND ENGLISHMEN: HUMAN BONDAGE IN THE EARLY MODERN ATLANTIC WORLD (2016).

[38] 2 DEFINITIONS OF WORDS AND PHRASES 1274–75 (Editorial Staff Nat'l Reporter System ed., 1904).

[39] JAMES PYLE WICKERSHAM, A HISTORY OF EDUCATION IN PENNSYLVANIA 253 (1886); *see also* SOCIETY OF FRIENDS, A STATISTICAL INQUIRY INTO THE CONDITION OF THE PEOPLE OF COLOR, OF THE CITY AND DISTRICTS OF PHILADELPHIA 5–8 (1848).

[40] *See* JACK D. FORBES, AFRICANS AND NATIVE AMERICANS: THE LANGUAGE OF RACE AND THE EVOLUTION OF RED-BLACK PEOPLES 239, 259–60 (2d ed. 1993); ALRUTHEUS AMBUSH TAYLOR, THE NEGRO IN SOUTH CAROLINA DURING THE RECONSTRUCTION 43–44 (1924); BRYAN EDWARDS, THE HISTORY, CIVIL AND COMMERCIAL, OF THE BRITISH WEST INDIES 1 (5th ed. 1819); *see also* State v. Chavers, 50 N.C. 11, 15–16 (1857) (defining free persons of color as "persons coloured by Indian blood, or persons descended from negro ancestors beyond the fourth degree").

[41] *See generally* JULIE WINCH, BETWEEN SLAVERY AND FREEDOM: FREE PEOPLE OF COLOR IN AMERICA FROM SETTLEMENT TO THE CIVIL WAR (2014); David L. Horowitz, *Color Differentiation in the American Systems of Slavery*, 3 J. INTERDISC. HIST. 509 (1973).

[42] *See* Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 3 (Angela J. Davis ed., 2017); ALEXANDER, *supra* note 8, at 8–13; Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063 (1993).

[43] *See* WINCH, *supra* note 41, at xiv; ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2008); *see also* State v. Belmont, 35 S.C.L. 445, 448 (1848) (assessing whether an individual was a "'free person of color,' and entitled to no other rights or privileges than those which appertain to all such persons, whether mulattoes, mestizos, Indians, or negroes"); Cauchoix v. Dupuy, 3 La. 206, 207 (1831) (finding the plaintiff was "not a man of color"). *See generally* Michael A. Elliott, *Telling the Difference: Nineteenth-Century Legal Narratives of Racial Taxonomy*, 24 L. & SOC. INQ. 611 (1999); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998); Daniel v. Guy, 19 Ark. 121 (1857) (determining whether an individual was white and thereby entitled to freedom).

[44] *See generally* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016) (examining how modern crime legislation perpetuates racial inequality and poverty); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010) (describing the historical connection between race and crime); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account,* 94 N.Y.U. L. REV. 1465 (2019); Dorothy E. Roberts, *Abolition Constitu-*

References to "people of color" can be found throughout the colonial era and the early years of the Republic.[45] In 1782, for example, a Virginia Quaker made a proposal to establish a private school "for the Instruction of the Children of Blacks and people of Color."[46] The school would teach "the principles of virtue and religion" and other subjects that would "render so numerous a people fit for freedom and to become useful Citizens."[47] In 1793, a North Carolina newspaper announced the arrival in Maryland of a ship with "people of color and negroes" onboard.[48] In 1797, the Supreme Court of Pennsylvania used the term "people of colour" in a decision freeing two enslaved women.[49] This varied usage is representative of how the term was used throughout the country and across U.S. history.

References to "free people of color"—individuals who were born free, were emancipated, escaped, or were granted manumission from slavery—also appear throughout U.S. history.[50] From the founding of the Virginia Colony in 1607, the scourge of slavery resulted in legal distinctions between free men and women, enslaved people, and "free people of color."[51] This

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tionalism, 133 HARV. L. REV. 1 (2019); Edward J. Littlejohn, *Black Before the Bar: A History of Slavery, Race Laws, and Cases in Detroit and Michigan: American Law, Slaves, and Freedmen: 1619–1860*, 18 J.L. SOC'Y 1 (2018).

[45] *See, e.g.*, Act of Nov. 2, 1795, ch. 16, 1795 N.C. Sess. Laws 70, 79 (imposing certain restrictions on free persons of color); Private Act of Nov. 2, 1795, ch. 41, 1795 N.C. Sess. Laws 70, 84 (emancipating "Frank, a person of colour"); *see also* RICK STATTLER, GUIDE TO MANUSCRIPTS AT THE RHODE ISLAND HISTORICAL SOCIETY RELATING TO PEOPLE OF COLOR (June 24, 2004), https://www.rihs.org/mssinv/PeopleofColorweb.htm [https://perma.cc/Z2Q7-3SY3].

[46] WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812, at 357 (1968); *see also* STEPHEN BEAUREGARD WEEKS, SOUTHERN QUAKERS AND SLAVERY: A STUDY IN INSTITUTIONAL HISTORY 215 (1896).

[47] VI VIRGINIA HISTORICAL SOCIETY, COLLECTIONS OF THE VIRGINIA HISTORICAL SOCIETY 18 (1887).

[48] *Domestic Articles: Maryland*, FAYETTEVILLE GAZETTE (N.C.), (July 30, 1793), at 3 (referencing "people of color and negroes" on board arriving French ships).

[49] Respublica v. Blackmore, 2 Yeates 234, 239 (1797); *see also* Evans v. Kennedy, 2 N.C. 422, 422 (1796) (describing an enslaved person as a person of color). The U.S. Supreme Court first used the term "people of color" in 1813. Queen v. Hepburn, 11 U.S. 290, 299 (1813) (Duvall, J., dissenting) ("And people of color from their helpless condition under the uncontrolled authority of a master, are entitled to all reasonable protection."). The term "person of color" was first used by the Supreme Court in 1810. The Brigantine Amiable Lucy v. United States, 10 U.S. (6 Cranch) 330, 330 (1810) (referencing the 1803 Act of Congress that used the term "person of color").

[50] *See generally* EMILY WEST, FAMILY OR FREEDOM: PEOPLE OF COLOR IN THE ANTEBELLUM SOUTH (2012); PAUL HEINEGG, FREE AFRICAN AMERICANS OF NORTH CAROLINA, VIRGINIA, AND SOUTH CAROLINA: FROM THE COLONIAL PERIOD TO ABOUT 1820 (5th ed. 2005); JAY HINSBRUNER, NOT OF PURE BLOOD: THE FREE PEOPLE OF COLOR AND RACIAL PREJUDICE IN NINETEENTH CENTURY PUERTO RICO (1996); NEITHER SLAVE NOR FREE: THE FREEDMAN OF AFRICAN DESCENT IN THE SLAVE SOCIETIES OF THE NEW WORLD (David William Cohen & Jack P. Greene eds., 1972); JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA, 1790-1860 (1971); JOHN BELTON O'NEALL, THE NEGRO LAW OF SOUTH CAROLINA (1848); COMMITTEE OF THE WHOLE HOUSE, 15TH CONGRESS, REPORT ON COLONIZING THE FREE PEOPLE OF COLOUR OF THE UNITED STATES (Comm. Print 1817).

[51] *See* JAMES OLIVER HORTON, FREE PEOPLE OF COLOR: INSIDE THE AFRICAN AMERICAN COMMUNITY 2-3 (1993); LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860 (1961); Sherri Burr, *The Free Blacks of Virginia: A Personal*

nomenclature followed European practice, which distinguished between those who were enslaved or subject to indentured servitude and those who were free.[52] The American colonies would continue this practice.[53] Its use in the United States would grow as free people of color, known as *gens de couleur*, arrived from the Caribbean.[54]

Free people of color held a unique position and became prominent advocates of abolition, including Frederick Douglass, Harriet Tubman, and Sojourner Truth.[55] Many free people of color could own property and operate businesses, and many played prominent roles in their states.[56] Yet free people of color were still subject to discrimination, such as being unable to vote, to serve as witnesses in legal proceedings, or to possess firearms.[57] Even the most basic acts could give rise to legal liability. In Alabama, for example, free people of color could be prosecuted for simply writing a letter or note on behalf of an enslaved person.[58] In Georgia, the failure of a free person of

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Narrative, A Legal Construct, 19 J. GENDER, RACE & JUST. 1 (2016); A. Leon Higginbotham, Jr. & Greer C. Bosworth, *"Rather Than the Free:" Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17 (1990).

[52] *See* MATT CHILDS, FREE PEOPLE OF COLOR 3 (2011); 2 STEFAN GOODWIN, AFRICA IN EUROPE: INTERDEPENDENCIES, RELOCATIONS, AND GLOBALIZATION 62–68 (2009); MAGNUS MÖRNER, RACE MIXTURE IN THE HISTORY OF LATIN AMERICA 56–60 (1967); Irene Diggs, *Color in Colonial Spanish America*, 38 J. NEGRO HIST. 403 (1953).

[53] By 1790, the U.S. population stood at approximately 3,939,000 people. Within this population, there were 697,000 enslaved people and 59,000 free people of color. CARROLL D. WRIGHT, THE HISTORY AND GROWTH OF THE UNITED STATES CENSUS, S. DOC. NO. 194, at 17 (1900). *See* PATHS TO FREEDOM: MANUMISSION IN THE ATLANTIC WORLD 6 (Rosemary Brana-Schute & Randy J. Sparks eds., 2009); NORAH L.A. GHARALA, TAXING BLACKNESS: FREE AFROMEXICAN TRIBUTE IN BOURBON NEW SPAIN 3 (2019); LIBERIAN DREAMS: BACK-TO-AFRICA NARRATIVES FROM THE 1850S x (Wilson Jeremiah Moses ed., 1998).

[54] HORTON, *supra* note 51, at 140; IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 35 (1974).

[55] *See generally* CATHERINE CLINTON, HARRIET TUBMAN: THE ROAD TO FREEDOM (2004); NELL IRVIN PAINTER, SOJOURNER TRUTH: A LIFE, A SYMBOL (1996); NATHAN IRVIN HUGGINS, SLAVE AND CITIZEN: THE LIFE OF FREDERICK DOUGLASS (1980).

[56] MARY GEHMAN, THE FREE PEOPLE OF COLOR OF NEW ORLEANS: AN INTRODUCTION 12–14 (2017); Higginbotham & Bosworth, *supra* note 51, at 34–39. *See, e.g.*, Parks v. Hewlett, 36 Va. (9 Leigh) 511 (1838) (affirming the right of free people of color in Virginia to inherit property); Wilson v. Shackleford, 25 Va. (4 Rand.) 5 (1826) (affirming the right of free people of color in Virginia to sue).

[57] *See* WARREN EUGENE MILTEER, JR., NORTH CAROLINA'S FREE PEOPLE OF COLOR, 1715-1885, at 244 (2020); FRANK MAROTTI, HEAVEN'S SOLDIERS: FREE PEOPLE OF COLOR AND THE SPANISH LEGACY IN ANTEBELLUM FLORIDA 50, 129–31 (2013); State v. Newson, 27 N.C. 250, 250 (1844) (holding that "free people of color" are not considered citizens "in the largest sense of the term"); Groning v. Devana, 18 S.C.L. (2 Bail) 192, 192 (1831) (holding that a free person of color is not a competent witness). There were some exceptions to the restrictions imposed on free people of color although these were often temporary. *See* Act of Dec. 23, 1833, § 7, 1833 Ga. Acts 226, 228 (declaring that "it shall not be lawful for any free person of colour in this state, to own, use, or carry firearms of any description whatever").

[58] ALA. CODE § 32 (Slaves, and Free Persons of Color), *in* A DIGEST OF THE LAWS OF THE STATE OF ALABAMA 397 (John G. Aiken ed., 2d ed. 1836). Violation of this provision would result in "thirty-nine lashes on the bare back" and would require the free person of color to leave the state within thirty days. *Id.* The failure to leave the state would result in forfeiture of liberty, and the free person of color would "be sold as a slave for the term of ten years. . . ."

color to pay taxes could result in temporary enslavement, and "the status of the free person of color during the time of hiring is that of a slave."[59]

The U.S. Constitution makes no reference to color or "people of color," although it distinguishes between "free Persons," "Indians," and "all other Persons."[60] To be clear, "all other Persons" meant enslaved people who, for purposes of taxation and calculating legislative representation, would be considered "three-fifths" of "free Persons."[61] In addition, the Constitution provided that any "Person held to Service or Labour in one State" would not gain their freedom by escaping to another State.[62] Like the Three-Fifths Clause, the Fugitive Slave Clause did not reference color or "people of color." To protect slavery, the Constitution precluded any congressional legislation prohibiting the "migration or importation of such persons as any of the States now existing shall think proper to admit" until 1808.[63] And to ensure this restriction remained in place, the Constitution prohibited any constitutional amendment of this provision until 1808.[64] Through careful drafting and terminology, the drafters of the Constitution avoided using the terms "slave" or "slavery." However, the document would still affect people of color for centuries.[65]

In 1797, a group of four freemen of color petitioned Congress for relief from future enslavement.[66] They had been granted manumission in North Carolina and had fled to Pennsylvania. Fearing capture and return to bondage, they submitted a petition to the House of Representatives. After spirited debate, Congress declined to act.[67] A larger group filed a similar petition to Congress in 1799, titled "*The Petition of the People of Colour, Freemen*

Id. This was a common offense in many Southern states. *See* An Act Concerning Slaves and Free Persons of Color, N.C. Revised Code No. 105, Ch. 6, § 2 (1816) [hereinafter 1816 N.C. Act] ("No slave to teach another to read.").

[59] GA. PENAL CODE §1826 (1861); *see also* Ralph B. Flanders, *The Free Negro in Ante-Bellum Georgia*, 9 N.C. HIST. REV. 250, 262–63 (1932).

[60] U.S. CONST. art. I, § 2. *See generally* Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009, 1031 (1993); David Hall, *The Constitution and Race: A Critical Perspective*, 5 N.Y. L. SCH. J. HUM RTS. 229 (1988).

[61] U.S. CONST. art. I, § 2. Howard A. Ohline, *Republicanism and Slavery: Origins of the Three-Fifths Clause of the United States Constitution*, 28 WM. & MARY Q. 563 (1971).

[62] U.S. CONST. art. IV, § 2, cl. 3. For a general overview of the antebellum debate over the interpretation of the Fugitive Slave Clause, see H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 L. & HIST. REV. 1133 (2012).

[63] U.S. CONST. art. I, § 9, cl. 1.

[64] U.S. CONST. art. V.

[65] *See* Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1460 (2012) ("One of the ironies of the U.S. Constitution is that although it was clearly designed to accommodate the interests of slaveholding states, the word 'slavery' first appears in the Constitution in the Thirteenth Amendment, which claims to abolish slavery forever.").

[66] Nicholas P. Wood, *A "Class of Citizens:" The Earliest Black Petitioners to Congress and Their Quaker Allies*, 74 WM. & MARY Q. 109, 111 (2017). Similar petitions were filed in state legislatures. *See, e.g.*, THE BLACK PRESENCE IN THE ERA OF THE AMERICAN REVOLUTION 268 (Sidney Kaplan & Emma Nogrady Kaplan eds., rev. ed. 1989) (describing petition by three Black men to the South Carolina legislature "on behalf of themselves & other Free-Men of Colour").

[67] Wood, *supra* note 66, at 114.

Within the City, and Suburbs of Philadelphia," seeking relief "from the oppression and violence which so great a number of like colour and National Descent are subjected."[68] This second petition sought to challenge the slave trade and slavery. While both petitions were rejected by Congress, they reflected growing political activism by people of color and the move for abolition.[69]

The first reference to "person of color" in federal law occurred in 1803, when Congress adopted An Act to Prevent the Importation of Certain Persons into Certain States, Where, by the Laws Thereof, Their Admission is Prohibited.[70] The law banned any person from bringing into a state that had prohibited their entry "any negro, mulatto, or other person of colour" who was not "a native, citizen, or registered seaman of the United States, or seamen natives of countries beyond the Cape of Good Hope. . . ."[71] This language suggests the term "person of color" originally applied to individuals who were similar to, yet distinct from, Black people and persons of mixed white and Black ancestry. This interpretation is supported by the legislative history. During deliberations in the House of Representatives, several statements were made highlighting the distinction between "negroes, mulattoes, and persons of color."[72]

This federal law was adopted primarily at the request of southern states, which were concerned about the rise of free people of color in the United States, and viewed the successful slave rebellion in Haiti and the "contagion of liberty" with trepidation.[73] By prohibiting importation, slave states hoped to maintain control over the existing slave populations within their states. To comply with the Constitution, this law only applied to those states that had prohibited the entry of any "negro, mulatto, or other person of colour" into their territory.[74] Sanctions for violating the law were significant. Breaches would give rise to the payment of $1,000 for each "negro, mulatto, or other person of colour."[75] In addition, the ship or vessel bringing in such persons would be subject to forfeiture.[76] Case law reveals a varied meaning to the

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[68] WOODY HOLTON, BLACK AMERICANS IN THE REVOLUTIONARY ERA: A BRIEF HISTORY WITH DOCUMENTS 127–30 (2009); *see also* THE BLACK PRESENCE IN THE ERA OF THE AMERICAN REVOLUTION, *supra* note 66, at 267–72.

[69] Wood, *supra* note 66, at 114.

[70] An Act to Prevent the Importation of Certain Persons into Certain States, Where, by the Laws Thereof, Their Admission is Prohibited, ch. 10, 2 Stat. 205 (1803) [hereinafter 1803 Act]. *See generally* Paul Finkelman, *The First Federal Human Rights Legislation: Suppressing the African Slave Trade*, 3 CRIT. 20 (2010).

[71] 1803 Act, *supra* note 70, at § 1.

[72] 7 ANNALS OF CONG. 470–72 (1803).

[73] WINCH, *supra* note 41, at 40; *see also* DAVID SCOTT FITZGERALD & DAVID COOK MARTIN, CULLING THE MASSES: RACIST IMMIGRATION POLICY IN THE AMERICAS 89 (2014).

[74] 1803 Act, *supra* note 70, at § 1.

[75] *Id.*

[76] *Id.* at § 2.

term "people of color," with legal decisions using the term to identify both enslaved people and free citizens of other countries.[77]

When the constitutional restriction prohibiting legislation to end the migration or importation of enslaved people ceased, Congress adopted the Act to Prohibit the Importation of Slaves Into Any Port or Place Within the Jurisdiction of the United States in 1807.[78] The statute was drafted to end the slave trade in the United States and applied to "any negro, mulatto, or person of colour."[79] Significantly, the statute took effect on January 1, 1808—the first day that Congress could enact such a law under the Constitution.[80] Despite language which suggests a distinction among these three groups, subsequent practice reveals the term "person of color" was often used interchangeably with "negroes" and "colored persons."[81] Other federal statutes also distinguished between "negroes, mulattoes, and persons of colour."[82] State laws used similar terminology.[83]

In 1816, the Society for the Colonization of Free People of Color of America was established by an American pastor in New Jersey and gradually gained support from abolitionist groups.[84] It would soon change its name to the American Colonization Society.[85] The organization proposed the relocation of free people of color from the United States to a colony in west Africa.

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[77] *See, e.g.*, The Wilson v. United States, 30 Fed. Cas. 239 (No. 17846) (C.C.D. Va. 1820) (referring to free people of color as free citizens of a foreign state). *See generally* Jeffrey Orenstein, *Joseph Almeida: Portrait of a Privateer, Pirate and Plaintiff, Part II*, 12 GREEN BAG 35, 50–52 (2008); W. Howard Mann, *The Marshall Court: Nationalization of Private Rights and Personal Liberty from the Authority of the Commerce Clause*, 38 IND. L.J. 117, 120–25 (1963).

[78] Ch. 22, 2 Stat. 426 (1807).

[79] *Id.* at § 1.

[80] Pursuant to Article I of the Constitution, Congress did not have the authority to end the slave trade until 1808 at the earliest. U.S. CONST., art. I, § 9, cl. 1. *See* Paul Finkelman, *The American Suppression of the African Slave Trade: Lessons on Legal Change, Social Policy, and Legislation*, 42 AKRON L. REV. 431, 460–63 (2009).

[81] *See, e.g.*, United States v. Preston, 28 U.S. (3 Pet.) 57, 61, 64 (1830); The Josefa Segunda 18 U.S. (5 Wheat.) 338, 339 (1820); *see also Restoration of a Danish Slave*, 1 OP. ATT'Y GEN. 566 (1822) (using the term "people of color" in reference to enslaved people).

[82] *See* Act of Mar. 3, 1819, ch. 101, 3 Stat. 532; Act of Apr. 20, 1818, ch. 91, 3 Stat. 450.

[83] *See, e.g.*, An Act for the Better Regulation of Free Negroes and Persons of Color, and for Other Purposes, Act of Dec. 21, 1822, No. 2277, 7 Stat S.C. 461 (1822); Elkison v. Deliesseline, 8 F. Cas. 493 (C.C.D.S. Car. 1823); *see also* 2 FREE BLACKS, SLAVES, AND SLAVEOWNERS IN CIVIL AND CRIMINAL COURTS 1–22 (Paul Finkelman ed., 1988) (describing legal challenge to South Carolina law that allowed for the arrest and detention of free people of color who entered the ports of the state); Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215, 2231–32 (2021).

[84] *See* ROBERT FINLEY, THOUGHTS ON THE COLONIZATION OF FREE BLACKS (1816); Henry N. Sherwood, *Early Negro Deportation Projects*, 2 MISS. HIST. REV. 484 (1916). Proposals to establish a home for former enslaved people in west Africa had been considered for many years. *See* WINCH, *supra* note 41, at 36–37 (discussing the Free African Society and the Newport African Union); CARL B. WADSTROM, AN ESSAY ON COLONIZATION, PARTICULARLY APPLIED TO THE WESTERN COAST OF AFRICA (1794) (addressing the establishment of a colony in Africa for Blacks and people of colour).

[85] *See generally* ERIC BURN, SLAVERY AND THE PECULIAR SOLUTION: A HISTORY OF THE AMERICAN COLONIZATION SOCIETY (2005); Henry Noble Sherwood, *The Formation of the American Colonization Society*, 2 J. NEGRO HIST. 209 (1917).

"People of color" meant individuals of African ancestry, and "free people of color" were those individuals who were no longer enslaved.[86] This proposal proved highly controversial.[87] Some Black people refused to leave the United States for a continent they did not know. Others denounced it as a racist ploy to remove Black people from the United States. Frederick Douglass argued African Americans had a right to remain in the United States as "American citizens."[88] Advocates supported the proposal because it offered both freedom and a future to people of color.[89] Many enslavers supported the proposal because it would remove the growing population of free persons of color from the United States. In 1819, Congress even adopted legislation authorizing the President "to appoint a proper person or persons, residing on the coast of Africa, as agent or agents for receiving negroes, mulattoes, or persons of colour, delivered from on board of vessels seized in the prosecution of the slave trade."[90] However, a subsequent opinion by the Attorney General indicated the Act did not grant the President authority to purchase land in Africa "for the purposes of a settlement" or to transport any free people of color living in the United States to Africa.[91] Eventually, thousands migrated to Africa and settled in the territory that would become the independent country of Liberia.[92]

Government use of the term "people of color" continued throughout the nineteenth century, primarily motivated by states seeking to perpetuate white control over an enslaved population and white privilege over free people of color.[93] For example, Georgia's criminal law distinguished between

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[86] The term "people of color" was also used by other abolitionist groups. *See, e.g.*, VINCENT HARDING, THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA 139 (1981) (describing the work of the New York Association for the Elevation and Improvement of People of Color).

[87] *See* A. Leon Higginbotham, Jr. & F. Michael Higginbotham, *"Yearning to Breathe Free:" Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1231–32 (1993).

[88] JOHN STAUFFER, GIANTS: THE PARALLEL LIVES OF FREDERICK DOUGLASS AND ABRAHAM LINCOLN 80 (2008). *See generally* DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM (2018).

[89] *See* MEMOIR OF CAPTAIN PAUL CUFFEE, A MAN OF COLOUR: TO WHICH IS JOINED THE EPISTLE OF THE SOCIETY OF SIERRA LEONE, IN AFRICA (1812). Cuffee's work in bringing free people of color to Africa would help inspire the establishment of the American Colonization Society; *see also* WINCH, *supra* note 41, at 57–60; PENNSYLVANIA COLONIZATION SOCIETY, REPORT OF THE BOARD OF MANAGERS OF THE PENNSYLVANIA COLONIZATION SOCIETY, WITH AN APPENDIX (1830).

[90] Act of Mar. 3, 1819, ch. 101, 3 Stat. 532; *see also* The Antelope, 23 U.S. 66 (1825) (discussing the Act).

[91] *Suppression of the Slave-Trade*, 1 OP. ATT'Y GEN. 314, 316 (1819).

[92] *See generally* MARIE TYLER-MCGRAW, AN AFRICAN REPUBLIC: BLACK AND WHITE VIRGINIANS IN THE MAKING OF LIBERIA (2014); CLAUDE ANDREW CLEGG III, THE PRICE OF LIBERTY: AFRICAN AMERICANS AND THE MAKING OF LIBERIA (2004).

[93] The term "persons of color" was regularly used as a form of self-identification by Blacks. *See, e.g.*, *Disabilities of American Persons of Color*, N.Y. HERALD, (Jan. 24, 1860), at 4 (describing the inability of a Black woman to receive a U.S. passport because she was a "person of color"); DAVID WALKER, WALKER'S APPEAL, IN FOUR ARTICLES; TOGETHER WITH A PREAMBLE, TO THE COLOURED CITIZENS OF THE WORLD, BUT IN PARTICULAR, AND VERY

whites, enslaved people, and free persons of color.[94] North Carolina adopted the same typology.[95] In a world where rights were defined by color, definitions took on added significance. Many state statutes defined membership in these groups with great detail. Florida law provided that "[t]he words 'negro,' 'colored,' 'colored persons,' 'mulatto' or 'persons of color,' when applied to persons, include every person having one-eighth or more of African or negro blood."[96] In South Carolina, a person of color "is to be understood in our law, at this day, to mean a person descended from a negro within the fourth degree inclusive, though an ancestor in each intervening generation was white."[97]

While the term was often used to define and limit legal rights, the Black community also began using the term "people of color" as a form of collective terminology.[98] Reluctant to use either "African American" or "negro," some groups chose "people of color." For example, the African Baptist Church of Boston changed its name and became the First Independent Church of the People of Color in the 1830s because congregants believed "the name African is ill applied to a church composed of American citizens."[99] "Negro" posed concerns because of its connection to a word that was recognized as offensive and an extreme disparagement even in the nineteenth century.[100] Other groups seeking to define their unique status within the Black community used the term "free people of color," such as Philadelphia's Society of Free People of Color and New York's Society of Free People of Color.[101] In 1827, the inaugural issue of *Freedom's Journal*—the first national newspaper published by the Black community in the United

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EXPRESSLY, TO THOSE OF THE UNITED STATES OF AMERICA 12, 19, 58, 62 (1830) (addressing the plight of "men of colour" and "people of color").

[94] GA. PENAL CODE, Pt. 4, Tit. 3, Ch. 1 (1861) (titled "Slaves and Free Persons of Color"), *see also* BERLIN, *supra* note 54, at 94–95 (describing Georgia legislature's concerns in 1808 regarding the movement of "free negroes and persons of color").

[95] *See* 1816 N.C. Act, *supra* note 58, at § 1. *See generally* WILLIAM L. BYRD, III, NORTH CAROLINA GENERAL ASSEMBLY SESSIONS RECORDS: SLAVES AND FREE PERSONS OF COLOR, 1709–1789 (2011).

[96] REV. GEN. ST. 1920, § 3939; COMP. GEN. LAWS 1927, § 5858 (FL.), *see also* Albert Ernest Jenks, *The Legal Status of Negro-White Amalgamation in the United States*, 21 AM. J. SOCIO. 666 (1916).

[97] State v. Dempsey, 31 N.C. 384, 388 (1849). Connecticut used a similar definition. *See* Johnson v. Town of Norwich, 29 Conn. 407, 408 (1860) (defining a person having "one-fourth negro blood" to be a person of color).

[98] PATRICK RAEL, BLACK IDENTITY AND BLACK PROTEST IN THE ANTEBELLUM NORTH 103, 106, 148 (2002).

[99] PATRICK RAEL, EIGHTY-EIGHT YEARS: THE LONG DEATH OF SLAVERY IN THE UNITED STATES, 1777–1865, at 148 (2015); *see also* HORTON, *supra* note 51, at 159; JAMES OLIVER HORTON & LOIS E. HORTON, IN HOPE OF LIBERTY: CULTURE, COMMUNITY AND PROTEST AMONG NORTHERN FREE BLACKS, 1700–1860, at 201 (1996).

[100] *See* JOHN DILLARD, CASTLE AND CLASS IN A SOUTHERN TOWN 47 (1947); R.B. LEWIS, LIGHT AND TRUTH: COLLECTED FROM THE BIBLE AND ANCIENT AND MODERN HISTORY, CONTAINING THE UNIVERSAL HISTORY OF THE COLORED AND THE INDIAN RACE, FROM THE CREATION OF THE WORLD TO THE PRESENT TIME 342 (1844); J.C. Embry, *Afro-American vs Negro*, *reprinted in* 32 NEGRO HIST. BULL. 18 (1969).

[101] *See* FINLEY, *supra* note 84, at 1; THE BLACK PRESENCE IN THE ERA OF THE AMERICAN REVOLUTION, *supra* note 66, at 104; AUGUST MEIER & ELLIOTT RUDWICK, FROM PLANTATION TO GHETTO 110 (3d. ed. 1976).

States—expressed its commitment to support "free persons of color."[102] Another prominent newspaper, *The Colored American*, used the terms "free people of color," "colored people," and "colored Americans" interchangeably.[103] But even the term "free people of color" would eventually be shortened to simply "people of color" within the Black community as a "universalizing gesture" of solidarity.[104]

The movement to use the term "people of color" was not without criticism. Some Black leaders were suspicious of any collective terminology defined by race or color. Noted abolitionist William Whipper was a leading critic of terms that used "color" or "colored," arguing "the baneful effects of distinctions founded in hatred and prejudice."[105] Other critics also denounced "complexional distinctions."[106] While significant, these concerns did not generate sufficient traction within the Black community to displace the term "people of color."[107] A common response to those who challenged "complexional distinctions" was that color came from God, and "[t]hat we are colored, is a fact, an undeniable fact."[108] Henry H. Garnet, who would become the first Black man to speak in the U.S. House Chamber, offered a more pragmatic response: "[h]ow unprofitable it is for us to spend our golden moments in long and solemn debate upon the question whether we shall be called '*Africans*,' '*Colored Americans*' or '*Africo Americans*,' or '*Blacks*.' The question should be, my friends, *shall we arise and act like men, and cast off this terrible yoke?*"[109] However, the names controversy would always remain in the background of the Black experience. Other terms, including colored people, colored Americans, and Afro Americans, would also be used for decades.

The use of the term "people of color" is further evidenced in the Colored Conventions.[110] Beginning in 1830, Black advocates of abolition

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[102] *See* Editor, *To Our Patrons*, FREEDOM'S JOURNAL (Mar. 16, 1827), at 1, https://web.archive.org/web/20150209163534/http://www.wisconsinhistory.org/pdfs/la/FreedomsJournal/v1n01.pdf [https://perma.cc/YSC7-GXHK].

[103] THE COLORED AMERICAN (Mar. 4, 1837), https://sismo.inha.fr/files/original/1b88d58b0e6603f538d672025bd8d66d419722d6.jpeg [https://perma.cc/DPY8-RH8W]. The weekly newspaper was originally published as *The Weekly Advocate*, and its name change reflected its focus on the Black community.

[104] RAEL, *supra* note 99, at 148.

[105] Nat'l Reformer 18–19 (Oct. 1838), *quoted in* JULIE WINCH, A GENTLEMAN OF COLOR: THE LIFE OF JAMES FORTEN 310 (2002).

[106] BENJAMIN QUARLES, BLACK ABOLITIONISTS 57 (1969); *see also* STUCKEY, *supra* note 21, at 232; GEORGE A. LEVESQUE, BLACK BOSTON: AFRICAN AMERICAN LIFE AND CULTURE IN URBAN AMERICA, 1750–1860, at 129 (1994).

[107] *See* RAEL, *supra* note 98, at 102–15.

[108] THE COLORED AMERICAN (Mar. 13, 1841); *see also* STUCKEY, *supra* note 21, at 248.

[109] HENRY H. GARNET, THE PAST AND PRESENT CONDITION, AND THE DESTINY OF THE COLORED RACES: A DISCOURSE 17–18 (1848) (emphasis in original).

[110] *See generally* THE COLORED CONVENTIONS MOVEMENT: BLACK ORGANIZING IN THE NINETEENTH CENTURY (P. Gabrielle Foreman, Jim Casey & Sarah Lynn Patterson eds., 2021) [Hereinafter THE COLORED CONVENTIONS MOVEMENT]; MINUTES OF THE PROCEEDINGS OF THE NATIONAL NEGRO CONVENTIONS, 1830–1864 (Howard Holman Bell ed., 1969); HOWARD HOLMAN BELL, A SURVEY OF THE NEGRO CONVENTION MOVEMENT 1831–1861 (reprint 1969) (1953).

and racial equality convened a series of local, regional, and national meetings to organize their communities. Many of these meetings were initiated in response to racial attacks against free people of color.[111] In September 1830, free people of color from five states convened at the Mother Bethel AME Church in Philadelphia.[112] The meeting was called in response to a series of racially motivated attacks against the Black community in Cincinnati.[113] At this first meeting, the delegates called for the establishment of the American Society of Free Persons of Colour.[114] Its mission was to address emancipation and racial equality in the United States. It would also work to purchase land and create a settlement for free people of color in Canada.[115] The following year, the First Annual Convention of the People of Colour was held in Philadelphia.[116] While there was continued support for the establishment of a Canadian settlement, there was striking opposition to the work of the American Colonization Society and its proposal to establish a colony in west Africa.[117] At this meeting, delegates called for improving "the general character of the coloured population" in the United States. For example, delegates proposed establishing a school for "Young Men of Color" in New Haven, Connecticut.[118]

In subsequent years, similar conventions were held throughout the United States and addressed a multitude of issues, including emancipation, labor rights, education, temperance, and health care.[119] The Colored Conventions reflected the growing activism of people of color and their struggle for racial equality. Black leaders would continue to organize meetings during the antebellum period and throughout the Reconstruction era.[120]

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[111] *See* RAEL, *supra* note 99, at 145; WINCH, *supra* note 41, at 76; P. Gabrielle Foreman, *Black Organizing, Print Advocacy, and Collective Authorship*, *in* THE COLORED CONVENTIONS MOVEMENT, *supra* note 110, at 21.

[112] CONSTITUTION OF THE AMERICAN SOCIETY OF FREE PERSONS OF COLOUR, FOR IMPROVING THEIR CONDITION IN THE UNITED STATES; FOR PURCHASING LANDS; AND FOR THE ESTABLISHMENT OF A SETTLEMENT IN UPPER CANADA, ALSO THE PROCEEDINGS OF THE CONVENTION, WITH THEIR ADDRESS TO THE FREE PERSONS OF COLOUR IN THE UNITED STATES 9 (1831), https://omeka.coloredconventions.org/items/show/70 [https://perma.cc/24CR-B94W].

[113] *See* Foreman, *supra* note 111, at 21; MEIER & RUDWICK, *supra* note 101, at 124–25.

[114] Foreman, *supra* note 111, at 5.

[115] *See id.* at 10.

[116] Minutes and Proceedings of the First Annual Convention of the People of Colour (1831), https://omeka.coloredconventions.org/items/show/72 [https://perma.cc/R727-Y8QE].

[117] *See id.* at 5 ("We cannot for a moment doubt, but that the cause of many of our unconstitutional, unchristian, and unheard of sufferings, emanate from that unhallowed source; and we would call on Christians of every denomination firmly to resist it.").

[118] *Id.* at 6.

[119] *See* MINUTES OF THE PROCEEDINGS OF THE NATIONAL NEGRO CONVENTIONS, *supra* note 110, at ii; Shawn C. Cominey, *National Black Conventions and the Quest for African-American Freedom and Progress, 1847–1867*, 91 INT'L SOC. SCI. REV. 1 (2015); Jane H. Pease & William H. Pease, *Negro Conventions and the Problem of Black Leadership*, 2 J. BLACK STUD. 29 (1971).

[120] *See* Foreman, *supra* note 111, at 40. *See generally* KATE MASUR, UNTIL JUSTICE BE DONE: AMERICAN'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (2021).

In 1846, "Dred Scott, a man of color," filed his Petition to Sue for Freedom in Missouri state court.[121] Scott's wife, "Harriett, a woman of color," filed a similar petition.[122] Their pleas were rejected by the Missouri Supreme Court in *Emmerson v. Dred Scott (of Color)*[123] and again in *Scott, A Man of Color v. Emerson*.[124] The use of the term "of color" in the caption of these lawsuits was consistent with the Missouri statute authorizing such lawsuits.[125] In fact, dozens of freedom lawsuits were brought in Missouri courts.[126] While filed in a receptive jurisdiction, the cases reflect the challenges facing enslaved persons seeking freedom. As noted by the Missouri Supreme Court, "*color* raises the presumption of slavery, and until the contrary is shown, a man or woman of color is deemed to be a slave . . . in slaveholding states."[127]

In 1853, Scott filed a new petition in federal court, alleging subject matter jurisdiction under the federal diversity statute. Three years later, the U.S. Supreme Court issued its infamous decision in *Dred Scott v. Sandford*, holding that Scott, a man of African descent, was not a U.S. citizen.[128] Referring to several federal statutes, the Court noted "[p]ersons of color . . . were not included in the word citizens, and they are described as another and different class of persons. . . ."[129] As such, Scott could not file suit in federal court under the diversity statute. While the decision addressed the legal status of enslaved Black people, the Court also spoke of other groups. In its decision, the Court differentiated among the "white," "black," and "red"

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[121] Petition for Leave to Sue for Freedom (Dred Scott), St. Louis Circuit Court (Apr. 6, 1846) (on file with author). *See generally* PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS (2d ed. 2016); David Thomas Konig, *The Long Road to Dred Scott: Personhood and the Rule of Law in the Trial Court Records of St. Louis Slave Freedom Suits*, 75 UMKC L. REV. 54 (2006).

[122] Harriett's case was eventually subsumed by Dred Scott's petition, which was a strategic error because Harriett had a more compelling claim from freedom than her husband. *See generally* Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1088–89 (1997).

[123] 11 Mo. 413 (1848). The caption of the case misspelled the name of Dr. John Emerson, Scott's putative owner. Oddly, another misspelling occurred when Scott's case was heard by the U.S. Supreme Court. The caption of that case misspelled the name of John Sanford, who then claimed ownership of Scott and his family.

[124] 15 Mo. 576 (1852).

[125] *See* An Act to enable persons of color held in slavery to sue for freedom, 1825 Mo. Laws. 404. *See, e.g.*, Winny v. Whitesides, 1 Mo. 472 (Miss. Sup. Ct. 1824). The original complaint filed in 1818 was titled *Winney a free Blackwoman v. Phebe Pruitt*. *See University Libraries: Winny vs Phebe Whitesides (alias Pruitt)* http://repository.wustl.edu/concern/texts/8w32r6647 [https://perma.cc/7YV7-83DK].

[126] For an overview of freedom lawsuits filed in Missouri courts, see Robert Moore, Jr., *A Ray of Hope, Extinguished: St. Louis Slave Suits for Freedom*, 14 GATEWAY HERITAGE 5 (1994).

[127] Rennick v. Chloe, 7 Mo. 197, 203 (1841) (emphasis in original); *see also* Moore, *supra* note 126, at 12–14.

[128] 60 U.S. 393 (1857).

[129] *Id.* at 420 (citing to 1813 statute that provided it shall be unlawful to employ, "on board of any public or private vessels of the United States, any person or persons except citizens of the United States, *or* persons of color, natives of the United States.") (emphasis in original).

races and the corresponding rights afforded to each group.[130] It also distinguished between "colored persons" and members of "the Indian race."[131] But there was a clear hierarchy among these groups. The Court referred to the inferiority of the "black race" twenty-nine times.[132] The Native American population fared no better, as they were labeled uncivilized and in a "state of pupilage."[133]

The Supreme Court's affirmation of slavery in *Dred Scott* set the stage for the Civil War and the military defeat of the Confederacy.[134] But while slavery ended in 1865, the color line remained.

B. 1865–1954: Reconstruction and the Rise of Segregation

Distinctions based on color, and laws targeting people of color, continued after the Civil War. In fact, the first Black Codes—state and local laws designed to perpetuate the subordination of newly freed enslaved people—were adopted within months of the war's end.[135] Beginning in Mississippi and soon followed by South Carolina, these laws were eventually implemented by most southern states to limit the freedom of "persons of color."[136] These laws imposed punitive sanctions for the most mundane acts so that local officials could compel continued servitude from free men and women despite emancipation and the ratification of the Thirteenth Amendment.[137]

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[130] *Id.* at 404, 407, 410.

[131] *Id.* at 403. In dissent, Justice Curtis made a brief reference to "people of color." *Id.* at 574 (Curtis, J., dissenting).

[132] Higginbotham & Bosworth, *supra* note 51, at 19.

[133] *Dred Scott*, 60 U.S. at 404. The federal courts, including the Supreme Court, have a long and sordid history of using racist language to describe Native Americans. *See* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005).

[134] *See generally* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN LAW AND POLITICS 712 (1978); ROBERT K. CARR, THE SUPREME COURT AND JUDICIAL REVIEW 208 (1942); Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97 (2007); Faith Joseph Jackson, Dred Scott v. Sandford: *A Prelude to the Civil War*, 15 RICH. J. L. & PUB. INT. 377 (2011).

[135] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 199–201 (1988); BERLIN, *supra* note 54, at 382; DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 83–90 (2d ed. 1973); THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 98–99 (1965); REPORTS OF ASSISTANT COMMISSIONERS OF FREEDMEN, AND SYNOPSIS OF LAWS ON PERSONS OF COLOR IN LATE SLAVE STATES, S. EXEC. DOC. NO. 6, 39th Cong., 2d Sess., (1867).

[136] In South Carolina, for example, the Black Code of 1865 applied only to "persons of color," which was defined as anyone with more than one-eighth Negro blood. *See* 3 RACE AND ETHNICITY IN AMERICA: FROM PRE-CONTACT TO THE PRESENT 28 (Russell M. Lawson & Benjamin A. Lawson eds., 2019). *See generally* MONROE N. WORK, NEGRO YEAR BOOK 62, 69 (1912) (describing the treatment of people of color in several states); *The Negro Term*, THE INDIANAPOLIS RECORDER, Nov. 23, 1912, at 4 (describing how several states defined "a person of color").

[137] *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); JANE PURCELL GUILD, BLACK LAWS OF VIRGINIA (1995); THEODORE B. WILSON, THE BLACK CODES OF THE SOUTH (1965); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Injunctions*, 107 YALE L.J. 2249 (1998).

In North Carolina, the state legislature adopted laws to ensure that "all persons of color" would effectively be subject to the same restrictions that governed them prior to emancipation.[138] Even the terminology of the Black Codes was meant to perpetuate the slave era. In South Carolina, state law provided that "[a]ll persons of color who make contracts for service or labor, shall be known as servants, and those with whom they contract, shall be known as masters."[139]

While the Thirteenth Amendment was passed to make permanent the Emancipation Proclamation and the Union's military victory over the slave states, the Fourteenth and Fifteenth Amendments served a different purpose—to ensure equality for newly freed enslaved people and all African Americans.[140] Of the three post-war Reconstruction amendments, the Fifteenth Amendment alone references color.[141] Ratified in 1870, the Fifteenth Amendment provided "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."[142]

In *The Slaughter-House Cases*, the Supreme Court considered the meaning of the newly adopted Reconstruction amendments.[143] While these cases were ostensibly about the right of butchers in New Orleans to challenge state legislation under the Thirteenth and Fourteenth Amendments, race and color permeated the Court's opinion. According to the Court, the Reconstruction amendments were adopted in response to legislation in the former slave states, which had reacted to emancipation by enacting a series of punitive laws that imposed "upon the colored race onerous disabilities and burdens and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value. . . ."[144] But while the Reconstruction amendments had been ratified in response to discrimination that targeted those of African descent, the Court noted they were not limited to "negro slavery," and that they could address other races and colors, such as "the Mexican or Chinese race within our territory."[145] Despite this broad language, the Court narrowly interpreted the Fourteenth Amend-

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[138] An Act Concerning Negroes and Persons of Color or of Mixed Blood, Act of Mar. 10, 1866, Ch. 40 §§ 1–5, 1866 N.C. Sess. Laws 99–101. In fact, the 1866 Act echoed legislation adopted before the Civil War. *See* 1816 N.C. Act, *supra* note 58.

[139] An Act to Establish and Regulate the Domestic Relations of Persons of Colour, and to Amend the Law in Relation to Paupers and Vagrancy, § XXXV, 1865 S.C. Acts, 13 Stat. 269 (1865).

[140] *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 55, 93 (2019); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 10 (2004).

[141] The Civil Rights Act of 1866 references color, but in a different way. It required "[a]ll persons within the jurisdiction of the United States" to have the same rights and benefits as those "enjoyed by white citizens. . . ." Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

[142] U.S. CONST. amend. XV, § 1.

[143] 83 U.S. (16 Wall.) 36 (1872).

[144] *Id.* at 70.

[145] *Id.* at 72.

ment, and this construction would hamper the assertion of constitutional rights for decades.[146]

In response to Reconstruction, many of the Black Codes were rescinded, but they were soon replaced by the equally discriminatory features of Jim Crow legislation.[147] While these laws began in northern states, their most pernicious forms appeared in the South.[148] Yet again, state and local governments passed legislation promoting segregation along racial lines, although skin color was often the defining feature. These laws used various words and phrases, including "colored," "colored people," "person of color," and "people of color," to limit access to public and private resources and venues.[149] Other laws, while silent on color, were only used against people of color.[150] For example, literacy tests, poll taxes, and residency requirements were routinely used to limit Black voting rights while grandfather clauses protected white suffrage.[151] Jim Crow laws addressed every facet of life, including access to public and private accommodations, transportation, voting, employment, medicine, education, social activities, and even religion.[152]

In *Plessy v. Ferguson*, the Supreme Court legalized the principle of "separate but equal," and upheld the prosecution of Homer Plessy for violating a Louisiana statute requiring separate railway cars for "the white and colored races."[153] Throughout its decision, the Court referenced the terms "colored race," "colored persons," "colored people" as well as both "people of color" and "persons of color."[154] These terms were used interchangeably by the Court. That Plessy would even be subject to the restrictions of the Separate

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[146] *See* David S. Bogen, *Rebuilding the* Slaughter-House: *The Cases' Support for Civil Rights*, 42 AKRON L. REV. 1129 (2009); Kevin Christopher Newson, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643 (2000).

[147] *See* WILLIAM STURKEY, HATTIESBURG: AN AMERICAN CITY IN BLACK AND WHITE 4–6 (2019); HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW 7 (2019); RICHARD WOOMSER, THE RISE AND FALL OF JIM CROW 130 (2003).

[148] *See* WOOMSER, *supra* note 147, at 130. *See generally* STATES' LAWS ON RACE AND COLOR (Pauli Murray ed., 1997).

[149] For example, Alabama defined "[t]he term 'mulatto' or 'person of color,' . . . [as] a person of mixed blood, descended, on the part of the father or mother, from negro ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person." ALA. REV. CODE, Pt. I, Title I, ch. 1, § 2(4) (1897). *See generally* David Martin, *The Birth of Jim Crow in Alabama: 1865-1896*, 13 NAT'L BLACK L.J. 184 (1993). Georgia defined "persons of color" to include "[a]ll negroes, mulattoes, and their descendants, having any ascertainable trace of . . . either Negro or African, West Indian, or Asiatic Indian blood in his or her veins. . . ." GA. CODE ANN. § 79–103 (1927).

[150] *See, e.g.*, ALA. REV. CODE, Pt. IV, Title I, ch. 5, § 3630 (1896) ("Any person who, having no visible means of support, or being dependent on his labor . . . must each, on conviction for the first offense, be fined . . . .").

[151] *See* CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 3–6 (2018); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 111 (2000); Note, *The Grandfather Clause and the Fifteenth Amendment*, 24 HARV. L. REV. 388 (1911).

[152] *See* STURKEY, *supra* note 147, at 83–86; WOOMSER, *supra* note 147, at 12.

[153] 163 U.S. 537 (1896). *See generally* STEVE LUXENBERG, SEPARATE: THE STORY OF PLESSY V. FERGUSON, AND AMERICA'S JOURNEY FROM SLAVERY TO SEGREGATION (2019).

[154] *Plessy*, 163 U.S. at 546, 549, 551, 557. *See generally* Glenn Rifkin, *Homer Plessy, Who Sat on a Train and Stood Up for Civil Rights*, N.Y. TIMES, (Feb. 3, 2020).

Car Act reveals how entrenched views on color and race were at the time.[155] Plessy was a man "of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood" and, in fact, "the mixture of colored blood was not discernible in him."[156] Unlike most southern states, Louisiana did not define the meaning of the terms "colored race" or "people of color."[157] Plessy argued this omission alone justified the reversal of his conviction for violating the Separate Car Act because it granted the railway conductor unfettered power to decide his status and fate.[158] In raising this point to the Court, Plessy noted "that there are almost as many definitions of the terms, 'colored persons' and 'persons of color,' as there are lexicographers and courts of the highest resort in the several states of the Union."[159] Yet once the conductor concluded that Plessy was a person of color and was, therefore, excludable from the whites-only car, this "finding of fact" was never in dispute, and the Court declined to address it.[160]

Plessy empowered federal, state, and local governments to perpetuate a brutal system of legalized repression and racial subordination that extended well into the twentieth century.[161] As a result, distinctions based on color continued.

At the state level, the meaning of color varied by time and geography. In fact, a defining feature of the term "people of color" is its changing meaning.[162] While Black people were always considered "people of color," other groups were categorized as members at different times and for different reasons. In Mississippi, for example, Chinese Americans were considered "people of color" and, therefore, they were subject to the burdens and ignominies attached to that status. The U.S. Supreme Court upheld this treatment in *Gong Lum v. Rice*, which held the exclusion of a Chinese American child from a Mississippi high school did not violate the Equal Protection Clause.[163] The Court found the segregationist principles set forth in *Plessy* applied with equal rigor to legislation calling for separation of "white pupils

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[155] It is significant that *Plessy v. Ferguson* arose out of Plessy's arrest in New Orleans. *Gens de couleur libre* had a long history in the city, and it was a prominent group of Black residents who convinced Plessy to challenge the discriminatory law. *See* LUXENBERG, *supra* note 153, at 431–32; KEITH WELDON MEDLEY, WE AS FREEMEN: *Plessy v. Ferguson* (2003).

[156] *Plessy*, 163 U.S. at 538.

[157] Brief for Plaintiff in Error at 37–39, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 210), 1896 WL 13990 [hereinafter *Plessy* Brief].

[158] *See* LUXENBERG, *supra* note 153, at 469–72.

[159] *Plessy* Brief, *supra* note 157, at 38 (citing definitions from several states, including Louisiana, Michigan, and North Carolina).

[160] *See Plessy*, 163 U.S. at 548–49.

[161] *See* Maureen Johnson, *Separate But (Un)Equal: Why Institutionalized Anti-Racism is the Answer to the Never-Ending Cycle of Plessy v. Ferguson*, 52 U. RICH. L. REV. 327, 337–338 (2017); James C. Cobb, *Segregating the New South: The Origins and Legacy of Plessy v. Ferguson*, 12 GA. ST. U. L. REV. 1017 (1996); John P. Roche, *Plessy v. Ferguson: Requiescat in Pace?*, 103 U. PA. L. REV. 45, 46–47 (1954).

[162] Laws provided detailed criteria for defining "people of color." *See* MONROE N. WORK, NEGRO YEAR BOOK 147 (1914-15) (reviewing definitions of "people of color" from several states).

[163] 275 U.S. 78 (1927).

and the pupils of the yellow races."[164] In contrast, efforts by Georgia state officials to adopt a similar law targeting Chinese Americans failed due to local views that such restrictions were unnecessary.[165] Disparate treatment was the result of numerous factors, including the size of non-white minority groups, their ability to assimilate into the community, local beliefs about color and race, and fears of white majority groups about domination by minority groups.[166] The status and treatment of Mexican Americans as "people of color" throughout the Southwest varied for similar reasons.[167]

At the federal level, the meaning of color also varied across time, and this is most evident in U.S. immigration and nationality laws. Distinctions based on color and race had long appeared in immigration and nationality laws.[168] Since 1790, federal naturalization laws had limited citizenship to "free white persons," thereby excluding other colors and races from U.S. citizenship.[169] At that time, "white" was associated with "European" origins, although some interpretations were narrower.[170] In 1875, eligibility for naturalization was expanded to "aliens of African nativity and to persons of African descent."[171] However, other groups, such as individuals of Chinese ancestry, were subject to explicit exclusion.[172] These distinctions led to numerous challenges and corresponding decisions by U.S. courts that estab-

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[164] *Id.* at 86–87.

[165] *See* STEPHANIE HINNERSHITZ, A DIFFERENT SHADE OF JUSTICE: ASIAN AMERICAN CIVIL RIGHTS IN THE SOUTH 110 (2017). However, equality did not extend to other areas as evidenced by Georgia's anti-miscegenation statutes, which did apply to Chinese Americans. *See id.* at 102.

[166] *See id.* at 109–11; D. WU, THE COLOR OF SUCCESS: ASIAN AMERICANS AND THE ORIGINS OF THE MODEL MINORITY 2–3 (2015); LESLIE BOW, PARTLY COLORED: ASIAN AMERICANS AND RACIAL ANOMALY IN THE SEGREGATED SOUTH 21, 46 (2011).

[167] *See* JENNIFER R. NÁJERA, THE BORDERLAND OF RACE: MEXICAN SEGREGATION IN A SOUTH TEXAS TOWN 17 (2015); Cybelle Fox & Irene Bloemraad, *Beyond "White By Law:" Explaining the Gulf in Citizenship Acquisition between Mexican and European Immigrants, 1930*, 94 SOC. FORCES 181, 184 (2015); Kenneth Prewitt, *Racial Classification in America: Where Do We Go from Here?*, 134 DAEDALUS 5, 7 (2005).

[168] *See generally* Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865-1965)*, 15 GEO. IMMIGR. L.J. 625 (2001). In 1911, the U.S. Immigration Commission, established by Congress to study the subject of immigration, published a book to facilitate the classification of immigrants seeking entry into the United States. U.S. IMMIGRATION COMM'N, DICTIONARY OF RACES OR PEOPLES, S. Doc. No. 61-662 (3d Sess. 1911).

[169] *See, e.g.*, Naturalization Act of 1790, ch. 3, § 2169, 1 Stat. 103-04 (Mar. 26, 1790), Revised Statutes Title XXX (U.S. Comp. Stat. § 4358) [hereinafter Naturalization Act of 1790]; Naturalization Act of 1795, 1 Stat. 414; Naturalization Act of June 18, 1798, 1 Stat. 566; Naturalization Act of April 12, 1802, 2 Stat. 153.

[170] *See, e.g.*, BENJAMIN FRANKLIN, OBSERVATIONS CONCERNING THE INCREASE OF MANKIND, PEOPLING OF COUNTRIES, ETC. ¶ 24 (1755) (arguing "[t]hat the Number of purely white People in the World is proportionably very small," and it excludes those from Africa, Asia, and the Americas as well as numerous Europeans, such as Spaniards, Italians, Russians, Swedes, and most Germans).

[171] Act of Feb. 18, 1875, ch. 80, § 1, 18 Stat. 318.

[172] *See* Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882) (prohibiting the immigration of Chinese laborers into the United States). *See generally* ROGER DANIELS, GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882 (2004); BILL ONG HING, MAKING AND REMAKING ASIA AMERICA THROUGH IMMIGRATION POLICY, 1850-1990 (1993).

lished legal differences to the meaning of white.[173] Dozens of cases attempted to explain who was—and was not—white.[174]

In *Ozawa v. United States*, for example, the Supreme Court considered the application for U.S. citizenship by an individual of Japanese ancestry.[175] "That he was well qualified by character and education" was conceded by federal officials.[176] Yet his application was challenged because he was not considered a "free white person" as required by the naturalization statute.[177] The Supreme Court agreed. To the Court, it was significant that the naturalization statute was intended "to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified."[178] In assessing the meaning of the term "white person," the Court equated color with race and, specifically, "what is popularly known as the Caucasian race."[179] Any other approach would be impracticable because skin color "differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races."[180] Because an individual of Japanese ancestry was "clearly of a race which is not Caucasian," he was not a "free white person" eligible for naturalization.[181] Despite its holding, the Court pointed out that neither the naturalization statute nor its decision implied the "individual unworthiness or racial inferiority" of the Japanese people.[182]

The following year, the Supreme Court issued a similar decision. In *United States v. Bhagat Singh Thind*, the Court considered whether "a high-caste Hindu, of full Indian blood, born in Amritsar, India" was a white person as required by the naturalization statute.[183] The Court acknowledged the complexities of defining both color and race. But the Court declined to apply the racial standard it used in *Ozawa* to assess eligibility. It seemed to recog-

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[173] *See generally* Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595 (2005); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998).

[174] *See, e.g.*, *In re* Burton, 1 AK 111 (1900) (discussing whether a Native American was a white person); *In re* Rodriguez, 81 F. 337 (W.D. Tx. 1897) (discussing whether a Mexican national was white); *Matter of* San C. Po., 7 Misc. 471 (N.Y. Misc. 1894) (discussing whether Burmese national was white); *In re* Kanaka Nian, 21 Pac. (Utah) 993 (1889) (discussing whether a Native Hawaiian was white).

[175] 260 U.S. 178 (1922). *See generally* Devon W. Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633 (2009).

[176] *Ozawa,* 260 U.S. at 189.

[177] Naturalization Act of 1790, *supra* note 169.

[178] *Ozawa*, 260 U.S. at 195.

[179] *Id.* at 197.

[180] *Id.*

[181] *Id.* at 198.

[182] *Id.*

[183] 261 U.S 204 (1923). *See generally* Jennifer Snow, *The Civilization of White Men: The Race of Hindu in* United States v. Bhagat Singh Thind, *in* RACE, NATION, AND RELIGION IN THE AMERICAS 259 (Henry Goldschmidt & Elizabeth McAlister eds., 2004). The U.S. Immigration Service used the term "Hindu" to refer to "any native of India." U.S. IMMIGRATION COMM'N, *supra* note 168, at 75.

nize the speculative processes associated with "ethnological reasoning."[184] Instead, it relied on the common usage of the term "free white persons," as understood by "the common man from whose vocabulary they were taken."[185] The Court indicated the "average man knows perfectly well that there are unmistakable and profound differences between . . . the blond Scandinavian and the brown Hindu."[186] When the words "free white persons" were "interpreted in accordance with the understanding of the common man," it was evident that children born of Hindu parents were ineligible for naturalization, as were all others of Asian ancestry.[187]

In 1952, Congress removed race and color distinctions from immigration and naturalization laws, although the vestiges of these distinctions would remain for decades.[188]

C. 1954–2022: Structural Racism and the Perpetuation of Color

In the midst of the growing civil rights movement and the rise of the Second Reconstruction, the Supreme Court developed a more nuanced understanding of both color and equality.[189] In *Hernandez v. Texas*, the Court considered whether the systematic exclusion of persons of Mexican ancestry from a criminal jury in Jackson County, Texas was a violation of the Equal Protection Clause.[190] To establish the existence of group discrimination, the Court considered evidence from the local community, including signs at the courthouse that directed "Colored Men" and "*Hombres Aqui*" to separate restroom facilities.[191] Based on this evidence, the Court concluded that "persons of Mexican descent" were considered "distinct from 'whites'" in Jackson County.[192] Having established the existence of a discriminatory class, the Court held that constitutional protections extended beyond the "white" and "Negro" classes and included other colors, races, and groups, such as those of Mexican ancestry.[193] As the Court noted, "community prejudices are not static, and from time to time other differences from the community norm

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[184] *Thind*, 261 U.S. at 210.
[185] *Id.* at 209.
[186] *Id.*
[187] *Id.* at 214.
[188] *See* FITZGERALD & MARTIN, *supra* note 73, at 82; Marian L. Smith, *INS Administration of Racial Provisions in U.S. Immigration and Nationality Law Since 1898*, 34 PROLOGUE MAG. 90 (Summer 2002).
[189] *See generally* MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945–2006 (3rd ed. 2007); RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT (2004).
[190] 347 U.S. 475 (1954). *See generally* Ian F. Haney Lopez, *Retaining Race: LatCrit Theory and Mexican American Identity in* Hernandez v. Texas, 2 HARV. LATINO L. REV. 279 (1997); *see also* Kristi L. Bowman, *The New Face of School Desegregation*, 50 DUKE L.J. 1751 (2001).
[191] *Hernandez*, 347 U.S. at 480. In Spanish, the phrase "*Hombres Aqui*" means "men here." The Court determined the phrase was directed at men of Mexican descent.
[192] *Id.* at 479.
[193] *See id.* at 477–78.

may define other groups which need the same protection."[194] The Fourteenth Amendment protected such groups from unequal treatment. *Hernandez* would become even more significant because of another Supreme Court decision issued two weeks later.

In *Brown v. Board of Education*, the Supreme Court ended "separate but equal" as a legal doctrine by holding that the segregation of white and "colored children" violated equal protection.[195] Color could no longer be used in such an explicit and repressive manner. According to the Court, "in the field of public education the doctrine of 'separate but equal' has no place."[196] The Court's reasoning was that segregation in educational settings was unconstitutional because it had "a detrimental effect upon the colored children" by instilling in them "a sense of inferiority."[197] This approach has been subject to some criticism because it relied on social science to reject legal segregation.[198] Nonetheless, *Brown* was both a moral and legal repudiation of *Plessy*. Subsequent decisions extended the equality principles of *Brown* to all facets of American life.[199] Despite these rulings, the inequities generated by entrenched racism ensured that "separate but equal" would be perpetuated in a different form.

This new regime of structural racism—where public and private norms, rules, and institutions reinforce and perpetuate racial inequality—would survive the civil rights battles of the 1960s and would continue into the next century.[200] Unlike its predecessors, which lived openly in law, structural racism is pernicious because it hides in plain sight, even within the pillars of

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[194] *Id.* at 478 ("The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro.").

[195] 347 U.S. 483 (1954). *See generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (2004); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001).

[196] *Brown*, 347 U.S. at 495.

[197] *Id.* at 494.

[198] *See* Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 L. & CONTEM. PROBS. 57 (1978); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955).

[199] *See, e.g.*, Turner v. City of Memphis, 369 U.S. 350 (1962) (equal access to private restaurant located at municipal airport); Johnson v. Virginia, 373 U.S. 61 (1963) (equal access to courtroom); Gayle v. Browder, 352 U.S. 903 (1955) (equal access to bus system); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (equal access to municipal golf course); Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (equal access to public beach).

[200] *See generally* Zinzi D. Bailey, Justin M. Feldman & Mary T. Bassett, *How Structural Racism Works—Racist Policies as a Root Cause of U.S. Racial Health Inequities,* 384 N. ENG. J. MED. 768 (2021); Deborah N. Archer, *"White Men's Roads Through Black Men's Homes: Advancing Racial Equity Through Highway Reconstruction,"* 73 VAND. L. REV. 1259 (2020); Michael Siegel, *Racial Disparities in Fatal Police Shootings: An Empirical Analysis Informed by Critical Race Theory*, 100 B.U. L. REV. 1069 (2020); Dayna Bowen Matthew, *On Charlottesville*, 105 VA. L. REV. 269 (2019); William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KENT. L. REV. 1 (2011); Joe R. Feagin & Bernice McNair Barnett, *Success and Failure: How Systemic Racism Trumped the Brown v. Board of Education Decision*, 2004 U. ILL. L. REV. 1099 (2005); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

the legal system.[201] It does not require animus. Yet, it still bestows privilege to white(ness) and burden to color.

In recent decades, the Supreme Court has not used the term "people of color" in its opinions.[202] Two brief exceptions—albeit in dissenting opinions—are revealing. In *Adarand Constructors, Inc. v. Pena*, for example, the Supreme Court considered the appropriate level of judicial scrutiny for assessing a federal program designed to provide opportunities for socially and economically disadvantaged businesses.[203] The program used "race-based presumptions" to identify such businesses.[204] In a 5-4 decision, the Court acknowledged "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups."[205] Yet the Court still required the program to undergo strict scrutiny—the most rigorous form of judicial review—because consistency in the treatment of race was necessary to achieve equality.[206] In dissent, Justice Stevens rejected the majority's assertion about the need for consistency, arguing that "[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination."[207] Echoing this point, Justice Ginsburg stated that racial inequality continues to exist in this country—manifestations "of a system of racial caste only recently ended. . . ."[208] From job interviews and business transactions to the search for housing, Justice Ginsburg noted "[p]eople of color . . . still face discriminatory treatment."[209] In fact, this discrimination had become structural, as "[b]ias both conscious and unconscious, reflecting traditional and unexamined habits of thought," perpetuated subjugation, and undermined the equal protection of the law.[210] The dissenting opinions made clear that a color-blind approach to racial justice would not achieve equality.

In *Utah v. Strieff*, the Supreme Court upheld an arrest and subsequent conviction for drug possession despite the police officer's lack of a constitutional basis for the initial stop.[211] While this case involved a white defendant,

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[201] *See* JOE R. FEAGIN, SYSTEMIC RACISM: A THEORY OF OPPRESSION (2006); LAWRENCE E. MITCHELL, STACKED DECK: A STORY OF SELFISHNESS IN AMERICA (1998); Eric Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997).

[202] Throughout its history, the Supreme Court has used the term "people of color" in fifteen cases. The Court has used the term "person of color" in sixty-four cases. The Court's use of the term "person of color" typically occurs in citations to state legislation or reports. *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 697 (2019) (Thomas, J., concurring) (referencing congressional report); Bond v. United States, 572 U.S. 844, 892 (Thomas, J., concurring in part) (referencing South Carolina law); McDonald v. City of Chicago, Ill., 561 U.S. 742, 845 (2010) (Thomas, J., concurring in part) (referencing Georgia law). The term "people of color" appears in 113 federal appeals court decisions and 610 district court cases.

[203] 515 U.S. 200 (1995).

[204] *Id.* at 204.

[205] *Id.* at 237.

[206] *Id.* at 224, 229–30.

[207] *Id.* at 243 (Stevens, J., dissenting).

[208] *Id.* at 273 (Ginsburg, J., dissenting).

[209] *Id.*

[210] *Id.* at 274.

[211] 579 U.S. 232 (2016).

the disproportionate impact of police stops on "black and brown" people was evident.[212] Citing the work of W.E.B. Du Bois, James Baldwin, Ta-Nehisi Coates, and Michelle Alexander, Justice Sotomayor noted in dissent that "people of color are disproportionate victims" of suspicionless stops by police.[213] They are, in fact, "canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere."[214] It is difficult to read this passage without thinking of George Floyd, Eric Garner, Breonna Taylor, and countless other Black men and women who have suffocated at the hands and knees of police.

Congressional use of the term "people of color" has changed throughout history.[215] Since the Second Reconstruction, Congress has referenced "color" rather than "people of color" in legislation. The word "color" is identified in civil rights legislation as one of several protected categories.[216] For example, the Civil Rights Act of 1964 prohibits discrimination on the basis of "race, color, religion, sex, or national origin."[217] The Voting Rights Act of 1965 prohibits voting qualifications that deny or abridge the right of any citizen to vote on account of "race or color."[218] The Fair Housing Act of 1968 prohibits discrimination in the sale or rental of housing on the basis of "race, color, religion, sex, familial status, or national origin."[219] Color is acknowledged in other ways, such as through references to ethnicity or minority status.[220] In 2022, the term "people of color" made one brief appearance

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[212] *Id.* at 254 (Sotomayor, J., dissenting).

[213] *Id.* (citing TA-NEHISI COATES, BETWEEN THE WORLD AND ME (2015); MICHELE ALEXANDER, THE NEW JIM CROW (2010); JAMES BALDWIN, THE FIRE NEXT TIME (1963); W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (1903)).

[214] *Id.* (citing LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 274–83 (2002)).

[215] The term "people of color" was used occasionally as a description in federal legislation. *See, e.g.*, Pub. L. 107-255, 116 Stat. 1734 (2002) (Joint Resolution recognizing the work of Patsy Takemoto Mink and her influence on "millions of women and people of color across America"). In contrast, the term "person of color" was used more frequently in federal legislation and often with legal consequences. *See, e.g.*, An Act: Making Appropriations for the Support of the Army for the Year Ending the Thirtieth of June, Eighteen Hundred and Sixty-Five, and for Other Purposes, Ch. 124, 13 Stat. 126 (1864) (providing that all persons of color engaged in U.S. military service shall receive the same equipment and support as all other soldiers).

[216] *See* 42 U.S.C. § 1996b (interethnic adoption); 42 U.S.C. § 2000e-2 (prohibiting unlawful employment practices); 42 U.S.C. § 200e-16b (discriminatory practices prohibited).

[217] Civil Rights Act of 1964, 42 U.S.C. § 2000a.

[218] Voting Rights Act of 1965, 52 U.S.C. § 10101.

[219] Fair Housing Act, 42 U.S.C. § 3601.

[220] For example, the Small Business Administration ("SBA") maintains a program designed to assist small businesses that are owned by "socially disadvantaged individuals." The SBA defines this group to include "those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities." 13 C.F.R. § 124.103(a). There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands,

in federal legislation. The Federal Housing Finance Agency is required to seek diversity in its workforce by placing employment advertisements in publications oriented toward women and "people of color."[221]

Despite the advances of the Second Reconstruction, structural racism still exists within the federal code. Several statutes—with origins in the era of the First Reconstruction—continue to reference "white citizens" as the baseline for assessing equality. For example, 42 U.S.C. § 1981 protects the right of all U.S. citizens to make and enforce contracts as well as to receive the equal benefit of all laws and proceedings "as is enjoyed by white citizens."[222] 42 U.S.C. §1982 protects the right of all U.S. citizens to acquire property "as is enjoyed by white citizens."[223] Thus, both statutes measure compliance by reference to the rights "enjoyed by white citizens."

Some state and local jurisdictions still use the term "people of color" and its derivations. For example, Indiana has established several programs to assist vulnerable populations, including "young persons of color."[224] The Indiana code defines a "young person of color" as anyone under the age of eighteen who belongs to one of the following groups: Black or African American, Hispanic or Latino, Asian, American Indian, Alaska Native, or Native Hawaiian and other Pacific Islander.[225] In Washington, the state legislature created an interagency coordinating council to address health disparities among women and people of color.[226] Massachusetts uses the term in legislation that prohibits discrimination against "colored persons of African descent" in the sale of life insurance policies.[227] Similar references appear in other state codes.[228]

Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); and Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal). *Id.* § 124.103(b). This regulatory provision has been subject to litigation. *See* Vitolo v. Guzman, 999 F.3d 353, 357 (6th Cir. 2021).

[221] 12 U.S.C. § 4520(f)(2).

[222] 42 U.S.C. § 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by *white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.") (emphasis added).

[223] 42 U.S.C. § 1982 ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by *white citizens* thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.") (emphasis added).

[224] IND. CODE § 4-23-30.2-11 (2022).

[225] IND. CODE § 4-23-30.2-7 (2022).

[226] WA. REV. CODE 43.20.270 (2022).

[227] MASS. GEN. LAWS ch. 175, § 122 (2020). While the statute is titled, "Discrimination against Colored Persons of African Descent," the text of the statute uses broader language by referencing "a person of color."

[228] *See, e.g.*, CAL. PUB. CONT. CODE § 2051 (West 2020) (defining "minority" for purposes of certification of minority and women business enterprises to include "an ethnic person of color" who is also a member of an enumerated group).

Finally, the federal census questionnaire reveals the country's changing approach to color.[229] The first census of 1790 asked for information about free white males and females, other free persons, and enslaved people.[230] In the mid-nineteenth century, questionnaires asked about color and distinguished among free whites, free colored persons, and enslaved people.[231] In 1880, the census asked about color and distinguished among individuals who identified as White, Black, Mulatto, Chinese (which included all east Asians), or American Indian. In 1890, the focus on color was replaced by race, and the census questionnaire distinguished among White, Black, Mulatto, Quadroon, Octoroon, Chinese, Japanese, and Indian.[232] Between 1900 and 1940, the census questionnaires asked about color and race but did not distinguish between them. Ironically, it was in the 1920 census that Homer Plessy—a person of color in the Supreme Court's decision of 1897—was identified as white.[233] Reflecting the growing diversity of the U.S. population, the 1930 census included instructions on how to report the race of interracial persons.[234] It also began incorporating questions about American Indians, Mexicans, Filipinos, Hindus, and Koreans. Since 1950, U.S. census questionnaires have focused exclusively on race.

The 2020 federal census questionnaire reflects the diversity of the American population. But it also highlights the complexity and difficulty of creating a taxonomy for classifying human beings.[235] The census questionnaire lists fourteen distinct racial categories: White, Black or African Ameri-

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[229] *See generally* KENNETH PREWITT, WHAT IS YOUR RACE: THE CENSUS AND OUR FLAWED EFFORTS TO CLASSIFY AMERICANS (2013); ENCYCLOPEDIA OF THE U.S. CENSUS (Margo J. Anderson, Constance F. Citro & Joseph J. Salvo eds., 2d ed. 2011); Anna Brown, *The Changing Categories the U.S. Census Has Used to Measure Race*, PEW RESEARCH CENTER (Feb. 25, 2020), https://www.pewresearch.org/fact-tank/2020/02/25/the-changing-categories-the-u-s-has-used-to-measure-race/.

[230] *Index of Questions: 1790*, U.S. CENSUS BUREAU (Dec. 8, 2021), https://www.census.gov/history/www/through_the_decades/index_of_questions/1790_1.html [https://perma.cc/K7EQ-2D5A].

[231] *Index of Questions: 1840*, U.S. CENSUS BUREAU (Dec. 8, 2021), https://www.census.gov/history/www/through_the_decades/index_of_questions/1840_1.html [https://perma.cc/BB45-6T5W].

[232] *Index of Questions: 1890*, U.S. CENSUS BUREAU (Dec. 8, 2021), https://www.census.gov/history/www/through_the_decades/index_of_questions/1890_1.html [https://perma.cc/2TMX-D6N3].

[233] LUXENBERG, *supra* note 153, at 489–90.

[234] *Index of Questions: 1930*, U.S. CENSUS BUREAU (Dec. 8, 2021), https://www.census.gov/history/www/through_the_decades/index_of_questions/1930_1.html [https://perma.cc/Q6RB-ZNKX].

[235] *See* Sujata Gupta, *To Fight Discrimination, the U.S. Census Needs a Different Race Question*, SCIENCENEWS (Mar. 8, 2020), https://www.sciencenews.org/article/census-2020-race-ethnicity-questions [https://perma.cc/G4GG-KP5R]; Janai Nelson, *Counting Change: Ensuring an Inclusive Census for Communities of Color*, 119 COLUM. L. REV. 1399 (2019); Richard Alba, *There's a Big Problem with How the Census Measures Race*, WASH. POST (Feb. 6, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/06/theres-a-big-problem-with-how-the-census-measures-race/ [https://perma.cc/N9WV-X3W8]; Manav Bhatnagar, *Identifying the Identified: The Census, Race, and the Myth of Self-Classification*, 13 TEX. J. CIV. LIB. & CIV. RTS. 85 (2007); Naomi Mezey, *Erasure and National Recognition: The Census, Race and the National Imagination*, 97 NW. L. REV. 1701 (2003).

can, American Indian or Alaska Native, Chinese, Vietnamese, Native Hawaiian, Filipino, Korean, Samoan, Asian Indian, Japanese, Chamorro, other Asian (such as Pakistani, Cambodian, Hmong), and other Pacific Islander (such as Tongan, Fijian, and Marshallese).[236] The census also allows respondents to identify as "some other race." In addition, respondents are asked to identify their origins. For example, respondents who selected White are provided several examples of origins, including German, Irish, English, Italian, Lebanese, and Egyptian.[237] Respondents who selected Black or African American may indicate African American, Jamaican, Haitian, Nigerian, Ethiopian, Somali, or other place of origin.[238] Respondents who selected American Indian or Alaska Native are asked to identify the name of their enrolled or principal tribe, such as Navajo Nation, Blackfeet Tribe, Mayan, Aztec, Native Village of Barrow Inupiat Traditional Government, or Nome Eskimo Community.[239] Finally, the questionnaire asks respondents to identify whether they are of Hispanic, Latino, or Spanish origin, and it lists several options, including Mexican, Mexican American or Chicano, Puerto Rican, Cuban, or another form of Hispanic, Latino, or Spanish origin.[240] In the 2020 federal census questionnaire, the only mention of color is the reference to the white or Black races.

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Data mining can offer a different perspective on the use of collective terminology.[241] Through Google Ngram, the frequency of use for the term "people of color" in printed English language sources can be measured over time. While the dataset is limited by the number of printed materials available through Google's English language corpus, it offers an innovative method for measuring use of the term over time.

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[236] U.S. CENSUS BUREAU, CENSUS 2020, at 2, Quest. No. 9 (2020), https://www2.census.gov/programs-surveys/decennial/2020/technical-documentation/questionnaires-and-instructions/questionnaires/2020-informational-questionnaire.pdf [https://perma.cc/5BDA-S4J6].

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.* at Quest. No. 8. The questionnaire offers several examples, including Salvadoran, Dominican, Colombian, Guatemalan, Spaniard, and Ecuadorian.

[241] Data mining consists of extracting information and identifying patterns from large caches of data. *See generally* JIAWEI HAN, MICHELLE KAMBER & JIAN PEI, DATA MINING: CONCEPTS AND TECHNIQUES 1–2 (3d ed. 2013).

TABLE 3: GOOGLE NGRAM
(USE OF THE TERM "PEOPLE OF COLOR" AND THREE VARIANTS)[242]

According to the Google English language corpus, the term first appeared in the early nineteenth century, although it was originally phrased as "people of colour." Several variants soon emerged, including "person of colour" and "person of color." The term "people of color" became the preferred phrasing by 1940. Its use increased significantly in the 1950s, coinciding with the rise of the civil rights movement in the United States. By then, the term was much broader in scope. The use of the term reached its peak in 2001. By that time, other terms had entered the lexicon and were also being used, such as "minorities," "indigenous people," "marginalized groups," and "disadvantaged communities." But "people of color" remains an accepted and common term.

II. DEBATING COLLECTIVE TERMINOLOGY

In the United States, the term "people of color" refers to individuals who are not white—an admittedly imprecise definition. This includes a diverse group of people who are differentiated in multiple ways, including skin color, race, ethnicity, religion, and national origin.[243] For 232 years, the term "people of color" has been used in the United States to identify virtually every non-white group in the country.

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[242] This Google Ngram plots the frequency in which the term "people of color" and three variants appeared in English language publications available through the Google search engine from 1700 through 2019. (Search query from the corpus "English (2019)" with a smoothing of three.) For an explanation of Google Ngram including its methodology, see GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams/info.

[243] *See generally* HANEY LÓPEZ, *supra* note 24, at xxi–xxii; JACOBSON, *supra* note 33, at 13–14.

A. The Benefits of Color

The term "people of color" is a form of collective terminology.[244] To supporters, the term has significant benefits.

First, it reflects the shared experiences of marginalized groups living in a racialized society and who suffer at the hands of white privilege. People of color face many of the same challenges that arise out of discrimination and subordination—poverty, inequality, and disparate treatment under the law.[245] This dynamic has existed throughout American history and has affected every non-white group in the country. The term brings together these distinct groups. By embracing the term, people of color also gain authorship to their name and take ownership of their collective history.[246] To be clear, the experiences of people of color are similar, but they are not the same.[247] Each group has a unique history—from the Black victims of slavery to the Japanese American victims of internment during the Second World War. And each group faces its own unique struggles.

Second, the term supports collective action by promoting community building, solidarity, and allyship from individuals who identify as people of color.[248] It generates power by facilitating the formation of coalitions, a strategy many marginalized groups have pursued in speaking truth to power.[249] As explained by Efrén Pérez, "'your' political battle is 'my' battle because we

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[244] *See generally* Adam Alter, *The Power of Names*, NEW YORKER (May 29, 2013), https://www.newyorker.com/tech/annals-of-technology/the-power-of-names [https://perma.cc/9VUJ-4AJ4]; Peter J. Aspinall, *Collective Terminology to Describe the Minority Ethnic Population: The Persistence of Confusion and Ambiguity in Usage*, 36 SOCIOLOGY 803 (2002).

[245] *See, e.g.*, THE COST OF RACISM FOR PEOPLE OF COLOR (Alvin N. Alvarez, Christopher T. H. Liang & Helen A. Neville eds., 2016); PEOPLE OF COLOR IN THE UNITED STATES: CONTEMPORARY ISSUES IN EDUCATION, WORK, COMMUNITIES, HEALTH, AND IMMIGRATION (Kofi Lomotey ed., 2016); JAIME SEBA, GAY PEOPLE OF COLOR: FACING PREJUDICES, FORGING IDENTITIES (2011); LAWYERS FOR ONE AMERICA, BAR NONE: REPORT TO THE PRESIDENT OF THE UNITED STATES ON THE STATUS OF PEOPLE OF COLOR AND PRO BONO SERVICES IN THE LEGAL PROFESSION (2000).

[246] *See* Edward Yuen, *Social Movements, Identity Politics and the Genealogy of the Term "People of Color,"* 19 NEW POL SCI. 97, 100 (1997) (noting the term "people of color" reflects an identity "charged with counter-hegemonic politics simply by its naming"); Gregory Coles, *The Exorcism of Language: Reclaimed Derogatory Terms and Their Limits*, 78 COLL. ENG. 424 (2016).

[247] *Cf.* HORTON, *supra* note 51, at 3 ("At crucial times, at points of crisis, this diverse people united to support common goals. It was not necessary that they walk lockstep in order to form a community of common direction. There were many black experiences, yet one overwhelming common black history.").

[248] JOSEPH S. TUMAN, COMMUNICATING TERROR: THE RHETORICAL DIMENSIONS OF TERROR 36–37 (2003); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957 (1995).

[249] *See*, *e.g.*, Marie-Amelie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 WIS. L. REV. 504; Carey E. Flanders, *Under the Bisexual Umbrella: Diversity of Identity and Experience*, 17 J. BISEXUALITY 1 (2017). But even social justice coalitions may experience internal conflict. *See* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

are all *people of color*."[250] While they have gained significant influence in recent years, people of color still constitute a numerical minority in the United States.[251] The term thus offers an inclusive and empowering counterpoise to white privilege. To reject the term is to weaken the movement.[252]

Third, the term "people of color" is preferred to other phrasing, such as non-whites.[253] Writing in a 1988 *New York Times* article about the term "people of color," William Safire noted pointedly, "[w]hy should anybody want to define himself by what he is not?"[254] White should not be considered the standard from which all others are assessed and distinguished. Such criticisms raise serious concerns about existing federal civil rights legislation, which continues to treat "white citizens" as the baseline.[255] While the term "colored people" was used during the nineteenth and twentieth centuries, its syntax is outdated and its modern usage is exceedingly rare.[256] Even the word "minority" is flawed.[257] It implies marginalization and begs the question—a minority to whom?

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[250] Efrén Pérez, *(Mis)Calculations, Psychological Mechanisms, and the Future Politics of People of Color*, 6 J. RACE, ETHN. & POL. 33 (2021) (emphasis in original).

[251] However, this demographic dynamic is changing. *See generally* WILLIAM H. FREY, DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA (2018); VALERIE WILSON, ECON. POL'Y INST., PEOPLE OF COLOR WILL BE A MAJORITY OF THE AMERICAN WORKING CLASS IN 2032 (2016).

[252] *See* Nunn, *supra* note 20, at 313–21; Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1593–94 (2009).

[253] *See* Neil H. Buchanan, *White Privilege: What It Is, What It Is Not, and How It Shapes American Discussions of Policing and the Historical Figures We Honor*, 31 U. FL. J. L. & PUB. POL'Y 100, 101 (2020) (referring to non-White people); Valerie Fontaine, *Progress Report: Women and People of Color in Legal Education and the Legal Profession*, 6 HASTINGS WOMEN'S L.J. 27 (1995) (using "non-white" intentionally in lieu of minority).

[254] William Safire, *On Language; People of Color*, N.Y. TIMES, Nov. 20, 1988, at 18.

[255] *See supra* text accompanying notes 222 and 223. *Cf.* Michael Morris, *Standard White: Dismantling White Normativity*, 104 CALIF. L. REV. 949 (2016) (addressing white normativity in the United States).

[256] RAEL, *supra* note 98, at 102–15 ("By the end of the nineteenth century, [the term 'colored American'] . . . had become sullied by time and the malevolent intentions of hostile whites."). The National Association for the Advancement of Colored People ("NAACP") is perhaps the most well-known modern use of this term. In 1909, the National Negro Committee was established in New York to address the civil rights of African Americans. PATRICIA SULLIVAN, LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 6–13 (2009). Prominent members included W.E.B. Du Bois, John Dewey, Ida Wells-Barnett, and Stephen Wise. *Id.* at 12–13. The following year, the Committee proposed the creation of a permanent organization. At the insistence of Du Bois, the organization would be called the National Association for the Advancement of Colored People to proclaim "the association's commitment to advance the interests of all dark-skinned people." *Id.* at 15. Despite the strong connection between the term "colored persons" and segregation, the NAACP has not changed its name. According to the organization, "[t]imes change and terms change. Racial designations go through phases; at one time, Negro was accepted, at an earlier time, colored and so on. This organization has been in existence for 80 years and the initials NAACP are part of the American vocabulary, firmly embedded in the national consciousness, and we feel it would not be to our benefit to change our name." WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 536 (2008) (quoting NAACP spokesperson James Williams). Reflecting its broad mandate, the NAACP now addresses all forms of discrimination based on race.

[257] *See* Rinku Sen, *"Minorities?" It's Not Even Accurate. Try "People of Color,"* COLOR LINES (May 18, 2012), https://www.colorlines.com/articles/minorities-its-not-even-accurate-try-

A different approach—one that uses acronyms to reflect several distinct groups—has its own shortcomings. For example, "BIPOC" is used in the United States to identify "Black, Indigenous, and People of Color."[258] The term "non-black people of color" also appears in conversations about race.[259] In the United Kingdom, "BAME" is used to reference "Black, Asian, and Minority Ethnic."[260] Yet these neologisms raise significant concerns.[261] They inevitably prioritize some groups over others, essentially generating a system of *primus inter pares*.[262] To be fair, this is often intentional. Advocates of BIPOC argue such prioritization is necessary to address centuries of oppression against Black and indigenous people.[263] But as a result, both terms explicitly marginalize some groups by placing them within a residual category, whether it is "people of color" in BIPOC or "minority ethnic" in BAME.[264]

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people-color [https://perma.cc/Z4HP-9G4B]; Lewis M. Killian, *What or Who is a "Minority?*," 10 MICH. SOC. REV. 18 (1996).

[258] *See* Sandra E. Garcia, *Where Did BIPOC Come From?*, N.Y. TIMES (June 17, 2020), https://www.nytimes.com/article/what-is-bipoc.html [https://perma.cc/ZEX6-VK6Q]. (describing the use of the acronym BIPOC); *see also* THE BIPOC PROJECT, www.thebipocproject.org ("We use the term BIPOC to highlight the unique relationship to whiteness that Indigenous and Black (African Americans) people have, which shapes experiences of and relationship to white supremacy for all people of color within a U.S. context.").

[259] *See, e.g.*, Ana Cecilia Pérez, *As Non-Black POC, We Need to Address Anti-Blackness*, YES! MAGAZINE (July 6, 2020), https://www.yesmagazine.org/opinion/2020/07/06/non-black-poc-anti-blackness [https://perma.cc/J9H7-VCB9]; Sharon Park, *Non-Black People of Color Need to Start Having Conversations About the Anti-Blackness in Our Communities*, DOSOMETHING.ORG (Oct. 14, 2020), https://www.dosomething.org/us/articles/our-role-as-non-black-people-of-color-in-disrupting-racism [https://perma.cc/KRV2-ECPM]; Tamara K. Nopper, *Minority, Black and Non-Black, People of Color: "New" Color-Blind Racism and the U.S. Small Business Administration's Approach to Minority Business Lending in the Post-Civil Rights Era*, 37 CRIT. SOC. 651 (2011).

[260] *See* BIRMINGHAM CITY UNIVERSITY, BAME: A REPORT ON THE USE OF THE TERM AND RESPONSES TO IT (2021); Myriam Toua, *BAME Background Meaning: What is BAME Background?*, EXPRESS (June 2, 2020), https://www.express.co.uk/news/uk/1290431/BAME-background-meaning-What-is-BAME-background-BAME-people [https://perma.cc/BW58-Q8GS] (describing the use of the acronym BAME in the United Kingdom); *see also* JOHNY PITTS, AFROPEAN: NOTES FROM BLACK EUROPE (2019) (using the term "Afropean" to describe individuals of African ancestry living in Europe).

[261] *See* Meera E. Deo, *Why BIPOC Fails*, 107 VA. L. REV. ONLINE 115 (2021); Peter J. Aspinall, *Ethnic/Racial Terminology as a Form of Representation: A Critical Review of the Lexicon of Collective and Specific Terms in Use in Britain*, 4 GENEALOGY 87 (2020); Constance Grady, *Why the Term "BIPOC" Is So Complicated, Explained by Linguists*, VOX (June 30, 2020), https://www.vox.com/2020/6/30/21300294/bipoc-what-does-it-mean-critical-race-linguistics-jonathan-rosa-deandra-miles-hercules [https://perma.cc/PYE8-KLQ7].

[262] *See* Paul MacInnes, *"BAME" Term Offends Those It Attempts to Describe, Sporting Survey Finds*, THE GUARDIAN (Nov. 20, 2020), https://www.theguardian.com/sport/2020/nov/12/bame-term-offends-those-it-attempts-to-describe-sporting-survey-finds-sporting-equals [https://perma.cc/QFY3-AYFU]; Nora Fakim & Cecilia Macaulay, *"Don't Call Me BAME," Why Some People are Rejecting the Term*, BBC NEWS (June 30, 2020), https://www.bbc.com/news/uk-53194376 [https://perma.cc/F57G-36ZC].

[263] THE BIPOC PROJECT, *supra* note 258; Grady, *supra* note 261; Garcia, *supra* note 258.

[264] Deo, *supra* note 261, at 193 (BIPOC "can be misleading, overly simplistic, and even incorrect when centering the experiences of Black and Indigenous communities over others within the people of color umbrella."). *See generally* Amy Harmon, *BIPOC or POC? Equity or Equality? The Debate Over Language on the Left*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2021/11/01/us/terminology-language-politics.html [https://perma.cc/ED9F-R5EY].

Thus, these terms can undermine the unity and solidarity they are meant to promote. They also lack the simplicity and clarity offered by "people of color."[265]

Finally, the term "people of color" challenges the narrative of a color-blind society.[266] To be anti-racist requires color consciousness.[267] The United States was built as a racialized nation, and so it remains.[268] Despite progress, people of color still suffer because of structural racism as well as implicit bias.[269] Indeed, the power of these phenomena resides in their ability to exert a hidden, subtle, and yet overwhelming force.[270] Denying that color matters deters meaningful reflection and eventual change.[271] As Justice Stevens noted in *Adarand Constructors, Inc.*, "irrational racial prejudice—along with its lingering effects—still survives" and ignoring it simply perpetuates racial subordination.[272] A commitment to color consciousness, according to Michelle Alexander, is also empathic. It "places faith in our capacity as humans to show care and concern for others, even as we are fully cognizant of race and possible racial differences."[273] Thus, the term "people of color" is essential for

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[265] In the United States, for example, the term "indigenous" is generally not used to describe the Native American population. In addition, recognition of Indian tribes and membership within these tribes is often contested. *See* NATIONAL CONGRESS OF AMERICAN INDIANS, TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION (2019).

[266] *See* HANEY LÓPEZ,, *supra* note 24, at 147–62; EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 2–4 (3d ed. 2009); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM xviii-xxi (1999); Michael Morris, *Standard White: Dismantling White Normativity*, 104 CALIF. L. REV. 949 (2015).

[267] IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 110 (2019); Nunn, *supra* note 20, at 315–16.

[268] *See generally* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978); Charisse Jones, *Black and White Still Define America as Biden Prepares to Take Office, Country Deals with Capitol Riots Aftermath*, USA TODAY (Jan. 14, 2021), https://www.usatoday.com/story/money/2021/01/14/black-america-history-social-economic-inequalities/5759328002/ [https://perma.cc/DH3U-NX79]; Trina Jones, *Shades of* Brown*: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000).

[269] *See generally* MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

[270] *See* Isabel Wilkerson, *America's Enduring Caste System*, N.Y. TIMES MAG., July 5, 2020, at 26, 52 ("Modern day caste protocols are often less about overt attacks or conscious hostility. They are like the wind, powerful enough to knock you down but invisible as they go about their work."). Indeed, there is a strong analogy between the Indian caste system and racial discrimination in the United States. *See also* HINSBRUNER, *supra* note 50, at 19; BERLIN, *supra* note 54, at 15.

[271] *See* Molly P. Matter, *The Shaw Claim: The Rise and Fall of Colorblind Jurisprudence*, 18 SEATTLE J. SOC. JUST. 25 (2020); Elise C. Boddie, *The Indignities of Color Blindness*, 64 UCLA L. REV. DISCOURSE 64 (2016); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991); MIXED MESSAGES: MULTIRACIAL IDENTITIES IN THE "COLOR-BLIND ERA" (David L. Brunsma ed. 2006).

[272] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 243, 260 (1995) (Stevens, J., dissenting).

[273] ALEXANDER, *supra* note 8, at 230; *see also* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination* 101 HARV. L. REV. 1331, 1369 (1988) (arguing that race consciousness is essential for challenging subordination).

meaningful conversations about race and color.[274] Its absence makes these conversations more difficult.

B. The Costs of Color

To critics, the term "people of color" has significant limitations.[275] First, it perpetuates the color line, which distinguishes people based on skin color.[276] The term places people of color and the white community in permanent opposition because the term lacks meaning without its own "other." It thus promotes divisions based on immutable characteristics with historically troubling antecedents. This alone justifies eliminating color labels.[277] Focusing on differences in skin also implicates colorism, which promotes disparate treatment within groups based on differences in skin shade or tone.[278] Lighter shades are often privileged, even within Black and Brown communities.[279]

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[274] The failure to confront color can inhibit meaningful conversations. *See* Yuvraj Joshi, *Racial Transition*, 98 WASH. U. L. REV. 1 (2020); Neil S. Siegel, *The Supreme Court is Avoiding Talking About Race*, THE ATLANTIC (Aug. 7, 2020), https://www.theatlantic.com/ideas/archive/2020/08/supreme-court-doesnt-like-talk-about-race/614944/ [https://perma.cc/MGM3-EZWT]; Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 Am. POL. SCI. REV. 75 (2005).

[275] *See, e.g.*, Efrén Pérez, "*People of Color*" *are Protesting: Here's What You Need to Know About This New Identity*, WASH. POST (July 2, 2020), https://www.washingtonpost.com/politics/2020/07/02/people-color-are-protesting-heres-what-you-need-know-about-this-new-identity/ [https://perma.cc/M57K-DPAT]; Brooke Sparks, *Opinion: The Term "POC" Contributes to Solidarity, But Also to Erasure*, THE STUDENT LIFE (Oct. 16, 2019), https://tsl.news/opinion-the-term-poc-contributes-to-solidarity-but-also-to-erasure/ [https://perma.cc/6QPS-KQUK]; Janani, *What's Wrong with the Term "Person of Color,"* BGD (Mar. 20, 2013), https://www.bgdblog.org/2013/03/2013321whats-wrong-with-the-term-person-of-color/ [https://perma.cc/TQ2W-4C6X].

[276] *See* W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 125 (1903); Frederick Douglass, *The Color Line*, 132 NORTH AM. REV. 567 (1881). *See generally* ENOBONG HANNAH BRANCH & CHRISTINA JACKSON, BLACK IN AMERICA: THE PARADOX OF THE COLOR (2020); Sheldon Novick, *Homer Plessy's Forgotten Plea for Inclusion: Seeing Color, Erasing Color-Lines*, 118 W. VA. L. REV. 1181 (2016).

[277] *See* Kalunta-Crumpton, *supra* note 2, at 130.

[278] *See* KIMBERLY NORWOOD, COLOR MATTERS: SKIN TONE BIAS AND THE MYTH OF A POST RACIAL AMERICA (2014); ALICE WALKER, IN SEARCH OF OUR MOTHER'S GARDENS (1983); Karla Cornejo Villavicencio, *The Spectacle of Latinx Colorism*, N.Y. TIMES (Aug. 1, 2021), https://www.nytimes.com/2021/07/30/opinion/latino-racism-colorism-latinx.html [https://perma.cc/8CUT-YEED]; Taylor J. Mathews & Glenn S. Johnson, *Skin Complexion in the Twenty-First Century: The Impact of Colorism on African American Women*, 22 RACE, GENDER & CLASS 248 (2015); Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000).

[279] *See* PEW RESEARCH CENTER, MAJORITY OF LATINOS SAY SKIN COLOR IMPACTS OPPORTUNITY IN AMERICA AND SHAPES DAILY LIFE (2021); Ellis P. Monk, Jr., *The Unceasing Significance of Colorism: Skin Tone Stratification in the United States*, DAEDALUS 76 (Spr. 2021); Taylor J. Mathews & Glenn S. Johnson, *Skin Complexion in the Twenty-First Century: The Impact of Colorism on African American Women*, 22 RACE, GENDER & CLASS 248 (2015); Holland Cotter, *Testimony of a Cleareyed Witness*, N.Y. TIMES, Jan. 24, 2014, at C25. This phenomenon extends to Asian communities as well. *See* Ana Salvá, *Where Does the Asian Obsession with White Skin Come From?*, THE DIPLOMAT (Dec. 2, 2019), https://thediplomat.com/2019/12/where-does-the-asian-obsession-with-white-skin-come-from/ [https://perma.cc/RQK3-LP4Z].

Second, the term is vague. The word "color" presumably refers to skin color, which itself is a subjective concept. All human beings possess skin color.[280] In addition, the word "color" is often used as a proxy for race, which raises a distinct set of concerns. The concept of race remains deeply contested, and it is viewed as a social construct lacking scientific foundation. Its meaning is fluid through time.[281] Indeed, the "race question" has been debated for decades in the United States and throughout the world.[282]

Third, the term "people of color" is neither consistently applied nor universally applicable. Determining someone's color or race often leads to arbitrary classifications.[283] For example, the notorious "one-drop rule," also known as hypodescent, was historically used to designate someone as "Black" or "colored" if any descendant met that criteria.[284] Such rules were used to

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[280] Even people with albinism—a genetic condition that limits the production of melanin pigment—possess skin color. ALBINISM IN AFRICA: HISTORICAL, GEOGRAPHIC, MEDICAL, GENETIC, AND PSYCHOLOGICAL ASPECTS 1 (Jennifer Kromberg & Prashiela Manga eds., 2018). In fact, the lack of melanin pigment in their skin has resulted in significant persecution against people with albinism. *See* SHANTHA RAU BARRIGA, HUM. RTS. WATCH, OUT OF THE SHADOWS: THE RESILIENCE AND COURAGE OF PEOPLE WITH ALBINISM IN MOZAMBIQUE (2019), https://www.hrw.org/news/2019/07/01/out-shadows-resilience-and-courage-people-albinism-mozambique [https://perma.cc/46DB-J53T]; Peter Ash, *Albino Persecution Must Stop. We Are People Too*, NEWSWEEK (June 13, 2017), https://www.newsweek.com/albinos-albinism-africa-tanzania-albinos-624463 [https://perma.cc/897T-R9C2]; William J. Aceves, *Two Stories About Skin Color and International Human Rights Advocacy*, 14 WASH. U. GLOBAL STUD. L. REV. 563 (2015).

[281] *See* KWAME ANTHONY APPIAH & AMY GUTMAN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 30 (1998); Ta-Nehisi Coates, *How Racism Invented Race in America*, THE ATLANTIC (June 23, 2014), https://www.theatlantic.com/politics/archive/2014/06/the-case-for-reparations-a-narrative-bibliography/372000/ [https://perma.cc/WC63-URA5]; Michael Banton, *The Idiom of Race: A Critique of Presentism*, *in* THEORIES OF RACE AND RACISM, *supra* note 33, at 55, 67.

[282] *See* Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997); Robert Bernasconi, *Who Invented the Concept of Race?, in* THEORIES OF RACE AND RACISM, *supra* note 33, at 83. As early as 1950, the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") issued a statement on "The Race Question" that challenged common assumptions about race and asserted that any purported biological distinctions within humanity were far less meaningful than distinctions based on nationality, ethnicity or culture. *See* U.N. EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION, FOUR STATEMENTS ON THE RACE QUESTION (1969).

[283] *See* Uki Goñn, *Time to Challenge Argentina's White European Self-Image, Black History Experts Say*, THE GUARDIAN (May 31, 2021), https://www.theguardian.com/world/2021/may/31/argentina-white-european-racism-history [https://perma.cc/XUE8-UTMM]; Laura E. Gómez, *"Other" As The Nation's 2nd-Largest Race? Latinos and the 2020 Census May Make That Happen*, L.A. TIMES (Apr. 29, 2021), https://www.latimes.com/opinion/story/2021-04-29/other-latinos-census-2020-race [https://perma.cc/RK4F-H3G4]; Lucia Benavides, *Why Labeling Antonio Banderas A "Person of Color" Triggers Such a Backlash*, NPR (Feb. 9, 2020), https://www.npr.org/2020/02/09/803809670/why-labeling-antonio-banderas-a-person-of-color-triggers-such-a-backlash [https://perma.cc/VUL3-GDW5]; Rebecca Morin, *GOP Congressman on Trump Tweets: 'I'm a Person of Color. I'm White. I'm an Anglo-Saxon,'* USA TODAY (July 17, 2019); https://www.usatoday.com/story/news/politics/2019/07/17/rep-mike-kelly-trump-tweets-im-person-color-im-white/1762259001/ [https://perma.cc/SN7Z-SYQ2]. *See generally* Salvador Vidal-Ortiz, *On Being a White Person of Color: Using Autoethnography to Understand Puerto Ricans' Racialization*, 27 QUALITATIVE SOCIOLOGY 179 (2004).

[284] *See* Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860*, 91 MINN. L. REV. 592 (2007); Christine Hickman, *The Devil and the One*

discriminate against individuals who could not establish their white lineage.[285] It also perpetuated a stigma against individuals of mixed-race and reinforced racial boundaries, such as anti-miscegenation laws.[286] While the one-drop rule no longer exists in most legal systems, it remains entrenched in perceptions about color, race, and class.[287]

In countries where whites represent the majority population, the term "people of color" is often used to describe a broad range of individuals who are identified by physical, social, and cultural characteristics.[288] The unifying feature of these individuals is that they are not members of the white community. But membership within both groups continuously changes, which makes this collective terminology less valuable.[289] Moreover, there is no consistency in how the term is used.[290] In countries where whites do not represent the majority, the term is essentially meaningless.[291] Many of these countries do not even have a comparable word or term in their official language.[292]

Drop Rule: Racial Categories, African Americans, and the U.S. Census, 95 MICH. L. REV. 1161 (1997).

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

[286] *See* Loving v. Virginia, 388 U.S. 1 (1967).

[287] *See generally* Deborah W. Post, *Cultural Inversion and the One-Drop Rule: An Essay on Biology, Racial Classification, and the Rhetoric of Racial Transcendence*, 72 ALBANY L. REV. 909 (2009); David A. Hollinger, *One Drop & One Hate*, 134 DAEDALUS 18 (2005).

[288] *See, e.g.*, Luke Pearson, *Who Identifies as a Person of Colour in Australia?*, ABC NEWS (Nov. 30, 2017), https://www.abc.net.au/news/2017-12-01/who-identifies-as-poc-in-australia/9200288 [https://perma.cc/J3A2-BD6K]. In South Africa, the apartheid regime distinguished among three groups: blacks, whites, and colored. *See* MOHAMED ADHIKARI, NOT WHITE ENOUGH, NOT BLACK ENOUGH: RACIAL IDENTITY IN THE SOUTH AFRICAN COLOURED COMMUNITY 4–5 (2005); GEOFFREY C. BOWKER & SUSAN LEIGH STAR, SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES 185 (1999); Alan Cowell, *South Africa's "Coloreds:" A Group Torn Between Black and White Worlds*, N.Y. TIMES, Sept. 11, 1985, at A10.

[289] *See* DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN "POST-RACIAL" AMERICA (2013); Eduardo Bonilla-Silva & David G. Embrick, *Black, Honorary White, White: The Future of Race in the United States?*, *in* MIXED MESSAGES: MULTIRACIAL IDENTITIES IN THE "COLOR-BLIND" ERA 33 (David L. Brunsma ed., 2006); KEVIN R. JOHNSON, HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN'S SEARCH FOR IDENTITY (1999); GREGORY WILLIAMS, LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK (1995); Naseeb Bhangal & Oiyan Poon, *Are Asian Americans White? Or People of Color?*, YES! MAGAZINE (Jan. 15, 2020), https://www.yesmagazine.org/social-justice/2020/01/15/asian-americans-people-of-color/ [https://perma.cc/423G-SMY6]; Min Zhou, *Are Asian Americans Becoming "White,"* 3 CONTEXTS 29 (2004).

[290] BIRMINGHAM CITY UNIVERSITY, *supra* note 260, at 56.

[291] Distinctions based on race and color still exist in most of these countries. *See* Adeel Hassan, *What It's Like to Be a Black Man in Japan*, N.Y. TIMES (Mar. 9, 2019), https://www.nytimes.com/2019/03/09/us/what-its-like-to-be-a-black-man-in-japan.html [https://perma.cc/38WS-XQDD]; Marketus Presswood, *On Being Black in China*, THE ATLANTIC (July 17, 2013), https://www.theatlantic.com/china/archive/2013/07/on-being-black-in-china/277878/ [https://perma.cc/YTP9-P2AG]; David Wright, *The Use of Race and Racial Perceptions Among Asians and Blacks: The Case of the Japanese and African Americans*, 30 HITOTSUBASHI J. SOC. STUD. 30 (1998); Hiroshi Wagatsuma, *The Social Perception of Skin Color in Japan*, 96 DAEDELUS 407 (1967).

[292] In countries where whites do not represent the majority, the terminology used to describe whites often reflects unique social, political, and historical dynamics. *See, e.g.*, Lawrence

Finally, the term promotes essentialism and an undifferentiated approach to people of color.[293] While there may be reasons to use collective terminology, this can also raise significant concerns.[294] There are profound differences within these communities. Moreover, there will be occasions when discrete communities prefer and deserve acknowledgment of the distinct issues affecting them. When Dr. Martin Luther King, Jr. spoke of citizens of color in his 1963 *I Have a Dream* speech, he was speaking about African Americans as the descendants of enslaved people.[295] The Black Lives Matter movement denounces the targeted violence and disparate treatment of Black people by law enforcement.[296] Referring to discrete groups as people of color may be accurate, but it can fail to capture their unique experiences and the distinct issues they face.[297] As a result, these communities may feel further marginalized. At worst, they may feel erased.[298] Or, in Ralph Ellison's words, "invisible . . . simply because people refuse to see [them]."[299]

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While the debate over collective terminology is ongoing, it is not new. The arguments, both real and rhetorical, can trace their origins to the names

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Bosiwah, Kofi Busia Abrefa & Charles Okofo Asenso, *An Etymological Study of the Word "Aborfo" (Europeans) and Its Impact on Akan Language*, 1 INT'L J. APP. LING. & TRANSL. 1 (2015) (describing the meaning of the Akan word for Europeans and other white people).

[293] *See* KATHARINE T. BARTLETT & ANGELA HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 1007 (1998); Rachelle Hampton, *Which People? How "People of Color" Evolved From a Gesture of Solidarity and Respect to a Cover For Avoiding the Complexities of Race*, SLATE (Feb. 13. 2019), https://slate.com/human-interest/2019/02/people-of-color-phrase-history-racism.html [https://perma.cc/RMR5-E2AC]; Alvira Bonsu, *"People of Color" is an Unjust Umbrella Term*, THE TEMPLE NEWS (Sept. 18, 2019), https://temple-news.com/people-of-color-is-an-unjust-umbrella-term/ [https://perma.cc/HFA5-AHGE]; Anna Stubblefield, *Racial Identity and Non-Essentialism About Race*, 21 SOC. THEORY & PRAC. 341 (1995).

[294] *See* Donna F. Edwards & Gwen McKinney, *We Are Black Women. Stop Calling Us "Women of Color*," WASH. POST (Sept. 14, 2020), https://www.washingtonpost.com/opinions/2020/09/14/we-are-black-women-stop-calling-us-women-color/ [https://perma.cc/R3BB-4NH5]; Jason Parham, *What We Get Wrong About "People of Color,"* WIRED (Nov. 26, 2019), https://www.wired.com/story/rethinking-phrase-people-of-color/ [https://perma.cc/7RMH-5UNX].

[295] *See* Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), *in* A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. 75 (Clayborne Carson & Kris Shepard eds., 2001).

[296] *See* Jay Caspian Kang, *Off Topic: Can We Please Talk About Black Lives Matter for One Second?*, N.Y. TIMES MAG., July 5, 2020, at 7; Jennifer J. Garcia & Mienah Z. Sharif, *Black Lives Matter: A Commentary on Racism and Public Health*, 105 AM. J. PUB. HEALTH 27 (2015).

[297] Similar criticisms have been made about other forms of collective terminology. Deo, *supra* note 261, at 131–39 (highlighting the shortcomings of the term "BIPOC").

[298] Nadra Widatalla, *The Term "People of Color" Erases Black People. Let's Retire It*, L.A. TIMES (Apr. 28, 2019), https://www.latimes.com/opinion/op-ed/la-oe-widatalla-poc-intersectionality-race-20190428-story.html [https://perma.cc/DB7V-B88N]; Adebola Lamuye, *I Am No "Person of Colour," I Am a Black African Woman*, INDEPENDENT (U.K.) (July 31, 2017), https://www.independent.co.uk/voices/phrase-people-person-of-colour-bme-black-woman-women-different-experiences-race-racism-a7868586.html [https://perma.cc/6AYC-WZJM].

[299] RALPH ELLISON, INVISIBLE MAN 3 (Modern Library ed. 1994) (1947).

controversy of the nineteenth century. From the antebellum period and throughout Reconstruction, Black leaders considered numerous forms of collective terminology, including people of color, colored people, colored Americans, and negroes as well as Free Africans, Anglo-Africans, Afro-Americans, Afmericans, and Afro-Saxons.[300] This variation reflects a search for identity and belonging. While various terms were considered, they all shared a common goal: "the demand for freedom, liberty, and equality."[301]

III. Reflections on Color and White(ness)

Throughout history, the terminology used to describe racial and ethnic groups has changed. Yet, it has always reflected extant power structures and the political, economic, and legal dominance of a community that defined itself as white. Despite their prevalence, this collective terminology remains obscured by a reluctance to engage in candid discourse and difficult conversations.[302] In promoting meaningful dialogue, there is value in exposing both color and white(ness) to the light.[303]

A. The Meaning of Color

Historically, the term "people of color" was used to describe the broad group of individuals who were not members of the white community and who were, therefore, treated differently and adversely under the law. The term distinguished between individuals who were granted privilege and status within society and those who were not entitled to the full protection of the law. Its legal and social relevance continued for centuries—from the antebellum period through the Civil War, Reconstruction, and the Jim Crow era. By the end of the Second Reconstruction, the term "people of color" had ceased to define legal rights. Both case law and civil rights legislation made clear that such legal distinctions could no longer exist. However, the term still had meaning.

While it was often used to describe a variety of racial and ethnic groups, the term developed a rich history within the Black community. Initially, free people of color embraced the term to let others know of their legal status and corresponding rights—from national organizations such as the Society for the Colonization of Free People of Color to local groups such as Philadelphia's Society of Free People of Colour for Promoting the Instruction and

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[300] Stuckey, *supra* note 21, at 224.

[301] Rael, *supra* note 98, at 117.

[302] Morrison, *supra* note 24, at 91 ("All of us, readers and writers, are bereft when criticism remains too polite or too fearful to notice a disrupting darkness before its eyes.").

[303] *See* Henry Louis Gates Jr. & Andrew S. Curran, *We Need a New Language for Talking About Race*, N.Y. Times (Mar. 3, 2022), https://www.nytimes.com/2022/03/03/opinion/sunday/talking-about-race.html [https://perma.cc/SD2G-BRGB].

School Education of Children of African Descent.[304] Similar groups developed throughout the United States.[305] Eventually, this collective terminology came to reflect the emerging consciousness of the Black community.[306] Recognizing its rhetorical and unifying power, Black leaders intentionally used "people of color" to project unity and common purpose.[307] After the Civil War and the adoption of the Thirteenth Amendment, "free people of color" became simply "people of color." While other terms would wax and wane in usage, the term "people of color" would remain a constant form of collective terminology for the Black community.

In the twentieth century, the burgeoning civil rights movement and its extension beyond the Black community led to increasing use of the term "people of color." As other groups—including Hispanics, Asian Americans, and Native Americans—grew in size and strength, this collective terminology brought them together. Thus, the term proved invaluable for descriptive and strategic reasons.[308]

This historical reflection is instructive. Unlike some words that were intentionally used as insults and slurs, "people of color" was different.[309] The term was generally not used in a pejorative sense, although it had significant legal consequences. Thus, "people of color" does not share the mark of ignominy that so many historical words and terms contain.[310] Indeed, the term

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[304] *See* FINLEY, *supra* note 84, at 1; THE BLACK PRESENCE IN THE ERA OF THE AMERICAN REVOLUTION, *supra* note 66, at 104.

[305] In Charleston, for example, a benevolent society known as the "Free Dark Men of Color" was established in 1791. *See* PETER P. HINKS, TO AWAKEN MY AFFLICTED BRETHREN: DAVID WALKER AND THE PROBLEM OF ANTEBELLUM SLAVE RESISTANCE 24 (1997). The New York Society of Free People of Color established a school for orphans in 1812. MEIER & RUDWICK, *supra* note 101, at 110. The Pennsylvania Augustine Society for the Education of People of Colour was established in 1818. HORTON & HORTON, *supra* note 99, at 151.

[306] *See* RAEL, *supra* note 99, at 148; STUCKEY, *supra* note 21, at 218.

[307] *See* RAEL, *supra* note 98, at 83, 89, 106–07, 115.

[308] Even the terms used to identify these individual communities raised difficult questions about inclusion, and how people should be defined. *See, e.g.*, G. CRISTINA MORA, MAKING HISPANICS: HOW ACTIVISTS, BUREAUCRATS & MEDIA CONSTRUCTED A NEW AMERICAN (2014); Li Zhou, *The Inadequacy of the Term "Asian American,"* VOX (May 5, 2021), https://www.vox.com/identities/22380197/asian-american-pacific-islander-aapi-heritage-anti-asian-hate-attacks [https://perma.cc/K8N6-3W7P]; Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels*, 23 AM. IND. Q. 1 (1999).

[309] John H. McWhorter, *Why is Colored Person Hurtful and Person of Color OK? A Theory of Racial Euphemisms*, SLATE (Aug. 24, 2016), https://slate.com/human-interest/2016/08/colored-person-versus-person-of-color-how-does-society-decide-which-racial-terms-are-acceptable.html [https://perma.cc/X8VV-MEE3].

[310] *See, e.g.*, JABARI ASIM, THE N WORD: WHO CAN SAY IT, WHO SHOULDN'T, AND WHY (2007). *See generally* Taylor Telford, *Six Dr. Seuss Books With Racist Imagery Will Go Out of Print*, WASH. POST (Mar. 2, 2021), https://www.washingtonpost.com/business/2021/03/02/dr-seuss-racist-imagery/ [https://perma.cc/9R43-ZFUL]; Nicole Daniels, *How Should Racial Slurs in Literature Be Handled in the Classroom?,* N.Y. TIMES (Dec. 16, 2020), https://www.nytimes.com/2020/12/16/learning/how-should-racial-slurs-in-literature-be-handled-in-the-classroom.html [https://perma.cc/7523-6WY2].

has been fully claimed by the community it now describes.[311] Such reclamation projects have a long history within marginalized communities.[312] While "people of color" does not carry the shame of racist language, this does not absolve the term from critical inspection.[313]

Today, the term "people of color" represents an inclusive effort to identify diverse groups that share a common experience and similar struggles. When used contextually, there is value in the term.[314] It reflects a shared history among disparate people. Aggregating their experiences through collective terminology generates power against hierarchy. At its core, it represents "a shared form of identity in which members of distinct groups see one another interchangeably as a single, unified group."[315] The term is intentionally color conscious at a time when color consciousness is essential. In addition, language should always be used to make visible that which is unseen or ignored.

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[311] *See* Mistinguette Smith, *After Asian American Hate, I'm Reclaiming Racial Solidarity and the Term "People of Color,"* USA TODAY (May 11, 2021). *See generally* RAEL, *supra* note 99, at 147. *But see* Damon Young, *The Phrase "People of Color" Needs to Die*, GQ (Aug. 19, 2020), https://www.gq.com/story/author-damon-young-on-bipoc-phrasing [https://perma.cc/H9JH-4ELT].

[312] *See, e.g.*, Symposium, *Non-Derogatory Uses of Slurs*, 97 GRAZER PHIL. STUD. 1 (2020); Sarah Jeong, *Should We Be Able to Reclaim a Racist Insult—as a Registered Trademark?*, N.Y. TIMES MAG. (Jan. 17, 2017), https://www.nytimes.com/2017/01/17/magazine/should-we-be-able-to-reclaim-a-racist-insult-as-a-registered-trademark.html [https://perma.cc/J7VJ-GMAN]; Gregory Coles, *The Exorcism of Language: Reclaimed Derogatory Terms and Their Limits*, 78 COLL. ENG. 424 (2016). These issues have been explored in a variety of contexts, including gender studies. *See* Gary Nunn, *Power Grab: Reclaiming Words Can Be a Bitch*, THE GUARDIAN (Oct. 30, 2015), https://www.theguardian.com/media/mind-your-language/2015/oct/30/power-grab-reclaiming-words-can-be-such-a-bitch [https://perma.cc/6XX5-HFXH]. *But see* Sherryl Kleinman, Matthew B. Ezzell & A. Corey Frost, *Reclaiming Critical Analysis: The Social Harms of "Bitch,"* 3 SOCIO. ANAL. 47 (2009).

[313] *See* Kalunta-Crumpton, *supra* note 2, at 131. Other terms remain controversial and reflect the complexity of language. *See* John McWhorter, *I Can't Brook the Idea of Banning "Negro,"* N.Y. TIMES, (Jan. 7, 2022), https://www.nytimes.com/2022/01/07/opinion/negro-ban-word-dont.html [https://perma.cc/H2EL-KKQL].

[314] *See* THE COST OF RACISM FOR PEOPLE OF COLOR, *supra* note 245; PEOPLE OF COLOR IN THE UNITED STATES: CONTEMPORARY ISSUES IN EDUCATION, WORK, COMMUNITIES, HEALTH AND IMMIGRATION (Kofi Lomotey ed., 2016). However, there are times when disaggregation is preferred to collective terminology. *See, e.g.*, MEASURING RACE: WHY DISAGGREGATING DATA MATTERS FOR ADDRESSING EDUCATIONAL INEQUALITY (Robert T. Teranishi, Bach Mai Dolly Nguyen, Cynthia M. Alcantar & Edward R. Curammeng, eds., 2020). This issue has been particularly significant for assessing the impact of the COVID-19 pandemic on distinct racial groups. *See* Manish Pareek, Mansoor N. Bangash, Nilesh Pareek, Daniel Pan, Shirley Sze, Jatinder S. Minhas, Wasim Hanif & Kamlesh Khunti, *Ethnicity and COVID-19: An Urgent Public Health Research Priority*, 395 LANCET 1421, 1422 (2020) (noting disaggregated data based on ethnicity would assist in identifying potential risk factors through recognizing confounding variables within specific and unique community groups); Namratha Kandula & Nilay Shah, *Asian Americans Invisible in COVID-19 Data and in Public Health Response*, CHI. REP. (June 16, 2020), https://www.chicagoreporter.com/asian-americans-invisible-in-covid-19-data-and-in-public-health-response/ [https://perma.cc/PWN7-NYSK] (describing the significant racial disparity in COVID-19 cases).

[315] PÉREZ, *supra* note 7, at 186.

But when used indiscriminately—an ironic phrasing, to be sure—the term "people of color" hides identity, and its flaws become evident.[316] Intersectional dynamics require a nuanced approach to collective terminology. For this reason, it should always be used intentionally and contextually.[317] Moreover, it should never be used to define legal rights. Harkening back to Homer Plessy's arguments at the Supreme Court, there are simply too many definitions of the term "people of color" to escape arbitrary outcomes or inequitable treatment.[318] Individuals and groups should also be free to accept or decline inclusion in this collective terminology.[319] Agency is essential.

B. The Meaning of White(ness)

As history reveals, the term "people of color" cannot be studied in isolation to its antipode—the white community.[320] They exist in a dialectic relationship. Each, as Toni Morrison and bell hooks described, is their "other."[321] They were bound together throughout American history by the chains of slavery, and they remain inexorably linked. People of color are still shackled by structural racism that permeates every aspect of the American experience. The white community is constrained in other ways, trapped "in a history which they do not understand and until they understand it, they cannot be released from it."[322]

Like its counterpart, the definition of the white community has also undergone significant change.[323] Throughout American history, membership

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[316] *See* Higginbotham & Bosworth, *supra* note 51, at 17 ("We recognize that it is impossible to use one phrase that satisfies everyone. Sometimes the debate on semantics as to which term should be used diverts people from the important substantive issue. The important issue is whether people are being treated adversely because of their skin color."); Andrea Plaid & Christopher Macdonald-Dennis, *Stop Saying "People of Color" When You Mean Black*, NEWSWEEK (May 26, 2021), https://www.newsweek.com/stop-saying-people-color-when-you-mean-black-opinion-1595113 [https://perma.cc/VQB8-2XJJ].

[317] *See* Kalunta-Crumpton, *supra* note 2, at 131 ("[P]roponents of the term *people of color* (and related terms) ought to review their real reasons for using and advancing the use of the term.") (emphasis in original).

[318] *See Plessy* Brief, *supra* note 157, at 38.

[319] *See* Marc P. Johnston-Guerrero, *Who Gets to Choose? Racial Identity and the Politics of Choice*, *in* THE COMPLEXITIES OF RACE, *supra* note 10, at 36; Kalunta-Crumpton, *supra* note 2, at 131; Steven Pinker, *The Game of the Name*, N.Y. TIMES, (Apr. 5, 1994), https://www.nytimes.com/1994/04/05/opinion/the-game-of-the-name.html [https://perma.cc/8R2T-UPE7] ("Respect means treating people as they wish to be treated, beginning with names.").

[320] *See* HANEY LÓPEZ, *supra* note 24, at 21; Finkelman, *supra* note 42, at 952–57.

[321] MORRISON, *supra* note 24, at x, xi; BELL HOOKS, BLACK LOOKS: RACE AND REPRESENTATION 166 (1992). *See generally* MONICA MCDERMOTT, WORKING-CLASS WHITE: THE MAKING AND UNMAKING OF RACE RELATIONS (2006).

[322] James Baldwin, *A Letter to My Nephew*, THE PROGRESSIVE MAG., (Dec. 1, 1962), https://progressive.org/magazine/letter-nephew/ [https://perma.cc/S6NA-SCK9]; s*ee also* McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting) ("[W]e remain imprisoned by the past as long as we deny its influence in the present.").

[323] *See* JIA LYNN YANG, ONE MIGHTY AND IRRESISTIBLE TIDE: THE EPIC STRUGGLE OVER AMERICAN IMMIGRATION, 1924-1965, at 270 (2020); MONICA MCDERMOTT, WHITENESS IN AMERICA (2020); JACOBSON, *supra* note 33, at 91; ARE ITALIANS WHITE?

in the white community has varied.[324] At times, it was limited to those of Anglo-Saxon origin, thereby excluding many nationalities, including individuals of German, Irish, Italian, Russian, Spanish, and Swedish ancestry.[325] Other ethnic and religious groups have also been excluded.[326] Even today, the meaning of white is in flux and who it defines is unclear.[327] In sum, both "the white community" and "people of color" are dynamic terms whose membership has never been fixed.

It is important, however, to separate white(ness) from the white community. White(ness) was constructed—as W.E.B. Du Bois observed over 100 years ago—which means it can be changed.[328] After many centuries, it is time to reframe white(ness). Scholars such as Ian Haney López have called for separating white(ness) from the white community, writing "[j]ustice lies, then, not in embracing Whiteness (that is, advantage), but in seeking to

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HOW RACE IS MADE IN AMERICA (Jennifer Guglielmo & Salvatore Salerno eds., 2003); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995); Brent Staples, *How Italians Became "White*," N.Y. TIMES (Oct. 12, 2019), https://www.nytimes.com/interactive/2019/10/12/opinion/columbus-day-italian-american-racism.html [https://perma.cc/5M76-LND6]; Tanya Katerí Hernández, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998).

[324] In *St. Francis College. v. Al-Khazraji*, the Supreme Court noted the diverse manner in which the "white race" had been defined throughout U.S. history. 482 U.S. 604, 610–13 (1987).

[325] *See, e.g.*, FRANKLIN, *supra* note 170, at ¶ 24 (arguing "[t]hat the Number of purely white People in the World is proportionably very small," and it excludes those from Africa, Asia, and the Americas as well as numerous Europeans, such as Spaniards, Italians, Russians, Swedes, and most Germans); *see also* DAVID R. ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE (2005); Kamala Kelkar, *How a Shifting Definition of "White" Helped Shape U.S. Immigration Policy*, PBS NEWS HOUR (Sept. 16, 2017), https://www.pbs.org/newshour/nation/white-u-s-immigration-policy [https://perma.cc/DD99-LFPA]; Cybelle Fox & Thomas A. Guglielmo, *Defining America's Racial Boundaries: Blacks, Mexicans, and European Immigrants, 1890–1945*, 118 AM. J. SOC. 322 (2012); Alastair Bonnett, *Who Was White? The Disappearance of European White Identities and European Racial Whiteness*, 21 ETHNIC & RACIAL STUD. 1029 (2008).

[326] *See, e.g.*, JOHN TEHRANIAN, WHITEWASHED: AMERICA'S INVISIBLE MIDDLE EASTERN MINORITY (2008); KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (1998). *Cf.* Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (holding that individuals of the Jewish faith could bring a claim for racial discrimination under 42 U.S.C. § 1982).

[327] *See* GEORGE A. YANCEY, WHO IS WHITE?: LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE (2003); Frank H. Wu, *Are Asian Americans Now White?*, 23 ASIAN-AM. L. REV. 201 (2016); Nate Cohn, *More Hispanics Declaring Themselves White*, N.Y. TIMES (May 21, 2014), https://www.nytimes.com/2014/05/22/upshot/more-hispanics-declaring-themselves-white.html [https://perma.cc/HG25-ZDMZ].

[328] *See* W.E.B. DU BOIS, DARKWATER: VOICES FROM WITHIN THE VEIL 29–30 (1920). *See generally* 1 THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE: RACIAL OPPRESSION AND SOCIAL CONTROL (2012); RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS (1993); Robert P. Baird, *The Invention of Whiteness: The Long History of a Dangerous Idea*, THE GUARDIAN (Apr. 20, 2021), https://www.theguardian.com/news/2021/apr/20/the-invention-of-whiteness-long-history-dangerous-idea [https://perma.cc/3VWZ-KS9Y]; Jay Caspian, *Noel Ignatiev's Long Fight Against Whiteness*, NEW YORKER (Nov. 15, 2019), https://www.newyorker.com/news/postscript/noel-ignatievs-long-fight-against-whiteness [https://perma.cc/9UPF-KMC7].

dismantle race as a system that correlates to power and privilege."[329] White(ness) is built on a legacy of slavery, racial terror, and discrimination—a legacy that remains entrenched in U.S. law. It is embedded in countless institutions, including criminal justice, health care, employment, housing, immigration, and education.[330] It still offers privilege to some and burden to others.[331]

Indeed, the connection between white(ness) and privilege is so powerful, it has affected how both "white" and "white community" are used. There is a dissonance to these words. They generate discomfort, and people avoid their use as collective terminology. This dissonance even affects their spelling. For example, many media organizations decline to capitalize "white" when referring to someone's color or race. According to the *Associated Press*, "capitalizing the term white, as is done by white supremacists, risks subtly conveying legitimacy to such beliefs."[332] The *New York Time*s offers a different rationale: "white doesn't represent a shared culture and history in the way Black does."[333] Of course, there are different perspectives.[334] But significantly, this debate about capitalization is really a debate about the power and legacy of white(ness).

One way to challenge white(ness) is to end its use as a legal baseline. Several statutes with origins in the era of the First Reconstruction continue to reference "white citizens" as the baseline for assessing equality. For example, 42 U.S.C. § 1981 protects the right of all U.S. citizens to make and enforce contracts as well as to receive the equal benefit of all laws and pro-

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[329] HANEY LÓPEZ, *supra* note 24, at xvii; *see also* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

[330] *See* Deborah N. Archer, *Exile from Main Street*, 55 HARV. CIV. RTS.-CIV. LIB. L. REV. 789 (2020); Zinzi D. Bailey, Nancy Krieger, Madina Agénor, Jasmine Graves, Natalia Linos & Mary T. Bassett, *Structural Racism and Health Inequities in the USA: Evidence and Interventions*, 389 LANCET 1453 (2017).

[331] *See* DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (2007); KARYN D. MCKINNEY, BEING WHITE: STORIES OF RACE AND RACISM (2005); THOMAS SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY (2004); GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS (1998).

[332] David Bauder, *AP Says It Will Capitalize Black But Not White*, ASSOCIATED PRESS (July 20, 2020), https://apnews.com/article/entertainment-cultures-race-and-ethnicity-us-news-ap-top-news-7e36c00c5af0436abc09e051261fff1f [https://perma.cc/AY4X-X2XM].

[333] Nancy Coleman, *Why We're Capitalizing Black*, N.Y. TIMES (July 5, 2020), https://www.nytimes.com/2020/07/05/insider/capitalized-black.html [https://perma.cc/AD3M-UKSW].

[334] *See* Nell Irvin Painter, *Why "White" Should Be Capitalized, Too*, WASH. POST (July 22, 2020), https://www.washingtonpost.com/opinions/2020/07/22/why-white-should-be-capitalized/ [https://perma.cc/HZT5-C2DE]; Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, THE ATLANTIC (June 18, 2020), https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159/ [https://perma.cc/4UA3-M76F]; Eve L. Ewing, *I'm a Black Scholar Who Studies Race. Here's Why I Capitalize "White,"* ZORA (July 1, 2020), https://zora.medium.com/im-a-black-scholar-who-studies-race-here-s-why-i-capitalize-white-f94883aa2dd3 [https://perma.cc/D28G-6N22].

ceedings "as is enjoyed by white citizens."[335] Another federal statute, 42 U.S.C. § 1982 protects the right of all U.S. citizens to acquire property "as is enjoyed by white citizens.[336] Thus, both statutes measure compliance by reference to the rights "enjoyed by white citizens." Given the significance of these civil rights statutes, the perpetuation of white normativity and privilege is both ironic and deeply troubling; it should end.[337] These statutes should be amended to exclude such references. The Constitution also contains the vestiges of white(ness), as the notorious Three-Fifths Clause and the Fugitive Slave Clause remain etched in the text. These provisions should be struck from the Constitution.[338]

Another way to challenge white(ness) is to change the collective terminology used to identify the white community.[339] This can help separate white(ness) from the white community. Perhaps "non-people of color" is a more appropriate term.[340] It would reflect a transfer of power and build a new narrative for both people of color and the white community. Admittedly, it has some shortcomings. William Safire's admonition against defining people by what they are not would apply to this term.[341]

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[335] 42 U.S.C. § 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by *white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.") (emphasis added).

[336] 42 U.S.C. § 1982 ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by *white citizens* thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.") (emphasis added).

[337] *See generally* John Hope Franklin, *The Civil Rights Act of 1866 Revisited,* 41 HASTINGS L.J. 1135 (1990); Judith Olans Brown, Daniel J. Givelber & Stephen N. Subrin, *Treating Blacks as If They Were White: Problems of Definition and Proof in Section 1982 Cases,* 124 U. PA. L. REV. 1 (1975).

[338] *See, e.g.*, William J. Aceves, *Amending a Racist Constitution*, 170 U. PA. L. REV. ONLINE 1 (2021); Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899 (2019).

[339] The question of "who is white" has existed for as long as race and color categories have existed. *See* HANEY LÓPEZ, *supra* note 24, at 1–2, 17–26.

[340] The term "non people of color" is rarely used although this is changing. *See, e.g.*, ALLIES IN ACTION, https://www.allies-in-action.com/ [https://perma.cc/FW9D-ZGTP] ("The Allies in Action Membership Network is a place for non people of color to unite in solidarity, taking action to champion, support and celebrate women of color in fundraising and philanthropy."). However, this term has generated significant controversy. *See* Jennifer Henderson Carma Hassan & Leah Asmelash*, University of Michigan-Dearborn Apologizes for Segregated "Virtual Cafes" Meant to Spur Discussion*, CNN (Sept. 11, 2020), https://www.cnn.com/2020/09/11/us/michigan-dearborn-cafes-segregated-trnd/index.html [https://perma.cc/LG9E-DQEJ]; Jessica Campisi, *Festival Backtracks After Backlash For Charging White People More*, THE HILL (July 9, 2019), https://thehill.com/blogs/blog-briefing-room/news/452123-festival-backtracks-over-backlash-for-charging-white-people [https://perma.cc/W2Z2-6MXA]; Derrick Bryson Taylor, *Detroit Festival Backtracks After Charging White People Double*, N.Y. TIMES (July 7, 2019), https://www.nytimes.com/2019/07/07/us/afrofuture-fest-tiny-jag.html [https://perma.cc/59SX-4MYV] (describing a musical festival that charged "non-POC" double the price of admission).

[341] *See* Safire, *supra* note 254, at 18.

A different approach would add a new color to the racial lexicon.[342] Race is a social construct, and the history of color reveals the same.[343] In discussions about racial identity, there is no reason we cannot add, change, or mix colors. For example, the color gray could be used to represent individuals who now self-identify as members of the white community. For several reasons, individuals may choose to self-identify as members of this new gray community. First, these individuals choose to reject the history of white privilege and the continuing power of white(ness). This new collective terminology signals separation from a brutal history that established the power and privilege of white(ness). Second, the term "gray community" can be structured to be more inclusive than "white." It can represent a multitude of ethnicities, nationalities, and experiences. Third, these individuals recognize that they are members of a group that is distinct from people of color. Finally, the term can serve as a "universalizing gesture" of solidarity to people of color.[344] Terminology alone cannot end white privilege.[345] But it can help change the meaning of color.

There is a powerful symbolism to this new collective terminology, and it is here where history can offer its final lessons. For centuries, people of color grappled with their identity. Indeed, the names controversy of the nineteenth century reflects this long-standing struggle. Modern debates over the term "people of color" are simply extensions of this historical struggle. It is now time for the white community to engage in a similar process of self-reflection and embrace their own names controversy.

History reveals another benefit to this new terminology. When enslaved people were abducted from their ancestral homes in Africa and transported

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[342] This approach is inspired by the artist Amy Sherald. In her remarkable portraiture, Sherald reflects skin color through the *grisaille* technique, which uses shades of gray. Through this approach, Sherald seeks to "exclude the idea of color as race" and "even the playing field" for Black people. Amy Sherald: Gallery Guide, Contemporary Art Museum, St. Louis (May 11 – Aug. 18, 2018), https://camstl.org/wp-content/uploads/2018/01/gallery-guide-amy-sherald.pdf [https://perma.cc/XD4Z-25CG]. *See generally* Steve Johnson, *Amy Sherald Painted Michelle Obama and Many People Didn't Get It, and to Her, That's Just Fine*, CHI. TRIB. (Feb. 19, 2020), https://www.chicagotribune.com/entertainment/museums/ct-amy-sherald-michelle-obama-portrait-explained-0220-20200219-bnf4267cyrekrdbtkomybuh4dy-story.html [https://perma.cc/5WDR-WWHB]; High Museum of Art, *What's Behind the Gray Skin Tones and Arresting Eyes in Amy Sherald's Portraits?*, MEDIUM (Apr. 11, 2018), https://medium.com/high-museum-of-art/whats-behind-the-gray-skin-tones-and-arresting-eyes-in-amy-sherald-s-portraits-8d21477d6b40 [https://perma.cc/64TU-CHMW]; Doreen St. Félix, *The Mystery of Amy Sherald's Portrait of Michelle Obama*, NEW YORKER (Feb. 13, 2018), https://www.newyorker.com/culture/annals-of-appearances/the-mystery-of-amy-sheralds-portrait-of-michelle-obama [https://perma.cc/EM3W-75GR].

[343] *See* TONI MORRISON, RECITATIF: A STORY (2022); Honorée Fanonne Jeffers, *Toni Morrison's Only Short Story Addresses Race by Avoiding Race*, N.Y. TIMES (Jan. 30, 2022), https://www.nytimes.com/2022/01/28/books/review/toni-morrison-recitatif.html [https://perma.cc/PJL5-SNBM].

[344] RAEL, *supra* note 99, at 148.

[345] *See, e.g.*, Rashmi Dyal-Chand, *Autocorrecting for Whiteness*, 101 B.U. L. REV. 191 (2021).

to the United States, they were often given new names by their enslavers.[346] This was meant to sever their remaining ties to the past and confirm the end of their agency. When enslaved people eventually gained their freedom, they gave themselves new names that represented an end to their bondage and a return of their agency.[347] Changing the terminology of the white community could offer a similar opportunity for "white Americans . . . [to] be released from" their own history and to build a new one.[348]

Conclusion

In his memoirs, Henry Louis Gates, Jr. wrote to his children about living in West Virginia in the midst of the civil rights era.[349] He chronicled the lives of the people he knew and loved, and the humiliations wrought by segregation. Gates self-identified as a "colored person" while documenting the rich history of the Black experience. To his children, he acknowledged that their journey in America would be different from his own.[350] Even the labels that would be used to describe them would change. "In your lifetimes," Gates wrote, "I suspect, you will go from being African Americans, to 'people of color,' to being, once again, 'colored people.' (The linguistic trend toward condensation is strong.)"[351] Gates knew all too well the transient nature of identity and color.

Today, we should embrace the term "people of color." It empowers current generations by connecting their struggle for equality to past generations. It also has rhetorical and political force. Growing concerns about racial inequality and social justice make this collective terminology even more relevant.[352] Yet despite its long history and the symbolism it now provides, we should not become too comfortable with this term.[353] The complicated role

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[346] *See* Catherine Adams & Elizabeth H. Pleck, Love of Freedom: Black Women in Colonial and Revolutionary New England 7 (2010); George Francis Dow, Slave Ships and Slaving 295 (1927); Martha S. Jones, *Ida, Maya, Rosa, Harriet: The Power in Our Names*, N.Y. Times (June 18, 2020), https://www.nytimes.com/2020/06/18/style/self-care/sojourner-truth-harriet-tubman-slavery-names.html [https://perma.cc/63H2-XM4S].

[347] *See* Stuckey, *supra* note 21, at 260; Susan Benson, *Injurious Names: Naming, Disavowal, and Recuperation in Contexts of Slavery and Emancipation*, *in* The Anthropology of Names and Naming (Gabriele vom Bruck & Barbara Bodenhorn eds., 2006); Sarah Abel, George F. Tyson & Gisli Palsson, *From Enslavement to Emancipation: Naming Practices in the Danish West Indies*, 61 Comp. Stud. Soc'y & Hist. 332 (2019).

[348] Baldwin, *supra* note 322.

[349] Henry Louis Gates, Jr., Colored People: A Memoir (1995).

[350] *Id.* at xi.

[351] *Id.* at xvi.

[352] *See* Democracy Fund Voter Study Group, Racing Apart: Partisan Shifts on Racial Attitudes Over the Last Decade (2021); Stacey Y. Abrams, *Identity Politics Strengthens Democracy*, 98 For. Aff. 160 (Mar.-Apr. 2019).

[353] *See* Lee Sigelman, Steven A. Tuch & Jack K. Martin, *What's In a Name? Preference for "Black" Versus "African-American" Among Americans of African Descent*, 69 Pub. Opinion Q. 429 (2005); Tom W. Smith, *Changing Racial Labels: From "Colored" to "Negro" to "Black" to "African American,"* 56 Pub. Opinion Q. 496 (1992); Lerone Bennett, Jr., *What's in a Name? Negro vs. Afro-American vs. Black*, 26 ETC: Rev. Gen. Sem. 399 (1969).

of color in human relations suggests the terminology we use in conversations about ourselves will continue to evolve until, eventually, we get it right.[354]

[354] *See* STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 213 (2002) ("Names for minorities will continue to change as long as people have negative attitudes toward them. We will know that they have achieved mutual respect when the names stay put."); W.E.B. Du Bois, *The Name "Negro,"* 35 THE CRISIS 96–97 (1928) ("Do not . . . make the all too common error of mistaking names for things. Names are only conventional signs for identifying things. Things are the reality that counts.").

From the Chinese Exclusion Act to the Muslim Ban: An Immigration System Built on Systemic Racism

Tina Al-khersan[*] & *Azadeh Shahshahani*[**]

INTRODUCTION

On January 27, 2017, the first version of President Donald Trump's travel ban [hereinafter the Muslim Ban or the Ban] went into effect. It targeted nationals from Muslim majority countries including Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[1] It also indefinitely barred Syrian refugees, cut the total number of refugees allowed to be resettled to the United States by more than half, suspended the refugee admissions program, and prioritized the admission of non-Muslim religious minorities.[2] While the first Muslim Ban was challenged in court, the Executive Order went through another iteration in March,[3] until it settled in its final form in September 2017. In this Presidential Proclamation, President Trump indefi-

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[1] Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

[2] *Myth v. Fact: Trump's Refugee and Immigration Executive Order*, HUMAN RIGHTS FIRST (Feb. 7, 2017), https://www.humanrightsfirst.org/resource/myth-v-fact-trumps-refugee-and-immigration-executive-order [https://perma.cc/3W4Q-GXKA].

[3] Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

nitely prohibited nationals from six Muslim-majority countries from entering the United States.[4] This list included Iran, Libya, Somalia, Sudan, Syria, and Yemen, in addition to North Korea and all government officials from Venezuela.[5] A month after the third iteration of the Muslim Ban was enacted, the portion banning refugees expired, so President Trump issued a separate Executive Order that slowed down the resettlement process and effectively dismantled the resettlement program.[6] This new Refugee Ban imposed extreme vetting policies and introduced another 90-day ban on eleven countries, nine of which have a Muslim-majority population: Egypt, Iran, Iraq, Libya, Mali, Somalia, Sudan, Syria, and Yemen.[7] Despite swift public outcry that denounced President Trump's executive orders as xenophobic, the Supreme Court of the United States upheld the third iteration of the ban on June 26th, 2018.[8]

Unsurprisingly, the implementation of the Bans resulted in devastating consequences for refugees and immigrants worldwide. In the short term, the confusion and chaos that ensued after the first Ban led to the detention of individuals in airports, stranded refugee families who were due to arrive in the United States abroad, and even resulted in the expulsion of refugee families who had just arrived to the United States.[9] Subsequent iterations of the Ban would also indefinitely separate families, prohibit students from continuing their studies, and prevent sick individuals from accessing necessary medical treatment.[10] And while the long-term impacts of the Ban are yet to be fully determined, one notable effect is the drastic decrease in the number of refugees resettled in the United States, particularly of Muslims—a decrease that will negatively impact refugee resettlement in the United States for years to come.[11]

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[4] Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

[5] *Id.*

[6] Exec. Order No. 13,815, 82 Fed. Reg. 50055 (Oct. 24, 2017); *See* Susan Nahvi, *Trump's Muslim and Refugee Ban: Where are We Now?*, FRIENDS COMM. ON NAT'L LEGIS. (Jan. 24, 2018), https://www.fcnl.org/updates/trump-s-muslim-and-refugee-ban-where-are-we-now-1222 [https://perma.cc/KDN6-EF64].

[7] *Id.*

[8] *Trump v. Hawaii*, 323 U.S. 214 (2018).

[9] Jeremy Diamond & Steve Almasy, *Trump's Immigration Ban Sends Shockwaves*, CNN, (Jan. 30, 2017), https://www.cnn.com/2017/01/28/politics/donald-trump-executive-order-immigration-reaction/ [https://perma.cc/75T4-RUFA].

[10] *E.g.,* Sabrina Siddiqui, *'A Hellish Nightmare': How Trump's Travel Ban Hit a Syrian Refugee Family*, THE GUARDIAN (Jan. 30, 2017), https://www.theguardian.com/world/2018/feb/04/syrian -refugee-family-trump-travel-ban-virginia [https://perma.cc/7S3B-ZUU6]; Karen Zraick, *Iranian Students Set to Start at U.S. Universities Are Barred From Country*, N.Y. TIMES (Sept. 20, 2019) [hereinafter Zraick] https://www.nytimes.com/2019/09/20/us/iranian-students-visas.html [https://perma.cc/H697-4TH6]; *The Muslim Ban: Discriminatory Impacts and Lack of Accountability,* CTR. FOR CONST. RTS (Jan. 14, 2019) [hereinafter *The Muslim Ban*], https://ccrjustice.org/home/get-involved/tools-resources/publications/muslim-ban-discriminatory-impacts-and-lack [https://perma.cc/5JNQ-E4PH].

[11] Int'l Rescue Comm., New IRC Analysis of US Refugee Resettlement Shows Vastly Reduced Arrivals at a Time of Record Global Need and Consistent Popular Support (June 18, 2019) (on file with author); *see, e.g.*, Amanda Holpuch, *Trump Has Nearly Destroyed US Refugee Program, Experts Say*, THE GUARDIAN (Sept. 28, 2019), https://www.theguardian.com/world/2019/sep/27/trump-refugee-cap-asylum-program [https://perma.cc/ETW6-5G6Y].

In response to the Muslim Ban, thousands of individuals took to the streets to protest that the Ban did not align with "American values,"[12] but this article demonstrates that the Ban is a continuation of U.S. immigration policies that have long been driven by racism and exclusion. Although immigration to the United States was relatively unrestricted in the first few hundred years after the country's founding, qualitative and quantitative restrictions were subsequently enacted to exclude nonwhite individuals from naturalizing. As immigration policies became increasingly predicated on one's whiteness, judges sought to define the concept by creating "tests" based on common knowledge and science. These tests were designed to exclude nonwhite immigrants, including Muslims from traveling to the United States and becoming American long before the enactment of the Muslim Ban. When whiteness was no longer explicitly the test for allowing immigrants into the United States, various administrations used economic or national security arguments to continue to inhibit nonwhite individuals from immigrating—a tactic that the Muslim Ban adopted. Such racist immigration policy coming out of the legislative and executive branch has endured for centuries in part because of the plenary power doctrine, which allows the Supreme Court to ignore even overt animus under the guise of deferential review. Together, these arguments prove that despite the public outcry that erupted after the implementation of the Muslim Ban, the Muslim Ban fit right in with "American values."

To work towards an immigration system that does not operate on racism and exclusion, it is necessary to document and discuss this country's dark history. This article attempts to do just that. By no means an exhaustive summary of racist U.S. immigration policy, this article highlights the ways in which white supremacy has maintained and defined the U.S. immigration system, harming countless individuals in the process. Only once we confront the dark history of the U.S. immigration system and the legal mechanisms that prop it up will we be able to work towards legal solutions that contribute to a more inclusive immigration system.

I. An Open Door For White Immigrants

When European colonization of the United States first began in 1492, it was accompanied by an era of unrestricted immigration that lasted until 1875.[13] The first ten presidents believed that immigration benefitted the

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[12] *See, e.g.*, Lauren Gambino, Sabrina Siddiqui, Paul Owen & Edward Helmore, *Thousands Protest Against Trump Travel Ban in Cities and Airports Nationwide,* The Guardian (Jan. 30, 2017), https://www.theguardian.com/us-news/2017/jan/29/protest-trump-travel-ban-muslims-airportsl [https://perma.cc/6NRE-LELG]; Joshua Kurtz, *Activists Protest Supreme Court Muslim Ban Decision*, HIAS (June 27, 2018), https://www.hias.org/blog/activists-protest-supreme-court-muslim-ban-decision [https://perma.cc/P5M8-7FPE].

[13] Walter A. Ewing, *Opportunity and Exclusion: A Brief History of US Immigration Policy*, Am. Immigr. Council, 2 (Jan. 2012) [hereinafter Ewing], https://www.americanimmigrationcouncil.org/sites/default/files/research/opportunity_exclusion_011312.pdf [https://perma.cc/PSY2-6WKJ].

overall health and prosperity of the country, so they effectively established a pro-immigration consensus.[14] Therefore, immigration policy during this time is often categorized as an open-door policy, one that was driven by the United States' need for labor.[15]

However, even during this era of relatively urestricted immigration, the door was only open to some. Congress's first act to address immigration was the Naturalization Act of 1790, which recognized immigrants who were "free white persons" of "good moral character" as eligible for naturalization.[16] This resulted in whiteness serving as a proxy for citizenship to the United States, an idea that would define subsequent U.S. immigration policy for centuries to come.[17] The question of who was considered white, however, was not easily answered and often forced immigrants to prove their racial identity in order to be eligible to naturalize.

Deciding who would be considered white in the United States and therefore allowed to naturalize received particular attention when Irish Catholics began to migrate to the United States.[18] Throughout the 1700s and 1800s, Irish migrants arrived to the U.S. to escape famine, comprising one of the earliest and largest non-English immigrant groups.[19] However, many Irish immigrants identified as Catholic, which frustrated American Protestants who considered Catholics to be nonwhite.[20] Thus, the arrival of Irish Catholic immigrants ultimately resulted in the first successful anti-immigrant movement in the United States organized by the Know-Nothings.[21]

The Know-Nothings were one of the first white supremacist groups in the U.S. that opposed immigration and gained enough momentum to enter the political realm, reaching one million members at their peak.[22] Not only did members have to be native-born white Protestants, they also rejected immigrants based on their religion and took an oath to resist foreign influences on the country.[23] Their success came from their ability to link "American values" to the image of an idealized past of the United States[24]—an idea that "Make America Great Again" iterates. Around the same time, the Ku Klux Klan appeared in the North to defend "the country's schools, govern-

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[14] ROGER DANIELS, GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882 6 (2005).

[15] Philip Martin & Elizabeth Midgley, *Immigration: Shaping and Reshaping America*, POPULATION BULL., 12 (Dec. 2006) [hereinafter Martin], https://www.prb.org/wp-content/uploads/2006/12/61.4USMigration.pdf [https://perma.cc/JZJ8-T5KQ].

[16] Naturalization Act of 1790, 1 Stat. 103, 103–04 (1790) (repealed 1795).

[17] Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?"*, 7 J. GENDER RACE & JUST. 315, 319–20 (2003) [hereinafter Boswell].

[18] Benjamin Oppenheimer, Swati Prakash & Rachel Burns, *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L. J. 1, 7–8 (2016).

[19] *Id.*

[20] *Id.* at 9.

[21] A. Cheree Carlson, *The Rhetoric of the Know-Nothing Party: Nativism as a Response to the Rhetorical Situation*, 54 S. COMM. J. 364, 364–65 (1989) [hereinafter Carlson].

[22] *Id.* at 367.

[23] DANIELS, *supra* note 14, at 10.

[24] Carlson, *supra* note 21, at 276.

ment, and social conduct" against Catholic immigrants.[25] The Klan's white supremacist, nativist ideologies were based on the idea that "American ideals" were too weak to withstand outside pressure, which necessarily meant that any foreigners would subvert American culture.[26] Contrary to the Klan's approach, the Know-Nothings recognized that the country needed immigrants to succeed. Therefore, instead of arguing for the outright exclusion of Catholics, they focused their attention on the assimilation of immigrants and increasing the waiting time before naturalization.[27]

This nativist rhetoric subsequently transformed into concrete law.[28] In particular, New York and Massachusetts experienced great influxes of Irish migrants in the 1840s and '50s and strengthened their laws to exclude Irish and Catholic immigrants from entering their borders in fear of them becoming economic burdens.[29] Their efforts resulted in the most advanced regulatory immigration systems among the seaboard states,[30] and the two states would successfully transform their nativist states laws into federal ones as immigration law shifted from state to federal control, resulting in the Immigration Act of 1882.[31]

Despite the initial anti-immigrant rhetoric Irish immigrants faced, both anti-Irish sentiment and the Know-Nothings dissipated as Irish Catholics were enveloped into the definition of white.[32] Germans, Eastern European Jews, and Italians were also eventually categorized as white, despite facing similar racialization to that of the Irish when they immigrated to the United States.[33] Among the various reasons for the successful assimilation of European ethnic groups were their anti-Black attitudes and the expansion of the country westward, both of which provided a path for Europeans and white

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[25] David Montgomery, *Presidential Address: Racism, Immigrants, and Political Reform*, 87 J. AM. HIST. 1253, 1269 (2001) [hereinafter Montgomery].

[26] Carlson, *supra* note 21, at 368.

[27] Erika Lee, *Immigrants and Immigration Law: A State of the Field Assessment*, 18 J. AM. ETHNIC HIST. 85, 88 (1999) [hereinafter Lee].

[28] *Id.* at 87. States had primary jurisdiction over immigration law prior to 1875. The only exception was naturalization, which was controlled by the federal government.

[29] Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government and the Formation of American Immigration Policy*, 99 J. AM. HIST. 1092, 1095 (2013) [hereinafter Hirota].

[30] *Id.*

[31] While not directly at issue in this article, it is important to note that the Immigration Act of 1882 created the public charge rule, a rule which was designed to exclude impoverished Europeans or poor, nonwhite immigrant populations in general. Immigration Act of 1882, 22 Stat. 214 (1882); *see generally*, Hirota, *supra* note 29. The Trump administration moved to expand the rule in 2018, which took effect nationwide in 2020, and the expansions are predicted to exclude green card applicants primarily from Asia, Latin America, and Africa. *See* Hamutal Bernstein, Dulce Gonzalez, Michael Karpman & Stephen Zuckerman, *Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019*, URBAN INST. 1, 3 (May 2020), https://www.urban.org/sites/default/files/publication/102221/amid-confusion-over-the-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-in-2019_2.pdf [https://perma.cc/D6SQ-E72D].

[32] Oppenheimer et al., *supra* note 18, at 9; Carlson, *supra* note 21, at 376–379.

[33] Oppenheimer et al., *supra* note 18, at 7, 14, 17.

Americans to form a white, cohesive social group that marginalized other people including African-Americans, Indians, Asians, and Mexicans.[34]

II. Closing the Door for Nonwhite Immigrants

As European immigrants were categorized as white and immigration policy shifted from state to federal control, nativist rhetoric targeted a different population: Chinese immigrants.[35] In 1875, the U.S. passed the Page Law, which was the first federal immigration law that regulated the admission of immigrants to the United States.[36] Specifically, the Page Law restricted the entry of Chinese, Japanese, and other Asian laborers involuntarily brought to the U.S. While nativism and xenophobia had always been a part of U.S. immigration history, the Page Law marked the first time the federal government yielded to nativist demands and restricted immigration by law.[37]

A federal law emerged at this time for two main reasons: changes in the racial, religious, ethnic, and cultural composition of the immigrant population triggered xenophobic reactions, and the growth of the nation state equipped the federal government with administrative capacity.[38] As the demographics of the immigrant population began to change from European to Asian migrants, white Americans grew more hostile towards immigrants, calling for legislation that placed qualitative restrictions on immigrants perceived as threatening. This would ultimately result in devastating legal consequences for Chinese immigrants who were categorized as nonwhite.[39] In this way, the exclusion of Chinese immigrants brought about an end to the so-called open-door era of U.S. immigration policy.[40]

III. Justifying the Exclusion of Nonwhite Immigrants

A. The Portrayal of Nonwhite Immigrants as Economic Threats

The difference in legal outcomes for Chinese and Irish Catholic immigrants demonstrates the significance the racial category "white" has historically had on U.S. immigration policy. Because whiteness was not easily defined when the U.S. began to exclude Chinese immigrants, Chinese immigrants were often portrayed as economic threats to justify their race-based

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[34] Monica McDermott & Frank L. Samson, *White Racial and Ethnic Identity in the United States*, 31 Ann. Rev. Soc. 245, 251 (2005).
[35] Lee, *supra* note 27, at 89.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 88.
[39] Whiteness was still a prerequisite for citizenship at this time. Martin & Midgley, *supra* note 15, at 12.; Naturalization Act of 1790, 1 Stat. 103, 103–04 (1790).
[40] *Id.*

exclusion. In particular, the discovery of gold in California in 1848 attracted over 300,000 Chinese laborers.[41] Before the passage of the Chinese Exclusion Act in 1882, Chinese laborers were welcomed into the U.S. because they worked in especially harsh conditions for long hours and received low wages.[42] As soon as Chinese laborers began to see economic success, however, exclusionary immigration policy followed, including the Chinese Exclusion Act of 1882.[43] Not only did the Act suspend the entry of Chinese laborers for ten years, it rendered Chinese immigrants ineligible for naturalization.[44]

While the belief that Chinese immigrants were economic threats resulted in restrictive immigration policy, a similar view of the Irish Catholics did not. Instead, through legislation and court proceedings, the state legitimized the racialization and subjugation of Chinese immigrants, but not of the Irish Catholics. For example, while the state gave the Irish the ability to naturalize and the right to vote, it did not do the same for Chinese laborers, largely under the justification that Chinese individuals did not meet the definition of "free white persons."[45] Among the three racial categories that existed at that time, courts often grouped Chinese immigrants as Indigenous or Black instead of white.[46]

Ultimately, the influx of Chinese immigrants forced courts to grapple with the definition of white, causing whiteness to become more than a race; whiteness granted individuals the rights and privileges of citizenship that nonwhite individuals could not attain.[47] This notion was exemplified in *Chae Chan Ping v. United States,* also known as the *Chinese Exclusion Case*.[48] Chae Chan Ping was a Chinese citizen and legal resident of San Francisco who decided to visit China twelve years after he arrived to the United States. While he was abroad, an amendment was passed to the Chinese Exclusion Act, resulting in the denial of his re-entry into the United States.[49] Although he subsequently challenged the denial, the Supreme Court rejected his challenge, acknowledging the Act's racist rationale in their opinion but accepting it as legitimate.[50]

In an attempt to define Chinese immigrants as nonwhite and therefore preclude them from citizenship, Justice Stephen Field emphasized the supposed differences between Chinese immigrants and American citizens. His

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[41] Oppenheimer et al., *supra* note 18, at 19.
[42] Martin & Midgley, *supra* note 15, at 12.
[43] *Id.* at 19–20.
[44] The Chinese Exclusion Act would be extended again in 1892 for another ten years and indefinitely in 1902. Ewing, *supra* note 13, at 3.
[45] Erin L. Murphy, *Prelude to Imperialism: Whiteness and Chinese Exclusion in the Reimagining of the United States*, 18 J. HIST. SOC. 457, 470 (2005).
[46] *Id.* at 470–72.
[47] *See id.* at 460.
[48] Chae Chan Ping v. United States, 130 U.S. 581 (1889); *see also* United States v. Wong Kim Ark, 169 U.S. 649 (1898) (demonstrating that even U.S. citizenship could not guarantee individuals with Chinese ancestry the rights and privileges associated with whiteness).
[49] *Chae Chan Ping*, 130 U.S. at 581–82.
[50] Oppenheimer et al., *supra* note 18, at 22.

unanimous opinion explained that Chinese individuals in the United States were "adhering to the customs and usages of their own country," which made it "impossible for them to assimilate with our people, or to make any change in their habits or modes of living."[51] Well-known figures like Theodore Roosevelt also celebrated the passage of the Act, claiming that Chinese individuals should be kept out of the country because their presence was "ruinous to the white race" and threatened democracy.[52]

Throughout the 1900s, other Asian immigrant groups faced discriminatory immigration policies as well, such as the Japanese. For example, in 1907 President Roosevelt persuaded the Japanese government to enter into the Gentlemen's Agreement, which resulted in Japan denying passports to Japanese laborers intending to enter the U.S.[53] The goal of the informal agreement was to ease tensions arising within the United States as a result of the growing presence of Japanese workers. In 1917, this exclusionary policy was expanded when Congress created a geographic zone known as the "Asia-Pacific Triangle" specifically designed to prohibit Asians, including the already barred Chinese, from immigrating to the United States.[54]

Just six years later, the Supreme Court cemented the idea that citizenship was predicated on whiteness in *United States v. Baghat Singh Thind*.[55] Here, the Court rejected an Indian immigrant's right to naturalize on the grounds that children born to Hindu parents "would retain indefinitely the clear evidence of their ancestry"— an ancestry that the Supreme Court determined was incompatible with whiteness and therefore citizenship.[56] Prior to this decision, debates in the courts about the boundaries of whiteness revolved around two main theories: common knowledge and scientific evidence.[57] The court in *Thind*, however, ultimately rejected the role of science in racial assignments. Because science justified the categorization of some individuals with dark skin as Caucasian, courts began to discredit science as the measure of whiteness.[58] In other words, because science could not guarantee whites superiority in a racial hierarchy, courts instead made common knowledge the arbiter of whiteness, holding that "free white persons" were

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[51] *Chae Chan Ping*, 130 U.S. at 595.

[52] Motoe Sasaki, *Excludable Aliens vs. One Nation People: The U.S. Chinese Exclusion Policy and the Racialization of Chinese in the United States and China*, 23 JAPANESE J. AM. STUD. 27, 33 (2012) [hereinafter Sasaki].

[53] Julia G. Young, *Making America 1920 Again? Nativism and US Immigration, Past and Present*, 5 J. MIGRATION & HUM. SEC. 217, 221 (2017).

[54] Boswell, *supra* note 17, at 324.

[55] United States v. Baghat Singh Thind, 261 U.S. 204 (1923).

[56] *Id.* at 215.

[57] IAN HANEY LÓPEZ, WHITE BY LAW 5–7 (1996).

[58] This transformation occurred over a series of cases, including *In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878), and *Ozaawa v. United States*, 260 U.S. 178 (1922). However, the *Thind* case best demonstrates the divergence of science and common knowledge in "determining one's racial category." In *Thind,* the Court believed that the inclusion of brown and Black individuals meant that science had been manipulated to create a broader category of Caucasians. *Thind*, 261 U.S. at 213-215.

words that could be interpreted through the common individual's understanding.[59]

To further confine immigration to "western and northern European stock"—an idea that was driven by prominent eugenicists at the time[60]—Congress enacted a quota in 1910 that limited the number of eastern and southern Europeans entering the country.[61] This discriminatory quota was made permanent with the passage of the National Origins Act of 1924.[62] The Act lowered the number of immigrants allowed into the U.S. to 150,000 individuals, as opposed to the previous cap of 350,000, and limited the percentage of individuals from each nationality to two percent of the members of that nationality present in the U.S.[63] A more complex quota would govern U.S. immigration policy from 1929 until 1952, the year Congress enacted the Immigration and Nationality Act and formally removed whiteness as a prerequisite for citizenship.[64]

Throughout the mid-1900s, other racist restrictions began to lift. In 1943, Congress repealed the Chinese Exclusion Act,[65] and in 1963 President Kennedy proposed immigration reforms that would formally remove national origin as a barrier to immigration. His quantitative system relied on skills needed in the United States, family ties to U.S. citizens, and priority registration. It also included the first cap for immigrants coming from the Western Hemisphere.[66] These reforms attempted to end racial and ethnic exclusion and continue to define today's immigration system.[67] Despite this apparent progress, however, immigration policies to come would continue to operate on an exclusionary basis but with national security as the justification.

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[59] By using common knowledge to determine who was white, the Court furthered the notion that whiteness stemmed from physical differences among individuals. This left the Court to decide which physical differences were not white, paving the way for them to create a legal construct of whiteness. *Id.*

[60] Boswell, *supra* note 17, at 325 (citing U.S. Comm'n On Civil Rights, The Tarnished Golden Door: Civil Rights Issues In Immigration 8 (1980).

[61] Desmond King, *Liberal and Illiberal Immigration Policy: A Comparison of Early British (1905) and US (1924) Legislation*, 1 TOTALITARIAN MOVEMENTS & POL. RELIGIONS 78, 82 (2000) [hereinafter King].

[62] Boswell, *supra* note 17, at 325.

[63] King, *supra* note 61, at 81–82.

[64] This act is also known as the McCarran-Walter Act. Boswell, *supra* note 17, at 324–25.

[65] Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), repealed by Act of Dec. 17, 1943, ch. 344 § 1, 57 Stat. 600 (1943).

[66] Boswell, *supra* note 17, at 326–27

[67] *See* Muzaffar Chishti, Faye Hipsman & Isabel Ball, *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, MIGRATION POL'Y INST.: MIGRATION INFO. SOURCE (Oct. 15, 2015), https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states [https://perma.cc/5MW4-38TC].

B. The Portrayal of Nonwhite Immigrants as National Security Threats

While the United States appeared to be advancing towards less racist immigration policies in the mid-1900s, exclusionary policies directed at nonwhite individuals were still enacted but now justified under the guise of national security. During the open-door era of immigration, national security justifications were less of a concern as colonial leaders in the U.S. believed that the strength of the country depended on the size of its population.[68] Therefore, the country looked to immigrants to provide protection and wealth in case of catastrophic events like war.[69] While the founders did have some concerns that immigrants could expose Americans to foreign spies or use ethnic and racial violence to cause disruption in society, national security did not define immigration policy.[70]

This changed leading up to the Chinese Exclusion Act, where Chinese individuals were portrayed as a direct threat to the peace and security of the United States. U.S. citizens feared that the growing number of Chinese immigrants would result in an "Oriental invasion,"[71] in addition to the "race suicide" of Anglo-Americans.[72] Such ideas permeated the Supreme Court, which also endorsed the idea that Chinese individuals posed a threat to national security because of their supposed inability to assimilate into American society. Specifically, the Supreme Court espoused the notion that the growing number of Chinese immigrants would ultimately result in a separate "Chinese settlement within the state" that had no interest in the U.S. or its institutions.[73]

Ultimately, nativist rhetoric directed at Asian immigrants paved the way for immigration policy to be utilized as an instrument of national self-defense against racially suspect immigrants throughout the mid 1900s.[74] For example, in 1942 President Franklin Roosevelt issued Executive Order 9066, which allowed the military to enact policies necessary to preserve national security, including the relocation and incarceration of individuals with Japanese ancestry.[75] Fred Korematsu's violation of this order resulted in the landmark case *Korematsu v. United States*.[76] Although the Court in *Korematsu* explained that all legal restrictions curtailing the rights of a single ra-

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[68] Robbie Totten, *National Security and U.S. Immigration Policy*, 39 J. INTERDISC. HIST. 37, 38–39 (2008).

[69] *Id.* at 46.

[70] *See id.* at 43.

[71] Chae Chan Ping v. United States, 130 U.S. 581, 595–96 (1889).

[72] For more information on how the usage of the word "invasion" was instrumental in developing an American national identity and in gatekeeping who belonged, *see* Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping*, 21 J. AM. ETHNIC HIST. 36, 43 (2010).

[73] *Id.*

[74] Matthew Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 7 (2010).

[75] Exec. Order No. 9,066, 3 C.F.R. 1092 (1943).

[76] 323 U.S. 214 (1944).

cial group were immediately suspect, they upheld the constitutionality of the order by using national security as a means to justify racial discrimination.[77]

Recent U.S. presidents have continued to use national security to justify racist and exclusionary immigration policies. After the September 11, 2001 attacks, national security became the dominant lens through which immigration policy was viewed under the Bush administration, and funding for immigration programs linked to "homeland security" experienced exponential growth.[78] Immigration enforcement was also restructured from the local to federal level, linking immigration to intelligence and law enforcement, which in turn resulted in a closer connection between immigration and counterterrorism campaigns that disproportionately impacted Muslims.[79] For example, one of the principal tactics used by the Bush Administration was detaining noncitizens with possible ties to terrorism.[80] As evidenced by the "National Security Entry and Exit Registration System" (NSEERS), these ties were often assumed on the specious basis of national origin. Initiated in 2002, NSEERS targeted men from predominantly Arab and Muslim countries including Iran, Iraq, Libya, Sudan, Syria, Somalia, North Korea, and Yemen—countries that have all been included in iterations of Trump's Muslim Ban.[81] NSEERS operated on the false notion that individuals from a particular religion or nationality were more likely to commit acts of terrorism, but the program unsurprisingly failed to meet its declared objective of identifying suspects involved in terrorism-related crimes.[82] Other efforts under the Bush Administration that connected immigration to national security and disproportionately impacted Muslims include: the FBI conducting interviews with Muslim and Iraqi immigrants to detect and prevent Al-Qaeda acts of reprisal, Department of Homeland Security (DHS) launching Operation Liberty Shield and requiring the detention of asylum seekers from thirty-three countries where Al-Qaeda was known to operate, and the Department of Justice (DOJ) designating several thousand men as

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[77] *Id.* at 216, 220.

[78] MICHELLE MITTELSTADT, BURKE SPEAKER, DORIS MEISSNER, MUZAFFAR CHISHTI, THROUGH THE PRISM OF NATIONAL SECURITY: MAJOR IMMIGRATION POLICY AND PROGRAM CHANGES IN THE DECADE SINCE 9/11, MIGRATION POL'Y INST. 1, 2 (Aug. 2011).

[79] *Id.* at 5.

[80] Shoba S. Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L REV. 1485, 1491 (2010).

[81] *Id.* at 1503.

[82] The NSEERS registration consisted of three main components. First, individuals from the listed countries were required to be fingerprinted, photographed, and interrogated about their background when entering or exiting the country. Second, individuals had to re-register thirty days after their initial registration at a port-of-entry and annually if they stayed in the United States for over a year. Lastly, individuals were required to register each time they left the United States. Despite costing American taxpayers more than $10 million annually, there is no evidence that NSEERS led to the identification of any individual suspected of terrorism, Instead, it devastated family members and communities. RIGHTS. WORKING GROUP, THE NSEERS EFFECT: A DECADE OF RACIAL PROFILING FEAR, AND SECRECY 15–16 (May 2012); *National Security Entry-Exist Registration System (NSEERS) Freedom of Information Act (FOIA) Request,* CTR. FOR CONST. RTS (Apr. 15, 2019), https://ccrjustice.org/home/what-we-do/our-cases/national-security-entry-exit-registration-system-nseers-freedom.

"priority absconders" because they hailed from "countries in which there ha[d] been al-Qaeda terrorist presence or activity."[83]

Moreover, in 2003, immigration-related functions once carried out by the DOJ's Immigration and Naturalization Service were transferred to DHS, solidifying the fact that the administration viewed immigration as a national security issue.[84] The creation of DHS was the largest reorganization of federal government responsibilities since the creation of the Defense Department post-World War II, centralizing 22 federal agencies,[85] expanding U.S. Customs and Border Protection (CBP), and creating U.S. Immigration and Customs Enforcement (ICE).[86] During its initial stages, DHS even released a memo explaining that the Department considered in their analysis race, ethnicity, and an individual's connections to countries associated with acts of terrorism when there was a compelling government interest, demonstrating that profiling individuals based on their nationality was permissible and even preferred during the Bush Administration.[87]

The Obama Administration also manipulated immigration law in the name of national security.[88] Critics of the Obama Administration have drawn attention to the ways in which his administration conflated immigration with counterterrorism programs and utilized lower due process protections afforded to immigrants to heighten surveillance and racially and religiously profile individuals.[89] Additionally, Muslims during President Barack Obama's tenure were subjected to preventive detention, exclusion based on their political views, and potentially unconstitutional racial profiling.[90] And while the NSEERS program was indefinitely suspended in 2011, the Obama administration continued to disproportionately detain and deport Muslims, in addition to denying them immigration benefits, by portraying lawful activities that they engaged in as dangerous.[91] In using national security as a justification for the targeting of Muslims, U.S. policy positioned

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[83] MITTELSTADT ET AL., *supra* note 78, at 6–7.

[84] Wadhia, *supra* note 80, at 1513.

[85] Dara K. Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 676 (2006).

[86] *History of ICE*, U.S. IMMIGR. & CUSTOMS ENF'T (July 12, 2022), https://www.ice.gov/features/history [https://perma.cc/FT47-5H9S].

[87] Wadhia, *supra* note 80, at 1513 (citing Memorandum from Tom Ridge, Sec'y. of the Dep't of Homeland Security, on The Department of Homeland Security's Commitment to Race Neutrality in Law Enforcement Activities (June 1, 2004)).

[88] Sudha Setty, *Obama's National Security Exceptionalism*, 91 CHI.-KENT. L. REV. 91, 106 (2016) [hereinafter Setty]. *See also* Desirée Colomé-Menéndez, Joachim A. Koops & Daan Weggemans, *A Country of Immigrants No More? The Securitization of Immigration in the National Security Strategies of the United States of America*, 7 GLOBAL AFF. 1 (2021) (analyzing the National Security Strategies published between 2002 and 2017 to explain how the Obama administration reintroduced immigration as a security issue for the U.S.).

[89] Setty, *supra* note 88. For a more detailed analysis of how the Obama administration's counterterrorism programs impacted Muslim, Arab, and South Asians, *see also*, Sudha Setty, *Country Report on Counterterrorism: United States of America*, 62 AM. J. COMP. L. 634 (2014).

[90] Setty, *supra* note 88, at 108.

[91] CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, N.Y.U., ASIAN AM. LEGAL DEF. & EDUC. FUND, UNDER THE RADAR: MUSLIMS DEPORTED, DETAINED, AND DE-

Muslim populations within the U.S. as a suspect and foreign group deserving of government discipline, a belief the Muslim Ban was predicated on.

C. The Racialization of Muslim Immigrants as Nonwhite

Despite Islam being a religion with adherents from countless racial and ethnic backgrounds, Muslims immigrating to the U.S. have been racialized as nonwhite and precluded from citizenship since the Naturalization Act of 1790.[92] In particular, the cases that reached the Supreme Court in the early 1900s highlight the problems that arose for Muslims when the courts attempted to establish who was white by law.[93] As demonstrated in cases where Christian, Middle Eastern immigrants were categorized within the statutory definition of whiteness and were therefore able to naturalize, Christianity often served as a proxy for whiteness.[94] Although early Muslim migrants tried to persuade judges they were white, they were unsuccessful due to Orientalist views that framed Islam as incompatible with Christianity and therefore whiteness.[95]

NIED ON UNSUBSTANTIATED TERRORISM ALLEGATIONS 2 (2011), https://chrgj.org/wp-content/uploads/2016/09/undertheradar.pdf [https://perma.cc/VK8G-S8AJ].

[92] Khaled Beydoun, *"Muslim Bans" and the (Re)Making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733, 1741–47 (2017) (arguing that the Naturalization Act of 1790 operated as a *per se* ban on Muslims as a person's faith served as a proxy for whiteness or otherness) [hereinafter Beydoun].

[93] Because race is a social construct, it is in part a legal construct as well. The law has been used to create racial boundaries, define racial identities, and assign relative privilege and/or disadvantage in society. One way the law has created race is by defining the meaning of white and nonwhite, choosing which traits code as what race, and assigning that to individuals. LÓPEZ, *supra* note 57, 1–24. Although Islam is a religion and not a race, Islamophobia is often classified as racism because it is a structural, racial project that maintains the race-based subordination of marginalized groups and upholds white supremacist thought. In fact, the facial lens on which Islamophobia operates is why a set of physical traits and characteristics can label someone as Muslim, despite their actual religion or nationality. ERIK LOVE, ISLAMOPHOBIA AND RACISM IN AMERICA 2–4 (2017). Outside of the law, the racialization of Muslims is less determined by the absence of ethnic and racial uniformity among them, but more on the narrow gaze of those who do the racializing. *See* Neil Gotanda, *The Racialization of Islam in American Law*, 637 ANNALS AM. ACAD. POL. & SOC. SCI. 184, 13–14 (2011). Anti-Muslim racism often implies that Muslim identity, and any negative characteristics associated with Islam, are innate and unchangeable. Anna Sophie Lauwers, *Is Islamophobia (Always) Racism?*, 7 CRITICAL PHIL. RACE 306, 306 (2019).

[94] Beydoun, *supra* note 92, at 1743.

[95] *Id.* at 1742–43. Initially, Orientalist thought positioned immigrant Muslims as threats to domestic interests. However, as Black Muslims who embraced Islam adopted a liberation ideology against White Supremacy, Orientalist thought merged with anti-Black sentiment, and Islam became associated with militant Blackness, radicalism, and violence. Its adherents, therefore, were categorized as anti-American individuals who threatened democracy and foreign interests. For more information, *see*, Sahar Aziz, *Orientalism, Empire, and The Racial Muslim*, *in* OVERCOMING ORIENTALISM: ESSAYS IN HONOR OF JOHN L. ESPOSITO 221 (Tamara Sonn, ed., 2021). The current racialization of Muslims often operates on two tropes: the "Muslim terrorist" and the "good Muslim." The good Muslims are model minorities who can assimilate in the United States while the Muslim "terrorists" remain permanently foreign due to their supposed opposition to U.S. goals and foreign policy. This racialization is similar to that the Chinese faced in U.S. history, when they were perceived to be unable to assimilate into U.S. life because of their race. *See generally* Gotanda, *supra* note 93.

As courts began to use religion as a proxy for whiteness, they simultaneously grappled with how skin color impacted one's categorization as white, facing particular difficulty in classifying dark-skinned Arabs who were also Christian. For example, in the 1913 case *Ex parte Shahid*, William Shahid was an Arab Christian who attempted to rebut the notion that he was Muslim.[96] The judge, however, viewed Shahid's skin, which he described as the color "of a walnut," as proof that Shahid was in fact Muslim.[97] The judge came to this conclusion by interpreting "free white persons" to mean the same it did in 1790, limiting whiteness to Christian Europeans and their descendants.[98] In this way, *Ex parte Shahid* helped create a legal white identity through a two-step process: first by deciding who was and was not white, and second by subjugating nonwhites and excluding them from privileges like the right to naturalize.[99]

To be able to articulate what whiteness meant, the judge in *Ex parte Shahid* also offered the idea that whiteness was an inherited and a commonly recognized truth—one that Muslims did not belong to.[100] This notion was solidified in the 1942 case *In re Ahmed Hassan*,[101] where the petitioner attempted to prove his whiteness using both common knowledge and science, despite the role of science being rejected earlier in *United States v. Baghat Singh Thind* and *Ex parte Shahid*. Ultimately, the court in *In re Ahmed Hassan* ruled that Arabs were not white for a variety of reasons, among them being that they hailed from the "Mohammedan world," could not assimilate or intermarry due to their Muslim beliefs, and their skin color differed from the Europeans.[102] In this case, the judge relied on both skin color and the trope that Islam was incompatible with Christianity to delineate the boundaries of whiteness. Thus, regardless of what test a judge was relying on in delineating the boundaries of whiteness, judges were reluctant to conclude that Muslims could or should be categorized as white under the law.

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[96] 205 F.812, 813 (E.D.S.C. 1913).

[97] *Ex parte* Shahid, 205 F. 812, 813 (E.D.S.C. 1913).

[98] *Id.* at 814 (the judge determined the meaning of "free white persons" to be "all persons belonging to the European races, then commonly counted as white, and their descendants." He went on to stipulate that this definition "would not mean a 'Caucasian' race; a term generally employed only after the date of the statute and in a most loose and indefinite way." Acknowledging the difficulties that arose with defining whiteness through "ocular inspection," however, he relied on geography as it was "at least capable of uniform application" and "avoid[ed] the uncertainties of shades of color and invidious discriminations as the race of individuals.").

[99] LÓPEZ, *supra* note 57, at 19–20.

[100] *See Ex parte* Shahid, 205 F. at 814, 816. The inheritability of whiteness was made clear through the judge's determination that only the descendants of Europeans were white. While he acknowledged the illogical definition he proposed, explaining that whiteness "may not, ethnologically or physiologically speaking, be a very clear and logical construction," he still insisted that whiteness was only supposed to include "fair-complexioned people." He then noted that the argument that Jews and Christians would be excluded from such a definition was "unworthy of consideration," yet did not extend the same courtesy to Muslims.

[101] 48 F. Supp. 843, 845 (E.D. Mich. 1942).

[102] *Id.*

Moreover, while the "free white persons" citizenship requirement was formally removed in 1944, legal barriers implemented in recent history continue to categorize Muslims as nonwhite, thereby precluding them from certain rights and privileges granted to white people. This is perhaps most salient with the implementation of the NSEERS program. In total, the program targeted 25 countries, of which all but two were Muslim majority.[103] Targeting such a broad geographic region demonstrated that national security did not serve as the sole justification of each country's inclusion, especially when considering the fact that most of the countries were allies of the United States.[104] Instead, an individual's "blood relationship" to Islam incited the creation of the registration system,[105] playing on the notion presented in *Ex parte Shahid* that whiteness was inheritable. By making the defining criterion of registration the inheritability of Islam, the registration positioned Islam as an innate and unchanging characteristic, one that negated whiteness and inclusion in the U.S. permanently.[106]

The Muslim Ban went one step further than the NSEERs program by prohibiting Muslims from even entering the country, demonstrating that legal barriers designed to racialize and exclude Muslims from the country were becoming harsher and more effective. On January 27, 2017, President Trump issued the first iteration of the Muslim Ban through an Executive Order titled "Protecting the Nation from Foreign Terrorist Entry into the United States."[107] The Order restricted the entry of immigrants and nonimmigrants from countries with predominantly Muslim populations, and its stated purpose was to protect Americans from indiviuals who had hostile attitudes toward the United States.[108] Countries were supposedly selected based on terrorist threats they posed to the U.S.[109] A bipartisan group of experts, however, argued that the order would in fact harm the country's national security and foreign policy interests.[110] One consular officer even described Trump's proposed waiver process as fraudulent.[111]

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[103] These countries included: Iran, Iraq, Libya, Sudan, Syria, Egypt, Tunisia, Algeria, Morocco, Somalia, Eritrea, Yemen, Kuwait, Saudi Arabia, United Arab Emirates, Qatar, Oman, Bahrain, Lebanon, Jordan, Pakistan, Indonesia, Bangladesh, Afghanistan, and North Korea. Moustafa Bayoumi, *Racing Religion*, 6 THE NEW CENTENNIAL REV. 267, 273 (2006).

[104] *Id.* at 283.

[105] *Id.*

[106] *See id.* at 278.

[107] Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

[108] *Id.*

[109] *Id.*

[110] Experts argued that the Ban furthered ISIS and al-Qaida's narrative that the West is the enemy of Islam and responded to political rhetoric instead of data, among other things. Nina Totenberg, *Why Dozens of National Security Experts Have Come Out Against Trump's Travel Ban* (Apr. 24, 2018), https://www.npr.org/2018/04/24/604949251/why-dozens-of-national-security-experts-have-come-out-against-trumps-travel-ban [https://perma.cc/DE8C-ZKS9].

[111] *Id.*; Jeremy Stahl, *"The Waiver Process is Fraud"*, SLATE (June 15, 2018), https://slate.com/news-and-politics/2018/06/trump-travel-ban-waiver-process-is-a-sham-two-consular-officers-say.html [https://perma.cc/H9AR-64SY].

The Trump administration justified the Muslim Ban using section 212(f) of the Immigration and Nationality Act,[112] which allows the President to suspend the entry of immigrants if their entry is found to be "detrimental to the interests of the United States."[113] While the Ban states that the national security standards to process visas, immigration petitions, and the background checks of the banned countries were lacking, Trump's historic targeting of Muslim majority countries and Islamophobic comments demonstrate that his immigration policy was also a reflection of his nativist attitude towards Muslims.[114] Specifically, his nativist attitude and resulting policies draw on historical immigration trends that privilege the "free white persons" and weaponize the law to subjugate nonwhite groups and exclude them from the rights and privileges that are granted to white individuals.[115] Just like Justice Field argued in 1882 that it was impossible for Chinese individuals to assimilate into American culture, President Trump has consistently argued that Islam itself is incompatible with American society, portraying Muslims as outsiders, enemies, and others who should not be offered citizenship.[116] In furtherance of this narrative, Trump has publicly questioned the allegiance of American Muslims to the United States, insinuating that Muslims are unable to uphold American civic values and assimilate into the United States.[117] For example, the stated purpose of the first iteration of the Muslim Ban included the line: "The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law,"[118] making the assumption that individuals from the banned countries espoused violent ideologies that were in direct opposition to the U.S. Constitution. This rhetoric portrays Muslims as intrinsically un-American.[119] Yet in contrast, the first Muslim Ban also prioritized refugee claims of religious-based persecution so long as the individual belonged to a minority religion in the individual's country.[120] Given that the countries were predominantly Muslim, this meant that Christians and other non-Muslim religious minorities would be prioritized for admittance to the United States. Less than a week after the first Ban was issued, Trump explicitly stated that persecuted Christians would be given priority over other refu-

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[112] Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

[113] Notably, various administrations prior to Trump have used the Immigration and Nationality Act (INA) to justify racist immigration policy in the name of national security. *See* KATE M. MANUEL, CONG. RESEARCH SERV., R44743, EXECUTIVE AUTHORITY TO EXCLUDE ALIENS: IN BRIEF 1 (2017) (citing P.L. 82–414, § 212(e), 66 Stat. 188 (June 27, 1952)).

[114] Young, *supra* note 53, at 228–29.

[115] Nadine Naber & Junaid Rana, *The 21st Century Problem of Anti-Muslim Racism*, JADALIYYA (July 25, 2019), https://www.jadaliyya.com/Details/39830 [https://perma.cc/7B3A-KLA3].

[116] Ruth Braunstein, *Muslims as Outsiders, Enemies, and Others: The 2016 Presidential Election and the Politics of Religious Exclusion*, 5 AM. J. CULTURAL SOC. 355, 357–58 (2017).

[117] *Id.*

[118] Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

[119] Braunstein, *supra* note 116, at 357–58.

[120] Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

gees,[121] emphasizing that religion continued to serve as a proxy for whiteness and therefore eligibility for citizenship.

Trump has also made many claims suggesting he views immigrants from regions including Latin America, the Middle East, and Africa to be a cultural threat to white Americans,[122] echoing Theodore Roosevelt's claim that the Chinese were "ruinous to the white race,"[123] except this time applied to a much larger group of potential nonwhite immigrants. Trump has also drawn direct comparisons to migration patterns in Europe, claiming that immigration is changing Europe's fabric and causing it to lose its culture—a phenomenon that he wants to avoid in the United States.[124] When discussing the "American culture" that he is concerned about losing, Trump often defines it in reference to popular white supremacist symbols like confederate statues, making his rhetoric popular among white nationalists.[125]

Then in January 2020, Trump expanded the ban to six more countries that have significant Muslim populations, including Nigeria, Eritrea, Sudan, Tanzania, Kyrgyzstan, and Myanmar.[126] The reasoning given for the expansion was that the six countries were not meeting certain baseline standards for security criteria and had deficiencies in sharing terrorist, criminal, or identity information, leading to national security concerns.[127] However, critics were quick to point out several anomalies in the proclamation, proving that it selectively applied criteria for deciding which countries to ban.[128] For example, DHS initially labeled 47 countries as inadequate for their "identity-management protocols, information-sharing practices, and risk factors;" however, only seven of those countries became the target of the Muslim

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[121] Daniel Burke, *Trump Says US Will Prioritize Christian Refugees*, CNN (Jan. 30, 2017), https://www.cnn.com/2017/01/27/politics/trump-christian-refugees/index.html.

[122] *See generally* Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197 (2019).

[123] Sasaki, *supra* note 52, at 27, 33.

[124] Srikantiah & Sinnar, *supra* note 120, at 199 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (June 19, 2018, 6:52 AM).

[125] *Id.* at 198. In a tweet, he explained that he was "sad to see the history and culture of our great country being ripped apart with the removal of our beautiful statues and monuments." Libby Cathey, *Trump's History of Defending Confederate 'Heritage' Despite Political Risk: Analysis*, ABC NEWS (June 11, 2020), https://abcnews.go.com/Politics/trumps-history-defending-confederate-heritage-political-risk-analysis/story?id=71199968 [https://perma.cc/D28R-88NS]. White supremacist groups today continue to use nativist arguments motivated by racially oriented beliefs to unify their base against immigration to the United States. In particular, popular white supremacists Stephen Bannon and Sebastian Gorka, who were formally part of the Trump administration, believe that Islam is an enemy ideology that the United States is engaged in war with because Islam inherently opposes fundamental American Judeo-Christian values. This echoes what Protestant Americans first argued when Catholic immigrants began to arrive on the shores of the United States. *See* Jeffrey Haynes, *Donald Trump, "Judeo-Christian Values," and the "Clash of Civilizations"*, 15 REV. FAITH & INT'L AFF. 66, 68 (2017).

[126] Proclamation No. 9983, 85 Fed. Reg. 6699 (2020).

[127] *Id.*

[128] *See* Harsha Panduranga, Faiza Patel & Michael W. Price, *Extreme Vetting and the Muslim Ban*, BRENNAN CTR. FOR JUST. 12—13 (Oct. 2, 2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_extreme_vetting_full_10.2_0.pdf [https://perma.cc/9WJT-BF8X].

Ban.[129] Moreover, DHS still recommended a travel ban for some countries like Somalia even though they met all baseline requirements.[130] Lastly, the main adviser behind the ban was Stephen Miller, whose leaked emails put on full display his affinity for ending nonwhite immigration to the United States due to his belief that nonwhite immigration constituted an attack on the country.[131] Overall, the lack of objective data used to fashion the Muslim Ban, combined with the authorship by white supremacists, demonstrates that the Muslim Ban is a subjective immigration policy designed to exclude Muslim, or nonwhite populations—one that is in line with the historical racist and exclusionary policies the country has long operated on.

IV. The Supreme Court's History of Exclusion: From Chae Chan Ping to the Muslim Ban

Given the exclusionary history of U.S. immigration policy, it is not surprising that the Supreme Court in *Trump v. Hawaii* upheld the Muslim Ban despite its overtly racist nature.[132] In justifying the outcome of the case amid national outcry, the majority largely relied on the plenary power doctrine, a doctrine that has racist underpinnings and has long been used to exclude nonwhite immigrant groups. The plenary power doctrine affords the federal government practically unchecked power to make decisions related to immigration policy,[133] and scholars posit that its origins lie in *Chae Chan Ping v. United States*.[134]

The Court in *Chae Chan Ping* upheld the Chinese Exclusion Act of 1882, finding that the federal government had the right to exclude immigrants on any basis, including race and nationality,[135] as national security decisions were "conclusive upon the judiciary."[136] Four years later in *Fong Yue Ting v. United States*,[137] the Court expanded its deferential stance when it upheld a federal statute that made Chinese laborers presumptively deportable, determining that the lack of due process the petitioners faced was constitutionally irrelevant because of Congress's plenary power over immigration.[138] Together, these early cases formed the backbone of the plenary power doctrine and the Court's extreme deference with regards to im-

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[129] *Id.* at 14.

[130] *Id.*

[131] Harsha Panduranga, *Trump's Expanded Travel Ban: New countries, Same Bigotry*, Brennan Ctr. For Just. (Feb. 11, 2020), https://www.brennancenter.org/our-work/analysis-opinion/trumps-expanded-travel-ban-new-countries-same-bigotry [https://perma.cc/S5QZ-XVWH].

[132] 138 S. Ct. 2392 (2018).

[133] David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. Rev. 583, 584, 594 (2017).

[134] *Id.* at 595.

[135] *Id.*

[136] Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

[137] 149 U.S. 698, 728 (1893).

[138] Rubenstein & Gulasekaram, *supra* note 133, at 584, 594.

migration policy, leading to a concept known as immigration exceptionalism.[139]

Since its racist inception, the plenary power doctrine has been used to uphold racist and exclusionary immigration policies that target nonwhite populations.[140] For example, federal courts have used the doctrine to justify deportations based on national origin, excluding or deporting people based on their political beliefs, denying individuals the right to due process in deportation proceedings, and allowing indefinite detention pending deportation.[141] The doctrine also justified the detention of Muslim, Middle Eastern, and South Asian immigrants after September 11, 2001;[142] the federal government's holding of American Indian resources in trust; and its avoidance of extending constitutional protections to the residents of external U.S. colonies.[143] Most relevant to this article, however, is the application of the plenary power in *Trump v. Hawaii*, which mirrors the application of the doctrine in *Korematsu.*[144]

The Court in *Trump v. Hawaii* found that the Executive Order authorizing the Muslim Ban did not exceed the President's authority, was facially neutral, and would survive even if the President's intent was examined as the order was based on legitimate purposes.[145] While the Court in *Trump* claimed to overrule a narrow version of *Korematsu*, it actually embraced the decision's logic by relying on the plenary power to justify judicial passivity in the immigration context in the face of overt animus.[146] In both *Korematsu* and *Trump*, the Court argued that the judiciary did not have the institutional

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[139] The plenary power doctrine is the reason that immigration law is often described as operating outside the purview of mainstream constitutional law, leading to what some describe as immigration exceptionalism. For more information, *see generally*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (tracking the rise of the plenary power as the dominant principle of immigration law and how that led to phantom norm decisions); David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015) (arguing that the plenary power has remained a defining feature of immigration law despite the wide condemnation of *Chae Chan Ping v. United States* because of the Court's concern that lower courts would undervalue governmental interests if given wider authority to review); Rubenstein & Gulasekaram, *supra* note 133 (reconciling immigration exceptionalism across constitutional dimensions including rights, federalism, and separation of powers).

[140] See Robert S. Chang, Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases, 68 CASE W. RES. L. REV. 1183, 1192–1202 (2018).

[141] Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 24 (2003).

[142] *Id.* at 20–24.

[143] *Id.* at 27–28.

[144] Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L.J. F. 641, 645 (2019).

[145] Trump v. Hawaii, 138 S. Ct. 2392, 2410, 2418, 2420–21. (2018).

[146] Erik K. Yamamoto & Rachel Oyama, *Masquerading Behind a Façade of National Security*, 128 YALE L. J. 688 (2019) (citing Anil Kalhan, *Trump v. Hawaii and Chief Justice Roberts's "Korematsu Overruled" Parlor Trick*, AM. CONST. SOC'Y (June 29, 2018), https://www.acslaw.org/acsblog/trump-v-hawaii-and-chief-justice-robertss-korematsu-overruled-parlor-trick [https://perma.cc/BY3M-M7P3]).

competence necessary to review other branches' decisions when it came to matters of national security.[147] While the Court in *Korematsu* focused on its lack of military expertise, the Court in *Trump* explained that it could not substitute its own assessment for that of the Executive's predictive judgement.[148] Moreover, both majorities refused to consider the broader context behind the policies, did not thoroughly examine the evidence, allowed for improper information to go uncorrected, and rejected the dissent's characterization of the facts, which recognized the racial animus and is discussed later in this section.[149] In this way, the Court intentionally refused to examine the exclusionary motives behind the policies, despite their overt racist nature that treated an entire religious group and nationality as suspect.[150]

In granting such wide deference to the executive branch in cases like *Trump, Korematsu, Fong Yue Ting,* and *Chae Chan Ping*, the Court has taken an active role in creating a racist immigration system that excludes entire groups of nonwhite individuals. What's worse is that while attorneys and advocates may have previously experienced discomfort in citing to a widely repudiated case like *Korematsu* to justify the Court's blind deference to the executive, attorneys can now openly cite *Trump* without fear of similar reprisal, creating new precedent that allows the judicial branch to more easily defer to the executive regarding racist and exclusionary immigration policies that infringe on fundamental liberties.[151] Inevitably, such extreme deference will continue to allow immigration policy to operate on an exclusionary basis even in the presence of explicit animus.

In light of the plenary power doctrine's historically exclusionary application, the doctrine has recently shown signs of erosion amidst changing views among the legislature, judiciary, and the public at large.[152] In response, justices on the Supreme Court must find a new way to balance deference to executive actions regarding immigration, with the explicit animus that some-

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[147] Katyal, *supra* note 144.

[148] *Id.*

[149] For a detailed analysis of the similarities between *Korematsu* and *Hawaii* see generally *id.* (arguing that while *Korematsu* was overturned in *Hawaii*, the outcome of *Hawaii* recreated the doctrine under another name and maintains the Court's extreme deference given to the Executive Branch).

[150] Moreover, the majority invoked *Kleindienst v. Mandel* in their opinion to explain that the Court does not look beyond potentially legitimate reasons offered by the executive branch in cases that involve immigration supposedly impacting national security. Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018) (citing 408 U.S. 753 (1972)). *Kleindienst*, however, involved a challenge to decisions made by federal officials that denied entry to individual foreign nationals whereas the Muslim Ban prevents an entire group from entering the country. Earl M. Maltz, *The Constitution and the Trump Travel Ban*, 22 Lewis & Clark L. Rev 391, 399 (2018).

[151] *See* Yamamoto & Oyama, *supra* note 146, at 716.

[152] *Id.* at 720–21. While the plenary power doctrine has received steady criticism over time, some argue that the plenary power remains intact because the Supreme Court is concerned that lower courts will undervalue governmental interests if given greater authority to review political branch decisions. For a more thorough discussion, see David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 Okla. L. Rev. 29 (2015).

times motivates such actions.[153] Countless scholars and practitioners of immigration law have proposed solutions regarding how to challenge the application of the plenary power doctrine to better respond to explicit animus driving executive actions. For example, instead of granting total or no deference to the political branches, Sahlini Bhargava Ray has proposed an intermediate solution for courts. She suggests that courts use a mixed motives framework to invalidate a contested law where the same law would not be promulgated but for animus.[154] In this scenario, a plaintiff would plead animus with particularity, while the defendants would have an opportunity to rebut a claim of animus with evidence of a sufficient legitimate purpose. Ray's proposed solution would thus allow the executive to enact policy when its motives are legitimate and sufficient, while allowing courts to inhibit the executive from enacting policy in which the illegitimate motive is necessary for the executive action.[155] Similar anti-animus frameworks have been proposed by other scholars, including Shawn E. Fields, who has advocated for an intent inquiry that would allow courts to reject any immigration decision made with "invidious, unconstitutional norms."[156] Such a framework, he argues, would likely strike down immigration policies that violate constitutional norms.[157]

Others have argued that the *Trump* opinion left room to push for heightened judicial scrutiny where immigration and foreign affairs are not directly involved and where the government curtails fundamental liberties due to national security reasons.[158] Perhaps the most compelling example of such a view emerges from Justice Sonia Sotomayor's dissent in *Trump v. Hawaii*. In her dissent, Justice Sotomayor first provides a historical overview of President Trump's anti-Muslim statements to demonstrate how the executive used national security as a façade for its anti-Muslim animus, explaining that a "reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus."[159] In the face of such discriminatory motives, Justice Sotomayor explained that future courts should not be precluded from examining the motivation behind executive actions when plaintiffs af-

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[153] Karla McKanders, *Deconstructing Invisible Walls: Sotomayor's Dissents in an Era of Immigration Exceptionalism*, 27 WM. & MARY J. WOMEN & L. 95, 97 (2020).

[154] Sahlini Bhargava Ray, *Plenary Power and Animus in Immigration Law,* 80 OHIO ST. L.J. 13, 61 (2019) (arguing that judges should be able to consider statements the President utters in public discourse, addressing the oft cited concern posed in *Mandel* that the Executive's stated reasons should be taken at face value, and that courts should consider whether a more deferential motive standard should apply to religious discrimination challenges to immigration law by applying a "but-for" motive standard).

[155] *Id.* at 67.

[156] Shawn E. Field, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 775 (2017).

[157] *Id.*

[158] Yamamoto & Oyama, *supra* note 146, at 718–19 (citing Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. (1990)).

[159] McKanders, *supra* note 153, at 101 (citing *Trump v. Hawaii*, 138 S. Ct. at 2434–36).

firmatively make a showing of bad faith, triggering a heightened level of judicial review.[160] Scholars like Karla McKanders have convincingly argued that Justice Sotomayor's dissent is thus a step towards a more stringent standard of review for executive actions when freedom of religion and the Establishment Clause are implicated, requiring courts to examine whether an executive policy is pursuing legitimate state interests.[161] A more stringent standard of judicial review may allow for a more thorough examination of the executive branch's actions and may thus better balance the constitutional rights of nonwhite immigrants.

With the mounting criticism against the plenary power doctrine, it is possible that an era of blind deference and immigration exceptionalism may soon come to an end. In the absence of such change, blind deference to previous executive actions provide a forewarning of the harmful consequences exclusionary executive actions can have on individuals around the world, as seen with the devastating human impact from the Chinese Exclusion Act to the Muslim Ban. Advocates should thus continue to push for heightened scrutiny that balances individual interests with legitimate government concerns in a framework that acknowledges the need to honor the rights of noncitizens and citizens alike. Moreover, such legal solutions should be driven by a heightened sense of urgency. For as long as policies driven by animus are subject to incredibly deferential review, people will continue to suffer at the hands of the U.S. government.

V. The Human Impact of the Muslim Ban

The outcome of *Trump v. Hawaii* and the Muslim Ban disrupted the lives of individuals worldwide. Even after the initial chaos subsided, immigrants continued to be confronted with the fallout of the Ban. In some cases, the Ban indefinitely separated family members like the Ghazouls. The Ghazouls arrived in the United States one day before the enactment of the Muslim Ban.[162] They initially left their hometown Homs, Syria on foot in 2014 and applied for refugee status upon reaching Jordan.[163] Their daughter, however, had just married and did not immediately file her application for refugee status.[164] This decision marked the indefinite separation of the

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[160] *Id.* at 105.

[161] *Id.* at 109. Other scholars have also demonstrated how the equal protection doctrine with regards to immigrants is exceptional because of the plenary power doctrine. The level of scrutiny for equal protection depends on whether an immigrant is present in the United States lawfully and whether a state or federal classification is at play, undermining the doctrine of equal protection for immigrants. For more information see Jenny-Brooke Condon, *Equal Protection Exceptionalism,* 69 Rutgers U. L. Rev. 563 (2017).

[162] Sabrina Siddiqui, *'A Hellish Nightmare': How Trump's Travel Ban Hit a Syrian Refugee Family*, The Guardian (Jan. 30, 2017), https://www.theguardian.com/world/2018/feb/04/syrian-refugee-family-trump-travel-ban-virginia [https://perma.cc/7S3B-ZUU6].

[163] *Id.*

[164] *Id.*

Ghazouls from their daughter, who remains in Jordan.[165] The Ghazouls represent but one family among hundreds. Research carried out by the Bridge Initiative analyzed 549 cases and found that the Ban resulted in the separation of one in four children from their parents, one in ten from their siblings, and one in three individuals from their partners.[166]

In other cases, the Muslim Ban kept individuals from accessing life-saving medical treatment, and only those with the most severe medical cases were granted waivers for themselves or family members.[167] Shaima Swileh, a Yemeni national, was in Egypt when she applied for an I-130 visa to come the United States with her husband and son Abdullah Hassan, a two-year-old who was suffering from a genetic brain condition and was on a ventilator in San Francisco.[168] While Shaima's husband and son were U.S. citizens, she was not.[169] Although her visa application was going well, Shaima was informed in January 2018 that her application would not proceed unless she qualified for a waiver because of the Muslim Ban.[170] As Abdullah's condition worsened, Shaima's husband made the difficult decision to bring Abdullah to the United States for care without his wife. Eventually, Shaima's story was covered by mainstream media, and three members of Congress wrote a letter requesting an expedited decision on the visa waiver.[171] Abdullah died one week after Shaima was reunited with her only child.[172] Had there not been media intervention, it is likely that Shaima would not have been able to reunite with her son and husband.

Moreover, students, and particularly Iranians, were unable to pursue their higher education in the United States, despite having valid visas. While students with F-1 visas were technically exempt from the Muslim Ban, they faced heightened scrutiny when interacting with CBP.[173] In most of the deported students' cases, CBP questioned whether or not the students' work

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[165] *Id.*

[166] *The Muslim and African Bans*, BRIDGE (July 2, 2019), https://bridge.georgetown.edu/research-publications/reports/the-muslim-and-african-bans/ [https://perma.cc/FQ4D-X5VD].

[167] *The Muslim Ban, supra* note 10.

[168] Keith Allen & Chris Boyette, *The Family of a Boy on Life Support Is Trying to Get an Expedited Visa for His Mother to See Him, Group Says*, CNN (Dec. 18, 2018), https://www.cnn.com/2018/12/17/us/oakland-child-life-support-yemeni-mother-travel-ban/index.html [https://perma.cc/WHQ3-K97Z].

[169] *Id.*

[170] Sandra E. Garcia, *Yemeni Mother Gets Travel Ban Waiver to Visit Dying Son in California*, N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/us/yemen-mom-travel-ban-dying-son.html?action=Click&module=RelatedCoverage&pgtype=Article&region=footer [https://perma.cc/5MJ2-Y3BT].

[171] Christina Caron, *Son of Yemeni Mother Dies Soon After She Won Visa Battle with U.S. to See Him*, N.Y. TIMES (Dec. 29, 2018), https://www.nytimes.com/2018/12/29/world/abdullah-hassan-yemeni-toddler-dies.html [https://perma.cc/6U4R-QNLN].

[172] *Id.*

[173] Caleb Hampton, *'Treated like a Terrorist': US Deports Growing Number of Iranian Students Valid Visas from US Airports,* THE GUARDIAN (Jan. 14, 2020), https://www.theguardian.com/us-news/2020/jan/14/they-treated-me-like-a-terrorist-the-vetted-iranians-blocked-from-the-us [https://perma.cc/3JM9-MG25].

violated U.S. sanctions on Iran's government, while others said CBP accused them of hiding connections with the Iranian government.[174] To obtain a visa, the students had already gone through an extensive vetting process and in some cases were willing to accept single-entry visas that would prohibit them from seeing family members for years. Despite this, many were sent home and had their student visas cancelled,[175] and some students were even banned for five years from returning to the United States, a trend that immigration lawyers say began in 2019 and intensified amid political tensions between the United States and Iran in early 2020.[176] For example, Mohammed Elmi was 31 years old when he was on his way to join his wife in California and start his PhD.[177] In preparing for the move, he had left his job and depleted most of his savings.[178] Yet upon arrival to the United States, Elmi was held for over twenty-four hours, searched, and repeatably questioned, with many of the questions having surfaced during the visa application process months earlier.[179] Even so, Elmi was told that he could go back to Iran voluntarily or be deported and subsequently banned for five years. Left with no option, Elmi flew back to Iran without a job, money, or his wife.[180]

The Muslim Ban also detrimentally impacted immigration trends worldwide. By fiscal year 2018, Muslim arrivals experienced the sharpest decline in resettlement, even though many refugees originate from Muslim-majority countries.[181] Just in fiscal year 2017 to 2018, admissions of Christian refugees were down 36% while admissions of Muslim refugees declined by 85%.[182] The two non-Muslim countries included in the third iteration of the ban, Venezuela and North Korea, were not impacted to a similar extent as the restrictions against Venezuela were limited to certain governmental officials while immigration from North Korea to the U.S. was already in-

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[174] *Id.* Other Iranian students were chained and detained in U.S. Immigration and Customs Enforcement facilities where they were forced to strip naked, questioned about their opinions on political events in the Middle East, denied the opportunity to speak with family members, asked to sign documents saying they planned to overstay their visas, and had their electronics confiscated. Caleb Hampton & Caitlin Dickerson, *'Demeaned and Humiliated': What Happened to These Iranians at U.S.* Airports, N.Y. TIMES (Jan. 25, 2020), https://www.nytimes.com/2020/01/25/us/iran-students-deported-border.html [https://perma.cc/DN2X-4HZ9].

[175] Karen Zraick, *Iranian Students Set to Start at U.S. Universities Are Barred From Country*, N.Y. TIMES (Sept. 20, 2019), https://www.nytimes.com/2019/09/20/us/iranian-students-visas.html [https://perma.cc/AS6H-RVEH].

[176] Jihan Abdalla, *Iranian Students with Valid Visas Turned Back at US Borders*, AL JAZEERA (Feb. 4, 2020), https://www.aljazeera.com/news/2020/02/iranian-students-valid-visas-turned-borders-200202163132629.html [https://perma.cc/7BBX-XNXC].

[177] Hampton, *supra* note 173.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] Int'l Rescue Comm., New IRC Analysis of US Refugee Resettlement Shows Vastly Reduced Arrivals at a Time of Record Global Need and Consistent Popular Support (June. 18, 2019) (on file with the author).

[182] *Id.*

credibly limited.[183] The Muslim Ban's negative impact also extended beyond the refugee community. By December 2018, approvals for immigrant visas from the 48 majority Muslim countries had fallen by 30% while nonimmigrant visa approvals were down 18%.[184] In addition, short-term visas granted to Iranians fell from 1,650 per month in fiscal year 2017 to 501 the following year.[185]

As demonstrated, the Muslim Ban has had a detrimental impact on Muslim communities worldwide, and it will continue to be felt by these communities long after it is reversed—families may very well remain separated, students may not be able to continue their studies, and individuals will not be able to gain back the time that they lost—largely due to their classification as nonwhite. To fundamentally alter the future of the U.S. immigration system and halt the exclusion of individuals labeled as nonwhite, the legal field must be willing to not only acknowledge the system's racist history, but must also commit to working towards solutions that dismantle the racist system in place to make way for a more inclusive one.

Conclusion

As evidenced, anti-immigrant sentiment directed towards nonwhite individuals has existed in the United States since the first non-Protestant immigrants began arriving on the shores of the country. These nativist sentiments were transformed into exclusionary immigration policies directed at individuals categorized as nonwhite, demonstrated by the difference in treatment of Chinese immigrants compared to Irish immigrants. For the next century, immigration policy continued to exclude nonwhite individuals through qualitative and quantitative restrictions. In order to justify these restrictions, nonwhite immigrants were portrayed as economic and national security threats to the United States.

Among the subsequent immigrant groups deemed to be non-white were Muslims. Judges relied on "tests" related to common knowledge and science to create legal boundaries of whiteness that Muslims did not belong to, demonstrating that Muslims were excluded from entry into the United States long before the Muslim Ban. The Ban, therefore, is simply an extension of racist U.S. immigration policy that excludes individuals deemed nonwhite. Despite the overt racist nature of the Ban, legal challenges to the Ban and other immigration policies rooted in white supremacy have largely not succeeded due to immigration exceptionalism that arises from the plenary power doctrine, a doctrine that the Supreme Court has relied on for centuries to exclude nonwhite immigrants.

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[183] *The Muslim Ban*, *supra* note 10.

[184] David J. Bier, *Trump Cuts Muslim Refugees 91%, Immigrants 30%, Visitors by 18%*, Cato Inst. (Dec. 7, 2018), https://www.cato.org/blog/trump-has-cut-christian-refugees-64-muslim-refugees-93 [https://perma.cc/9RFY-C9XJ].

[185] Chishti et al., *supra* note 67.

Although Donald Trump lost the 2020 election, racist immigration policy in the U.S. exists beyond one presidential administration—it has deep roots in the U.S. immigration system that continue to shape immigration policies implemented today. To change the course of immigration policy, there must be an honest reckoning with this country's dark immigration history, one that not only acknowledges its racist nature but also posits legal arguments that challenge the application of the plenary power doctrine, especially in the presence of evident animus. Until this is accomplished, the United States will continue to uphold white supremacist policies that exclude individuals deemed nonwhite, harming countless people in the process.

Police Killings as Felony Murder

Guyora Binder & Ekow N. Yankah***

The widely applauded conviction of officer Derek Chauvin for the murder of George Floyd employed the widely criticized felony murder rule. Should we use felony murder as a tool to check discriminatory and violent policing? The authors object that felony murder—although perhaps the only murder charge available for this killing under Minnesota law—understated Chauvin's culpability and thereby inadequately denounced his crime. They show that further opportunities to prosecute police for felony murder are quite limited. Further, a substantial minority of states impose felony murder liability for any death proximately caused by a felony, even if the actual killer was a police officer, not an "agent" of the felony. In these "proximate cause" jurisdictions, felony murder is far more often used to prosecute the (often Black) targets of police violence, than to prosecute culpable police.

Previous scholarship on prosecution of felons for killings by police criticized such proximate cause rules as departures from the "agency" rules required by precedent. But today's proximate cause felony murder rules were enacted legislatively during the War on Crime and are thus immune to this traditional argument. The authors instead offer a racial justice critique of proximate cause felony murder rules as discriminatory in effect, and as unjustly shifting blame for reckless policing onto its victims. Noting racially disparate patterns of charging felony murder, and particularly in cases where police have killed, the authors call on legislatures to reimpose "agency" limits on felony murder as a prophylactic against discrimination. Finally, the authors widen this racial justice critique to encompass felony murder as a whole, urging legislatures to abolish felony murder wherever racially disparate patterns of charging can be demonstrated.

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** Thomas M. Cooley Professor of Law and Professor of Philosophy, University of Michigan. The authors thank research assistants Shakierah Smith, Ben Holwitt, and Matthew Biondolillo at Buffalo; librarians Joe Gerken at Buffalo and Shay Elbaum at Michigan; Colorado Representative Mike Weissman, Hollis Whitson of the Colorado Criminal Defense Bar, Georgia Special Prosecutor Pete Skandalakis, and journalists Alison Flowers and Sarah Macareag. The paper was improved by the comments of Luis Chiesa, Frank Rudy Cooper, Brenner Fissell, Aya Gruber, Kate Levine, Tony O'Rourke, Chris Slobogin and other participants at the Markelloquium at Brooklyn Law School, the Policing Conference at the University of South Carolina, the Law & Society Conference in Lisbon, the Guilty Minds conference at Arizona State University, and a panel discussion at Buffalo.

I. Murder, with an Asterisk?

On May 25, 2020 Officer Derek Chauvin of the Minneapolis Police Department was called to a convenience store to investigate a suspected counterfeit 20 dollar bill.[1] Chauvin, who is white, wrestled an unarmed and non-resisting Black suspect, George Floyd, to the ground and for nine minutes, captured on videotape, kneeled on Floyd's neck.[2] While Floyd begged for breath, the officer stared with contempt and defiance at witnesses begging him to release Floyd. Finally, Floyd would beg for his dead mother and utter the all too familiar, "I can't breathe," before dying.[3]

Three weeks later, police officers Devin Brosnan and Garrett Rolfe were summoned to an Atlanta-area Wendy's because Rayshard Brooks, another Black man, had fallen asleep in his car.[4] After determining that Brooks's blood alcohol exceeded the legal limit, the officers decided to arrest him.[5] Despite Brooks's pleas that he could walk a short way to his sister's home, the officers moved to handcuff him.[6] The resulting struggle sent Brooks and Brosnan to the ground. Brosnan reported that Brooks then took

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[1] *George Floyd: What happened in the final moments of his life,* BBC News (May 30, 2020, https://www.bbc.com/news/world-us-canada-52861726 [https://perma.cc/4S9U-87G6].

[2] Catherine Thorbecke, *Derek Chauvin had his knee on George Floyd's neck for nearly 9 minutes, complaint says*, ABC News (May 29, 2020), https://abcnews.go.com/US/derek-chauvin-knee-george-floyds-neck-minutes-complaint/story?id=70961042 [https://perma.cc/DSG6-PRW2]; State v. Chauvin, Sentencing Order, 27-CR-20-12646 (Minn. Ct. App. 2021).

[3] Esme Murphy, *'I Can't Breathe!': Video Of Fatal Arrest Shows Minneapolis Officer Kneeling On George Floyd's Neck For Several Minutes*, WCCO-TV (May 26, 2020), https://minnesota.cbslocal.com/2020/05/26/george-floyd-man-dies-after-being-arrested-by-minneapolis-police-fbi-called-to-investigate/ [https://perma.cc/M2HW-LNBZ].

[4] Malachy Browne, Christina Kelso & Barbara Marcolini, *How Rayshard Brooks Was Fatally Shot by the Atlanta Police*, N.Y. Times (June 14, 2020), https://www.nytimes.com/2020/06/14/us/videos-rayshard-brooks-shooting-atlanta-police.html [https://perma.cc/7M7L-4L3W].

[5] Aimee Ortiz, *What to Know About the Death of Rayshard Brooks*, N.Y. Times (May 6, 2021), https://www.nytimes.com/article/rayshard-brooks-what-we-know.html [https://perma.cc/HZL9-BZ7K].

[6] *Id.*

his taser and tased him. Rolfe drew his taser and fired it at Brooks, hitting him.[7] Brooks ran, turning and firing Brosnan's taser over Rolfe's head. Rolfe fired his gun, hitting Brooks twice and killing him. A third shot hit an occupied vehicle.[8]

Searing videos of these killings ignited waves of protest unseen in generations.[9] At the forefront of the racial justice issues raised in their wake were calls for less violent and less discriminatory policing and demands that police who unjustifiably kill be prosecuted with all tools available.[10] Facing enormous public scrutiny, prosecutors charged the police officers involved in these high-profile killings with a slew of crimes, including, most seriously, felony murder.[11]

The felony murder charges sent legal observers puzzling through the intricacies of the felony murder law and the "merger doctrine" that would preclude such charges in most states.[12] For criminal law reformers and social justice advocates, these felony murder charges forced a reckoning. On the one hand lay the long-standing academic disdain for felony murder liability, stretched to its furthest limits in these cases.[13] On the other lay the imperative to prosecute killer cops who for so long have seemed above the law.[14]

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[7] *Id.*

[8] Richard Fausset & Shaila Dewan, *Police Decisions Are Scrutinized After Rayshard Brooks's Fatal Encounter*, N.Y. TIMES (June 19, 2020), https://www.nytimes.com/2020/06/18/us/rayshard-brooks-police-tactics.html [https://perma.cc/WY3K-KRHL].

[9] *How George Floyd Died, and What Happened Next*, N.Y. TIMES (November 1, 2021), https://www.nytimes.com/article/george-floyd.html? [https://perma.cc/K26N-T4DY].

[10] *Id.*

[11] *4 Minnesota police officers fired after death of unarmed black man*, BBC NEWS (May 27, 2020), https://www.bbc.com/news/world-us-canada-52806572 [https://perma.cc/7QCU-TUB2]; Fausset & Dewan, *supra* note 8. On another notorious racist killing of 2020 resulting in felony murder charges, *see* Ekow N. Yankah, *Ahmaud Arbery, Reckless Racism, and Hate Crimes*, 53 ARIZ. ST. L.J. 681 (2021).

[12] Kyron Huigens, Minn. Should Consider Another Charge in the George Floyd Case, LAW360 (August 2, 2020), https://www.law360.com/articles/1291283/minn-should-consider-another-charge-in-george-floyd-case [https://perma.cc/W5D8-3UK6]. For explication and analysis of the merger doctrine, see Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 518-551 (2011).

[13] Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337 (2018); Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129 (2014); Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 966 (2008) (surveying academic indictments of felony murder) [hereinafter Binder, *The Culpability of Felony Murder*]; Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 60 (2004) (same) [hereinafter Binder, *Origins of American Felony Murder*]; Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads,* 70 CORNELL L. REV. 446, 446 (1985*)*; Hava Dayan, *Assaultive Femicide and the American Felony-Murder Rule*, 21 BERKELEY J. CRIM. L. 1 (2016).

[14] Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839 (2019) (noting the protections afforded police defendants but cautioning against a carceral solution to policing harms); Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997 (2021); Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. LEGAL F. 213 (2016); James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 280–291 (2011) (discussing incentives to use felony murder to secure otherwise unavailable sentences, including capital sentences).

Thus, scholars and activists struggled to reconcile their decarceral commitments with their insistence on police accountability.[15]

But the public was generally unmoved by such scruples. Outraged by news reports of violent officers remaining unpunished and unrestrained,[16] the public would accept no less than prosecutors' best efforts to convict offending officers of murder.[17] Accustomed to seeing prosecutors deploy enormous advantages against unpopular suspects on behalf of privileged victims, they demanded no less for Floyd and Brooks. If a felony murder rule was the shortest path to punishment, most did not care exactly what violent police were punished for.[18] Thus, when Chauvin was finally convicted and sentenced in June 2021 to twenty-two and a half years, many Americans, and particularly Black Americans, felt vindication.[19] That this penalty was imposed for the morally ambiguous offense of an inadvertently fatal assault was hardly noticed.[20] To be sure, Chauvin was also convicted of third degree murder for "causing . . . death . . . by means of an act eminently dangerous to others and evincing a depraved mind, without regard for human life,"[21] but that conviction added nothing to his penalty, because—paradoxically—it was considered the lesser charge.

Moreover, this depraved mind murder conviction will very likely be overturned on appeal.[22] Chauvin's trial was only the second time a police

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[15] Aya Gruber, The Feminist War On Crime: The Unexpected Role of Women's Liberation in Mass Incarceration 46-50, 199-204 (2020)(abolitionist critique of progressive criminalization strategies; Kate Levine, *The Progressive Love Affair With the Carceral State*, 120 Mich. L. Rev. 1225, 1232-1240 (critiquing progressive proposals to prosecute police and hate crimes); Aya Gruber, When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing, 83 Fordham L. Rev. 3 211, 3215-3228 (conflict between punishing crimes against minority and female victims and racial justice critique of carceral state).

[16] John Eligon, Tim Arango, Shaila Dewan & Nicholas Bogel-Burrough, *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, N.Y. Times (April 20, 2021), https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html [https://perma.cc/YA9S-BK6H]; Lorita Copeland Daniels & Rosa Castillo Krewson, *How Black Lives Matter Demands Accountability of Twitter – and When It Works*, Wash. Post (July 29, 2021), https://www.washingtonpost.com/politics/2021/07/29/how-black-lives-matter-demands-accountability-twitter-when-it-works/ [https://perma.cc/3XR7-HJFM].

[17] Emma Tucker, Mark Morales & Priya Krishnakumar, *Why It's Rare for Police Officers to be Convicted of Murder*, CNN (April 21, 2021), https://www.cnn.com/2021/04/20/us/police-convicted-murder-rare-chauvin/index.html [https://perma.cc/G7XY-V8GT]; Levine, *Police Prosecutions and Punitive Instincts*, *supra* note 14; Huq & McAdams, *supra* note 14.

[18] Gideon Yaffe, *The Lucky Legal Accident that Led to Derek Chauvin's Conviction*, The Hill (May 1, 2021), https://thehill.com/opinion/criminal-justice/551322-the-lucky-legal-accident-that-led-to-derek-chauvins-conviction/ [https://perma.cc/P7ZS-R8V3].

[19] Joshua Jamerson & Arian Campo-Flores, *Black Americans Greet Derek Chauvin's Conviction with Relief, Caution*, Wall St. J. (April 20, 2021), https://www.wsj.com/articles/black-americans-greet-derek-chauvin-conviction-with-relief-caution-11618963514 [https://perma.cc/WY5U-ARYA].

[20] Yaffe, *supra* note 18 (noting that Minnesota's felony murder law is unusual in requiring no felony other than the act causing death).

[21] Minn. Stat. § 609.195 (2020).

[22] Matt Cannon, *Derek Chauvin has a shot at appeal success. Here's why*, Newsweek (Jan. 22, 2022), https://www.newsweek.com/derek-chauvin-appeal-success-why-1632485 [https://

officer had been convicted of murder in Minnesota.[23] The first was the 2018 conviction of Officer Mohamed Noor for third degree (i.e. depraved indifference) murder.[24] In an inversion of the typical racial script, the Somali-American Noor, shot and killed the white Australian Justine Damond, while responding to her call to report a possible assault.[25] Many racial justice advocates were troubled that a Black police officer's killing of a white victim elicited the conviction that has proved so elusive when white officers have killed Black victims.[26] Yet three months after Chauvin's conviction, Noor's conviction for third-degree murder was overturned by the Minnesota Supreme Court.[27] The Court held this offense could not be charged where an offender's actions endangered one person rather than a number of people.[28] We regard this interpretation of depraved indifference as profoundly mistaken: *selective* indifference to the welfare of Black suspects *increases* the depravity of many police killings. Depraved indifference seemed to precisely describe Chauvin's attitude toward the person dying beneath him. Yet the Noor decision meant that in retrospect, the felony murder charge was the only way to convict Chauvin of murder in Minnesota, short of finding that he killed intentionally.[29]

The charges against Rolfe followed a circuitous path, passing through two elected county prosecutors to a state-appointed special prosecutor, who recently dropped them, finding the killing a justified use of force against an armed, resisting, felony arrestee.[30] This deflating result recalls that prosecutorial discretion and the law of justified force remain greater obstacles to prosecuting police than the burden of proving culpability; while the label of "felon" will be more often fastened to the *victims* of police violence than the perpetrators.

Yet the successful felony murder prosecution of Chauvin poses a genuine dilemma: should we celebrate deployment of prosecutorial privilege to

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perma.cc/ZD9Y-LU3W]; Appellant's Brief, Minnesota v. Chauvin, No. A21-1228 (Minn. Ct. App. Sept. 23, 2021).

[23] Emily Haavik, *Derek Chauvin Found Guilty of Murder, Manslaughter in Death of George Floyd,* KARE11 (April 20, 2021) https://www.kare11.com/article/news/local/george-floyd/derek-chauvin-guilty-murder-manslaughter-george-floyd-death/89-aa32108a-288e-4c62-af7d-e42d98589c7e [https://perma.cc/LW4M-Q86G].

[24] *Id.*

[25] *Justine Damond: U.S. Policeman Guilty of Australian's Murder*, BBC NEWS (May 1, 2019), https://www.bbc.com/news/world-us-canada-48113953 [https://perma.cc/9JWT-WZUR]; Jon Collins & Riham Feshir, *Did Race Color the Noor Verdict? Questions Linger for Some*, MPR NEWS (May 10, 2019), https://www.mprnews.org/story/2019/05/10/police-trial-shooting-justine-damond-ruszczyk-australia-race-color-verdict [https://perma.cc/98P5-WMEW].

[26] Collins & Feshir, *supra* note 25.

[27] Noor remains convicted of second-degree manslaughter. Jon Collins, Brian Bakst & Peter Cox, *MN Supreme Court Tosses 3d-Degree Murder Conviction of Ex-Cop Noor,* MPR NEWS (September 15, 2021), https://sahanjournal.com/policing-justice/mn-supreme-court-tosses-3rddegree-murder-conviction-of-excop-noor/ [https://perma.cc/PX64-SUMV].

[28] *Id.*

[29] *Id.*

[30] *See* Part III *infra*.

ease conviction of homicidal police? Or does this shortcut mark such convictions with an asterisk, signifying only the power of the state to punish whoever it pleases? We share the hunger to use potent prosecutorial tools to control racist police violence. Yet punishing police officers for felony murder in emblematic cases poses profound dangers.[31] Even those who accept punishment as a legitimate response to crime should hesitate. Criminal law influences not only by threatening punishment, but also by expressing collective judgments. In a democracy, it speaks for us. What do we express in calling such killings felony murders? Does such a conviction aptly name and denounce these wrongs?

At its best, felony murder condemns and punishes an inadvertent killing, because the risk of death was imposed in furtherance of a second grave wrong.[32] This account exposes two problems with these cases. First, these killings were not—and police killings typically are not—inadvertent. Punishing them as felony murder understates this culpability regarding death and thereby undeservedly exculpates the killer. Next, what is the second wrong here? Is it racial subordination? Or arrogantly prioritizing police authority or safety over the lives of civilians? If these are the motives we want to denounce, we will need the underlying felony to reflect this wrong: perhaps a hate crime or a civil rights violation, not an assault.

Moreover, another message expressed by a felony murder conviction should trouble us. This is the sentiment that felony murder liability is summary justice meted out only to those beyond the circle of our mutual concern. Unfortunately, this became a common way of thinking about punishment during the "War on Crime,"[33] as rising penal severity expanded prosecutorial discretion,[34] enabling "pretextual prosecution" of those suspected of hard-to-prove major crimes.[35] Lengthy recidivist sentences aimed

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[31] Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV 997, 1009-1033(2021); Gruber, *Murder, Minority Victims, and Mercy*, *supra* note 13, at 134-36; Gruber, *When Theory Met Practice*, *supra* note 15, at 3215-3217.

[32] *See* Binder, *The Culpability of Felony Murder*, *supra* note 13, at 991-1000, 1032-1046 (proposing that negligent killing deserves more severe condemnation when an apparent risk is imposed to further an independent wrongful purpose); Binder, Making the Best of Felony Murder, *supra* note 12 at 433-437 (same); and Section II.B *infra*.

[33] ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 1–2 (2017) [Herinafter HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME]; *See also* ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960'S (2021) [Herinafter HINTON, AMERICA ON FIRE]; MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

[34] William J. Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice,* 107 YALE L.J. 1 (1997); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 236–243, 251–274 (2011).; *see also* JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (2017).

[35] William J. Stuntz and Dan Richman, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COL. L. REV. 583 (2005); STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE *supra* note 34, 269–274.

at "incapacitation" further disconnected penalties from crimes.[36] Prosecutors increasingly used heightened penalties to coercively recruit informants to inculpate others, including the innocent.[37] Criminal justice increasingly seemed a vicious and cynical team sport. In this context, felony murder, with its disconnect between conduct and label, its disproportion between culpability and penalty, and its unfairly broad complicity, seemed emblematic rather than anomalous. Like a "Three Strikes" recidivist sentence, a felony murder conviction seemed a condemnation of the person rather than the offense.[38] Disproportion seemed its very point. Indeed, the appeal of felony murder liability for brutal police may inhere in its very arbitrariness. After police have long enjoyed undue power and impunity, arbitrary punishment may feel like poetic justice.

But before we declare "war" on police violence, we should reflect on the history of this metaphor and the discrimination inherent in a regime punishing dangerous dispositions and associations. Drawing on the research of Elizabeth Hinton, we will recall the War on Crime as a reaction against Black protest, that racialized the political issue of "crime."[39] The discriminatory use of felony murder liability is particularly apparent in cases of police violence. In a substantial minority of states, prosecutors can and do use felony murder rules to prosecute *arrestees rather than police* for killings committed by police.[40] Thus, felony murder charges have often shifted blame for unreasonably violent law enforcement onto its targets.

In a majority of felony murder states, such charges would be precluded by an "agency rule," confining felony murder liability to killings by parties to the felony.[41] But when Floyd and Brooks were killed, 15 states, representing 47% the American population, applied a broader "proximate cause" rule, imposing liability for all deaths foreseeable as a result of the felony, even if directly caused by police.[42] Thus, many felony murder rules, including Geor-

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[36] Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 1-2, 5-11 (2017); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 681-683 (2005).

[37] Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE L. REV. 107, 1009-1012(2006); Alexandra Natapoff, *Snitching: The Instiutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 645-646, 651-660, 663-677 (2004); Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 6-21 (2003).

[38] For a critique of punishing character rather than conduct, *see generally* Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019 (2004)(character theory encourages modern caste formation, reinforcing group subordination).

[39] HINTON, AMERICA ON FIRE, *supra* note 33.

[40] *See* Parts III & IV *infra*.

[41] See text accompanying footnotes 177, 235-264 *infra*.

[42] Until 2021, these included Texas, Florida, New York, Illinois, Ohio, Georgia, New Jersey, Arizona, Indiana, Missouri, Wisconsin, Colorado, Alabama, Oklahoma, and Alaska, however Illinois and Colorado adopted agency rules in 2021. See text and accompanying footnotes 118-120, 274-307 *infra*. For state populations, see https://www.census.gov/library/stories/2021/08/more-than-half-of-united-states-counties-were-smaller-in-2020-than-in-

gia's (but not Minnesota's), absolve culpable police officers of less visible racist killings by shifting blame onto their victims. Since Floyd's death, two more states adopted agency limitations as racial justice reforms,[43] but felony murder still extends to all proximately caused deaths in 13 states.

Prosecuting felons for police killings under this standard normalizes unreasonably violent and dangerous policing, almost requiring felons to expect it.[44] This proximate cause standard has been criticized for its vulnerability to hindsight bias—ex ante rare events tend to look inevitable after they occur.[45] But in a context of race discrimination, this inflation of danger is even more disturbing. It is sadly "foreseeable" that police kill Black civilians at 2.5 times the rate at which they kill whites.[46] Under a foreseeability test, Black felons may therefore be punished for attracting even unreasonable police violence. If prosecutors and juries already overattribute danger to putative felons, perhaps they will see a violent police response as particularly predictable when the suspect is Black.[47] Holding Black felons responsible to anticipate not just an excessive, but also a discriminatory response, is particularly ugly.

2010.html#:~:text=California%20was%20the%20most%20populous,half%20of%20the%20U.S.%20population [https://perma.cc/J2DF-SN4R].

[43] See text accompanying notes 118-120 *infra*.

[44] See text and accompanying notes 357-411 *infra*.

[45] Martin Lijtmaer, Comment, *The Felony Murder Rule in Illinois: The Injustice of the Proximate Cause Theory Explored via Research in Cognitive Psychology*, 98 J. CRIM. L. & CRIMINOLOGY 621, 621–624 (2008); Donald A. Dripps, Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame, 56 VAND. L. REV. 1383, 1385 (2003); Binder, *Origins of American Felony Murder*, *supra* note 13, at 462–463.

[46] *See* Wesley Lowery, *Aren't more white people than black people killed by police? Yes, but no.*, WASH. POST (JULY 11, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/ [https://perma.cc/QG3X-V4T7]. There remains a debate about whether the police are more likely to use lethal violence in identical situations. *Compare* Roland G. Fryer Jr., *An Empirical Analysis of Racial Differences in Police Use of Force,* 127 J. POL. ECON. 1210 (2017) (observing racial disparity in police nonlethal force in one city, but none in fatal shootings when controlling for situational factors such as being stopped) and Steven Durlauf & James Heckman, *An Empirical Analysis of Police Use of Force: A comment* 128 J. POL. ECON. 3998 (2020) (failure to observe effect of race on situational factors predicting shootings, such as being stopped, renders absence of observed racial disparity in shootings uninformative); *see also,* Joshua Correll, Bernadette Park, Charles M. Judd, Bernd Wittenbrink, Melody S. Sadler, & Tracie Keesee, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006, 1015 (2007). Others point out that racism in both policing and larger social structures can lead to disproportionate violence by generating situations where lethal force seems "necessary." Michael Siegel, *Racial Disparities in Fatal Police Shootings: An Empirical Analysis Informed by Critical Race Theory*, 100 B.U. L. REV. 1069, 1077-1085 (2020) (correlating racial disparities in probability of being fatally shot by police with level of residential segregation and other indices of structural racism); MAPPING POLICE VIOLENCE https://mappingpoliceviolence.org [https://perma.cc/6XZP-MH4V] (last updated Mar. 31, 2022).

[47] Police often treat Black neighborhoods as more threatening in disproportion to any evidence. Brad W. Smith & Malcolm D. Holmes, *Police Use of Excessive Force in Minority Communities: A Test of the Minority Threat, Place, and Community Accountability Hypotheses*, 61 SOC. PROBS. 83, 86–87 (2014).

"Agency" limits confined felony murder to deaths directly caused by felons throughout the nineteenth century.[48] After World War II, some courts fashioned broader proximate cause rules—unconfined by agency limits—as weapons in an imagined war against criminals. Eventually, courts in almost all states invoked precedent to reestablish agency limits. But soon most states enacted new codes in the face of rising crime and calls for increasing penal severity.[49] Broader proximate cause felony murder rules were written or read into many of these new codes. So, while an agency limit remains the majority rule, neither courts nor scholars have supported it with any normative rationale. One contribution of this essay is to do so: an agency rule prevents discriminatory prosecutorial decisions that shift blame onto the victims of discriminatory police violence. Such blame-shifting exacerbates police violence by intimidating, discrediting, and silencing surviving witnesses. Three recent cases aptly illustrate how proximate cause felony murder rules provide camouflage in the War on Crime.

In 2012, John Givens, Leland Dudley and David Strong, all unarmed Black men, burglarized an electronics store in Chicago, and loaded up the store's van with loot. When police surrounded the store, the three attempted escape by backing the van through a garage door. One officer was grazed by the van. Officers fired 77 shots into the van, killing Strong. Dudley took five bullets, and lost 40% of his skull, suffering brain damage. Givens was shot eight times. Both were convicted of felony murder, even though two members of the Independent Police Review Authority found the shootings unjustified (both members were fired for their candor). In 2021, Illinois adopted an agency rule as part of a broad criminal justice reform bill. Givens has been pardoned by the Governor and a jury awarded Strong's family one million dollars.[50]

In 2018, Columbus police set up stings to catch aspiring robbers advertising merchandise on social media. A police decoy would meet the seller, accompanied by a concealed SWAT officer. When the suspected robber showed a weapon, the sniper would shoot him. After police shot and killed Julius Tate, a Black 16 year old, prosecutors charged his 16 year old sweetheart, Masonique Saunders, also Black, with felony murder. She helped set up the meeting but was not present at the scene.[51] Tate was the second sus-

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[48] Binder, *Origins of American Felony Murder*, *supra* note 13, at 96. *See also* Norval Morris, The Felon's Responsibility for the Lethal Acts of Others, 105 U. PA. L. REV. 50 (1956).

[49] Part IV *infra*.

[50] Maya Dukmasova, *Chicago May Pay $1M to Estate of Man Killed in Burglary Try*, US NEWS (October 2, 2021, 1:01 a.m), https://www.usnews.com/news/best-states/illinois/articles/2021-10-02/chicago-may-pay-1m-to-estate-of-man-killed-in-burglary-try [https://perma.cc/U47H-5XTY].

[51] Adora Namigadde, *After Columbus Police Killed Teen, Officers Arrest Other Teen For His Murder*, WOSU, https://news.wosu.org/news/2018-12-14/after-columbus-police-killed-teen-officers-arrest-other-teen-for-his-murder [https://perma.cc/W947-UCLZ]; Melissa Gira Grant, *Police Killed Her Boyfriend, Then charged her with his murder*, NEW REPUBLIC (August 6, 2019), https://newrepublic.com/article/154674/masonique-saunders-columbus-ohio-police-felony-murder-laws [https://perma.cc/F8BC-RQZH].

pect shot in this operation within a week. After much protest, prosecutors allowed Saunders to plead to manslaughter. The killer won a medal.

In 2020, 15-year-old Latino, Stavian Rodriguez, and 17-year-old Caucasian, Wyatt Cheatham, attempted to rob a gas station in Oklahoma City.[52] During the robbery, the hapless Rodriguez returned to the scene, was locked inside the store by the clerk and surrounded by police.[53] Moments after police joked that he was probably calling his Mom, Rodriguez set down his gun and attempted to surrender. He was shot 13 times by 5 officers and killed.[54] Cheatham, 17, not even on the scene, was charged with felony murder, while prosecutors resisted mounting public pressure to prosecute the actual killers.[55]

In each case, police unnecessarily used deadly force, and prosecutors charged absent or unarmed defendants with murder. These cases display a disturbing symmetry between disproportionate police violence and disproportionate prosecution. Indeed, the more unreasonable police violence becomes, the more capacious felony murder liability must become to shift blame onto victims. The resulting murder charges presume police violence is deserved by its victims. Thus, the availability of such felony murder liability creates perverse incentives for both police and prosecutors.[56] Moreover, the targets of these prosecutions are disproportionately people of color. The War on Crime was not only an escalation of policing and punishment, but specifically a racialized escalation,[57] with racial disparity at every stage in the process.[58] Black people are not only disproportionately victimized by police violence, but also disproportionately punished for felony murder,[59] and disproportionately charged with felony murder when they attract police violence.[60]

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[52] Nolan Clay, *Five Oklahoma City Officers Charged with First-Degree Manslaughter in Fatal Shooting of Teen Who Dropped Gun*, USA TODAY (Mar. 10, 2021), https://www.usatoday.com/story/news/nation/2021/03/10/stavian-rodriguez-shooting-5-oklahoma-city-police-officers-charged/6945418002/ [https://perma.cc/5HCT-D7YD].

[53] *Id.*

[54] Michael Levenson, *Five Oklahoma Officers Charged in Shooting Death of 15-Year-Old Boy*, N.Y. TIMES (Mar. 10, 2021), https://www.nytimes.com/2021/03/10/us/oklahoma-city-police-stavian-rodriguez.html [https://perma.cc/7JE6-YTEE].

[55] *Murder Charge Dropped Against Teen Accomplice in Robbery that Resulted in OCPD Shooting of Stavian Rodriguez*, KOCO (Apr. 19, 2021), https://www.koco.com/article/murder-charge-dropped-against-teen-accomplice-in-robbery-that-resulted-in-ocpd-shooting-of-stavian-rodriguez/36164450 [https://perma.cc/8BWL-HBP5]. The killers were ultimately charged with manslaughter.

[56] Section V.D *infra.*

[57] HINTON, AMERICA ON FIRE, *supra* note 33, at 1-45; HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME, *supra* note 33 at 1-62, 134-179.

[58] Guyora Binder & Robert Weisberg, *What is Criminal Law About?*, 114 MICH. L. REV. 1173, 1201 (2016).

[59] See Section V.B *infra.*

[60] See Section V.C *infra.*

The prospect of race discrimination has often motivated prophylactic restrictions on law enforcement.[61] Vagrancy offenses were deemed unconstitutionally vague, because the discretion these crimes afforded police was a playground for prejudice.[62] Juries, lawyers, and exclusionary rules likewise serve as checks against discrimination.[63] We present felony murder as a similar site for discrimination and offer agency rules as a necessary prophylactic—the example of Illinois should be followed in other states that lack agency rules.

But while agency rules are necessary prophylactics, they may not be sufficient. Discrimination risk inheres not just in the attribution of police killings to felons but also in the more common attribution of felony murder to co-felons. In turn, our racial justice critique of proximate cause rules can also indict felony murder more broadly, wherever data reveals grossly disparate patterns of charging. One aim in reflecting on felony murder liability for police violence is to refresh the familiar critique of felony murder. That felony murder liability is often undeserved is a reason to narrow it. But that it has been imposed selectively by race is a reason—maybe our best reason—to abolish it altogether.

Our discussion proceeds as follows. Part Two explains the varieties of felony murder liability, and their application to both felons who cause death and accomplices who do not. It explains traditional criticisms and defenses of felony murder and reports on recent reform efforts. Part Three examines how and when felony murder can apply to police, in cases where police kill, and considers whether such liability can properly label and denounce their culpability. Next, it examines the implications of merger limitations, which properly preclude felony murder prosecutions of police predicated on assault in the great majority of states. Finally, it notes the rarity of laws punishing civil rights violations as felonies and proposes proliferating these, but not necessarily as predicates for felony murder. Part Four shows how felony murder can apply to suspected felons in cases where police kill. It discusses agency limitations, which preclude holding felons liable for police killings in most states, and the elimination of such agency limits in a substantial minority of states. It shows, moreover, that the postwar cases extending felon liability to such killings relied on a conception of law enforcement as warfare that should be seen as an early example of War on Crime rhetoric. Part Four

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[61] Michael Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48-49 (2000).

[62] Papachristou v. City of Jacksonville, 405 U.S. 156, 158-159, 162, 170-171 (potential for race discrimination in enforcing vagrancy laws, illustrated by facts of case) (1972); Guyora Binder & Brenner M. Fissell, *A Political Interpretation of Vagueness Doctrine*, 2019 U. ILL. L. REV. 1527, 1529, 1541-42(discussing *Papachristou*) (2019); RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960'S (2016) 247-248, 298-332.

[63] Norris v. Alabama 294 U.S. 587 (1935); Duncan v. Louisiana, 391 U.S. 145 (1968); Powell v. Alabama 287 U.S. 45 (1932); Mapp v. Ohio 367 U.S. 643 (1961); Brown v. Mississippi 297 U.S. 278 (1936).

also explicates Dean Norval Morris's influential doctrinal defense of agency limitations, showing how it was obsoleted by new tough-on-crime codes that left agency rules without a rationale. Part Five proposes racial justice as that rationale, recalling the centrality of racial subordination and systematic police violence in the War on Crime, and identifying felony murder prosecution of victims of police violence as a tactic in that war. Further, it justifies an agency limitation as a prophylactic against the discriminatory abuse of felony murder. Lastly, it proposes depraved indifference as a better test for assessing the culpability of both police and felons for death in cases where police kill. We conclude in Part Six, extending our racial justice critique from proximate cause variants of felony murder, to all felony murder. Returning to the problem of prosecuting police killings, we voice *two* concerns about using felony murder to prosecute police: it understates their culpability *and* legitimates a tool of racial subordination.

II. The Felony Murder Problem

Let us first introduce felony murder liability and provide background on when, how and why felony murder liability can apply to police and felons, in cases where police kill.

A. Felony Murder Defined

By "felony murder," we refer to any murder offense conditioned on killing in the commission or attempt of a felony but with less culpability than otherwise required for murder. Since almost all states punish some reckless killings as murder, the term is best applied to killings conditioned on negligence towards death or strict liability. By this measure, 41 states, the federal system, and the District of Columbia have felony murder rules.[64]

Felony murder rules have a second distinctive feature: they can impose murder liability not only on those who killed in the course of a felony, but also on their accomplices in the felony, even if they had no intention to aid or encourage a killing. About a third of felony murder statutes impose liabil-

[64] The exceptions: Hawaii requires intent to kill for all murder. Haw. Rev. Stat. § 707–701 (2022); Arkansas, Kentucky, Massachusetts, Michigan, New Hampshire, New Mexico, North Dakota, and Vermont, require at least recklessness with respect to death for murder in the course of a felony, although Arkansas defines such murder as "causes the death of any person . . . under circumstances manifesting extreme indifference to human life." Ark. Code Ann. §5-10-101 (2022); Ky. Rev. Stat. Ann. §507.020 (West 2022); Commonwealth v. Brown, 81 N.E.3d 1173, 1194 (Mass. 2017) (Gants, J., concurring); People v. Aaron, 299 N.W.2d 304, 326-327 (Mich. 1980); N.H. Rev. Stat. Ann. §630:1-b, §626:7(2); State v. Ortega, 817 P.2d 1196, 1208 (N.M. 1991); N.D. Cent. Code. 12.1-02-02, 12.1-16-01(1)(C) (2021); N.D. Criminal Instruction K-6.03 (2019); State v. Doucette, 470 A.2d 676, 682-683 (Vt. 1983).

ity on any participant in a felony that causes death.[65] In these collective liability states, each felon's liability depends on the causal attribution of the death to the felony. Typically, such causation requires that the death be foreseeable as a consequence of the felony; sometimes it also requires that the act causing death "further" the felony. This furthering requirement appears to exclude killings by those resisting the crime, such as crime victims and the police, but in some jurisdictions it is not so applied.[66]

In the remaining jurisdictions, the murder liability of co-felons depends on their complicity in the killing. Yet courts in these complicity states have conditioned complicity in the killing on criteria similar to those governing causation in the collective liability states. Almost all confine complicity to killings foreseeable as a result of the felony and most also require that the killings be in furtherance of the felony.[67] Both types of rules extend liability for the killing to accomplices in the felony who did not kill, or intentionally aid or encourage killing. By contrast, accomplice liability is usually limited to those crimes the accomplice intentionally aided or encouraged.[68]

B. Historical Origins

Felony murder is less ancient than is sometimes supposed.[69] The distinction between murder and manslaughter dates only from the sixteenth century in English law and was not originally defined by distinct culpable mental states. To be sure, murder required "malice," but malice was a normative conclusion about the absence of certain excusing and mitigating circumstances rather than a particular mental state. Both murder and manslaughter required (1) "killing"—fatal injury directly inflicted with a weapon—and (2) the absence of such "excuses" as self-defense, insanity or "accident" (as when the weapon was not intentionally aimed at a person). If the killing was provoked or arose from mutual combat, it lacked "malice" and was graded as manslaughter. During the sixteenth century, a limited doctrine of accessorial liability was adopted, holding conspirators who agreed together to use deadly force to overcome resistance to a crime (not necessarily a felony) responsible for such uses of deadly force.[70]

A doctrine that all participants in an unintentionally fatal felony would be liable for murder was proposed as dictum by Justice Holt in the early eighteenth century English decision of *R. v. Plummer*.[71] Holt's idea was then endorsed in several eighteenth century treatises, including Blackstone's.[72] Yet

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[65] Binder, *supra* note 12, at 510–517 (discussing Alabama, Alaska, Arizona, Colorado, Connecticut, Florida, Maine, Missouri, Montana, NJ, NY, Ohio, Oklahoma, Oregon and Washington).
[66] *See* People v. Hernandez 82 N.Y.2d 309, 313 (1993).
[67] *Id.* at 501–510.
[68] GUYORA BINDER, FELONY MURDER 217 (2012).
[69] *See* Binder, *Origins of American Felony Murder Rules*, *supra* note 13, at 60–66.
[70] *Id.* at 73–70.
[71] *Id.* at 88–89.
[72] *Id.* at 89–97.

it does not appear to have been actually applied in England before the American Revolution, and was not regularly applied there until well into the nineteenth century. Nevertheless, it was legislatively codified in many American states—notably Georgia, Illinois, New York and California—beginning in the second decade of the nineteenth century.[73] In many other states—notably Pennsylvania, Virginia and Massachusetts—statutes instead aggravated murder to the first degree if committed in the course of certain felonies. Over the course of the nineteenth century, courts read these grading statutes as imposing first degree murder liability for unintended killing in the course of these felonies.[74]

During the nineteenth century, felony murder liability was largely confined to a short list of predicate felonies, usually including robbery, arson, rape or burglary. A slow expansion of the meaning of killing to embrace indirect causation eventually expanded the scope of felony murder during the late nineteenth century. But almost all cases of remote causation dated from the century's last decade. Only one case, in 1900, involved an intervening actor: train robbers used the victim as a shield, forcing him into the path of gunfire.[75] Beginning in the 1930's felony murder liability in some states encompassed killings by police or others resisting the felony, on the theory that the felony had "proximately caused" such resistance. This doctrine will be examined and criticized in detail in Part IV below.

C. The Normative Problem

The normative questions posed by felony murder are whether it conditions liability on sufficient culpability to satisfy desert, and if not, whether it is defensible on consequentialist grounds.

Felony murder rules are often described as imposing strict liability for any death, which seems to imply that felony murder liability cannot be deserved. But whether that is so depends on what we mean by strict liability. If strict liability means liability without moral fault, strict liability for the very serious crime of murder would obviously be unfair. Liability without moral fault is sometimes referred to as "*substantive* strict liability."[76] By contrast, the American Law Institute's 1962 Model Penal Code offers what has been called a "*formal*"[77] conception of strict liability. It conditions criminal liability on proof of a mental state corresponding to each element. Under the Code, one must purposely, knowingly, recklessly or negligently perform any forbidden act or cause any forbidden harm to be guilty of any jailable offense.[78]

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[73] *Id.* at 161–186.
[74] *Id.* at 141–161.
[75] *Id.* at 194–195 (discussing Keaton v. State, 57 S.W. 1125 (Tex. Crim. App. 1900)).
[76] Kenneth Simons has helpfully distinguished between "substantive" and "formal" senses of strict liability. Ken Simons, *When is Strict Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1085-1093 (1997).
[77] *Id.*
[78] MODEL PENAL CODE § 2.02(1), 2.05 (Am. L. Inst. 1962).

The Code's scheme has had great influence among legal scholars[79] and considerable influence on the law.[80]

Yet it is easy to think of examples of offenses involving moral fault without satisfying this formal requirement of correspondence between act and mental state. Consider causing death with intent to torture.[81] Here is a terrible crime comprising a very bad mental state and a very bad result, yet the two do not correspond. Next consider a crime defined as causing death by means of torture: here we require a bad act and a bad result but no mental state at all. These crimes obviously involve fault and are substantively culpable. We may say that an intent to torture *implies* some culpable awareness of a risk of death. The second crime requires no mental state, but because the forbidden conduct of torture is very dangerous to life, it seems culpable "*per se*."[82] Thus we can see how a sufficiently malign and dangerous felony *could* supply enough moral fault to merit murder liability, without requiring any mental state corresponding to death. But that does not mean that every felony murder crime does.

One illuminating example of conduct culpable *per se* is use of a deadly weapon. In fact, for much of the history of the common law, weapons mattered much more than mental states in proving murder. The forbidden act was "killing," not causing death. Killing connoted an attack with a weapon or some other obviously apt means like strangulation or poison. Once it was established, a culpable attitude of malice was presumed, and the burden would fall to the defendant to show the deadly means were used unintentionally.[83] Mental states only became important as the conduct required for murder expanded to include causing death remotely by any means, as occurred in both English and American law during the nineteenth century.[84] As our later discussion of felony murder causation standards will reveal, standards of causal responsibility for death can matter just as much as mental states in aligning criminal liability with moral fault.

Today, felony murder often involves formal strict liability, but rarely involves substantive strict liability. Only five of 41 felony murder statutes explicitly condition the offense on negligence toward or foreseeability of death.[85] Eight states and the federal system condition felony murder on "malice," although whether this requires any culpability beyond the intent to

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[79] See, e.g., Paul Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

[80] WAYNE LAFAVE, CRIMINAL LAW §1.1(b) (2017); Darryl Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L. J. 285, 294 (2012).

[81] *See, e.g.*, IDAHO STAT. § 18-4001 (2022).

[82] Mark Kelman, *Strict Liability, an Unorthodox View, in* 4 ENCYC. CRIME & JUST. 1512, 1512–1518 (Sanford Kadish, ed. 1983) (discussing "*per se*" culpable conduct).

[83] GUYORA BINDER, THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW (2016) 195-196.

[84] Id. at 187–207; Binder, *Origins of American Felony Murder Rules*, *supra* note 13, at 192–197.

[85] JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 443 (9th ed. 2021).

commit the felony is often unclear.[86] Still, we might view dangerous predicate felonies like robbery and arson as inherently manifesting some culpability towards death. Both also involve non-corresponding culpability toward another wrong: theft, in the case of robbery, and destruction of property in the case of arson.

If certain felonies pose a reasonably apparent danger to life, their commission would be *per se* negligent. Among our 41 felony murder states, 22 exhaustively enumerate the felonies that can serve as predicates to felony murder liability. Most often, the felonies enumerated are robbery, burglary, rape, arson, escape, and kidnapping. Courts and commentators often view these predicates as especially dangerous, and some codes refer to them as such.[87] The remaining 19 felony murder states predicate at least some felony murders on non-enumerated felonies. In at least 14 of these states, the felony must be dangerous or involve the use of a deadly weapon.[88] Predicate felonies, on this view, are analogous to drunk driving: actions we understand are dangerous and that can easily go fatally wrong.

Culpability can also inhere in criteria of causal responsibility. Thus, conditioning causal responsibility for death on its foreseeability makes causation *per se* negligent toward that result.[89] Of 41 felony murder states, 29 have clearly required foreseeability for causation, while only three have clearly rejected it.[90] Conditioning accomplice liability on foreseeability of death can extend this negligence requirement to accomplices.[91] Thus, most felony murder rules can be seen as *per se* negligence rules with respect to death.

In addition to this negligence, most felony murder rules require non-corresponding culpability towards another harm through two principles. First, most states impose causation limitations by requiring that the act causing death further the predicate felony. Thus, if a plane coincidentally and fatally crashes while smuggling drugs, the lack of a relationship between the crime and death disables a felony murder conviction.[92]

Second, most states restrict predicate felonies to those other than homicide or assault. If a state could predicate felony murder on a lesser homicide like manslaughter, that offense would effectively be eliminated. Similarly, if a state was able to prosecute any fatal assault as felony murder, it would effectively erase any other grade of homicide. Every killing, whether reckless, provoked, or the freakish result of a punch could be punished as murder. This limitation on felony murder, often called a "merger" limit, is achieved in two ways. Some state codes exhaustively enumerate predicate felonies and

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[86] *Id.*

[87] But how much danger is required for negligence? About 1% of robberies and arsons are fatal, but fatal burglaries are far rarer. *Id.*

[88] *Id.* at 444.

[89] State v. Martin, 573 A.2d 1359, 1375 (N.J. 1990); MODEL PENAL CODE § 2.06 cmt. at 312 (AM. L. INST, Official Draft and Revised Comments 1980).

[90] KAPLAN, WEISBERG & BINDER, *supra* note 85, at 446.

[91] Although if courts require only foreseeability of a foreseeably dangerous act, however, we don't even have negligence. *See* BINDER, *s*upra note 68, at 213–225.

[92] King v. Commonwealth, 368 S.E.2d 704, 707-09 (Va. Ct. App. 1988).

simply leave out assault and lesser forms of homicide. Other codes allow courts to decide which felonies can support felony murder. In such states, courts often impose a merger limit as judicial doctrine.

Of 22 states exhaustively enumerating predicate felonies, none conditions felony murder on the manslaughter of the victim. Only four enumerate felony assault as a predicate felony. One uses drive-by shooting and 10 use felony child abuse as predicates. Merger doctrines exclude lesser homicide felonies and assault felonies in many of the remaining 19 jurisdictions with non-enumerated felonies, but five have rejected the merger doctrine.[93] As will be explained in part III, merger doctrines and related limits on predicate felonies prevent felony murder prosecution of police for unreasonable killings in most states.

So substantively, felony murder generally does not impose strict liability. It almost always requires *some* moral fault. But that does not mean felony murder requires *enough* fault to warrant condemnation and punishment as murder. Accordingly, felony murder liability has faced vigorous criticism from its inception.[94] In 1846 the English Law Commissioners wrote:

> If the punishment for stealing from the person be too light, let it be increased, and let the increase fall alike on all the offenders! Surely the worst mode of increasing the punishment of an offence is to provide that, besides the ordinary punishment, every offender shall run an exceedingly small risk of being hanged.[95]

James Stephen regarded felony murder liability as "cruel . . . and indeed monstrous."[96] In the U.S., the Model Penal Code rejected felony murder, commenting that "principled argument in favor of the felony-murder doctrine is hard to find."[97] Sanford Kadish condemned felony murder liability as

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[93] State v. Jackson, 346 N.W.2d 634, 636 (Minn. 1984); Baker v. State 225 S.E.2d 269, 272 (Ga. 1976); State v. Burkhart, 103 P.3d 1037, 1045-46 (Mont. 2004); Lawson v. Texas, 64 S.W.2d 396, 396-97 (Tex. Crim. App. 2001); Johnson v. State, 4 S.W.3d 254, 258 (Tex. Crim. App. 1997); State v. Williams, 24 S.W.3d 101, 117 (Mo. Ct. App. 2000).

[94] Several scholars—including one of this essay's two authors—have challenged this consensus, proposing retributive rationales for sufficiently limited felony murder rules. *See* David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359 (1985); Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73 (1990); Kenneth W. Simons, *Is Strict Liability in the Grading of Offences Consistent with Retributive Desert?*, 32 OXFORD J. LEGAL STUD. 445, 450-458 (2012); Ken Simons, When is Strict Liability Just? 87 J. Crim. L. & Criminology 1075, 1077, 1103, 1111-1125 (1997); Guyora Binder, *The Culpability of Felony Murder*, *supra* note 13 at 966-972; Binder, Making the Best, *supra* note 12 at 433-437. These arguments generally observe that in other contexts, criminal law increases liability based on non-corresponding harm, or non-corresponding culpability.

[95] COMM'RS ON CRIM. L., SECOND REPORT 17 (1846). "Constructive murder" is the term used for felony murder in England.

[96] 3 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 75 (1883).

[97] MODEL PENAL CODE § 210.2 cmt. 6 at 36 (AM. L. INST, Official Draft and Revised Comments 1980).

"rationally indefensible."[98] Nelson Roth and Scott Sundby argued that felony murder violates the constitution, by either punishing severely without culpability, or presuming culpability without proof.[99] Among former common law jurisdictions, England, Ireland, Canada and India have abolished felony murder.[100] However, two Australian states have limited felony murder rules, and two punish negligent unlawful act murder.[101]

Assuming that murder liability for inadvertent killing during a felony is undeserved, can it nevertheless be defended on consequentialist grounds, as a crime control measure? Might felony murder rules deter the commission of the underlying *predicate felonies*? Not likely, as empirical studies show that while raising the certainty of punishment marginally increases deterrence, raising the severity of punishment generally does not.[102] As the Law Commissioners argued, attaching punishment to an infrequent consequence of a felony establishes a punishment lottery, which should have no deterrent effect.

Nor can felony murder liability easily be justified as a deterrent to *killing* by those engaged in the felony. While one might argue that absolving the prosecution of proving culpability increases the certainty of punishment, this argument proves too much. Relieving prosecutors of proving *any* offense element increases the probability of punishing the guilty—*and* the probability of punishing the innocent. If, as many social scientists believe, most compliance is motivated by trust in the fairness and legitimacy of law rather than fear of sanctions,[103] proof of guilt is an important contributor to crime control. If felony murder is just a thumb prosecutors can selectively press on the scales of justice, who will most often be punished without proof of guilt? Indeed, in a criminal justice system affording prosecutors unreviewed discretion, within a society rife with race discrimination, a doctrine permitting punishment without proof might so corrode legitimacy as to counsel against its use at all.

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[98] Sanford H. Kadish, *Foreword: Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 695–697 (1994).

[99] Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L REV. 446, 448-449 (1984).

[100] Homicide Act 1957 (UK); Criminal Justice Act 1964 (Ir.); R. v. Martineau [1990] S.C.R. 633 (Can.); Penal Code §§ 299–300 (India).

[101] New South Wales Criminal Code of 1900, section 18(1) classifying as murder the causing death in any crime punishable by imprisonment for at least 25 years is unquestionably a felony murder rule, although the predicate felonies are very few. Also punishing murder in the course of certain felonies without culpability towards death is South Australia Criminal Law Consolidation Act 1935 § 12A (intentional violence in the course of any crime punishable by ten years). Harder to classify, but certainly harsh in conditioning murder on objectivity foreseeability of death in the course of any crime are Tasmanian Criminal Code § 157(c), and Western Australia Criminal Code § 279(1)(c).

[102] Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 181–189 (2003)

[103] TOM R. TYLER, WHY PEOPLE OBEY THE LAW 57-68, 165-166 (1990); RANDOLPH ROTH, AMERICAN HOMICIDE 9-20, 297-300 (2009); GARY LAFREE, LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA (1998) 79-81.

If deterrence cannot justify felony murder liability, it seems we cannot avoid the question of deserved punishment. So can felony murder liability *ever* be defended as deserved? Perhaps some felonies are so dangerous that they are *per se* reckless to human life. But these will be few: even robbery and arson cause death only about 1% of the time.[104] Nor can we morally equate an intention to commit another wrong with an intention to kill. Among crimes against persons, the Supreme Court permits capital punishment only for murder on the view that homicide is categorically worse.[105]

But what if we combine culpability towards death with culpability towards another grave wrong? Take Harry Goldvarg, a Chicago butcher, who in 1930 paid two men to burn his butcher shop so that he could recover insurance. What could possibly go wrong? The resulting fire and explosion killed two children who, as Goldvarg knew, lived with their parents behind the adjoining drygoods store.[106] Similarly, in 1973, Charlie Ware and Darius Slater robbed a motel clerk at gunpoint. What could possibly go wrong? Ware's thumb slipped off the pistol's hammer, it fired, killing the clerk.[107] These killings are grossly negligent in so far as the actors did not consider obvious risks. While it might be assumed that these offenders must have adverted to these risks, some offenders delude themselves that they have more control over events than they do.[108] Sometimes we hold people responsible not just for harm they do expect but also for harm they should expect.[109] To be sure, jurors may find recklessness in these cases, and requiring them to do so reduces the risk that biases, whether racial prejudice or hindsight bias, will induce them to overattribute negligence. Nevertheless, assuming negligence merits blame, killing negligently in furtherance of a felony combines two kinds of culpability, corresponding to two different harms. Together, these may merit more punishment than negligent killing alone.

This rationale fits some features of felony murder doctrine: it often requires that we condition felony murder liability on both foreseeability of death and a felonious purpose independent of injury to a person. This rationale also aligns with some evidence of popular intuitions about the punishment deserved for actual killers in the course of felonies. Paul Robinson and John Darley found mock jurors willing to impose sentences of over 20 years for negligent homicide committed in the perpetration of a robbery, while imposing sentences of only a year or two for negligent homicide outside of that context. Yet subjects supported *much* less severe sentences years for accomplices in a fatal robbery who did not personally kill, and *almost no pun-*

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[104] BINDER, *supra* note 68, at 190–191 (also noting that even assault with intent to grievously injure is fatal only 3% of the time, and that a study of drive by shooting found it fatal only 5% of the time).

[105] Kennedy v. Louisiana, 554 U.S. 407, 421, 447(2008).

[106] People v. Goldvarg, 178 N.E. 892, 894 (Ill. 1931).

[107] Slater v. State, 316 So.2d 539, 542-43 (Fl. 1975).

[108] Jack Katz, *The Motivation of the Persistent Robber*, 14 CRIME & JUST. 277, 295-300 (1990); Binder, Culpability of Felony Murder, *supra* note 13 1038-3.

[109] Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1423–25, 1472–1476 (1995).

ishment, when the victim was a co-felon and the shooter was a resisting victim.[110]

Of course, readers may agree that a negligently fatal robbery, arson, or rape is substantively culpable and a grave crime, and still feel that "murder" mislabels it. In addition, criminal liability is not only a question of labels. Our judgments about deserved blame are traduced by the unusually severe punishments our system attaches to such labels, as measured by international standards.[111] Further attenuating the link between criminal conviction and deserved blame is the prevalence of plea bargaining in this context of penal severity. Offense definitions may little matter in this context, and unproven convictions may communicate little about what offenders actually did.[112] Nevertheless, the cases considered here, killings by police and killings during crime, are not run of the mill. They attract public attention and affect our sense of civic status and security. It matters to us how the legal system evaluates these actions, in our name.

One reason to carefully measure the normative considerations in favor of felony murder liability is to assess dilemmas like those posed by felony murder prosecutions of police. Understanding the normative valence of a felony murder conviction illuminates its expressive implications. Can such a conviction ever express what is wrong with unjustified police killing? A second reason is to prioritize incremental reforms. What limits on felony murder are most important to its opponents? What limits can its supporters accept? That felony murder liability is defensible—if at all—as deserved rather than expedient has implications for its scope. If we persuade ourselves that felony murder liability can control crime by punishing excessively, or without proof of guilt, we will be tempted to expand it indefinitely. But if we believe it can only be justified when applied to conduct proven obviously dangerous to life and malignly motivated, felony murder may be narrower and less liable to abuse. Proving that a particular death is that exceptional case will be more difficult. Further, if only desert can justify felony murder liability, penalties must also be proportional to culpability. The less felony murder charges grant prosecutors unchecked power, the less politically invested they may be in its preservation. In this way, reforms that confine felony murder liability to its most justifiable applications may also advance the goal of ultimately abolishing it.

Public interest in reforming felony murder law has grown in recent years, with publicity focusing especially on murder convictions of those who did not personally kill. Thus, the focus of the reform movement has been on liability for killings by accomplices, or by law enforcement, or others re-

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[110] Paul H. Robinson & John M. Darley, Justice, Liability & Blame: Community Views and the Criminal Law 169–181 (1995).

[111] Amanda Petteruti & Jason Fenster, Just. Pol'y Inst., Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations 21–24 (2011) (US imposes incarceration for many more crimes, and for much longer sentences than Canada, Australia, UK, Germany, and Finland).

[112] We are indebted to Frank Rudy Cooper for pressing this point.

sisting the felony.[113] As concern about mass incarceration has focused attention on severe sentences, felony murder sentencing has come under scrutiny. Felony murder is graded as first degree murder or is punishable with Life Without Parole in many states.[114]

Several states have recently implemented reforms. Massachusetts abandoned felony murder in the 2017 case of *Commonwealth v. Timothy Brown*.[115] California's SB 1437 eliminated accomplice liability for felony murder in 2018.[116] Maryland courts adopted a merger rule in the 2017 case of *State v. Tyshon Jones*.[117] In 2021, Colorado adopted SB 124-2021, reducing felony murder penalties from life to a term of years, broadening an affirmative defense for unarmed accomplices of the killer, and adopting an agency rule.[118] Also in 2021, Illinois—which originated the practice of punishing felons for killings by non-parties—adopted an agency rule as part of a massive criminal justice reform bill, HB 3653, also known as the Safe-T Act.[119] Since passage of this bill, the Illinois governor has begun reviewing

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[113] Adam Liptak, *Serving Life for Providing Car to Killers*, N.Y. TIMES (Dec. 4 2007), https://www.nytimes.com/2007/12/04/us/04felony.html [https://perma.cc/4VYY-6RYD]; Abbie Van Sickle, *If he didn't Kill Anyone, Why Is It Murder?*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/california-felony-murder.html [https://perma.cc/M8UV-9QMA]; Beth Schwartzapfel, *D'Angelo Burgess Fled from Police. Does That Make Him a Killer?*, MARSHALL PROJECT (May 30, 2019), https://www.themarshallproject.org/2019/05/30/d-angelo-burgess-fled-from-police-does-that-make-him-a-killer [https://perma.cc/2JUM-HJXG]; Katie Rose Quandt, *Curtis Brooks didn't Kill Anyone. So why is He labeled a Murderer for Life?*, THE APPEAL (Sept. 18, 2018), https://theappeal.org/curtis-brooks-felony-murder-life-sentence/ [https://perma.cc/TR68-F3Q3]; Alison Flowers & Sarah Macaraeg, *Charged with Murder, But They Didn't Kill Anyone—Police Did*, CHI. READER (August 18, 2016), https://chicagoreader.com/news-politics/charged-with-murder-but-they-didnt-kill-anyone-police-did/ [https://perma.cc/JQN5-MQ7Q]; Criminal, *76th and Yates, Criminal #150*, THIS IS CRIMINAL (Oct. 23, 2020), https://thisiscriminal.com/episode-150-76th-and-yates-10-23-2020/ [https://perma.cc/KZ2Q-M784]; *PBS NewsHour: Convicted of Murder, But Police Pulled the Trigger* (PBS television broadcast September 14, 2019).

[114] NAZGOL GHANDNOOSH, EMMA STAMMEN & CONNIE BUDACI, FELONY MURDER: AN ON-RAMP FOR EXTREME SENTENCING (2022), https://www.sentencingproject.org/publications/felony-murder-an-on-ramp-for-extreme-sentencing/ [https://perma.cc/ZT7B-KRHJ]; *See* ARIZ. REV. STAT. §§ 13-1105, 13-751 to 13-752 (LexisNexis); IOWA CODE §§ 707.2, 902.1 (LexisNexis); LA. REV. STAT. ANN. § 14:30.1 (LexisNexis); MISS. CODE ANN. §§ 97-3-19(1)(c), 97-3-21(1); NEB. REV. STAT. ANN. §§ 28-303, 29-2520 to 29-2524 (LexisNexis); N.C. GEN. STAT. § 14-17(a); 18 PA. CONS. STAT. ANN. §§ 2502(b), 1102(a)(1) (LexisNexis); S.D. CODIFIED LAWS §§ 22-16-4(2), 22-16-12, 22-16-1(1) (LexisNexis); 18 U.S.C.S. § 1111(a)-(b) (LexisNexis)(states mandating life without parole for adults convicted of felony murder).

[115] 81 N.E.3d 1173. 1190 (Mass. 2017).

[116] CAL. PENAL CODE §§ 188–189 (2021).

[117] State v. Jones, 155 A.3d 492, 508 (Md. 2017).

[118] Pat Poblette and Marianne Goodland, *Gov. Jared Polis signs felony murder, drug importation blls*, COLO. POL. (JULY 27, 2022), https://www.coloradopolitics.com/legislature/gov-jared-polis-signs-felony-murder-drug-importation-blls/article_d42540c4-a6bd-11eb-95c4-374184ebf102.html [https://perma.cc/58HM-3JYH].

[119] 02 Feb FAQ: Final Felony Murder Language in House Bill 3653, Senate Amendment 2 As passed, January 2021, RESTORE JUST. ILL. (Feb. 2, 2021), https://restorejusticeillinois.org/faq-final-felony-murder-language-in-hb3653sa2-as-passed-january-2021/ [https://perma.cc/EL49-E4DG].

cases of those previously convicted of felony murder for police killings, and issuing pardons.[120]

Ultimately, clarity on the normative meaning of felony murder may not settle the tension between abolitionist and reformist impulses. But in delineating the justificatory limits of the doctrine, we can both shape the most acceptable felony murder rule and highlight what remains morally unsatisfying, even where felony murder convictions are most justifiable. In seeing how felony murder fails to adequately condemn, and sometimes exonerates, racist policing, we expose its less acknowledged shortcomings and perhaps illuminate a path to doctrinal abolition.

III. Felony Murder Prosecution of Police

Clarity about the normative implications of felony murder highlights its appeal as a tool to punish police killings such as those committed by Derek Chauvin and Garrett Rolfe. But on closer inspection the doctrine's potential for denouncing or deterring brutal policing is quite limited.

Chauvin was charged with, and ultimately convicted of, three homicide offenses under Minnesota law: third degree murder, defined as "caus[ing] the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life," and punishable up to 25 years;[121] second degree murder, defined as "caus[ing] the death of a human being . . . while committing or attempting to commit a felony," and punishable up to 40 years;[122] and second degree manslaughter, defined as causing death negligently. The predicate felony for Chauvin's felony murder charge was assault in the third degree, requiring "assault[ing] another and inflict[ing] substantial bodily harm."[123]

The third degree murder charge was initially dismissed by the trial judge, who read the statute as requiring that a depraved indifference murder endanger multiple victims.[124] It was restored after the Minnesota Court of Appeals upheld the third degree murder conviction in the S*tate v. Noor*.[125] As noted earlier, however, the Court of Appeals decision, and Noor's third degree murder conviction, were later overturned by the Minnesota Supreme

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[120] Maya Dukmasova, *supra* note 50.

[121] Minn. Stat. § 609.195 (2020).

[122] Minn. Stat. § 609.190 (2020).

[123] Minn. Stat. § 609.223 (2020).

[124] Dakin Andone, Omar Jimenez, Brad Parks & Kay Jones, *Judge drops third-degree murder charge against former officer Derek Chauvin in George Floyd's death, but second-degree murder charge remains*, CNN (Oct. 22, 2020, 6:08 PM) [https://perma.cc/9H7Q-WX5Y].

[125] State v. Noor, 955 N.W.2d 644 (Minn. App. 2021). Brad Parks, Aaron Cooper & Eric Levenson, *Judge reinstates third-degree murder charge against Derek Chauvin in George Floyd's death*, CNN (Mar. 11, 2021 0:41 PM), https://www.cnn.com/2021/03/11/us/derek-chauvin-george-floyd-charges/index.html [https://perma.cc/ZMW7-HCGP].

Court.[126] This very likely implies that Chauvin's third degree murder conviction is no longer valid.

One effect of this decision is that Chauvin will be punished and condemned much more severely than Noor. The reversal of Noor's third degree murder conviction leaves him liable only for second degree manslaughter, which requires causing death by "culpable negligence" by "consciously" creating a risk of death or great bodily harm.[127] Noor's sentence was reduced from 12.5 to 4.75 years.[128] Obviously, some disparity may be appropriate: unlike Chauvin, Noor was responding to a call about a violent crime, he saw his partner draw his gun and his fatal mistake was a momentary impulse, not a choice defiantly maintained for nine minutes.

In overturning Noor's depraved indifference murder conviction, the Minnesota Supreme Court pointed to extensive Minnesota precedent restricting that crime to deaths resulting from acts endangering more than one person.[129] The state urged the court to overrule this precedent on the basis of a structural interpretation of the code: restricting depraved indifference murder to reckless acts endangering multiple victims left a gap, as the code had no other offense encompassing killing with reckless indifference toward an individual. The court responded that such conduct is encompassed by second degree murder—felony murder—when predicated on assault.[130]

However, this crime—the very crime Chauvin was convicted of—does *not* require proof of recklessness towards death.[131] Moreover, because Minnesota lacks a merger limitation, its felony murder rule does not require any aggravating motive for imposing such risk. As noted above, the selective imposition of a risk of death on a single victim can be *more* depraved if the principle of selection is an illegitimate one such as racial identity, political dissent, or resistance to subordination. The *Noor* decision may accord with precedent, but that precedent is not compelled by the statutory language, and it does leave a gap in the law. The court filled this gap with a broader felony murder offense uncabined by a merger limitation. The result left prosecutors free to charge fatal assaults as manslaughters or murders without requiring any difference in proof.

Minnesota is not unique in lacking murder liability for killing with depraved indifference directed at an individual. Seven states appear not to per-

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[126] Paulina Villegas, *Court overturns third-degree murder conviction against ex-Minneapolis officer*, WASH. POST (Sept. 15, 2021, 9:31 PM);State v. Noor A19-1089 (Sept. 15, 2021), https://www.mncourts.gov/mncourtsgov/media/Appellate/SupremeCourt/StandardOpinions/OPA191089-091521.pdf [https://perma.cc/NF26-R83H]; State v. Noor, 964 N.W.2d 424, 440 (Minn. 2021).

[127] MINN. STAT. § 609.205 (2021).

[128] Jon Collin & Matt Sepic, *Ex-cop Noor set for June release after resentence in Ruszczyk killing*, MPR NEWS (October 21, 2021, 4:00 AM), [https://perma.cc/X97Y-6H5E].

[129] Noor, 964 N.W.2d, at 431-433.

[130] *Id.* at 440.

[131] MINN. STAT. § 609.19(2)(1) (2020).

mit murder based on recklessness (outside the context of a felony).[132] Four states join Minnesota in conditioning murder offenses on recklessness only if directed toward multiple potential victims,[133] although one also punishes killing with recklessness towards an individual as murder.[134] Thus, in 39 states, murder would potentially be available for any reckless and unjustified police killing. Felony murder is unnecessary as a prosecutorial tool for punishing most unjustified police violence in those states.

As it happened, Chauvin was, and Noor was not, charged with second degree (felony) murder. Although convicted of both second and third degree murder, Chauvin was sentenced only for the higher charge, receiving 22 ½ years in prison.[135] Two of the factors used to justify increasing Chauvin's sentence above a 15-year guideline recommendation for second degree murder sentence were his "abuse of a position of trust and authority,"[136] and his "particular cruelty" toward the victim.[137] In finding abuse of authority, the judge pointed out Chauvin's reckless indifference to human life in these terms:

> Defendant . . . held a handcuffed George Floyd . . . for an inordinate length of time (more than nine minutes and forty seconds), [in] a position that Defendant knew from his training and experience carried with it a danger of positional asphyxia. The prolonged use of this technique was particularly egregious in that George Floyd made it clear he was unable to breathe and expressed the view that he was dying as a result of the officers' restraint . . . . In addition, the other officers involved in the restraint . . . twice inquired during the restraint if they should roll Floyd onto his side, i.e., into a "recovery position" and [one] later also informed Defendant that he believed Floyd had passed out. Thus, not only was the

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[132] HAW. REV. STAT. § 707-701.5; 720 ILL. COMP. STAT. 5/9-2 (2022); IND. CODE § 35-42-1-1 (2022) (second degree murder requires malice express or implied, not otherwise defined); LA. STAT. ANN. § 14:30 (2022); MONT. CODE ANN. § 45-5-102 (2022); NEB. REV. STAT. § 28-304; OHIO REV. CODE ANN. § 2903.02 (West 2022); Of these, Hawaii does not punish felony murder either. An eighth state, Iowa, does not condition murder on recklessness, but does condition second degree murder on "general intent," rendering any fatal assault punishable as murder. IOWA CRIMINAL JURY INSTRUCTIONS § 700.7 (malice is unlawful purpose or intent to injure), State v. Lee, 494 N.W.2d 706, 707 (Iowa 2003) (intent to inflict physical harm); IOWA CODE § 707.1, 707.3. State v. Caldwell, 385 N.W.2d 553, 556 (Iowa 1986); IOWA CRIMINAL JURY INSTRUCTIONS § 700.14 (general intent).

[133] *See* Howard v. State, 85 So.3d 1054, 1062(Alabama 2011); Ex Parte Williams, 838 So.2d 1028, 1031 (Ala. 2002); Gholston v. State 494, So.2d 876, 883 (Ala. Crim. App. 1986); State v. Pettus, 89 Wash. App. 688 (Wash. Ct. App. 1998); COLO. REV. STAT. 18-3-102(1)(d) (2016); People v. Zekany, 833 P.2d 774, 778 (Colo. App. 1996). *But see* Candelaria v. People, 148 P.3d 178, 182 (Colo. 2006) (one victim can be targeted if perpetrator is indifferent to identity); State v. Candelaria, 434 P.3d 297, 303-307 (N.M. 2018); N.M. STAT. ANN. § 30-2-1(A)(3) (2022).

[134] N.M. STAT. ANN. § 30-2-1(B) (2022).

[135] The other homicide offenses were viewed as lesser included offenses. State v. Chauvin, No. 27-CR-20-12646, 2021 WL 2621001, at *7 (Minn. Dist. Ct. June 25, 2021).

[136] *Id.* at *3.

[137] *Id.* at *9.

> danger of asphyxia theoretical, it was communicated to the Defendant as actually occurring with George Floyd.[138]

The court's finding of abuse of authority also relied on such facts as his violation of his training, his failure to render aid, and his using force far in excess of what was necessary to maintain custody.[139] The judge's finding of cruelty detailed further culpability:

> b. It was particularly cruel to kill George Floyd slowly by preventing his ability to breathe when Mr. Floyd had already indicated he was having trouble breathing. c. The slow death of George Floyd, occurring over approximately six minutes of his positional asphyxia was particularly cruel in that Mr. Floyd was begging for his life and was obviously terrified by the knowledge he was likely to die but during which the defendant objectively remained indifferent to Mr. Floyd's pleas. . . . the prolonged nature of the asphyxiation was by itself particularly cruel.[140]

These official statements, measured, grave but painfully graphic and patiently detailed, from an exponent of the legal system, do describe and denounce Chauvin's actions in appropriate terms. They contributed to making the trial, conviction and sentencing the moving and cathartic event that it was.

Nevertheless. As discretionary sentencing factors, these facts did not have to be charged, proven beyond a reasonable doubt, or found by a jury.[141] They were not integral elements of the offense of conviction. To be sure, the jury necessarily found Chauvin's conduct "dangerous" and "depraved" in convicting him of third degree murder, but the felony murder charge for which he was actually sentenced did not require this. The jury had to find that Chauvin's use of force was not justified to find him guilty of assault but did not have to additionally find that he abused his office. Under Minnesota's statute, Chauvin could have been convicted of exactly the same charge if he had thrown a punch in response to a suspect's curse and the suspect had improbably suffered a fatal head injury.

Minnesota is unusual (although not unique) in permitting felonious assault as a predicate for felony murder.[142] It neither enumerates predicate felonies, nor limits predicate felonies by means of a merger rule. Rather than two

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[138] State v. Chauvin, No. 27-CR-20-12646, slip op. at 2 (Minn. Dist. Ct. May 11, 2021), https://mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12646/Order05112021.pdf [https://perma.cc/H3JR-RP2S].

[139] *Id.* at 1-3.

[140] *Id.* at 4.

[141] *See* U.S. v. Booker, 543 U.S. 220, 251–52 (2005).

[142] *See* State v. Morris, 290 Minn. 523, 524-525 (Minn. 1971); State v. Smith, 203 N.W.2d 348, 350-351 (Minn. 1972); State v. Carson, 219 N.W.2d 88, 88 (Minn. 1974); Kochevar v. State, 281 N.W.2d 680, 686 (Minn. 1979); State v. Loebach, 310 N.W.2d 58, 65 (Minn. 1981); State v. Abbott, 356 N.W.2d 677, 680 (Minn. 1984); State v. Jackson, 346 N.W.2d 634, 636 (Minn. 1984); State v. French, 402 N.W.2d 805, 808 (Minn. Ct. App. 1987); State v. Gorman, 532 N.W.2d 229, 233-34 (Minn. 1995).

dimensions of culpability (towards physical harm and an independent felonious purpose), felony murder predicated on assault has only one. The reader might assume that at least the culpability towards physical harm required for felony assault must be very high, since that crime requires inflicting substantial physical injury. Surely the intent to inflict such injury would imply consciously imposing a risk of death. Yet in Minnesota, third degree assault does not require intent—or, for that matter *any* culpable mental state—with respect to the injury. In the case of *State v. Gorman*, for example, defendant was convicted of felony murder for a single, fatal blow with a fist.[143] Thus, while Chauvin's presumptively invalid third degree murder conviction implied that he acted with both reckless indifference to human life and a depraved motive, Chauvin's legally valid felony murder conviction required no finding of any culpability beyond the bare foreseeability of death. Such a charge gives the jury no responsibility—and no real opportunity—to judge the defendant's moral guilt. At the close of his summation, prosecutor Jerry Blackwell famously concluded that while the defense had argued that "Mr. Floyd died because his heart was too big. . . the truth of the matter is that the reason George Floyd is dead is because Mr. Chauvin's heart is too small."[144] Yet, the felony murder charge neither required nor permitted any such finding.

The abuse of public authority found by the judge at Chauvin's sentencing represents culpability toward a secondary harm. While the jury did not learn this, Chauvin had earlier used the same tactic, kneeling for 17 minutes on the neck of a bleeding 14-year-old, who also complained that he could not breathe, while his mother protested.[145] Chauvin's misuse of public authority to inflict unnecessary pain, fear, and risk bespeaks an attitude of contempt for the governed, and disregard of public responsibilities, as well as indifference to human life. Does Minnesota have an official misconduct or civil rights felony that could have better served as a predicate felony? No. It has an official misconduct offense of unlawfully injuring another in his person or rights, but it is only a misdemeanor.[146] Conceivably an assailant's animus or selective disregard toward a particular group could add culpability toward a secondary harm. So does Minnesota have a hate crime felony? Minnesota imposes a sentence enhancement for some hate-motivated crimes

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[143] *See* State v. Gorman, 532 N.W.2d 229, 231 (Minn. 1995). *See also* Binder, *supra* note 12, at 489–90; State v. Mosley, 414 N.W.2d 461, 465 (Minn. Ct. App. 1987) (no such intent required for third degree assault).

[144] *Jurors Have The Case In Chauvin Trial; Prosecutors Ended With Call For Common Sense*, NPR NEWS (Apr. 19, 2021, 5:40 PM), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/19/988802717/watch-live-prosecutors-offer-rebuttal-to-chauvin-defense-closing-arguments [https://perma.cc/A276-NH56].

[145] Ray Sanchez & Omar Jimenez, What we know about the 2017 encounter that led to Derek Chauvin's second indictment, CNN (May 7, 2020, 3:44 PM), https://www.cnn.com/2021/05/07/us/derek-chauvin-indictment-2017-incident/index.html [https://perma.cc/79LT-9J94].

[146] MINN. STAT. 609.43 (2021).

but imposes felony liability only for a second hate-motivated assault conviction.[147]

In Minnesota, if reckless killers cannot be charged with depraved indifference murder as a result of endangering a single victim, felony murder predicated on assault is the only unintentional murder charge available to Minnesota prosecutors in such a case. This puts critics of felony murder and critics of police violence in the dilemma with which we began. The felony murder law which enabled Chauvin's murder conviction—lacking any merger limitation—is one of the broadest and least defensible.

Officer Garrett Rolfe was charged with "felony murder,"[148] defined as "in the commission of a felony, caus[ing] the death of another human being irrespective of malice."[149] Like Minnesota, Georgia lacks a merger limitation, so that assault can serve as a predicate felony there. Apart from murder, the felonies originally charged in the Rolfe case were of two kinds: willful and intentional violation of oath by a public officer (by shooting Brooks twice in the back, and failing to render medical aid),[150] and aggravated assault with a deadly weapon (committed against Brooks and bystanders in the parking lot).[151] The felony murder charges were predicated only on the aggravated assault offenses.[152]

On these facts, a high degree of culpability towards death—recklessness—was implicit in the weapon Rolfe used. But the offense definition treats as a deadly weapon any weapon actually causing a serious injury, without requiring any culpability towards that result. As a result, in Georgia, as in Minnesota, an assailant can be convicted of felony murder for a single fatal blow with a bare hand.[153] Thus, the felony murder charge predicated on assault would not have required proof of the culpability towards death Rolfe demonstrated and does not require culpability towards any secondary harm. When we turn to the official misconduct felony, that could have supported additional felony murder counts, we find that its elements do not inherently entail culpability towards death. However, the offense does entail an abuse of

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[147] MINN. STAT. 609.2231 (2021); MINN. STAT. 609.2233 (2021).

[148] Case No. 20CP192494 State of Georgia vs Garrett Rolfe Complaint Room Case Summary (Filed 6/18/2020); Criminal Warrant for arrest of Garrett David Rolfe, Superior Court of Fulton County, Georgia, issued by Judge Rebecca Rieder, 6/17-2020 2:52 p.m.

[149] GA. CODE ANN. § 16-5-1(c) (2022); Complaint Room Case Summary *supra*; Zachary Hansen & Christian Boone, *Former Atlanta Cop Charged with Felony Murder in Rayshard Brooks' Death*, ATLANTA J. CONST. (June 17, 2020), https://www.ajc.com/news/crime—law/breaking-atlanta-cop-charged-with-felony-murder-other-charges-rayshard-brooks-death/h0j3W9OZvMgtSf3eE1i2hM/ [https://perma.cc/34NA-MGNT].

[150] GA. CODE ANN. § 16-10-1(2022); Complaint Room Case Summary, *supra* note 148; Hansen & Boone, *supra* note 149.

[151] GA. CODE ANN. § 16-5-21(2) (2022) (defining a deadly weapon as "any object, device, or instrument, which when used offensively against a person is likely to, or actually does result in serious bodily injury); Nicole Chavez, *What We Know About the Charges Against the Officers Invovled in Rayshard Brooks' Death*, CNN (June 17, 2020, 9:20 PM), https://www.cnn.com/2020/06/17/us/rayshard-brooks-officers-charges/index.html [perma.cc/DE3E-4RPL].

[152] Criminal Warrant *supra* note 148.

[153] Miller v. State, 571 S.E.2d 788, 793, 798 (Ga. 2002).

public trust. This provides culpability towards a secondary wrong and in that respect partially justifies the severe condemnation of a murder conviction. Georgia has now passed a bill imposing modest hate crime penalty enhancements, but did so only in the wake of the Ahmaud Arbery and Brooks killings.[154]

Could this case have been resolved by charging depraved indifference murder requiring recklessness as an offense element? Unlike Minnesota, Georgia has a depraved indifference murder offense that can apply to endangerment of an individual.[155] So why wasn't Rolfe originally charged with that form of murder? A possible reason is that Georgia's depraved indifference murder offense has an exception for provoked killings.[156] Brooks' alleged taser attack on Rolfe could have provided such provocation, even though we do not agree that it justified Rolfe's killing of Brooks. Given this difficulty, the felony murder charge might have eased the prosecution's path to conviction and avoided some risk of juror confusion. One option absent in Georgia is a manslaughter felony conditioned on recklessness or negligence toward death and not predicated on another offense.[157] Thus, in cases of unintended killing, prosecutors in Georgia face a dilemma. Murder is their only charging option involving any significant punishment. The legislature has helped prosecutors, not by enacting an involuntary manslaughter offense, but by rejecting a merger limitation on felony murder. Again, because Georgia's felony murder law is one of the broadest and least defensible,[158] the felony murder prosecution of Garrett Rolfe posed a dilemma for progressives bent on reforming both policing and felony murder law.

Yet the prosecution was ultimately dropped on other grounds. Paul Howard, Fulton County District Attorney, who approved the charges, was defeated in a primary election.[159] His successor, Fani Willis, successfully moved to recuse her office, on the ground that Howard had improperly used footage of the killing in his election campaign.[160] As a result in July 2021, the State Attorney General appointed a Special Prosecutor, not answerable to

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[154] Angela Barajas, Dianne Gallagher & Erica Henry, *Georga Governor Signs Hate Crime Bill Spurred by Outrage over Ahmaud Arbery's Killing*, CNN (June 26, 2020, 3:07 PM), https://www.cnn.com/2020/06/26/us/georgia-hate-crime-bill/index.html [https://perma.cc/9BZQ-HYFY].

[155] GA. CODE ANN. § 16-5-1(b) (2022).

[156] *Id.*

[157] GA. CODE ANN. § 16-5-3 (2022) (involuntary manslaughter punished as misdemeanor, unless committed during another misdemeanor).

[158] GA. CODE ANN. § 16-5-1(c) (2022).

[159] Christian Boone, *Fani Willis Unseat 6-term Fulton DA Paul Howard, Atlanta Journal Constitution*, Aug. 12, 2020, https://www.ajc.com/news/crime/early-results-show-fulton-da-challenger-in-the-lead/X23G6PDMIFBVHJKYH6UVTQMQ54/ [https://perma.cc/SJ6E-C6P3].

[160] Christopher Buchanan, *Judge Allows Fulton DA Recusal from Case Against Atlanta Officer in Rayshard Brooks Shooting*, 11ALIVE, June 5, 2021, https://www.11alive.com/article/news/crime/judge-allows-fulton-da-recusal-rayshard-brooks-shooting/85-f2f5e56a-e3a1-468c-9abd-61c77a8361c7 [https://perma.cc/98S5-HNX6].

Atlanta voters.[161] On August 23, 2022, Special Prosecutor Peter Skandalikis announced his decision to drop all charges against Rolfe and Brosnan.[162] Danny Porter, a former Gwinett County prosecutor, consulted as an expert, reasoned that after Brooks tased Brosnan, police "could have arrested Brooks on charges of aggravated assault of an officer, felony resistance to arrest and several other charges," and concluded that "Rolfe acted within accordance with Georgia law" and "the use of deadly force was reasonable."[163] Skandalikis added that Brooks, although fleeing, was in an "offensive position" by virtue of possessing the taser, and that "a Taser in the hands of an untrained person can also be deadly."[164] Although acknowledging that the Taser's two shots had already been spent by the time Rolfe fired, Skandalikis concluded that "it was reasonable to assume that Mr. Rolfe might not have counted" the shots.[165] Georgia NAACP President Gerald Griggs issued a statement arguing that Brooks was not a threat when shot and a grand jury would have been a more impartial decisionmaker.[166] Our own view is that there is probable cause to think Rolfe had alternatives to killing the fleeing Brooks and that his claim of justification should at the very least have been evaluated by a grand jury.

We have seen that both Minnesota and Georgia can prosecute police for felony murder, predicated on aggravated assault, because they (1) do not exhaustively enumerate felonies *and* (2) lack a merger rule. In addition, Georgia has a felony of official misconduct that can provide a predicate for felony murder. Six other states enumerate some form of aggravated assault as a predicate felony. Aggravated assault, where the victim of the assault is killed, can serve as a predicate felony in Montana, Ohio, Washington and Wisconsin.[167] In Washington, the victim cannot be a co-felon.[168] In Louisi-

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[161] Statement from Executive Director Peter J. Skandalikis, Prosecuting Attorneys' Council of Georgia, July 21, 2021, https://pacga.org/2021/07/21/statement-from-executive-director-peter-j-skandalakis/ [https://perma.cc/MJ5H-6CRP].

[162] WBS-TV Atlanta, *No Charges for Atlanta Officers in Shooting Death of Rayshard Brooks*, https://www.wsbtv.com/news/local/charges-dropped-against-atlanta-officers-rayshard-brooks-shooting-death/KPGYC5RJORA2TACW2PY3MSY2ZU/ [https://perma.cc/8EKP-FDCA].

[163] *Id.*

[164] Richard Fausset, *Charges to be Dropped Against Officers in Fatal Shooting of Rayshard Brooks*, N.Y. TIMES, Aug. 23,2022 https://www.nytimes.com/2022/08/23/us/rayshard-brooks-officers-no-charges.html [https://perma.cc/E3X9-K9GP].

[165] *Id.*

[166] *Id.*; Jozsef Papp, *Georgia NAACP demands case be presented to grand jury*, ATLANTA JOURNAL-CONSTITUTION, August 23, 2022, https://www.ajc.com/news/crime/georgia-naacp-demands-rayshard-brooks-case-be-presented-to-grand-jury/HJM7CYJ44JDL3EOQP4UF4HIJHU/ [https://perma.cc/P6MA-TXD6].

[167] MONT. CODE ANN. 45-5-102(1)(b) (2021) ("assault with a weapon" and "aggravated assault"); OHIO REV. CODE ANN. 2903.02(B), 2903.11(D)(1)(a) (2022) ("felonious assault"); State v. Owens, 166 N.E.3d 1142, 1146 (Ohio 2020) *cert. denied*, 141 S. Ct. 2577 (2021) (rejects merger doctrine); WASH. REV. CODE 9A.32.050 (1)(b) (2022) ("including assault"); WIS. STAT. 940.03, 940.19 (2022) ("battery"). For purposes of this discussion, we do not distinguish between offenses labelled "assault" and those labelled "battery," on the assumption that any homicide will satisfy the definition of either.

[168] WASH. REV. CODE ANN. 9A.32.050 (1)(b) (2022).

ana, a narrow form of assault entailing recklessness, drive-by-shooting, is an enumerated predicate felony.[169] In Illinois, felony murder can be predicated on assault, but not if the victim was the intended target.[170] Three other states, Texas, Missouri and Delaware, impose felony murder predicated on non-enumerated felonies and have rejected a merger rule.[171] Thus, in only seven other states could an officer face felony murder liability for an unjustified fatal assault of a civilian.

In only one state other than Georgia is it possible to punish killing in the course of an official misconduct, civil rights violation or hate crime felony as murder. Illinois has an official misconduct felony, which includes performance by an official of any act he is forbidden by law to perform.[172] If such a felony is performed, while contemplating that violence might be necessary to carry out the offense, it qualifies as a "forcible felony" that can be a predicate for felony murder.[173]

This summary returns us to our question. Should other states change their laws to enable felony murder prosecution of police who kill unreasonably, as in Delaware, Georgia, Illinois, Minnesota, Missouri, Montana, Ohio, Texas, Washington, and Wisconsin? Recall that the merger doctrine serves an important purpose: requiring an additional dimension of culpability for felony murder beyond negligently risking death and doing so for a gravely wrong purpose independent of that danger. If we are going to have felony murder, it should be bounded by a merger rule. Making it easier to prosecute police is not a sufficient reason to predicate felony murder on felonious assault.

On the other hand, predicating felony murder on a felony of civil rights violation or misuse of public authority would add an independent wrongful purpose to the negligent imposition of risk. This would comply with the merger doctrine and so it is a better way to expand felony murder liability to encompass unreasonable police violence. States lacking a civil rights or official misconduct felony arguably should add one whether or not they designate it as a predicate for felony murder. Adding such a felony is of value in denouncing and deterring police violence regardless of whether it can be used as a predicate for felony murder. Finally, a hate crime is another kind of felony that could add a felonious purpose independent of physical harm. Yet proving a discriminatory purpose for a particular act of police violence is also notoriously difficult.[174] Many instances of police violence may reflect what

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[169] LA. STAT. ANN. 14:30.1(2) (2022).

[170] 720 ILL. COMP. STAT. 5/2-8 (2022); 720 ILL. COMP. STAT. 5/9-1 (2022); People v. Morgan, 758 N.E.2.d 813, 838 (Ill. 2001); People v. Boyd, 825 N.E.2d 364, 369–70 (Ill. App. Ct. 2005).

[171] Lawson v. Texas, 64 S.W.3d 396, 396–97 (Tex. Crim. App. 2001); Johnson v. State, 4 S.W.3d 254, 258 (Tex. Crim. App. 1999); State v. Williams, 24 S.W.3d 101, 117 (Mo. Ct. App. 2000); DEL. CODE ANN. tit. 11, §§635,636 (2022); *see also* Binder, *supra* note 12, at 540 (explaining this statute as removing a requirement of causing death "in furtherance of the felony" to invalidate decisions basing a merger doctrine on this language).

[172] 720 ILL. COMP. STAT. 5/33-3 (official misconduct).

[173] *See* People v. Belk, 784 N.E.2d 825, 831 (Ill. 2003).

[174] Avlana Eisenberg, *Expressive Enforcement*, 61 U.C.L.A L. REV. 858, 891–93 (2014).

one of the authors has called reckless racism.[175] Nationally, hate crime charges and enhancements are little used by prosecutors, when other charges are available, as they almost always are. Not only hard to prove, bias allegations rarely affect penalties, and may provoke juror pushback.[176]

But supposing a state had a civil rights or hate crime felony, there would still be an objection to charging police with felony murder. Indeed, Georgia could have charged Garrett Rolfe with murder predicated on official misconduct felony, but there would still have been something unsatisfying about this charge. It would have understated the highly culpable attitude toward the risk of death Rolfe displayed. The killings of Floyd and Brooks were not merely careless. They were at least reckless toward the lives of their victims, a morally significant fact that felony murder liability does not reflect. Punishing Chauvin and trying Rolfe for felony murder might have been the best among bad alternatives, but charges of depraved indifference would have better characterized their culpability. Fortunately, such charges will be available to prosecute unjustified police killings in most states.

IV. Felony Murder Prosecution of Felons for Killings by Police

Thus far, we have examined the possibilities of using felony murder laws to punish unreasonable police killings. Here, we turn to another use of felony murder liability in cases of police violence: prosecuting not the police who kill, but the suspects they target or pursue. In many cases, the dead victims are co-felons. And sometimes the felons who survive to be charged are also injured victims.

Jurisdictions divide on permitting such prosecutions. A majority preclude felony murder liability for the actions of police in opposition to the felony, by imposing an "agency rule"—limiting felony murder liability to deaths directly caused by a participant in the felony.[177] But a substantial mi-

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[175] Yankah, *supra* note 11, at 683.

[176] Eisenberg, *supra* note 174, 883–95. Thus, the expressive deficiency of Chauvin's felony murder conviction explored here fits into a larger pattern of prosecutorial incentives and choices, in a context where penalties are high and multiple overlapping charges are often available.

[177] People v. Washington, 402 P.2d 130, 134-35 (Cal. 1965); State v. Young, 469 A.2d 1189, 1193 (Conn. 1983) (favorably citing New York agency rule decision of People v. Wood, 137 A.2d 472 (NY 1958) discussed *infra* at note 245); Comer v. State, 977 A.2d 334, 337 (Del. 2009); State v. Pina, 233 P.3d 71, 78 (Idaho 2010); State v. Sophophone, 19 P.3d 70, 77 (Kan. 2001); State v. Bryant, 78 P.3d 462, 466 (Kan. 2003); State v. Small, 100 So.3d 797, 806 (La. 2012) Campbell v. State, 444 A.2d 1034, 1042 (Md. 1982); State v. Branson, 487 N.W. 2d 880, 885 (Minn. 1992); State v. Rust, 250 N.W.2d 867, 875 (Neb. 1977); Sheriff v. Hicks, 506 P. 2d 766, 768 (Nev. 1973); State v. Bonner, 411 S.E.2d 598, 603-04 (N.C. 598); State v. Williams, 185 N.C. App. 318, 332 (2007); Commonwealth ex rel. Smith & Myers, 261 A.2d 550, 559-60 (Pa. 1970); State v. Severs, 759 S.W.2d 935, 938 (Tenn. Crim. App.1988); State v. Hansen, 734 P.2d 421, 427 (Utah 1986); Wooden v. Commonwealth, 284 S.E.2d 811, 816 (Va. 1981); State v. Bauer, 329 P.3d 67, 73 (Wash. 2014) ("no Washington case upholding . . . liability, where the accuse did not actively participate in the immediate physical impetus of

nority instead punish felons for any deaths "proximately caused" by the felony—including those caused by police or others in resisting the felony.

Although in force in most states, agency rules have heretofore lacked a principled rationale. The most influential argument in their favor, offered by Dean Norval Morris in 1956, invoked precedent, and the general disrepute of felony murder liability itself.[178] Probably Morris and many of his readers presumed that the Model Penal Code would soon rationalize homicide law and consign the anachronism of felony murder to the dustbin of history. His arguments were initially effective and proximate cause standards almost disappeared. Yet they ultimately proved helpless to prevent a legislatively led expansion of felony murder liability during the War on Crime. Proximate cause standards were based on an expansive modern conception of causation championed by the Model Penal Code itself. The new codes inspired by the Model Penal Code were passed during the War on Crime, not by liberal reformers, but by legislators eager to show they were tough on crime. Most new codes retained felony murder. New proximate cause standards drew authority from these new codes in many states.

A. "Chain Reaction": Proximate Cause as a Defensive Weapon

The restriction of felony murder liability to killings in furtherance of the felony is found in the earliest formulation of the rule. In *Rex v. Plummer*,[179] one smuggler shot another, while in flight from royal officers. Justice Holt supported extending murder liability to accomplices in any "deliberate" and "malicious" predicate felony "tend[ing] to the hurt of another either immediately or by necessary consequence," provided that "the killing must be in pursuance of that unlawful act, and not collateral to it."[180] However, since there was no proof that the shooting had anything to do with the smuggling crime, the accomplices of the shooter could not be guilty of murder.

A review of reported felony murder cases in nineteenth century America disclosed none where liability was imposed for a death directly caused by an intervening actor (such as a police officer), not party to the

harm."); Davis v. Fox, 735 S.E.2d 259, 265 (W. Va. 2012). For statutes appearing to require causation of death by a participant, see CONN. GEN. STAT. ANN. § 53a-54c; IOWA CODE ANN. § 707.2; LA. STAT. ANN. 14:30.1(A)(2); ME. REV. STAT. T. 17-A § 202 I.1; MINNESOTA STATUTES 609.19 Subd. 2 (1); MISS. CODE ANN. § 97-3-19 I.(1)(c); MONT. CODE ANN. 45-5-102 I.(1)(b); NEB. REV. STAT. ANN. § 28-303; O.R.S. § 163.115(b); R.I. GEN. LAWS. ANN. § 11-23-1; S.D. CODIFIED LAWS § 22-16-4; TENN. CODE ANN. § 39-13-202 I(a)(2); UTAH CODE ANN. § 76-5-203 (2)(d); WASH. REV. CODE ANN. 9A.32.030(1)(c); WYO. STAT. ANN. § 6-2-101(I)(a). For a jury instruction requiring causation by a participant, see SJCI §2-3 (South Carolina).

[178] Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 60-68 (1956).

[179] 84 Eng. Rep 1103, (K.B. 1701).

[180] *Id.* at 1105–07.

felony.[181] In the 1863 Massachusetts case of *Commonwealth v. Campbell*,[182] the defendant was a participant in a riot, during which a bystander was fatally shot, possibly by a soldier attempting to disperse the crowd.[183] The court held that "[n]o person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose."[184] The 1888 Illinois case of *Butler v. People*,[185] repeated this language in overturning manslaughter convictions for defendants who resisted arrest for a minor disturbance, and whose arresting officer fatally shot their uninvolved brother.[186] The court added that "[w]here the criminal liability arises from the act of another, it must appear that the act was done in furtherance of the common design . . . ; otherwise a person might be convicted of a crime to the commission of which he never assisted, which could not be done upon any principle of justice."[187] This pattern continued in the early twentieth century: a 1905 Kentucky case, *Commonwealth v. Moore*,[188] reasoned that "[i]n order that one may be guilty of homicide, the act must be done by him actually or constructively, and that cannot be, unless the crime be committed by his own hand, or by the hands of someone acting in concert with him, or in furtherance of a common object or purpose."[189] These courts presumed the principle prevailing in nineteenth century criminal law, that one actor could not be the cause of another's action.[190]

Yet by the early twentieth century, several lines of cases had eroded this principle. Some cases imposed causal responsibility on assailants for the dangerous flight,[191] or even suicide,[192] of victims. Others imposed liability for death mediated by another's neglect or unwise treatment of an injury.[193] Some imposed causal responsibility on arsonists when firefighters or inhabi-

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[181] Binder, *Origins of American Felony Murder*, *supra* note 13, at 193–96. The nearest exception occurred in 1900: the shield case of *Keaton v. State*, forcing the victim into gunfire. 57 S.W. 1125, 1129 (Tex. Crim. App. 1900).

[182] 7 Allen 541, 542 (Mass. 1863).

[183] *Id.* at 542.

[184] *Id.* at 544.

[185] 18. N.E. 338, 339–40 (Ill. 1888).

[186] *Id.* at 339–40. It is true that the court also quoted an English treatise to the effect that "If the unlawful act be a felony, it will be murder in all, although the death happened collaterally" *Id.* at 339.

[187] *Id.* at 645.

[188] 88 S.W. 1085 (Ky. 1905).

[189] *Id.* at 1086 (Ky. 1905); *accord*, State v. Majors, 237 S.W. 486, 488 (Mo. 1922); State v. Oxendine, 122 S.E. 568, 570 (N.C. 1924).

[190] BINDER, *supra* note 83, at 210–11; Paul Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773, 782 (1958).

[191] Rex v. Valade, 26 Can. Crim. Cas. Ann. 233 (K.B. 1915); Regina v. Halliday, 61 L.T.R. (n.s.) 701, 702 (Crown Cas. Res. 1889); Letner v. State, 299 S.W. 1049, 1052 (Tenn. 1927).

[192] People v. Lewis, 570 P. 470, 470 (Cal. 1899); Stephenson v. State, 179 N.E. 633, 650 (Ind. 1932).

[193] Queen v. McIntyre, 2 Cox C.C. 279, 279 (1847).

tants entered a blaze, even if imprudently.[194] Several decisions brushed aside as irrelevant, robbers' doubtful claims that their guns were discharged by struggling victims.[195] In one, the 1925 case of *People v. Krauser*, the Illinois Supreme Court distinguished *Butler*:

> The shooting of Souders was a consequence naturally to be expected from the plaintiff in error's acts. He made an assault with a deadly weapon, and Souders was justified in resisting the attack. . . . It is not material whether it was in the hand of the plaintiff in error or Souders. The plaintiff in error had the intent to commit murder if resisted.[196]

Additional cases upheld liability where felons had coerced victims to serve as shields and so exposed them to anticipated gunfire.[197] While a voluntary act could supersede the felony as a cause of death, a coerced act was neither voluntary nor independent of the felony.

By the middle third of the twentieth century, then, courts had identified several ways that felons might become causally responsible for the destructive act of a non-felon. It became plausible to see defensive force against a felony, and even force used in arresting felons, as coerced by the felony. In the 1935 case of *People v. Payne*,[198] The Illinois Supreme Court upheld a murder conviction for the fatal shooting of a robbery victim in an exchange of gunfire between a robber and the victim's brother, where the source of the fatal bullet was uncertain.[199] Citing *Krauser*, the court held "[i]t reasonably might be anticipated that an attempted robbery would meet with resistance, during which the victim might be shot either by himself or someone else in attempting to prevent the robbery, and those attempting to perpetrate the robbery would be guilty of murder."[200] In the 1952 Texas case, of *Miers v. State*,[201] a defendant appealed his conviction on the basis of the trial court's refusal to instruct the jury to acquit him if his robbery victim had accidentally shot himself.[202] The Texas Court of Criminal Appeals upheld the felony murder conviction, reasoning that the defendant caused the victim's act by menacing him.[203]

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[194] State v. Glover, 50 S.W.2d 1049, 1056 (Mo. 1932); State v Leopold, 147 A. 118, 121 (Conn. 1929).

[195] People v. Manriquez, 206 P. 63, 63 (Cal. 1922); Commonwealth v. Lessner, 118 A. 24, 25–26 (Pa. 1922); People v. Krauser, 146 N.E. 593, 601 (Ill. 1925).

[196] *Krauser,* 146 N.E. at 601.

[197] Keaton v. State, 57 S.W. 1125, 1129 (Tex. Crim. App. 1900) (defendant "would be responsible for the reasonable, natural, and probable result of his act, to wit, placing deceased in a place of danger, where he would probably lose his life"); Taylor v. State, 55 S.W. 961, 965 (Tex. Crim. App. 1900); Wilson v. State, 68 S.W.2d 100, 102 (Ark. 1934).

[198] 194 N.E. 539 (Ill. 1935).

[199] *Id.* at 543–44.

[200] *Id.* at 543.

[201] 251 S.W.2d 404, Tex. Crim. App. 1952).

[202] *Id.* at 407–08.

[203] *Id.* at 407–408 (citing Taylor v. State, 55 S.W. 961, 964 (Tex. Crim. App. 1900)).

This expansion of liability was not motivated merely by abstract theoretical debates about the reach of proximate cause. Rather, deaths caused by victims and police were recast as defensive responses compelled by enemy outsiders. Most influential were a pair of postwar Pennsylvania cases likening felonies to sedition and aggression, and portraying police as soldiers, immunized by duty. In the 1947 case of *Commonwealth v. Moyer*,[204] where the defense alleged that one robbery victim shot another while exchanging gunfire with the robbers, the Pennsylvania Supreme Court upheld an instruction that "[a]ll of the participants in an attempted robbery are guilty of murder in the first degree if someone is killed in the course of" that crime.[205] It invoked the recent war:

> It is the right and duty of both individuals and nations to meet criminal aggression with effective countermeasures. Every robber or burglar knows when he attempts to commit his crime that he is inviting dangerous resistance. . . . For Earl Shank, the proprietor of a gas station . . .being attacked by armed robbers, to return the fire of these robbers with a pistol which he had at hand was as proper and as inevitable as it was for the American forces at Pearl Harbor on the morning of December 7, 1941, to return the fire of the Japanese invaders. The Japanese felonious invasion of the Hawaiian Islands on that date was in law and morals the proximate cause of all the resultant fatalities. The Moyer-Byron felonious invasion of the Shank gas station on July 13, 1946, was likewise the proximate cause of the resultant fatality.[206]

The *Moyer* court next cited the Haymarket Riot, or "Anarchists' Case", convicting organizers of a labor demonstration for killing a police officer when a bomb was thrown by an unidentified person, never linked to the defendants.[207] The explosion was followed by police gunfire killing several members of the crowd.[208] Finally, the Moyer court cited a Civil War case finding that "the proximate cause of the fire [set by the Union army] which destroyed plaintiff's property was the rebel invasion."[209]

Moyer was followed in 1949 by *Commonwealth v. Almeida*,[210] in which an off-duty police officer was killed in a super-market parking lot in front of his family, during an exchange of fire between police and robbers fleeing the store after a hold-up.[211] Almeida contended that another officer had fired the

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[204] 53 A.2d 736, 740, (Pa. 1947).

[205] *Id.* at 741–43 (citing Keaton v. State, 57 S.W. 1125, 1129 (Tex. Crim. App. 1900); Taylor v. State, 55 S.W. 961, 964 (Tex. Crim. App. 1900); and People v. Manriquez, 206 P. 63 (Cal. 1922)).

[206] *Id.* at 741–42.

[207] *Id.* at 743 (citing Spies v. People, 12 N.E. 865, 911 (Ill. 1887)).

[208] James Green, Death in the Haymarket 174–91 (2007).

[209] Moyer, *supra* note 206 at 195 (citing Aetna Insurance Co. v. Boon 95 U.S. 117 (1877)).

[210] 68 A.2d 595 (Pa. 1949), *overruled* by Commonwealth ex rel. Smith v. Myers, 261 A.2d 550 (1970).

[211] *Id.* at 598–99.

fatal shot, but the Court upheld instructions that the defendants would be liable for shots fired in resisting the robbery.[212] The court reprised much of its argument in the Moyer case, reasoning that "he whose felonious act is the *proximate cause* of another's death is *criminally* responsible for that death."[213] Again, the court favorably invoked the Anarchists' Case.[214] The court asserted the involuntariness of police use of force: "The policemen cannot be charged with any wrongdoing because their participation in the exchange of bullets with the bandits was both in justifiable self-defense and in the performance of their duty."[215]

It is not surprising to see repeated references to *causal chains* in an opinion affirming proximate causation—but one of these revealingly involved a novel nuclear metaphor: "a knave who feloniously and maliciously starts *'a chain reaction'* of acts dangerous to life must be held responsible for the natural fatal results . . . ."[216] This trope of Hiroshima as both compelled and justified by Pearl Harbor was common in postwar America. Historian Paul Boyer recounts:

> A *Chicago Tribune* cartoon of August 8 [1945] pictured a long fuse running from Pearl Harbor to Hiroshima over which flies debris and various body fragments including a severed head murmuring "So sorry." . . . William L. Laurence struck the same note in *Dawn Over Zero* (1946) as he described his feelings while flying toward Nagasaki: "Does one feel any pity or compassion for the poor devils about to die? Not when one thinks of Pearl Harbor and of the Death March on Bataan."[217]

Yet America's unprecedented use of nuclear weapons late in the war was, like the court's unprecedented extension of felony murder, novel and of questionable legitimacy.[218] While the Pennsylvania Supreme Court would

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[212] *Id.* at 597.
[213] *Id.* at 599–600.
[214] *Id.* at 602.
[215] *Id.* at 607.
[216] *Id.* at 614 (emphasis added). The term "chain reaction" was not in general use until after World War II. A Corpus of Historical American English search conducted on 3/12/2021, https://www.english-corpora.org/coha/, documented no uses of this term in popular writing before 1945, seven in 1945 (all referencing a nuclear chain reaction), 59 in 1946 (of which 57 referenced a nuclear chain reaction); seven of 23 references from 1947 through 1949 were metaphoric. The concept of a nuclear "chain reaction" was developed by Leo Szilard and included in a 1934 patent application granted in 1936. Improvements in or relating to the transmutation of chemical elements, U.K. Patent No. GB630726A (filed June 28, 1934, (issued Mar. 30, 1936) (UK)).
[217] PAUL BOYER, BY THE BOMB'S EARLY LIGHT 185 (1994).
[218] Opinion polls in 1945 revealed Americans overwhelmingly supported use of the bomb immediately thereafter, although a small minority thought it should have first been demonstrated in an unpopulated area. *Id.* at 183–84. Influential considerations were the belief that use had saved American lives and that aerial bombardment of population centers had become routine during the war. *Id.* at 185–86, 189. By 1949, the cold war context induced most Americans to oppose an American pledge to avoid first use. *Id.* at 336. *See also* MARGOT HENRIKSEN, DR. STRANGELOVE'S AMERICA: SOCIETY AND CULTURE IN THE ATOMIC AGE 8 (1997) (dependence of American security on nuclear weapons consolidated approval of them).

abandon proximate cause in 1958, a dissent would continue to defend it in authoritarian terms: "The brutal crime wave . . . sweeping and appalling our country can be halted only if the courts stop coddling . . . and freeing murderers, communists and criminals on technicalities made of straw."[219]

Several other states adopted the proximate cause standard of *Almeida* and *Moyer*. In the 1952 case *People v. Podolski*, the Michigan Supreme Court upheld defendant's first-degree felony murder conviction for his participation in a bank robbery in which one police officer was fatally shot by another.[220] The court quoted *Moyer* on the need to "return the fire of the Japanese invaders."[221] In a 1955 Florida case, the defendant and an accomplice fled a robbery by taking hostages and firing at police.[222] The defendant's accomplice was killed by police, and an officer was killed by an unknown shooter. Citing *Almeida*, the court held that the source of the shot was immaterial as "the proximate cause of the killing was the malicious criminal action of the felons."[223] In the 1963 Oklahoma case if *Johnson v. State*,[224] the shot killing a police officer during a burglary might have come from his partner.[225] The jury was told to convict the burglar if he "set in motion a chain of events which were or should have been within his contemplation."[226] The Oklahoma Court of Criminal Appeals affirmed, citing *Podolski*.[227] An influential student comment defended Pennsylvania's new "proximate cause" test and rejected the traditional test limiting liability to acts in furtherance of a common plan, as a misapplication of "agency" principles, that improperly dignified criminal conspiracies as fiduciary relationships.[228] This gave the traditional "agency rule" its modern name.[229]

B. The Triumph of Morris's Doctrinal Defense of Agency

The proximate cause test was poorly received among academics. Norval Morris's 1956 article, *The Felon's Responsibility for the Lethal Acts of Others* became the authoritative critique. Morris identified the proximate cause test

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For Szilard's droll reflections on the legality of the nuclear weapons he helped develop, *see generally* L. Szilard, *My Trial as a War Criminal*, 17 U. CHI. L. REV. 79 (1949). For a later inconclusive view, *see* 1996 I.C.J. 11 (deciding by a vote of 7-7 with the President breaking the tie, that use of nuclear weapons would be contrary to humanitarian law, but might be justifiable in self-defense).

[219] Commonwealth v. Redline, 137 A.2d 472, 483 (Pa. 1958) (Bell, J., dissenting).

[220] 52 N.W.2d 201, 205 (Mich. 1952).

[221] *Id.* at 204.

[222] Hornbeck v. State, 77 So.2d 876, 877–78 (Fla. 1955).

[223] *Id.* at 878 (quoting Commonwealth v. Almeida, 68 A.2d 595, 614 (Pa. 1949)).

[224] 386 P.2d 336 (Okla. Crim. App. 1963).

[225] *Id.* at 338–39.

[226] *Id.* at 339.

[227] *Id.* at 340 (citing People v. Podolski, 52 N.W.2d 201, 205 (Mich. 1952)).

[228] Frederick C. Moesel Jr., *A Survey of Felony Murder,* 28 TEMP. L. Q. 453 (1955) (cited 31 times https://scholar.google.com/scholar?hl=en&as_sdt=0%2C33&q=Frederick+c+Moesel+jr&oq=Frederick+C.+Moesel [https://perma.cc/5BDG-T79C] retrieved Aug. 27, 2022).

[229] Moesel, *supra* note 228 at 461.

as a novel extension of felony murder liability. Morris reasoned that a felony murder rule defines the *mens rea* of murder, and so should not affect causation, an *actus reus* concept. He interpreted American statutory felony murder rules as incorporating common law doctrine and denied the Pennsylvania court's claim that "any person committing any common law felony . . . is from time immemorial responsible for the natural and reasonably foreseeable results of his felony."[230] An absence of older precedents imposing liability for defensive killings implied that such liability was not incorporated by reference in statutes punishing murder generally, or felony murder in particular. Morris proceeded to distinguish the twentieth century cases expanding causation, arguing that, properly understood, the shield cases and dangerous flight cases were cases where the death was directly caused by the defendant.[231]

Absent statutory compulsion or long-settled precedent, judicial application of a proximate cause standard was discretionary, and so could only be justified by policy considerations.[232] "Deterrence," he reasoned, "must be the main purpose; it is the purpose expressed by the majority in *Almeida* and *Thomas*."[233] Morris then considered the deterrent value of such liability and invoked the punishment lottery argument against felony murder liability, quoting the classic reasoning by the English Criminal Law Commission.[234] The only reform of felony murder that could be justified by policy was to abolish it.

Morris's arguments had an immediate impact. In the 1958 case of *Commonwealth v. Redline*,[235] the Pennsylvania Supreme Court overturned a felon's murder conviction, for the killing of a co-felon by a police officer, thereby overruling Thomas and repudiating the reasoning of Almeida.[236] The Court acknowledged that these cases had "provoked a large amount of critical law review comment" and singled out Morris's piece as "a particularly well-considered and cogent criticism."[237] It reasoned that it was not the place of the judiciary to expand the scope of criminal liability, invoked *Campbell*, *Butler* and *Moore*, and distinguishing the same cases that Morris had,[238]argued that *Almeida* and *Thomas* had deviated from precedent.[239] While overruling only *Thomas*'s imposition of felony murder liability for non-party killings of co-felons, the court threatened to overrule *Almeida*, a shoe it proceeded to drop in the 1970 case of *Commonwealth ex rel Smith &*

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[230] Morris, *supra* note 178 at 60–61 (1956) (quoting Commonwealth v. Thomas, 117 A.2d 204, 207 (Pa. 1955) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES §§ 192–93, 200–01), and calling this claim "false").
[231] *Id.* at 62–64.
[232] *Id.* at 63–64.
[233] *Id.* at 67.
[234] *Id. at* 68; Comm'rs on Crim. L., Second Report 17 (1846).
[235] 137 A.2d 472, (Pa. 1958).
[236] *Id.* at 482–83.
[237] *Id.* at 473 n.1.
[238] *Id.* at 499–501.
[239] *Id.* at 482–82.

Myers.[240] There, the court again cited Morris,[241] called felony murder "'a hold-over from the days of our barbarian Anglo-Saxon ancestors,'"[242] doubted that felony murder "has the deterrent effect its proponents assert,"[243] and concluded that "[w]ith so weak a foundation, it behooves us not to extend it further."[244]

Morris's arguments triumphed in eight other states. The 1960 New York decision in *People v. Wood*[245] dismissed a felony murder charge for the fatal shootings of a bystander and co-felon by a third party resisting the felony.[246] The court invoked *Campbell*, *Butler, Moore* and *Redline*,[247] reasoned that the common law felony murder rule had been "barbaric[ally]" broad, and concluded the legislature must have intended to restrict it to killings by parties to the felony.[248] The 1963 Michigan decision in *People v. Austin*,[249] adopted *Redline*'s reasoning[250] and rejected *Podolski's*.[251]

In the 1965 case of *People v. Washington*,[252] the California Supreme Court reversed the felony murder conviction of a robber for the killing of his co-felon by a victim.[253] While the court below had relied on *Almeida*, the Supreme Court rejected felony murder for any victim killed by a non-party.[254] Citing Morris,[255] the court rejected deterrence of both the homicide and the predicate felony as justifications for punishing felons for defensive killings, concluding that felony murder was justifiable on the basis of neither utility nor desert: "Although it is the law in this state . . . it should not be extended beyond any rational function that it is designed to serve."[256] However, the court offered prosecutors another path to murder liability for "defendants who initiate gun battles. . . if their victims resist and kill": depraved indifference murder,[257] a path later taken in *Taylor v. Superior Court*.[258]

Also in 1965, the Massachusetts decision of *Commonwealth v. Balliro*[259] awarded a new trial to a burglar who was denied an instruction conditioning murder liability on the fatal shots having been fired by burglars rather than police. The court cited Morris, the *Campbell*, *Butler*, and *Moore* cases on

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[240] 261 A.2d 550, 559–60 (Pa. 1970).
[241] *Id.*
[242] *Id.* at 554 (quoting Addison Mueller, *Criminal Law and its Administration*, 34 N.Y.U. L. REV. 83, 98 (1959)).
[243] *Id.* at 554.
[244] *Id.*
[245] 167 N.E.2d 736 (N.Y. 1960).
[246] *Id.* at 738.
[247] *Id.* at 738-39.
[248] *Id.* at 738.
[249] 120 N.W.2d 766, (Mich. 1963).
[250] *Id.* at 769 (Mich. 1963) (Opinion of Dethmers, J.); *Id.* at 775 (Opinion of Kelly, J.).
[251] *Id.* at 775 (Opinion of Kelly, J.).
[252] 402 P.2d 130 (Cal. 1965) (en banc).
[253] *Id.* at 133–35.
[254] *Id.* at 132, 135.
[255] *Id.* at 134.
[256] *Id.*
[257] *Id.*
[258] 477 P.2d 131, 133–34 (Cal. 1970).
[259] 209 N.E.2d 308 (Mass. 1965).

which he relied, and the *Wood*, *Washington*, *Redline* and *Austin* cases that cited him.[260] In the 1970's similar reasoning was adopted and similar sources cited in Nevada,[261] Colorado,[262] and New Jersey.[263] Even in Illinois, an intermediate court decision cited *Redline* in reversing a conviction for the death of a co-felon shot by a robbery victim, although on the narrow grounds that the victim was a co-felon, shot justifiably.[264] By the early 1970's, Morris's arguments had triumphed everywhere and the proximate cause standard seemed in full rout.

C. The Codification of Proximate Cause During the War on Crime

Yet like many progressive ideas that seemed intellectually inevitable in 1970, the extinction of the proximate cause standard—and indeed of felony murder itself—failed to materialize. American politics turned right and got tough on crime.[265] While it is tempting to describe this as a triumph of politics over principle, Morris's argument was not about principle. If, as Morris implied, predicate felonies supply insufficient culpability to justify murder liability, felony murder liability will be unjustified whether or not causation is direct. Morris did not argue as did others, that proximate cause rules too easily blamed felons for deaths that were ex ante improbable.[266] Nor did he argue, as Anthony Amsterdam and George Fletcher later would, that objective criteria of liability were preferable for civil libertarian reasons.[267] This lack of policy rationale left the agency rule vulnerable. In a society increasingly engineering complex systems, and using economic and epidemiological modeling in policy, confining causation to direct contact was bound to seem quaint.

Indeed, Morris probably expected his argument to have a limited shelf life. He could justifiably assume in 1956 that if a future Model Penal Code

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[260] *Id.* at 313–15.

[261] Sheriff, Clark County v. Hicks, 506 P.2d 766, 768 (Nev. 1973).

[262] Alvarez v. Dist. Ct., 525 P.2d 1131, 1133 (Col. 1974) (en banc) (during supermarket robbery, officer killed store employee who had disarmed a robber; court also cites Morris, *supra* note 221 and Commonwealth ex rel. Smith v. Myers, 261 A.2d 550 (1970)).

[263] State v. Canola, 374 A.2d 20, 26 (N.J. 1977) (citing Morris, *supra* note 221). The victim shot a co-felon during a store robbery and the court interpreted statutory language imposing liability for committing a felony from which death "ensues" as imposing liability for killings by a co-felon "with or through the criminal agency of another . . . in furtherance of the felony." *Id.* at 22. And it rejected "the theory of proximate cause." *Id.* Turning to "public policy implications of the proposed doctrine," the court, citing the Model Penal Code, concluded that "modern progressive thought in criminal jurisprudence favors restriction rather than expansion of the felony murder rule." *Id.* at 29. The court also cited *Smith,* 261 A.2d at 558. *Id.*at 24 n.4.

[264] People v. Morris, 274 N.E.2d 898, 901(Ill. App. Ct. 1971).

[265] Jonathan Simon, Governing Through Crime 33–74 (2007) (observing that over 30 gubernatorial candidates won office after promising to restore the death penalty).

[266] *Cf.* Frederick Ludwig, *Foreseeable Death in Felony Murder*, 18 U. Pitt. L. Rev. 5, 59, 62-63(1956).

[267] George Fletcher, Rethinking Criminal Law 115–24 (1978); Anthony Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers and the Like*, 3 Crim. L. Bull. 205, 205-207, 224-234 (1967).

had any influence, it would be to eliminate felony murder legislatively.[268] The proposed Code would indeed effectively abolish felony murder by requiring at least recklessness for murder.[269] But of the 36 new state codes passed after the drafting and circulation of the MPC's homicide provisions, only five states formerly imposing felony murder liability abandoned it,[270] and one state actually added felony murder.[271] More influential was the Model Penal Code's proximate cause approach to causation. In section 2.03, the Model Penal Code defined a cause as conduct creating necessary conditions for results foreseeably risked. This definition was adopted by 14 different codes.[272]

Most of the new codes were passed in the 1970's and interpreted by later appellate courts, by which time the War on Crime was well under way. In many cases, new codes were adopted by the same legislators that reenacted capital statutes in the wake of Furman v. Georgia.[273] In any case, by superseding prior codes, the new codes obsoleted Morris's argument from precedent. Courts were free to construe these new felony murder provisions as weapons in the War on Crime. And if they failed to, legislatures sometimes corrected them with further revisions. Thus, ironically the Model Penal Code only slightly reduced the prevalence of felony murder laws while

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[268] Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1096, 1108–09 (1952).

[269] Model Penal Code § 210.2 (Am. L. Inst 1962).

[270] Hawaii and Kentucky required intent for all murders, while New Hampshire, Arkansas and North Dakota required recklessness for murder in the context of a felony. HAW. REV. STAT. §§ 707-701–707-701.5; KY. REV. STAT. ANN. § 507.020 (LexisNexis); N.H. REV. STAT. ANN. §§ 630:1-a–630:1-b (LexisNexis); ARK. CODE ANN. § 5-10-102; N.D. CENT. CODE § 12.1-16-01. WAYNE LAFAVE, CRIMINAL LAW 5–6 (5th ed. 2010) (listing 36 codes revised subsequent to MPC); *see also* Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399, 475–76 (2000), (noting that Ohio also conditioned felony murder on intent but had never previously had a felony murder rule, but subsequently adopted one in 1998).

[271] Pfister v. State, 425 P.3d 183, 185–86 (Alaska 2018) (explaining that Alaska first adopted felony murder as part of new code in 1980).

[272] MODEL PENAL CODE § 2.03 (AM. L. INST 1962). Of 13 states with MPC-influenced codes that lack agency limitations, six have MPC-style causation provisions. ALA. CODE § 13A-2-5 (2022); ARIZ. REV. STAT. ANN § 13-203 (2022); GA. CODE ANN. §§ 16-2-1, 16-2-2 (2022) (crime requires intent or negligence, conditions causal responsibility for harm on intent, negligence or "criminal scheme"); MO. REV STAT. § 565.003 (2022) (transfer of mental state); N.J. STAT. ANN. 2C:2–3 (West 2022); TEX. PENAL CODE ANN. 6.04 (West 2022). Additional states with causation provisions include: ARK. CODE ANN. § 5-2-205 (2022); DEL. CODE ANN. tit. 11 § 261 (2022); KY. REV. STAT. ANN. § 501.060 (West 2022); ME. REV. STAT. tit. 17-A, § 33 (2022); MONT. CODE ANN. § 45-2-201 (2022); N.D. CENT. CODE § 12.1-02-05 (2022); 18 PA. CONS. STAT. § 303 (2022); UTAH CODE ANN. § 76-2-105 (West 2022).

[273] Proximate cause states that passed a new code within four years of a new capital statute were Alabama, Colorado, Florida, Georgia, Indiana, Missouri, New Jersey, Ohio, and Texas. Ohio and Texas adopted their new capital statutes in their new codes (although Ohio's code had only a proximate cause felony manslaughter rule, see text accompanying nn. 290-293 infra). Leigh Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg*, 87 J. CRIM. L. & CRIMINOLOGY 130, 166 (1996) (listing dates of post-Furman capital statutes); LAFAVE, *supra* note 270, at 5 (2010) (listing dates of new codes).

expanding the scope of causation of death, creating the conditions for a revival of proximate cause felony murder rules.

All Fifteen states that adopted proximate cause rules did so by either legislation or interpretation of new codes.

Seven did so legislatively. Five new codes explicitly permitted felony murder liability for killings by non-parties.[274] These included new codes recodifying felony murder in Arizona and Florida.[275] Alaska's new code adopted felony murder for the first time, extending it to deaths caused by "any person."[276] New codes in New Jersey and Colorado initially confined felony murder to killings in furtherance of the felony.[277] However, the New Jersey and Colorado legislatures swiftly added language explicitly including killings by non-parties, in response to court decisions recognizing agency rules.[278] Missouri and Oklahoma legislated proximate cause standards outside the context of codification. Missouri first adopted a proximate cause rule judicially in the precodification case of *State v. Moore*.[279] In 1984, Missouri codified this rule through a provision imposing second degree murder liability for attempting a felony in which "another person is killed as a result."[280] Oklahoma did not adopt a new code and long retained the proximate cause standard adopted judicially in *Johnson*. However, the 1993 decision of State v. Jones adopted an agency limit.[281] In 1996, the legislature responded by broadening liability to include "death . . . result[ing] from" a felony.[282]

The remaining eight states all adopted rules punishing felons for nonparty killing on the basis of statutory interpretation of new codes. Code interpretation was central in two decisions adopting proximate cause standards in states where courts had earlier endorsed Morris's approach.

Illinois recodified criminal law in 1962. In 1974, the Illinois Supreme Court reasserted the vitality of *Payne's* proximate cause standard in *People v. Hickman*.[283] Police staking out a warehouse, observed three men break in. As

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[274] ALASKA STAT. §11.41.110 (2022); ARIZ. REV. STAT. ANN. §13-1105 (2022); COLO. REV. STAT. §18-3-102 (2022); FLA. STAT. §782.04 (2022); N.J. STAT. ANN. §2C:11-3 (West 2022).

[275] ARIZ. REV. STAT. ANN. §13-1105 (2022); FLA. STAT. §782.04 (2022).

[276] ALASKA STAT. §11.41.110(a)(3) (2022).

[277] 1978 N.J. LAWS 540–41; COLO. REV. STAT. § 18-3-102 (1972).

[278] *See* State v. Canola, 374 A.2d 20, 22 (N.J. 1977) (attributing an agency rule based on statutory requirement that a "participant" cause death "in furtherance" of the felony); 1979 N.J. LAWS 684 (substituting "any person"); 1981 N.J. LAWS 1107; N.J. S. JUDICIARY COMM., STATEMENT TO SENATE COMMITTEE SUBSTITUTE, S. 199-1537, 2nd Sess., at § 14 (N.J. 1981); Alvarez v. Dist. Ct., 525 P.2d 1131, 1133 (Col. 1974) (en banc) (adopting agency rule in Colorado); C.R.S.A. 18-3-102; *see also* H.B.1203, 50th Gen Ass., 1st Reg. Sess. (Colo. 1975) (adding "is caused by anyone").

[279] 580 S.W.2d 747, 752–53 (Mo. 1979) (en banc)(while the new code became effective in 1979, Moore was convicted for a 1975 killing; *accord* State v. Baker, 607 S.W.2d 153, 156–57 (Mo. 1980) (en banc).

[280] 1984 Mo. Laws 755.

[281] Accelerated Docket Order, State v. Jones, 859 P.2d 514, 515 (Okla. Crim. App. 1993).

[282] State v. Kinchion, 81 P.3d 681, 684 (Okla. Crim. App. 2003) (punishing felon for killing of co-felon by victim).

[283] 319 N.E.2d 511 (Ill. 1974)

they emerged, police arrested one, while two fled. One officer fired a warning shot. A second officer, on observing an armed man crouching, yelled "drop it." When the armed man—one of the *seventeen* officers at the scene—failed to drop his weapon, the first officer killed him with a shotgun. The two at large burglars were later apprehended at another location, unarmed. In affirming their felony murder convictions, the Illinois Supreme Court invoked this provision of the new 1962 code: "a person who kills . . . commits murder if, in performing the acts which cause death . . . he is attempting or committing a forcible felony."[284] The court argued that this provision's drafting history showed that "kills" meant simply "performing the acts which cause death," that the legislature intended that *Payne* would remain good law, and that felons could be held causally responsible for third party killings motivated by resistance to the felony.[285] The court added that burglary was classified as a forcible felony,[286] and treated it as a violent provocation to deadly force:

> The commission of the burglary, coupled with the election by defendants to flee, set in motion the pursuit by armed police officers. The shot which killed Detective Loscheider was . . . fired in opposition to the escape of the fleeing burglars, and it was a direct and foreseeable consequence of defendants' actions. The escape here . . .invited retaliation, opposition and pursuit. Those who commit forcible felonies know they may encounter resistance, both to their affirmative actions and to any subsequent escape.[287]

The felons here supposed to have foreseen police shooting each other after their flight did not initiate violence or show weapons.[288] Thus, *Hickman* held fleeing felons responsible to foresee and prevent even *unreasonable* police violence.

New York's 1965 Penal Law replaced language punishing "killing" in the course of a felony with a provision punishing one who commits an enumerated felony and "in the course and in furtherance of" the felony he or another participant "causes death of a person other than one of the participants."[289] By confining those who cause death to participants, confining victims to non-participants, and requiring that death be caused "in furtherance," this language seemed to adopt an agency rule, and this is how the code was applied for decades.[290] In the 1993 case of *People v. Hernandez*,[291] however, the New York Court of Appeals held that the agency

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[284] *Id.* (quoting 720 ILL. COMP. STAT. 5/9–1(a)(3) (1971)).
[285] *Id.* at 512–13.
[286] *Id.* at 513.
[287] *Id.* (discussing People v. Allen, 309 N.E.2d 544 (Ill. 1974)).
[288] The arrested felon, not convicted of murder, was armed.
[289] N.Y. PENAL LAW § 125.25(3) (McKinney 2022).
[290] People v. Castro, 529 N.Y.S.2d 554 (N.Y. App. Div. 1988), *abrogated by* People v. Hernandez, 624 N.E.2d 661, 663 (N.Y. 1993); People v. Ramos, 496 N.Y.S.2d 443, 443 (N.Y. App. Div. 1986), *abrogated by Hernandez*, 24 N.E.2d at 663.
[291] 624 N.E.2d 661 (N.Y. 1993).

rule adopted in *Wood* was extinguished by the new statute.[292] Thus, "causing death" included proximately causing death by provoking gunfire.[293] Hernandez, in flight from an attempted robbery of an undercover officer, threatened several officers with a gun. One fired at him, fatally striking another. The court invoked a 1974 causation decision under the new Penal Law, involving depraved indifference murder, holding a defendant liable for *indirectly, but foreseeably*, causing death.[294] The court reasoned that as the Penal Law defined all homicides using the same term, "causes the death,"[295] it could not have intended causation to have a narrower meaning for felony murder.

Courts similarly based proximate cause rules on new codes in six other states. Alabama relied on its Model Penal Code style causation provision in a 2009 case.[296] Ohio enacted felony murder only in 1998, in a provision using the phrase "caus[ing] the death of another as a proximate result" of attempting certain grave felonies.[297] Ohio courts had long interpreted a manslaughter provision with the same causation language as permitting indirect causation.[298] In a 1999 involuntary manslaughter case this causation test was used to hold a car thief liable for death caused by the unreasonably hazardous pursuit by a police officer *who was convicted of negligent homicide*.[299] A 2002 decision applied this proximate cause standard to the 1998 felony murder provision.[300] Georgia's 1969 code provided that "A person . . . commits the crime of murder when in the commission of a felony he causes the death of another human being . . . ."[301] A 2010 decision held that "Georgia is a proximate cause state. . . [where] 'cause' is customarily interpreted in almost all legal contexts to mean 'proximate cause' . . . ."[302] A 1997 Indiana decision interpreted its 1977 code to require that a felon is responsible for any fatal act of a non-party "[w]here the accused reasonably should have foreseen that . . . the contemplated felony would . . . expose another to the danger of death at the hands of a nonparticipant" . . . .[303] The 1974 Texas code treats as a cause any act necessary to and creating a risk of the result.[304] In a pair of intentional murder cases, a court held escapees causally responsible for the

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[292] *Id.* at 665.
[293] *Ibid.*
[294] *Id.* at 663(citing People v. Kibbe, 321 N.E.2d 773, 776 (N.Y. 1974)).
[295] N.Y. PENAL LAW § 125.25(3) (McKinney 2022).
[296] Witherspoon v. State, 33 So.3d 625, 628, 630 (2009).
[297] H.B. 5, 122 Gen Assemb. Reg. Sess. (Ohio 1998).
[298] State v. Chambers, 373 N.E.2d 393, 394–95 (Ohio Ct. App. 1977).
[299] State v. Lovelace, 738 N.E.2d 418, 424–28 (Ohio Ct. App. 1999) (holding car thief liable for motorist killed by police squad car running a stop sign at 65 mph in downtown Cincinnati; the officer was charged with negligent vehicular manslaughter).
[300] State v. Dixon 2002 WL 191582 at *2–7 (Ohio Ct. App. 2002).
[301] GA. CODE ANN. § 26-1101(b) (1969).
[302] State v. Jackson, 697 S.E.2d 757, 759 (Ga. 2010).
[303] Sheckles v. State, 684 N.E.2d 201, 205 (Ind. Ct. App. 1997) (quoting 40 AM.JUR.2D *Homicide* § 39 (1968)).
[304] Tex. Penal Code Ann. 6.04 (West 2022).

shooting of one officer by another under this provision.[305] One presumed that this reasoning already applied to felony murder.[306] Finally, Wisconsin has used causation of death during a felony as the basis for a substantial sentence enhancement, since the adoption of a new code in 1955. In the 1994 case of State v. Oimen, the Wisconsin Supreme Court applied such an enhancement to an absent accomplice of a robber killed by the victim.[307]

In sum, after nearly disappearing, felony murder liability for killings by those opposing the felony returned in 15 states covering nearly half the nation's population, by legislative means, and primarily as a result of the widespread recodification of criminal law.

Long before Lyndon Johnson declared war on crime, postwar courts justified shifting blame for police violence onto felons, by portraying them as invading enemies. Initially rejected as an improper judicial innovation, proximate cause felony murder was later widely enacted legislatively, as part of a recodification of criminal law coinciding with a national resurgence of penal severity. And although advocated by liberal law professors in the 1960's, recodification was achieved by conservative legislators waging the War on Crime. Felony murder prosecutions of the targets of police violence were authorized by many of those new codes. Today, we can no longer criticize proximate cause felony murder rules as judicial innovations. Sadly, they have a majoritarian warrant. Critics will need to show majorities why these rules are *unjust*. Our next part provides that argument.

V. A Racial Justice Critique of Blaming Felons for Police Violence

A. Race and Police Violence in the War on Crime

We have seen that felony murder liability for proximately causing police violence was born of a metaphor portraying law enforcement as warfare. Within this metaphor, crime was both aggression and a fuse, inevitably triggering an explosive response. As a mechanical metaphor, the proximate cause standard at once blames felons for triggering deaths and effaces the intervening agency of police. As a war metaphor, it presents crimes and arrests not as individual cases, but as collective action, with each crime a battle in a larger war. Likening felonies to warfare provides a blanket justification for killing felons. This blame-shifting use of war metaphors preceded and anticipated the War on Crime, with roots in such internal conflicts as the

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[305] Blansett v. State 556 S.W.2d 322 (Tex. Crim. App. 1977), *abrogation recognized by* Ex parte Davis, 866 S.W.2d 234 (Tex. Crim. App. 1993).

[306] Dowden v. State, 758 S.W.2d 264, 272–73 (Tex. Crim. App. 1988) (en banc).

[307] State v. Oimen, 516 N.W.2d 399 (1994) (citing Walter Dickey, David Schultz & James L. Fullin, Jr., *The Imprtance of Clarity in the Law of Homicide: The Wisconsin Revision*, 1989 Wisc. L. Rev. 1323, 1329 (1989)).

Civil War and the World War I Red Scare.[308] However, the "War on Crime" announced by Lyndon Johnson in 1965[309] gave this metaphor new life, and a specifically racial significance.[310] This section reconstructs the expressive significance of the new proximate cause standards, in the larger context of a "War" on Black people that was much more than a metaphor.

It is important to locate this "War on Crime" among a larger set of war metaphors. In 1961, President Kennedy had declared a "total attack on delinquency."[311] Only a year earlier, in his first State of the Union address, Johnson had announced the "War on Poverty," as a remedy for racial injustice.[312] These metaphors evoked the continuous Cold War against communism while also justifying a potentially controversial federal role in local issues.[313] Indeed, historian Mary Dudziak has shown that national leaders saw civil rights enforcement "as a cold war imperative" to improve America's

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[308] These include not only the Haymarket Square Riot litigated in the *Spies* case, but also the wave of vigilante actions by the "Protective Leagues" during World War I, including the Bisbee Deportation of IWW members and the American Protective League's mass arrests of suspected draft dodgers in New York, Chicago and other cities. *See generally* KATHERINE BENTON-COHEN, BORDERLINE AMERICANS: RACIAL DIVISIONS AND LABOR WAR IN THE ARIZONA BORDERLANDS (2009) 1-17, 198-238 (Bisbee deportation as racist violence, mobilizing a wartime accusation of disloyalty against immigrant labor) and JOHN HIGHAM, PATTERNS OF AMERICAN NATIVISM, 1860-1925 (1983) 211-223 (describing American Protective League during WWI); East St. Louis, Tulsa, and Elaine, Arkansas were three of many sites of massacres in Black communities carried out by white mobs during and after World War I. *See* ALFRED BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921 (2002) xvii, 3-6 (describing deputizing of white rioters to suppress supposed Black uprising; while Black wartime service and wartime propaganda about defending democracy encouraged Black mobilization for reform); ELLIOTT RUDWICK, RACE RIOT AT EAST ST. LOUIS, JULY 2, 1917 (1964) 7-15 (describing rhetoric of Black "colonization" of northern cities); GRIF STOCKLEY, BRIAN K. MITCHELL & GUY LANCASTER, BLOOD IN THEIR EYES: THE ELAINE MASSACRE OF 1919 (2020) 21-31 (myth of Black uprising mobilizes white police, vigilantes and army troops to attack black labor, in massacre, culminating in blame-shifting prosecutions, including one overturned for testimony coerced by torture and mob intimidation in Moore v. Dempsey, 261 U.S. 86 (1923).

[309] HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME, *supra* note 33, at 1-2 (referencing Mar. 8, 1965 Statement of the President on Establishing the President's Commission on Law Enforcement and the Administration of Justice), 49–86 (recounting and contextualizing war metaphors used to describe federal initiatives aimed at Black people between 1961 and 1965).

[310] Interpretations of the War on Crime as a program of racial supremacy include ALEXANDER, *supra* note 33, and PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017).

[311] HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME, *supra* note 33, at 3.

[312] Lyndon B. Johnson, State of the Union Address (Jan. 8, 1964).

[313] The term, apparently coined by Herbert Bayard Swope in 1946, was used publicly by Bernard Baruch in 1947: "we are today in the midst of a Cold War. Our enemies are to be found abroad and at home." Larry G. Gerber, *The Baruch Plan and the Origins of the Cold War*, 6 DIPLOMATIC HISTORY 69, 92 (1982); Andrew Glass, *Bernard Baruch coins term 'Cold War,' April 16, 1947*, POLITICO (Apr. 16, 2010), https://www.politico.com/story/2010/04/bernard-baruch-coins-term-cold-war-april-16-1947-035862 [https://perma.cc/6TA3-T7BR]. On permanent mobilization, *see generally* MARY DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, AND ITS CONSEQUENCES (2012).

image abroad.[314] Historian Elizabeth Hinton has shown that these leaders also saw Black urban poverty as a crime risk and as "social dynamite" set to explode.[315]

Hinton has emphasized the pivotal role of "Black rebellion"—referred to as "riots" in the press—from 1964 and 1972 in the construction of crime policy as warfare.[316] She describes a "cycle"[317] in which violent police harassment of Blacks provoked protest and collective defensive force, followed by further indiscriminate police violence. Although police-initiated, these "riots" provoked white consternation and were conflated with escalating levels of crime:

> From the ashes of the Watts 'riot' in August 1965, a growing consensus of policymakers, federal administrators, law enforcement officials, and journalists came to understand crime as specific to black urban youth. They concluded that only intensified enforcement of the law in black urban neighborhoods, where contempt for authority seemed widespread, would quell the anarchy and chaos in the nation's streets.[318]

According to President Johnson, "the riots as well as other criminal and juvenile delinquency problems in our cities—are closely connected" and were "aggravated by hoodlums and habitual lawbreakers."[319] Thus, collective protest against discriminatory police violence was reinterpreted as crime, while any crime with a Black perpetrator was reinterpreted as a collective challenge to legal authority. In this way, the historic Black common grievance against police brutality was reinterpreted as a common motive for criminal offending and a rationale for discriminatory suspicion.

Police increasingly understood patrolling predominantly Black communities as their primary mission, conceptualized as the military occupation of hostile territory.[320] The contemporaneous Vietnam conflict became a double-edged metaphor for police presence in inner cities.[321] Bluntly put, the War on Crime came to signify a war on Black communities. This perception would later be reflected in statistical disparities in the treatment of Blacks

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[314] *See generally* Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988); *see also* MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

[315] HINTON, From the War on Poverty to the War on Crime, *supra* note 33, at 29–32.

[316] HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME, *supra* note 33, at 14, 63-95; *see also* HINTON, AMERICA ON FIRE, *supra* note 33, at 8-10, 21-25.

[317] *See* HINTON, America on Fire, *supra* note 33, at 19–45.

[318] HINTON, From the War on Poverty *supra* note 33, at 12; *see also* STEVE HERBERT, POLICING SPACE: TERRITORIALITY AND THE LOS ANGELES POLICE DEPARTMENT 3-7, 79-122 (1996).

[319] *See* HINTON, America on Fire, *supra* note 33, at 4.

[320] HINTON, America On Fire *supra* note 323 at 44–49, 54-55, From the War on Poverty, *supra* note 33, 182-209.

[321] HINTON, America on Fire, *supra* note 33, at 97. In some cases, weapons and tactics were redirected from Vietnam to the War on Crime. *Id.* at 11, 34.

and whites at every stage of the criminal justice process during the War on Crime.[322]

Hinton has demonstrated the political centrality of "riots", by documenting over 2,000 of these conflicts between 1964 and 1972.[323] Police officials routinely justified police violence by exaggerating the scale of Black violence.[324] In the Newark rebellion of 1967, for example, 24 of 26 fatalities were Black protestors.[325] Matthew Lassiter reports that in at least 21 of 35 fatal shootings by police during the 1967 Detroit rebellion, "eyewitness testimony . . . or forensic evidence contradicted the official accounts."[326] "Riots" sometimes played a direct role in reshaping routine police law enforcement. Thus, the Detroit Police Department responded to criticism for violating its use of force policies during the "riot," not by changing institutional behavior but by loosening those policies to encourage deadly force against fleeing suspects. As a result, "[t]he Detroit Police Department killed at least 108 people between 1971 and 1973 . . . [a]lmost all . . . young African American males, and the majority . . . unarmed."[327] Twenty-two of these victims were killed by "STRESS," a squad of robbery decoys, presaging the one that killed Julius Tate.[328] Riot suppression had become a routine mode of policing.

Illinois, birthplace of the proximate cause doctrine, was another key battleground in the War on Crime. Between 1964 and 1972, Illinois endured 210 "riots."[329] These unfolded in the typical cycle of racist policing, Black protest, and violent police response. The 1969 law enforcement killing of sleeping Black Panther leader Fred Hampton in Chicago was widely seen as retaliation for his calls for organized resistance to the police.[330] During the

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[322] Binder & Weisberg, *supra* note 58, at 1201.

[323] HINTON, AMERICA ON FIRE, *supra* note 33, at 313–38. Hinton calls these incidents "rebellions" rather than "riots" to emphasize their character as politically motivated collective resistance to injustice, rather than irrational, chaotic or criminally motivated. *Id.* at 3–4. Matthew Lassiter critiques the term "riots" as disguising the primary police role in initiating and perpetrating violence. Matthew D. Lassiter, *Uprising and Occupation, 1967*, DETROIT UNDER FIRE: POLICE VIOLENCE, CRIME POLITICS, AND THE STRUGGLE FOR JUSTICE IN THE CIVIL RIGHTS ERA, U. MICH. POLICING & SOC. JUST. HIST. LABS (2020), https://policing.umhistorylabs.lsa.umich.edu/s/detroitunderfire/page/1967 [https://perma.cc/9JT9-NFCJ].

[324] HINTON, AMERICA ON FIRE, *supra* note 33, 94-120.

[325] Lassiter, *supra* note 323.

[326] *Id.* "2. Fatalities and Victims," LABS, https://policing.umhistorylabs.lsa.umich.edu/s/detroitunderfire/page/aftermath [https://perma.cc/Q3B8-UDCF].

[327] Matthew D. Lassiter, *Stress and Radical Response,* UNDER FIRE: POLICE VIOLENCE, CRIME POLITICS, AND THE STRUGGLE FOR JUSTICE IN THE CIVIL RIGHTS ERA, U. MICH. POLICING & SOC. JUST. HIST. LABS (2020), https://policing.umhistorylabs.lsa.umich.edu/s/detroitunderfire/page/1971-73 [https://perma.cc/FKS2-6U3F].

[328] *Id.* at 2. The Creation of STRESS: Remembering STRESS Victims, https://policing.umhistorylabs.lsa.umich.edu/s/detroitunderfire/page/rememberingstressvictims [https://perma.cc/JVV8-7B75]; HINTON, FROM THE WAR ON POVERTY, *supra* note 33 at 191-202.

[329] *See generally* HINTON, AMERICA ON FIRE, *supra* note 33, at 313–338 (2021).

[330] *See* Hans Bennett, *The Black Panthers and the Assassination of Fred Hampton*, 3 J. PAN AFR. STUDS. 215, 215-222 (2010).

next two decades, Chicago Police Commander John Burge and his subordinates tortured over a hundred Black suspects.[331]

Neither Burge's systematic use of torture nor his targeting of Black victims were isolated phenomena.[332] A 2006 study of policing in Chicago found the department widely perceived as "brutal, racist, and corrupt."[333] These patterns were again reflected in police shootings. One study tallied 523 civilians shot by Chicago police between 1974 and 1978, resulting in 132 killings. Although whites outnumbered Blacks 60.5% to 32.1% in the general population in 1970, 70% of those shot were Black and 20% white.[334] Thus Black Chicagoans were almost 7 times more likely to get shot by police then white ones. Chicago police reported killing 70 victims between 2010 and 2014 of which, 65% were Black.[335] Statewide, the *Washington Post* database identified 113 fatal police shootings in the state of Illinois between 2015 and January 2021.[336] Of these, 58% were Black, and 28% were white, although the 2020 state population was 14% Black and 77% white.[337] Thus, Black residents of Illinois were 11 times more likely to be killed by police than white residents.

These depressing statistics align with historical research on the origins of penal severity and militant policing. It seems racial animus has shaped not only the distribution of police violence but also background decisions to adopt violent policies and practices of policing in the first place. These practices threaten all and debase the vocation of police themselves. The reemergence of proximate cause felony murder during this period must be read against the background of these changes in policing.

B. Race and Felony Murder

A promising strategy for critiquing felony murder connects American exceptionalism in criminal justice—reflected in such distinctive features as mass incarceration, penal severity, incapacitative sentencing, capital punish-

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[331] *See Survivors*, CHI. TORTURE JUST. MEM'LS, https://chicagotorture.org/survivors/ [https://perma.cc/R7RS-7YTE]; Andrew S. Baer, *The Men Who Lived Underground: The Chicago Police Torture Cases and the Problem of Measuring Police Violence*, 44 J. OF URB. HIST. 262, 263 (March 2018).

[332] *See* Paul Bleakey, *A Thin-Slice of Institutionalised Police Brutality: A Tradition of Excessive Force in the Chicago Police Department*, 30 CRIM. L.F. 425,426, 429, 44 (Describing Richard Zuley, another serial torturer. One squad, "The Skullcap Crew," randomly assaulted Black civilians to spread fear. They attracted 128 brutality complaints, 87% by African Americans).

[333] WESLEY G. SKOGAN, POLICE AND COMMUNITY IN CHICAGO: A TALE OF THREE CITIES 11 (2009).

[334] William A. Geller & Kevin J. Karales, *Shootings of and by Chicago Police: Uncommon Crises—Part I, Shootings by Chicago Police*, 72 J. CRIM. L. & CRIMINOLOGY 1813, 1839, 1841 (1981).

[335] Andrew Schroedter, *Fatal Shootings By Chicago Police: Tops Among Biggest U.S. Cities*, BETTER GOV. ASS'N (July 26, 2015 5:02 AM), https://www.bettergov.org/news/fatal-shootings-by-chicago-police-tops-among-biggest-us-cities/ [https://perma.cc/58X8-ZKJ4].

[336] *Fatal Force*, WASH. POST (Retrieved on Jan. 23, 2021), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/5BJG-FRGL].

[337] *Id.*

ment and violent policing—to its "peculiar" history of racial subordination.[338] Significantly, felony murder became another American exception in the post-war period, as analogous doctrines were abandoned in other common law systems.[339] Its persistence in spite of academic argument and the American Law Institute's proposed reform is usefully seen as one skirmish in the War on Crime. So, without dismissing familiar criticisms of felony murder as both disproportionate and inefficacious, we want to shift the focus of critique to felony murder as a vector of racial subordination. The persistence and expansion of felony murder in that period suggests that, like recidivist statutes,[340] felony murder became attractive less as a method of crime control than as a trope of "backlash."[341] If so, disproportion along many dimensions was a feature, not a bug.

Consider the lay consensus that felony murder liability is disproportionate for co-felons who do not kill.[342] Felony murder seems least appealing as an expansive doctrine of accessorial liability for a killing by a co-felon. Academic and public calls for abolishing the felony murder rule often highlight defendants punished as murderers for relatively minor roles when their co-felon kills.[343] Moral outrage is easily mobilized on behalf of a young driver imprisoned for decades for idling in a car while a routine drug deal turned deadly.[344] Granting that under reasonably just economic and political cir-

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[338] *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955); KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH (1956). On race and capital punishment in particular, *see* MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 54–77, 124–36 (1973). On incapacitative sentencing, *see generally* Binder & Notterman, *supra* note 36. On the distinctive features of American criminal justice, *see generally* Binder & Weisberg, *supra* note 58; *see also* BINDER, *supra* note 83 at 40-49.

[339] Homicide Act 1957, 5 & 6 Eliz. 2, c. 11 (Eng.); Criminal Justice Act 1964 (Act No. 5/1964) (Ir.), https://www.irishstatutebook.ie/eli/1964/act/5/enacted/en/html [https://perma.cc/83ZQ-88BZ]; R. v. Martineau [1990] 2 SCR 633 (Can.).

[340] *See generally* FRANK ZIMRING, GORDON HAWKINS, & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2003).

[341] *See* Lawrence Glickman, *How White Backlash Controls American Progress*, THE ATLANTIC (May 22, 2020), https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914/ [https://perma.cc/J6HF-J8Z8].

[342] *See* ROBINSON & DARLEY, *supra* note 110, at 172-173, 176-178. In the philosophical literature on punishment, disproportionate punishment is viewed as illegitimate regardless of the distributive principle dictated by the underlying theory of punishment. This idea of proportionate punishment is ancient. *See, e.g.*, *Deuteronomy* 25:2 (English Standard Version) ("then if the guilty man deserves to be beaten, the judge shall cause him to lie down and be beaten in his presence with a number of stripes in proportion to his offense"). On some accounts it is the commitment to proportionality that distinguishes punishment and revenge. *See* Robert Nozick, Philosophical Explanations (1982) 366-368; JOHN GARDNER, OFFENCES AND DEFENCES, 213–25 (2007). CF. WILLIAM IAN MILLER, IN DEFENSE OF REVENGE, IN MEDIAEVAL CRIME AND SOCIAL CONTROL (B.A. . Hanawalt & D Wallace (1999) 70, 73-74 (criticizing such views).

[343] Adnan Khan, Video Essay, *I Didn't Kill Anyone. Why Did I Just Serve 16 Years For Murder?* N. Y. TIMES (July 22, 2019), https://www.nytimes.com/video/opinion/100000006616407/felony-murder-rule-adnan-khan.html [https://perma.cc/DT3X-4EL7].

[344] *Cf. id.*

cumstances, it is wrong to aid an illegal transaction for pay,[345] that wrong pales in comparison to murder, as the lay public acknowledges. Such sentences punish offenders, not for killing, but for associating with killers—and so bespeak a view of crime as affiliation or identity rather than conduct. And to the extent that identity fused "Black" with "criminal" in the public mind, those who would bear this disproportionate punishment seemed to warrant no deep concern.[346] Indeed, officials expanding felony murder liability likely assumed their constituents wanted them to impose disproportionate punishment.

The limited statistical evidence available suggests felony murder prosecution has indeed been discriminatory. A recent study of felony murder charges in Minnesota's Hennepin and Ramsey Counties (the Minneapolis metro area where Derek Chauvin was tried) reported that whites made up 77% of the population, but only 20% of the defendants convicted of felony murder. Thus, a person of color was 12 times more likely than a white person to be convicted of felony murder.[347]

A recent study examined felony murder charges since 2010 in Cook County, Illinois, which was 65% white and 24% Black according to 2019 census estimates.[348] During the period studied, 768 Black defendants and 80 white defendants had been charged with felony murder; and ultimately, 96 Blacks and 9 whites were sentenced for this crime.[349] Thus Black Cook County residents were 26 times more likely to be charged with felony murder and 29 times more likely to be convicted, than white residents. The attrition from charging to sentencing is also striking, suggesting that felony

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[345] Whether such lawbreaking is unjustified under conditions of deep and lasting unjust economic deprivation is a more contentious one embedded in a deep literature. For an overview *see generally* TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT AND REFORM (2018); Ekow N. Yankah, *Punishing Them All, How Criminal Justice Should Account for Mass Incarceration*, 97 RES PHILOSOPHICA 185 (2020); Richard Delgado, *Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation*, 3 L. & INEQ. 9 (1985); Jeffrey Howard, Punishment, *Socially Deprived Offenders, and Democratic Community*, 7 CRIM. L. & PHIL. 121 (2013); Stuart P Green, *Just Deserts in Unjust Societies: A Case-specific Approach*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW, (R. A. Duff & Stuart P. Green eds., 2011); Jeffrie Murphy, Marxism & Retribution, 2 Philosophy and Public Affairs 217, 233-243 (1973).

[346] *See* Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1560-1566 (2019): Yankah, *supra* note 38 at 1025-1033.

[347] Greg Egan, *Deadly Force: How George Floyd's Killing Exposes Racial Inequities In Minnesota's Felony Murder Doctrine*, 39 L. AND INEQ. 543, 547-548 (2021). For an early study from Dade County, Florida, see Steven D. Arkin, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-Furman Murder Cases in Dade County, Florida, 1973-1976*, 33 STAN. L. REV. 75, 86-89 (finding 61% of defendants charged with felony murder were Black). Dade's population was about 15% Black. BUREAU OF THE CENSUS, 1970 CENSUS, SUPPLEMENTARY REPORT: RACE OF THE POPULATION BY COUNTY: 1970 AT 9 (1975).

[348] Schroedter, *supra* note 335.

[349] Kat Albrecht, Data Transparency & The Disparate Impact of the Felony Murder Rule, DUKE CENTER FOR FIREARMS LAW (August 11, 2020), https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felonymurder-rule/ [https://perma.cc/JN4S-8D33].

murder charges are viewed cynically by prosecutors, as bargaining chips, "upcharges" they add because they can.

Next, a 2020 survey of Pennsylvania's inmate population found that 70% of those imprisoned for felony murder were Black,[350] although the Black population was only 12%.[351] Thus Blacks were 17 times more likely to be imprisoned for felony murder than other Pennsylvanians.

Finally, a review of Colorado felony murder charges and convictions from 2015-2019 presented to the legislature by the Colorado Criminal Defense Bar found that non-Hispanic whites comprised only 20% of those charged with, and 34% of those convicted of, felony murder, although that group is 68% of the state population. Blacks comprised 41% of those charged and 31% of those convicted, but only 4.6% of the population.[352] Thus it appeared that Blacks were 30 times more likely to be charged and 13 times more likely to be convicted of felony murder than whites.

In sum, not only can felony murder rules authorize disproportionate liability, they have been imposed on a racially disparate basis anywhere anyone has looked.

C. Proximate Cause: From Discriminatory Policing to Discriminatory Prosecution

Having explored racial disparities in police violence and in felony murder charging, we now turn to the convergence of these vectors in prosecuting felons for police killings in the states that embraced broad proximate cause felony murder rules during what we have described as a racialized War on Crime. Data is limited, and of necessity, the case we make is anecdotal and qualitative rather than quantitative. But because we are concerned with meanings, the stories, and the people in them, matter.

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[350] ANDREA LINDSAY, PHILA. LAWS. FOR SOC. EQUITY, LIFE WITHOUT PAROLE FOR SECOND-DEGREE MURDER IN PENNSYLVANIA, 23 (2021), https://www.plsephilly.org/wp-content/uploads/2021/01/PLSE-Second-Degree-Murder-Audit-Jan-19-2021.pdf [https://perma.cc/V2VE-2WXG].

[351] *Pennsylvania: 2020 Census*, U.S. CENSUS BUREAU (August 25, 2021), https://www.census.gov/library/stories/state-by-state/pennsylvania-population-change-between-census-decade.html#:~:text=population%20(up%207.4%25%20to%20331.4,or%20More%20Races%2010.2%25 [https://perma.cc/QQ5P-362H].

[352] Colorado Criminal Defense Bar, Felony Murder And Racial Disparities in Colorado (briefing exhibit prepared by Hollis Whitson and Hannah Seigel Proff, based on data provided by the Colorado State Court Administrator's Office and retrieved from the Colorado Department of Corrections at https://www.doc.state.co.us/oss (email from Hollis Whitson to Guyora Binder, 8/15/2022). This data was reported in testimony of Philip Cherner of Sam Cary Bar Association, before Colorado Senate Judiciary Committee at 5:06:48 pm on 3/18/2021, available at https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20210318/41/11143 and received by the Senate Judiciary Committee, per email from Rep. Mike Weissman to Guyora Binder, June 27, 2022). See *Quick Facts: Colorado*, U.S. CENSUS BUREAU (July 1, 2021), https://www.census.gov/quickfacts/CO [https://perma.cc/2CHV-SZWW]. This review counted only cases where felony murder was the only theory of murder charged.

The expansion of felony murder to embrace killings of felons, bystanders, and fellow officers by police, requires us to deny the testimony of our own eyes as to who is killing whom. Recall that, according to Robinson and Darley, killings of co-felons by those resisting the felony are those the lay public finds least punishable.[353] Perhaps the public finds only the dead felon at fault for having made himself liable to harm,[354] though it should be noted that recent cases show that the public sometimes finds the violence of those resisting felonies unjustified.[355] But even where there may be consensus that murder liability for the co-felon seems justified—where a felon has recklessly provoked a defensive killing—we will argue that a felony murder rule is not necessary for murder liability. In any case, the popularly perceived disproportion of felony murder in these cases seems reason enough for an agency limitation. As Robinson and Darley have argued, divergence between criteria of liability and popularly perceived desert erodes the legitimacy of criminal prohibitions on which compliance chiefly depends.[356]

Yet legislatures perversely added this most controversial form of felony murder during the racially inflected War on Crime. Felons were not just guilty of getting shot; they were guilty of getting shot while Black. A rule imposing flagrantly disproportionate punishment on the basis of participation in a felony, like a recidivist statute, expresses that such offenders do not deserve desert, and that their welfare is of little value. They are not recognized as partners in a social contract, sharing in its burdens and benefits,[357] or as included in a social welfare function, in which penal severity yields diminishing returns.[358] In this context, disproportionate punishment is an expression of disdain. That this disdain is expressed at the discretion of prosecutors is troubling. That their discretion can be influenced by police, in cases where police killed is more troubling still.

Proximate causation is troubling enough when imposing a tenuous link between a felon and a death no one seemed to cause: a homeowner suffers a heart attack after trapping a burglar, a police officer falls off a roof, a toddler runs into the path of a stolen car.[359] But proximate causation is problematic not only because it often punishes offenders disproportionately relative to their actual blameworthiness. It can also illicitly shift punishment, drawing our eyes from the truly blameworthy. Thus, in the circumstances of an unjustified police killing, the power of prosecutors to indict for felony murder enables them to shift blame from the appropriate person onto the shoulders

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[353] ROBINSON & DARLEY, *supra* note 110, at 172-173, 176-178.

[354] *See* Christopher H. Wellman, *The Rights Forfeiture Theory of Punishment* 122 ETHICS 371 (2012).

[355] *See, e.g.*, Clay, *supra* note 52.

[356] *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. L. REV. 453, 457-58, 468-490 (1997).

[357] For the classic formulation of this Kantian account of retributive desert, *see* Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475 (October 1968).

[358] For critique of incapacitation as violating the utility principle by excluding offenders from the social welfare calculus, *see* Binder & Notterman, *supra* note 36, at 3-4, 43-50.

[359] *See* Binder, *supra* note 12, at 405–407 (collecting several cases where death seemed too unlikely ex ante to impose blame).

of the defendant. This is unfair not only to the defendant unjustly blamed but to the victim left unvindicated. Indeed, in some cases, like that of John Givens, a felon blamed for an officer's unjustified killing of a co-felon is also a victim of police abuse. Shifting the appropriate legal blame spares the appropriate agent censure and punishment and obscures the wrongful nature of her actions.

In these scenarios, the defendant serves a lengthy sentence in place of a wrongdoer too privileged to punish. Here, a felon, who after all was engaged in wrongdoing, makes for a tempting defendant, a scapegoat on whom to heap blame. And all too often that defendant—poor, Black, shadowed by a record, inevitably spending most of his time with others similarly circumstanced—is ready-made in our social imagination to be blamed and banished.[360] This natural temptation makes the use of proximate cause to shift blame from the privileged to the pariah all too predictable. In this process, the truly culpable wrongdoer escapes not just punishment but even inspection.[361] Thus extended by proximate causation, felony murder liability has too often obscured and excused police violence, particularly against Black and Brown men.

We can best see this convergence of disproportion and discrimination in both policing and prosecution in Illinois. The dynamic is most visible there because of the long and successful struggle of activists and journalists to expose police violence and prosecutorial connivance[362] and to finally persuade legislators to impose an agency limit on felony murder.[363] Illinois is also a fitting place to survey because it was the birthplace of the proximate cause doctrine in the *Payne* and *Hickman* cases. Later decisions there would confirm that felony murder liability extended to the deaths of co-felons and the killing of a co-felon by police or a resisting victim.[364]

The interaction of this broad felony murder rule with racial profiling is well illustrated by the notorious 1989 Illinois case of *People v. Jenkins*.[365] Officers Hattenberger and Brunkella of the Chicago Police Department were dispatched as part of a "tactical squad" to suppress drug-dealing near a school. Hattenberger observed Allison Jenkins, a Black male immigrant from Belize, approach a vehicle and receive a bag of potato chips, which the police later claimed contained marijuana. Hattenberger confronted Jenkins

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[360] *See id.*; Yankah, *Good Guys and Bad Guys*, *supra* note 38 at 1025-1026; CYNTHIA LEE, MURDER AND THE REASONABLE MAN 5 (2003).

[361] *See generally* Ekow N. Yankah, *Legal Hypocrisy*, 32 RATIO JURIS 2 (2019) (exploring the expressive wrongs and potential harms of legal doctrines that obscure blameworthiness).

[362] *See, e.g.*, Flowers & Macaraeg, *supra* note 112.

[363] *See, e.g.*, Jobi Cates, *Testimony to the Illinois Senate Executive Committee: In Support of HB163, SA2,* RESTORE JUST. ILL. (Jan. 9, 2021 1 p.m.), https://ilga.gov/senate/101CommitteeWrittenTestimony/ SEXC//20210109%201300%20PM/HB163,%20SA2%20Proponent%20Jobi%20Cates%20Restore%20Justice%20Illinois.pdf [https://perma.cc/6DYV-Q6TE].

[364] *See* People v. Lowery, 687 N.E.2d 973, 975-979 (1997) (holding that felons could be held liable for deaths of co-felons directly caused by a party to the felony); People v. Graham, 477 N. E.2d 1342, 1346-49(1985) (holding that felons could be held liable for deaths of co-felons directly caused by a party to the felony).

[365] 190 Ill. App.3d 115 (1989).

with a cocked .45.[366] According to Hattenberger, Jenkins ran and the officer "chambered a bullet," and pursued.[367] According to Jenkins, he backed away until he collided with Brunkella. All witnesses agreed that Hattenberger, still waving the gun, tackled Jenkins.[368] All three men fell, and Hattenberger shot and killed Brunkella.[369] Hattenberger claimed that unnamed sources had told him that Jenkins carried a gun and that Jenkins had moved his hands to his middle.[370] He further claimed that Jenkins had elbowed him in the chest and that Jenkins' later effort to shake himself free from Hattenberger's grip caused Hattenberger to fall.[371] Jenkins denied striking Hattenberger, instead claiming that the gun discharged when Hattenberger struck him with it.[372] Jenkins was convicted of battery, a felony when committed against a police officer, and felony murder. Although the jury instructions (initially proposed by the prosecution) failed to require the jury to find that Jenkins foreseeably caused Brunkella's death, this conviction was upheld on appeal.[373] The Seventh Circuit later ruled the instruction harmless error, as no juror could have reasonably doubted Jenkins' guilt.[374] That Jenkins fled from a death threat proved he foresaw a danger of death.

Nevertheless, a *Chicago Tribune* story quoted Jenkins as saying he believed he might not have been convicted if there were more than one Black on the jury.[375] Nine other Black jurors were stricken, four by the prosecution, for such ostensibly race-neutral reasons as living in a high crime area, renting, having been falsely accused of crime, having not worked long at their current jobs, and being poorly dressed.[376] The lone Black juror, a young teacher, tearfully reported that she held out for acquittal for nine hours before giving in but "couldn't do it [her]self."[377] She said that the other jurors could not believe that police would use unnecessary force: "they were completely out of touch with reality, with the way things can be (in the city) and are."[378] Jurors never learned that Hattenberger had previously shot *another*

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[366] Linnet Myers, *Suspect Faces Murder Charge in Cop's Killing by Partner*, CHI. TRIB., October 8, 1986.
[367] *Jenkins*, 190 Ill. App.3d at 121.
[368] *See* Myers, *supra* note 366.
[369] *Jenkins*, 190 Ill. App.3d at 122.
[370] *Id.* at 121.
[371] *Id.* at 121–22.
[372] *Id.* at 123.
[373] *Id.*
[374] *See* Jenkins v. Nelson, 157 F.3d 485 (7th Cir. 1998). The case was upheld in a federal habeas, which concluded that the error in instructing the jury, although a violation of due process, was harmless: "Jenkins conduct was in the very heartland of this expanded concept of felony murder. But for Jenkins' struggling, Officer Hattenberger's gun would not have discharged. Additionally, it is foreseeable that struggling with an armed police officer could cause the officer's gun to discharge, injuring anyone at the scene. . . ..[A] properly instructed, rational jury would have found causation beyond a reasonable doubt." *Id.* at 496; *See also* Linnet Myers, *A Shot is Fired, a Cop Dies, But is it Murder?* CHI.TRIB., Oct. 30, 1987; Jack Clark, *Who Killed Jay Brunkella?* CHI. READER, Jan. 25, 1988.
[375] Myers, *supra* note 374.
[376] *See Jenkins*, 190 Ill. App.3d at 141.
[377] Myers, *supra* note 374; Clark, *supra* note 374.
[378] Myers, *supra* note 376.

officer he bumped into with a cocked gun.[379] A second juror later became convinced Hattenberger had lied about the circumstances of the shooting after visiting the scene.[380] Even some police blamed Hattenberger and criticized the prosecution.[381] The case illustrates how easily self-serving police testimony can persuade white jurors—and judges—that a Black suspect caused police to use unreasonable force.

A 2016 *Chicago Reader* investigative report identified a pattern of felony murder prosecutions of the targets of particularly troubling uses of police force in Cook County.[382] The authors reported finding ten arrestees charged with felony murder for police killings during the preceding five years.[383] The cases also illustrate patterns of racial disparity in police shootings and in felony murder charges. These included the cases of John Givens and Leland Dudley, described above, convicted of the felony murder of their partner David Strong, after police shot all three unarmed Black men multiple times.[384] Officers offered the strange explanation that they fired volleys of bullets into the stationary vehicle because an officer might have been under it.[385]

Another disturbing case of fatal police violence was the killing of Marquise Sampson. Tevin Louis and Sampson, his best friend, were troubled Chicago teens navigating difficult childhoods pocked with foster care and poverty.[386] On a summer evening in 2012, the 19-year-olds allegedly robbed a local restaurant of $1200 when Sampson crossed paths with police officer Dicarlo.[387] Sampson and Louis fled in separate directions and Dicarlo pursued Sampson. Although Dicarlo claimed Sampson pointed a gun at him, video footage did not show that.[388] Dicarlo shot Sampson three times, once in the back, killing him. Although Louis did not arrive on the scene until

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[379] *Id.*

[380] *See id.*

[381] *See* Clark, *supra* note 374.

[382] Flowers & Macaraeg, *supra* note 113. The story recounted the 2006 case of Tristan Scaggs, a passenger in a stolen car at which police fired almost 70 bullets, with no return fire. Scaggs, who was shot by police while lying on the ground, was charged with felony murder for the killing of his two companions by police. All three shooting victims were Black. *See also* People v. Scaggs, 2021 Ill. App. 173017 (Ill. App. Ct. 2021).

[383] Flowers & Macaraeg, *supra* note 113.

[384] Givens was sentenced to 20 years and Dudley to 25. *See* Peter Hancock, *U.S. Supreme Court won't review Illinois 'Felony Murder' Law*, SO. ILLINOISAN (Nov. 25, 2019), https://thesouthern.com/news/local/crime-and-courts/us-supreme-court-won-t-review-illinois-felony-murder-law/article_84b16866-d391-5996-91ec-3922cd31f554.html [https://perma.cc/7GWT-GLPZ].

[385] Petition for Writ Certiorari, Givens v. Illinois, 2018 IL App (1st) 152031-U* at P*12, https://www.supremecourt.gov/DocketPDF/18/18-9761/103313/20190618144715676_Givens%20cert%20Pet%20.pdf [https://perma.cc/62CM-CGTY] at pp. 4-6

[386] Flowers & Macaraeg, *supra* note 113.

[387] *Id.*

[388] *Id.*; *see also* Amy Goodman, Alison Flowers, Sarah Macareg, *A Shocking Story of How a Chicago Cop Killed a Teen — Then Locked Up His Best Friend for the Murder*, DEMOCRACY NOW (August 22, 2016), https://www.democracynow.org/2016/8/22/a_shocking_story_of_how_a [https://perma.cc/3KTM-WNWN].

after Sampson had been shot, Louis was charged with the murder, while Dicarlo won a medal.[389]

Other cases included that of Timothy Jones, a Black man, charged with the death of motorist Jacqueline Reynolds, a Black woman,[390] whom a police vehicle killed while chasing Jones after he fled a home invasion burglary.[391] Similarly, Erik Martinez, Latino, a passenger in a car driven by Rafael Cruz, also Latino, was charged with Cruz's murder after Cruz was shot by an officer who had previously killed three other civilians. Martinez was accused of having provoked this shooting by firing at another car and so was charged with felony murder.[392] Martel Odom and Akeem Clarke, both Black, were charged with the felony murder of their accomplice, 17 year-old Cedric Chatman, in a carjacking. The unarmed Chatman (also Black) was fatally shot by police while fleeing. Odom and Clarke were blocks away.[393]

Devante Graham, then 17, and Emmanuel Johnson, then 15, both Black, were charged with the felony murder of their accomplice in robbery, when 16 year old Deonta Mackey, (also Black) was fatally shot by the robbery victim, an off-duty officer.[394] Finally, Breanna Patterson, a 20 year old Black woman, was charged with felony murder after police fatally shot her accomplice in robbery, Charles Smith, also Black.[395]

Of the ten felony murder defendants charged with killings actually committed by police, nine were Black, and none were white. Six of seven victims were Black. None were white. As a result of cases like these, activists

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[389] Flowers & Macaraeg, *supra* note 113.

[390] Jacqueling Reynolds, HOMICIDE WATCH CHI., http://chicago.homicidewatch.org/category/victims/jacqueline-reynolds/index.html [https://perma.cc/8ATZ-RFNR]. Jones was sentenced to 22-28 years. Steve Schmadeke, *Man Given 28 Years in Prison for Chicago Police Chase that Turned Fatal*, CHI.TRIB. (May 1, 2015), https://www.chicagotribune.com/news/breaking/ct-fatal-police-chase-sentencing-met-20150501-story.html [https://perma.cc/CJ6R-MS5Y].

[391] *See* Flowers & Macaraeg, *supra* note 113. Criminal, *76th and Yates, supra* note 113.

[392] *See* Flowers & Macaraeg, *supra* note 113.

[393] See Emily Morris, *2 Men Charged with Carjacking, Murder After Fatal Police Shooting*, DNA INFO (Jan. 9, 2015), https://www.dnainfo.com/chicago/20130109/south-shore-above-79th/2-men-charged-with-carjacking-murder-after-fatal-police-shooting/ [https://perma.cc/58VT-LFBJ]; Email from Sarah Macareag, to Guyora Binder (Sept. 13, 2021) (on file with author). Each eventually pled guilty to robbery and auto-theft and was sentenced to 10 years. *See* Jorden Owen, *Two Men Get 10 Years in Prison for Fatal Police Chase and Shooting*, CHI. SUN TIMES (Sept. 22, 2015), https://chicago.suntimes.com/2015/9/22/18442502/two-men-get-10-years-in-prison-for-fatal-police-chase-and-shooting [https://perma.cc/5MS9-NCZG].

[394] *Emmanuel Johnson*, HOMICIDE WATCH CHI., http://chicago.homicidewatch.org/category/suspects/emmanuel-johnson/index.html [https://perma.cc/484E-M4NF]. Graham was sentenced to 25 years. Rummana Hussain, *Man Gets 25 Years for Deadly Robbery That Claimed Life of Cohort*, CHI. SUN TIMES (Apr. 26, 2016), https://chicago.cbslocal.com/2016/04/27/armed-robbery-devante-graham-guilty-plea/ [https://perma.cc/DEP9-V9S5].

[395] *See Woman Charged in Connection with Fatal Police-Involved Shooting in Englewood*, ABC 7 CHICAGO (Feb. 2, 2016), https://abc7chicago.com/englewood-police-standoff-73rd-and-paulina/1183467/ [https://perma.cc/4UJM-FRHP]; *Charles M Smith*, EB WIKI, https://ebwiki.org/cases/charles-m-smith [https://perma.cc/BH87-3PAZ]. Patterson ultimately received an 18-year sentence for robbery. *See* INSIDE PRISON, Breanna Patterson (last visited Sep. 3, 2022), https://www.insideprison.com/state-inmate-search.asp?lnam=Patterson&fnam=Breanna&county=cook&st_abb=IL&id=2026185172 [https://perma.cc/J5RC-2EVK].

in Illinois framed felony murder reform as a racial justice issue, and in 2021 the Illinois legislature imposed an agency limit on felony murder as part of a comprehensive reform bill targeting police misconduct.[396] In Colorado, similarly, supporters framed a 2021 bill adopting an agency rule as a racial justice reform.[397]

But this pattern is not limited to Illinois and Colorado. Similar examples continue to proliferate across the country. Consider D'Angelo Burgess, pulled over for a routine traffic stop in Tulsa, Oklahoma.[398] Burgess panicked and fled from police, who pursued at over 100 mph.[399] Policing experts counsel against high-speed chases as among the most dangerous policing practices and indeed, such chases violated department policy.[400] One officer lost control of his car and struck and killed fellow officer Heath Meyer. Officer Meyer became the eighth person in just over a year killed in

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[396] Pivotal in this effort was the 2019 killing of 14 year old Ja'Quan Swopes, fatally shot by a suburban homeowner in Lake County when he and five other black teens attempted to steal the homeowner's car. The remaining five were initially charged with felony murder. *See* Jobi Cates, *Lake County Case Shows Why Illinois Should Abolish The Felony Murder Rule, Chicago Sun-Times*, CHI. SUN TIMES (August 15, 2019), https://chicago.suntimes.com/2019/8/15/20807715/felony-murder-rule-illinois-gurnee-teens-lake-county-restore-justice-jobi-cates [https://perma.cc/NK2N-YHQC]; Frank S. Aberholden, *Community Meeting Focuses on Felony Murder Law Used to Charge 5 Teens in Botched Lake County Car Theft*, CHI. TRIB. (Sept. 5, 2019), https://www.chicagotribune.com/suburbs/lake-county-news-sun/ct-lns-old-mill-creek-shooting-meeting-st-0904-20190905-zsdiwsypyjfitbqvjialgpj3tm-story.html [https://perma.cc/2E4H-Q9D4]. In legislative testimony in support of what would become the felony murder provision of HB 3653, abolishing Illinois' proximate cause rule, the group also referenced the Timothy Jones case. Cates, *supra* note 363. Proximate cause cases like these helped reframe felony murder reform as an issue of racial justice in Illinois.

[397] *See* Marianne Goodland, *Felony Murder Bill Wins Preliminary Approval in the House*, COLO. POL. (Apr. 23, 2021)("'We have a doctrine that is profoundly problematic' against people of color [sponsor Mike] Weissman added,."); *Changes to Felony Murder: Hearing on SB21-124 Before the Senate Judiciary Committee*, 2021 Leg., 72nd Sess. (Co. 2021) (testimony of Curtis Brooks, Philip Cherner), https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20210318/41/11143 [https://perma.cc/CA4U-XCW7].

[398] *See* Schwartzapfel, *supra* note 113.

[399] *See id.*

[400] *See* John P. Gross, *Unguided Missiles: Why the Supreme Court Should Prohibit Officers From Shooting at Moving Vehicles*, 164 PENN. L. REV. ONLINE 135, 137–141 (2016); Brief for The Association of Trial Lawyers of America as Amicus Curiae Supporting Respondents, County of Sacramento v. Lewis, 523 U.S. 833 (1998) (No. 96-1337); Tim Grimmond, *Police Pursuits: Traveling a Collision Course*, POLICE CHIEF, July 1993, at 43, 47; Michael Avery, *Police Chases: More Deadly Than a Speeding Bullet?*, Trial, Dec. 1 (1997); M. Amanda Racines, Case Note, *Constitutional Law—To Chase or Not to Chase: What "Shocks the Conscience" in High-Speed Police Pursuits?*—County of Sacramento v. Lewis, 523 U.S. 833 (1998), 73 TEMP L. REV. 413, 438–439. In three notorious analogous cases, the Supreme Court has limited the Constitutional restrictions on police high-speed chases that lead to death or serious injury. In *Sacramento v. Lewis*, the Court held that police pursuit must "shock the conscience" for a due process violation to occur. 523 U.S. 833, 846–847 (1998). In *Scott v. Harris*, the Supreme Court ruled that an officer's attempt to terminate a high-speed chase by forcing a fleeing offender off the road did not constitute unreasonable force even if it put that driver's life and those of bystanders in jeopardy. 550 U.S. 372, 379-380, 385-386 (2007). And in *Plumhoff v. Rickard*, 572 U.S. 765, 769, 775-778(2014), the court applied *Scott v. Harris*, to justify firing 15 shots into an immobilized car to end a chase. *Id.* at 777.

Oklahoma in a police chase, two of them, uninvolved drivers.[401] It was ultimately Burgess who was charged with felony murder.[402] Even if one believes Burgess shares blame for Meyer's death, the felony murder charge effaces the role of irresponsible police behavior. Only now, years later, has the State legislature began to consider regulating police chases.[403]

Or consider 15-year-old Lakeith Smith, who participated in two burglaries in Millbrook Alabama, along with four other Black teens, two of whom were armed. Police confronted and exchanged gunfire with the group, fatally shooting 16-year-old A'Donte Washington. Smith, who was unarmed, was convicted of felony murder along with other crimes, and received consecutive sentences totaling 65 years.[404]

Or 14-year-old Johnny Reed, charged with the felony murder along with two others, for the killing by Phoenix police of 19 year old Jacob Harris en route from a robbery. Police, following the group in six unmarked cars, disabled the vehicle and threw a flash grenade. Jacob Harris ran from the car. Police fired a volley of shots, striking him fatally in the back. Although police claimed that he fired shots, neither video nor ballistics evidence confirmed this. Harris was Black, as are two of those charged with his murder.[405]

Or the cases of Christopher Ransom, who held up a phone store in Queens with a toy gun, and the unarmed Jagger Freeman who served as a lookout. After police surrounded the store, Ransom emerged, along with

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[401] A similar tragic story occurred last year when a police chase resulted in a crash between a police car and an Uber driver, Bismark Asare, killing Asare. *See Texas Uber Driver Killed in Crash with Police Involved in High-speed Chase*, WLVT 8 NEWS (Aug. 2, 2020), https://www.wvlt.tv/2020/08/02/texas-uber-driver-killed-in-crash-with-police-involved-in-high-speed-chase/ [https://perma.cc/XNK7-WS6P]. The fleeing suspect was apprehended and charged with felony murder. *See* Brian White, *Texas Uber Driver Killed In Crash With Police-Involved in High-Speed Chase*, ATT'Y BRIAN WHITE PERS. INJ. LAWS. (August 18, 2020), https://attorneybrianwhite.com/blog/texas-uber-driver-killed-in-crash-with-police-involved-in-high-speed-chase/ [https://perma.cc/TYV5-FQWP].

[402] *See* Corey Jones, *Fleeing Driver Convicted of Felony Murder in Death of OHP Lieutenant in Trooper Collision*, TULSA WORLD (Mar. 11, 2019), https://madison.com/news/state-and-regional/fleeing-driver-convicted-of-felony-murder-in-death-of-ohp-lieutenant-in-trooper-collision/article_4e2f5f13-2ee6-5b3e-9069-c6a7d666777d.html [https://perma.cc/HB63-8BDY].

[403] *See* Melissa Scavelli, *Lawmaker Requests Study of Police Pursuit Policies*, J. REC. (July 13, 2021), https://okcfox.com/news/local/lawmaker-requests-police-pursuit-study-to-create-safer-policy [https://perma.cc/Q89Z-3NKE].

[404] *See* Jamiles Lartey, *Alabama Police Shot a Teen Dead, but His Friend Got 30 Years for the Murder*, THE GUARDIAN (Apr. 15, 2018), https://www.theguardian.com/us-news/2018/apr/15/alabama-accomplice-law-lakeith-smith [https://perma.cc/H4PN-DLZH]. The sentence was subsequently reduced to 55 years. *See* Krista Johnson, *Accomplice Law Case of Lakeith Smith, Sentenced To 55 Years, Gains Renewed Interest*, MONTGOMERY ADVERTISER (June 11, 2020), https://www.montgomeryadvertiser.com/story/news/crime/2020/06/11/alabama-case-lakeith-smith-inmate-sentenced-55-years-gains-renewed-interest/5344257002/ [https://perma.cc/A2BV-NNRL].

[405] *See* Meg O'Connor, *Police Shot Jacob Harris—Then Charged His Friends with Murder*, PHX. NEW TIMES (June 28, 2019), https://www.phoenixnewtimes.com/news/phoenix-cops-shot-jacob-harris-charged-friends-with-murder-11319507 [https://perma.cc/X4U7-XKYY]; Emily Wilder, *A Police Officer Killed Jacob Harris, But His Unarmed Friends Were Charged with His Murder*, BUZZFEED NEWS (August 24, 2021), https://www.buzzfeednews.com/article/emilywilder/police-shooting-felony-murder-third-party [https://perma.cc/QP8B-DJBP].

two detectives in plain clothes. They were met with a volley of 42 shots fired by seven officers. Ransom survived multiple gunshots, but one of the detectives did not. Ransom and Freeman, both Black were both charged with felony murder.[406] Freeman was recently convicted of felony murder.[407]

Lastly, consider the analogous story of the chronically mentally ill Glenn Broadnax, also Black, who tried to kill himself in traffic in Times Square.[408] When he attracted police attention, the police response to his behavior was to open fire in a crowded, world famous tourist destination, striking two innocent bystanders.[409] One, ironically a mental health expert trained to handle just such situations, observed that police missed every opportunity to deescalate the situation; the other, disabled by her injuries, has sued the NYPD.[410] Again, the police response avoided scrutiny when prosecutors convicted the mentally ill Broadnax of assault crimes.[411]

Too be sure, none of these stories is simple.[412] Many of those charged engaged in dangerous and reprehensible criminal behavior. But it is not only perfect people who deserve to survive police encounters. Policing is not just a matter of *if* the police become involved but *how* the police use force once they are involved. To be sure police proverbially make "split second life and death" decisions.[413] But occasions when deliberation is impossible are too

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[406] *See Christopher Ransom Pleads Guilty in Friendly Fire Death of NYPD Detective Brian Simonsen*, EYEWITNESS NEWS (Oct 20, 2021), https://abc7ny.com/christopher-ransom-brian-simonsen-jagger-freeman-t-mobile-store-robbery/11147156/ [https://perma.cc/YT49-AYWT].

[407] *See* Deshenia Andrews, *Queens Man convicted of Murder in NYPD Cops Friendly Fire Death*, N.Y. POST (June 13, 2022), https://nypost.com/2022/06/13/man-convicted-of-murder-in-nypd-cops-friendly-fire-death/ [https://perma.cc/K63K-XXXV].

[408] *See* Ben Yakas, *Mentally Ill Man Charged With Assault Because Cops Shot Two Bystanders*, THE GOTHAMIST (December 5, 2013).

[409] *See id.*

[410] *See* Jon Campbell, *After NYPD Open Fire On an Unarmed, Mentally-Ill Man in Times Square, Who Gets the Blame?* THE VILLAGE VOICE (August 10, 2016), https://www.villagevoice.com/2016/08/10/after-the-nypd-opened-fire-on-an-unarmed-mentally-ill-man-in-times-square-who-gets-the-blame/ [https://perma.cc/ZAE8-7BNA].

[411] Rebecca Rosenberg, *'Deranged' Times Square Man Sentenced to Two Years in Prison*, N.Y. POST (Mar. 11, 2015), https://nypost.com/2015/03/11/deranged-times-square-man-sentenced-to-two-years-in-prison/ [https://perma.cc/K9DA-EHC7].

[412] While this article focuses on the way felony murder obscures unreasonable police behavior, a similar observation could be made in cases of questionable non-police uses of self-defense. *See, e.g.*, Robinson v. State, 782 S.E.2d 657, 661-662 (Ga. 2016) (finding defendant guilty of felony murder of his accomplice in an attempted robbery of a business after the accomplice was shot in self-defense by the business owner and defendant failed to immediately inform police that wounded accomplice was in crashed and abandoned getaway vehicle); People v. Lowery, 687 N.E.2d 973, 977-979 (Ill. 1997)(finding defendant guilty of felony murder where the target of an attempted robbery wrestled the gun away from defendant and accidentally shot a bystander as defendant fled the scene of the robbery); Layman v. State, 42 N.E.3d 972, 979-981 (Ind. 2015) (reaffirming proximate cause standard, but nevertheless overturning felony murder convictions for two defendants who burglarized a home while unarmed and whose co-conspirator was shot and killed by the home's occupant, providing insufficient evidence of foreseeability).

[413] The oft (and overused) incantation that deadly force by police is often dispensed with "split second" decisions is recognized in our Fourth Amendment jurisprudence, even in circumstances that seem to utterly belie such urgency. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 396–97 (1989). It is further reified in our policing norms. Seth W. Stoughton, *Policing Facts*,

often the product of avoidable choices. Police operations that create predictably explosive and fatal circumstances should be recognized as reckless. Indeed, the deaths that arise from these volatile setups are in some ways more blameworthy than rash police shootings in sudden circumstances. In reckless stings like the Saunders case, stakeouts like the Hickman case, needless chases like the Burgess case, or stopping cars with guns, as in the Givens case, police deliberately construct high noon confrontations and games of chicken.[414]

Indeed, a consistent criticism in high profile police killings has been the over-eagerness of police to charge into situations, thus forcing split-second decisions. Thus, the killing of Tamir Rice was stunning in part because of how quickly his life was forfeited. The video shows Officer Loehmann's car pull into the frame and Rice's body crumpling nearly instantaneously.[415] Loehmann's contention that he had to make an instantaneous decision ignores the obvious fact that it was his aggressive insertion into the situation before assessing it, that created this false dilemma.[416] Likewise, police killings cannot be justified by the urgency of the moment where police tactics themselves staged urgent life and death decisions. Zooming out from the moment of the shooting itself and inspecting the wisdom of tactics that narrow options into fatal pathways exposes many police killings as unnecessary.[417]

But where blame for those deaths can be shifted onto another criminal defendant, it is all too easy to avoid that inspection. Thus, the possibility of shifting all blame to a co-felon perversely incentivizes police violence. Given a choice between two culprits, one a member of the cohesive organization on which the prosecutor depends to prove every case, and the other chargeable with another crime, who will the prosecutor side with? It is not only the felons who find themselves outgunned in these confrontations.

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88 TUL. L. REV. 847, 865 (2014). But too little attention is paid to the unwise, negligent or reckless police decisions which force such "split second" decisions. *See* Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 228–232, 291–293 (2017); James J. Fyfe, *The Split-Second Syndrome and Other Determinants of Police Violence*, *in* CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 466, 475–77 (Roger G. Dunham & Geoffrey P. Alpert eds., (2010)).

[414] *Garrett & Stoughton, A Tactical Fourth Amendment*, *supra* note 413 at 214-220, 228.

[415] *Id.* at 214; S. LAMAR SIMS, INVESTIGATION INTO THE OFFICER-INVOLVED SHOOTING OF TAMIR RICE WHICH OCCURRED AT CUDELL PARK, 1910 WEST BOULEVARD, CLEVELAND, OH, ON NOVEMBER 22, 2014 at 12 (Oct. 6, 2015) [hereinafter Sims Report], http://prosecutor.cuyahogacounty.us/pdfprosecutor/en-US/Tamir%20Rice%20Investigation/Sims-Review%20of%20Deadly%20Force-Tamir%20Rice.pdf [https://perma.cc/DCX9-ATCS]; KIMBERLY A. CRAWFORD, REVIEW OF DEADLY FORCE INCIDENT: TAMIR RICE 2–3 [hereinafter Crawford Report], http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Tamir%20Rice%20Investigation/Crawford-Review%20of%20Deadly%20Force-Tamir%20Rice.pdf [https://perma.cc/9GRM-NLBC].

[416] *Id.* at 215-216, 220, 260-261.

[417] *See* Garrett & Stoughton, A Tactical Fourth Amendent *supra* note 413, at 228-232, 291-293.

Of course, shoot-outs are dangerous for all and most police, one hopes, do not seek danger.[418] Thus, the most salient incentive for police will be the possibility of harm to themselves. But budgets must be justified, brass will stage theatrical operations, and when forced into danger, caution will push police to shoot first.[419] What is less clear is how to incentivize police to be solicitous of the lives of even felons they must arrest.[420] We cannot prove that rewarding killing with a collar as well as a medal actually adds to the carnage. But it expresses, through our legal doctrine, that the lives and futures of felons are forfeit.

Moreover, immunizing police from scrutiny permits them to engage in tactics that show Black life is considered cheap. After all, incentives are unnecessary where police already highly value the lives of civilians.[421] We are unlikely to see police set up explosive stings in wealthy, white neighborhoods.[422] But where the lives of the likely victims are not valued, being shielded from the consequences liberates the police to implement dangerous policing tactics.[423] Regardless of the legal regime, a sting that would be un-

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[418] The classic scholarship in the field was more focused on reducing danger to *officers* by avoiding circumstances calling for deadly force. *See, e.g.,* POLICE ORGANIZATION AND TRAINING: INNOVATIONS IN RESEARCH AND PRACTICE 159 (M.R. Haberfeld et al. eds., 2012) (interviewing seminal policing practice scholar James Joseph Fyfe).

[419] This is probably exacerbated by the systematic lack of clear guidance in police departments as to the appropriate levels of force to use in a wide range of situations. *See* Garrett & Stoughton, *supra* note 413, at 280-285.

[420] For example, there remains a split in American jurisprudence as to whether the Fourth Amendment should restrict police force to the least violent methods available. Compare Griffith v. Coburn, 473 F.3d 650, 658 (6th Cir. 2007) (requiring officers to effectuate seizures using "the least intrusive means reasonably available" (quoting St. John v. Hickey, 411 F.3d 762, 774–75 (6th Cir. 2005) (internal quotation marks omitted)), with Wilkinson v. Torres, 610 F.3d 546, 551 (9th Cir. 2010) (holding availability of a less-intrusive alternative does not make use of deadly force unreasonable (citing Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994)). *See also* SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY 51 (1st ed. 2005) (describing minimum-force policies as the "prevailing standard"); *Police Use of Force*, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUST. (Apr. 13, 2015), https://nij.ojp.gov/topics/law-enforcement/use-of-force [https://perma.cc/974J-5CSW].

[421] See Siegel, *supra* note 45, at 1074-1081; Osagie Obasogie & Zach Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment,* 2016 WIS. L. REV. 541, 544; Osagie K. Obasogie & Zachary Newman, *Police Violence, Use of Force Policies, and Public Health*, 43 AM. J. L. AND MED. 279 (2017).

[422] Public conversation about the way police use force in executing arrests has spiked since the tragic shooting death of Breonna Taylor. The conversation surrounds not the fact that police returned fire when being fired upon but the justification in executing an explosive "no knock" warrant at all. It is interesting to note the widespread expert condemnation of the same tactics when Federal agents executed a similar warrant against Paul Manafort. *See* Brian Dolan, Note: *To Knock or Not to Knock? No-knock Warrants and Confrontational Policing*, 93 ST. JOHN'S L. REV. 201, 201-205 (2019); *cf.* Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks"*, 6 J. GENDER RACE & JUST. 381, 382 (2002.

[423] While demographic data is difficult to accurately collect, experts observe the same striking racial disparities we see elsewhere in policing. *See* Radley Balko, Opinion, *Little Rock's Dangerous and Illegal Drug War*, WASH. POST (Oct. 14, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/10/14/little-rocks-dangerous-and-illegal-drug-war/?utm_term=.41d32be5732c [https://perma.cc/ZU5C-7UPJ]; AMERICAN CIVIL LIBERTIES UNION,

thinkably risky in a white neighborhood may be accepted as the cost of police business in a poorer minority neighborhood. But a doctrine that so readily shifts blame for police violence onto the companions of those killed invites police to shoot on location, wherever they expect felons to be found.

Lastly, we admit many proximate cause cases, including some explored here, are ambiguous. Even clearly condemnable cases of police violence often include suspects behaving unacceptably. Whatever happened the night Julius Ervin Tate, Jr.[424] or Marquise Sampson[425] were killed, both were engaged in reprehensible and dangerous criminal behavior. We do not minimize the wrong of robbery. But victims do not have to be blameless for police killings to be unjustified. For too long, standard political deflection of police accountability centered on smearing the victim of lethal police violence.[426] Michael Brown, killed in Ferguson, allegedly with his hands up, was publicly impeached with videos of him stealing a package of cigarillos.[427] Walter Scott, shot in the back by Officer Michael Slager, was indicted in the media as behind on child support payments.[428] This character assassination seems particularly virulent regarding victims of color who are afforded none of the media's generosity in examining the paths leading to their deaths.[429] To demand that Black victims of police violence embody virtue before deserving our regard is to deny them the equal consideration every citizen deserves. That someone was armed or spurred a police chase is significant but not decisive in determining whether lethal police violence was required.[430] Chicagoans, alongside the nation, were rightly incensed upon the release of

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WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 33 (2014).

[424] Melissa Gira Grant, *supra* note 51.

[425] Flowers & Macaraeg, *supra* note 113.

[426] *See* KATHERYN RUSSELL-BROWN, UNDERGROUND CODES: RACE, CRIME AND RELATED FIRES, 60-62 (2004); *Cf.* Gregory S. Parks & Danielle C. Heard, "*Assassinate the Nigger Ape[ ]": Obama, Implicit Imagery, and the Dire Consequences of Racist Jokes*, 11 RUTGERS RACE & L. REV. 259, 278 (2010).

[427] Blanche Bong Cook, *Biased and Broken Bodies of Proof: White Heteropatriarchy, the Grand Jury Process, and Performance on Unarmed Black Flesh*, 85 UMKC L. REV. 567, 575-577; Transcript of Grand Jury, vol. 4 at 84–86, Ferguson Police Shooting, Sept. 10, 2014, *available at* https://www.documentcloud.org/documents/1370517-grand-jury-volume-4.html [https://perma.cc/Z9QT-5J63]; *see also* Katherine Goldwasser, *The Prosecution, the Grand Jury, and the Decision Not to Charge, in* FERGUSONS'S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION 37, 44 (Kimberly Jade Norwood ed., ABA Publishing 2016), *available at* http://www.americanbar.org/content/dam/aba/multimedia/cle/materials/2016/05/ce1605fss.authcheckdam.pdf [https://perma.cc/KG6Q-PLJC].

[428] *See Walter Scott had Bench Warrant for His Arrest, Court Documents Show*, NBC NEWS (Apr. 10, 2015), https://www.nbcnews.com/storyline/walter-scott-shooting/walter-scott-shooting-warrant-over-child-support-court-records-show-n339151 [https://perma.cc/VM5U-43WV].

[429] *Cf.* Agnes Constante, *Mainstream Media Fell Short in Atlanta Shooting Coverage, Activists Say*, CENTER FOR HEALTH JOURNALISM (Apr. 05, 2021), https://centerforhealthjournalism.org/2021/04/02/mainstream-media-falls-short-atlanta-shooting-coverage-amid-rise-hate-crimes-against [https://perma.cc/7CSY-UUBJ].

[430] *See* Tennessee v. Garner, 471 U.S. 1, 20 (1985) (holding that the use of deadly force to apprehend a fleeing felon is unconstitutional unless the felon poses a physical danger to arresting officer or to others).

video showing the killing of LaQuan McDonald by Officer Jason Van Dyke. Though McDonald was armed with a knife, the video showed him walking away from police officers when Van Dyke opened fire. A gun in the waistband does not always justify a shot in the back.

Indeed, the subjectivity of perceptions of danger is one reason to preclude murder liability for the crime of frightening police. That relativity came to public notice in the famous Fourth Amendment case of *Scott v. Harris*. Harris, hurrying home from work, led Georgia sheriff's deputies on a high-speed chase until Deputy Scott rammed his car, flipping it and leaving Harris quadriplegic.[431] Assessing the reasonableness of this "seizure," the Supreme Court sided with the police in an 8 to 1 decision.[432] In an unprecedented step, the Court released the dashboard video of the car chase.[433] The majority writer, Justice Scalia, was so confident that deadly force was reasonable that he mused that there could be no reasonable disagreement about the video footage.[434]

Such confidence naturally proved irresistible to academic inspection, leading Professors Kahan, Hoffman and Braman to survey wider assessments of the video. In the dashcam video, we see Harris's car weaving in and out of traffic on a commercial boulevard.[435] We don't see—but some viewers no doubt imagined—the view in his rearview mirror: multiple police cars, also driving dangerously, all chasing one terrified Black man. The court's decision, upholding summary judgment for Scott, deprived a jury of the opportunity to make that situationally dependent judgment of reasonableness from a diversity of perspectives. Though the Kahan, Hoffman and Braman survey found much agreement with the Court's decision it also found marked divergence of perspective across gender, ethnic and racial lines.[436]

Like Harris, Jenkins was denied an opportunity to face the judgment of a properly instructed, diverse jury. Instead, both cases now stand for the legal proposition that these Black men forced police to use deadly force against by them, by fleeing in mortal fear that police would kill them. In a society where police are socialized to identify Black people as dangerous, we cannot condition murder liability on getting shot at by police.

Yet proximate cause felony murder shifts blame for police violence onto its targets and can thereby obscure where the blame rightfully belongs. Police officers shooting indiscriminately, pursuing recklessly, or staging avoidable armed confrontations are all blameworthy, notwithstanding the felon's part

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[431] *See* Scott v. Harris, 550 US 372, 374-75, 385(2007) (holding that officer used reasonable force in ramming the rear fender of speeding motorist's car, inflicting severe injury, and ending chase lasting six minutes at high-speeds and through busy streets).

[432] *Id.*

[433] Adam Liptak, *Supreme Court Enters the YouTube Age*, NEW YORK TIMES (Mar. 2, 2009), https://www.nytimes.com/2009/03/03/us/03bar.html [https://perma.cc/YD6J-9P42].

[434] *See id.*; Scott v. Harris, 550 US at 380, 385.

[435] *See* Scott v Harris *(USSC 05-1631) Pursuit Video*, YOUTUBE (Sep. 2, 2008), https://www.youtube.com/watch?v=QRVKSgRZ2GY [https://perma.cc/25Z5-E5LZ].

[436] *See* Donald Braman, Dan Kahan & David Hoffman, *Whose Eyes are you Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841-843, 860-863, 867, 879-880 (2009).

in the wrongdoing. Too often, felony murder prosecutions divert our attention from deadly policing and encourage us to assume that the guilty party has already been punished.

D. Proximate Cause and Systemic Corruption

While proximate cause felony murder enables police wrongdoing, it also invites prosecutors to become complicit in that wrongdoing. Police can expect felony arrestees to bear the blame for their violence, only insofar as prosecutors place it there. Obviously, prosecutorial discretion remains central to our criminal justice system, where well over 90% of convictions are achieved by guilty pleas. Prosecutors, in turn, rely on police to supply evidence and, if necessary, testimony.

Even without the additional weapon of proximate cause felony murder, prosecutors have little incentive to prosecute their working partners for unjustified use of force and face a heavy burden of proof in doing so.[437] The directly involved officers have incentives to lie about the circumstances and shift blame onto victims.[438] While officer-involved killings are not typically investigated by the perpetrators, they are usually investigated by the officer's colleagues and superiors.

Further, police suspects are afforded rights and advantages that are vastly more protective than the typical suspect.[439] Police culture incentivizes investigators of an officer-involved shooting to look the other way. Union representatives intervene early in these cases, arranging legal representation, often fostering collusion among police witnesses on statements.[440] And the prosecutors who evaluate these cases are typically from the office that regularly works with the force whose agent committed the killing.[441] All of this creates, obvious conflicts of interest.[442] Prosecutors investigating such cases report pressure from both supervisors and peers to prosecute perps, not police.[443]

Moreover, prosecutors often face pressure to establish that police killings were justified—for example by inducing a grand jury to issue a "no-bill" finding—in order to help the killer to defend a civil rights suit.[444] Criminal conviction of surviving victims of police brutality can discredit them in civil

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[437] *See* PAUL CHEVIGNY, EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS 98–101 (1995).

[438] See Kevin Hogan, *Officer Involved Shooting Investigations Demystified: Slicing Through the Gordian Knot*, 13 DREXEL L. REV. 1, 15–23(2021).

[439] *See* Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745 (2016); Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197 (2016) [hereinafter Levine, *Police Suspects*].

[440] *See* Levine, *Police Suspects*, *supra* note 439, at 1236-1237.

[441] *See* Hogan, *supra* note 438, at 15-18.

[442] See generally Somil Trivedi & Nicole Van Cleve, *To Serve and Protect Each Other: How Police Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 899, 905-911(2020).

[443] *See id.* at 905-906, 908-911.

[444] *See id.* at 915-918; Jonathan Abel, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 Yale L.J. 1730 (2017).

rights suits, and prosecutors are often expected to pursue weak charges against victims, relying on self-serving and dubious police testimony.[445] Winning a felony murder conviction of an arrestee can also win favor with police, by protecting the killer against a civil suit by that arrestee. But blame-shifting also protects the officer against suit by the estate of the deceased, by implying the killing was justified. A felony murder conviction can even preclude a surviving victim's civil rights suit altogether, under *Heck v. Humphrey*.[446] Further, a felony murder charge for a survivor of police brutality can be advantageous even without a conviction. Prosecutors can bargain the charge away in exchange for releasing their police allies from civil liability.[447]

We might hope that prosecutors in proximate cause states would only charge felons for those police killings they recklessly provoked with gunfire. But the incentives we have canvassed—like the cases we have described—show otherwise. Prosecutors predictably bring disproportionate charges against felons for unjustified killings by police, because doing so is in their interest.

Waging war on crime has proliferated a militarized and racialized police state on our streets and bound millions of our fellow citizens into a degraded status of unfreedom. Felony murder has been just one weapon in that war—police and prosecutors would have mistreated suspects without it. But expanding felony murder to encompass killings by non-parties condones abusive policing and invites corrupt prosecution. An agency rule supplies a prophylactic against the abuse of prosecutorial authority to punish friendless pariahs for the crimes of police.

But can we hope that legal reform might affect prosecutor and ultimately police behavior? Consider again the recent police shooting of Stavian Rodriguez, the 15-year-old Oklahoma teen, who joined 17-year-old Wyatt Cheatham in a gas station robbery.[448] Locked in the station by the store clerk and surrounded by mocking police, the hapless Rodriguez surrendered, pulling out his gun with his thumb and forefinger and dropping it to the ground.[449] A crowd of police proceeded to give him inconsistent commands and, when a seemingly confused Rodriguez moved his hand towards his waist, five police officers opened fire, striking him 13 times and killing him. Rodriguez's absent accomplice, Cheatham, was charged with his murder.[450]

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[445] *See* Seth Kreimer, *Release, Redress, and Police Misconduct*, 136 U. PA. L. REV. 851, 871–872 (1988) (describing widespread practice of aggressive prosecution of weak cases against potential civil rights claimants, to bolster the officer's defense); Tamara F. Lawson, *Powerless Against Police Brutality: A Felon's Story* 25 ST. THOMAS L. REV. 218 (2013).

[446] 512 U.S. 477 (1994).

[447] Newton v. Rumery, 480 U.S. 386, 389-98 (1987); Kreimer, *supra* note 445, at 852-53, 871-872, 903-910, 917-924.

[448] *See* Clay, *supra* note 52.

[449] *See id.*

[450] *See Murder Charge Dropped Against Teen Accomplice in Robbery that Resulted in OCPD Shooting of Stavian Rodriguez*, *supra* note 55.

State v. Cheatham[451] was poised to join our list of disproportionate felony murder convictions until derailed by a confluence of events. Protestors gathered outside Cheatham's prison, decrying the use of felony murder against him as disproportionate punishment for the absent co-defendant. At the same time, video of the police encounter was released, sparking outcry about whether the police were justified in opening fire.[452] Subsequent to both, the prosecution dropped the felony murder charges against Cheatham and, more remarkably, charged the five police officers with first degree manslaughter.[453]

A number of factors, including compelling video, perhaps contributed to these hopeful results. Yet one notable feature of this tragedy is the way charging Cheatham with the death of his co-felon initially shielded questionable and lethal police responses from further legal inspection. Once they could no longer pin Rodriguez's death on his co-felon, it seems prosecutors were compelled to ask if his death was in fact justifiable. Were prosecutors systematically foreclosed from the easy blame shifting offered by proximate cause felony murder, such inspection and public accountability of police violence might be more common.

E. Depraved Indifference

Given the perverse incentives proximate cause felony murder creates, and the popular moral intuitions against it, why does this doctrine maintain a stubborn grip on a significant minority of jurisdictions? One reason, we have contended, is precisely its appeal to police and prosecutors as a way of shifting blame onto the victims of often racist police violence. Yet its applications need not always yield disproportionate results.

Recall that agency rules predicate felony murder on acts taken in furtherance of a dangerous felony. Thus, deaths directly caused by others resisting a felony fall outside of its ambit. In the examples we have surveyed, e.g., a police officer needlessly shooting a fleeing suspect, precluding murder liability for the felon seems the better result. But the armed robber who starts a gun battle with police, or with a cornered storekeeper or homeowner, resulting in a predictable death does seem blameworthy, even if the fatal bullet is fired by someone else. It is this insight that is marked when court opinions note that liability ought not turn on the arbitrary identity of the victim or the vagaries of forensic ballistics.

Yet such scenarios only counsel for felony murder liability at first blush. Even without felony murder, there will be independent grounds for murder liability in such cases. In the classic example, the robber who forces a hostage into the path of police gunfire does not need to be charged with felony murder. Rather, he can be charged with depraved indifference murder on the

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[451] We here refer to the hypothetical case the state ultimately declined to prosecute.

[452] *See* Levenson, *supra* note 53.

[453] *See Murder Charge Dropped Against Teen Accomplice in Robbery that Resulted in OCPD Shooting of Stavian Rodriguez,* supra note 55.

basis of his action. Similarly, as held in the California case of *People v. Taylor*, a felon who starts a gun battle, knowing others may well be killed, can be held liable for such a death, based on the depraved indifference to human life these actions manifest.[454]

Beneficially, such murder liability requires proof of recklessness, requiring that the robber recognize a substantial risk that one or more persons would be killed.[455] The robber's malign purpose for imposing a known risk of death supplies the additional measure of "depraved" or "extreme" indifference that often separates this form of unintended murder from "involuntary" (i.e. reckless) manslaughter. This long recognized independent basis of murder liability captures cases where death results from a felon's conscious choice to endanger others. It captures the sense that some atrocious crimes can be committed in ways so patently dangerous that the deaths they cause seem morally adjacent to murder.

We have seen that the great majority of states punish murder on the basis of such aggravated recklessness. Indeed, we propose adoption of such murder liability in the remaining jurisdictions, as a device for prosecuting unjustified police homicides. We acknowledge that a few states, like Minnesota, regrettably require that risk be recklessly imposed on more than one person, and we propose eliminating this requirement. Yet even in these states, it will generally be possible to use depraved indifference murder to prosecute offenders who initiate fatal gun-battles. So the few scenarios where expansive indirect causation is most appealing can be prosecuted outside the framework of felony murder, in the great majority of jurisdictions. In judging *both* unjustifiable police violence and conduct provoking justifiable police violence, depraved indifference murder better captures our intuitions about deserved blame than does felony murder. And, as we argue in the next Part, aligning blame with culpability is not just a theoretical concern. Getting the culpability right matters, not only to confine blame to the deserving but also to fulfill our responsibility to victims—by naming the wrong done them, to say their names.

Yet causal responsibility matters too. There are grounds for concern about indirect causal responsibility, even when we require a higher level of culpability towards death. Even if we abolish felony murder altogether and replace it with depraved indifference murder, police shootings will challenge the integrity of the criminal justice system. Prosecutors may still be motivated to shift blame for unjustified police shootings onto suspects. Deference to authority, hindsight bias, and racial bias may still induce jurors to overattribute culpability to suspects and underestimate the causal agency of police. If depraved indifference murder proves pliable in practice, further reforms—possibly including an agency limit—will be needed there too.

While depraved indifference murder may best capture our moral intuitions about blame for initiating fatal conflict, our criminal justice system too

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[454] *See* Taylor v. Superior Court, 477 P.2d 131, 135 (Cal. 1970).
[455] *Id.*

often weighs desert on a flawed scale. To be sure, in recategorizing certain types of antisocial conduct as depraved indifference murder rather than felony murder, we narrow liability and better align it with principles of desert. But the test of reform is practice rather than ideal normative theory. Our case against broad proximate cause felony murder standards rests on their demonstrable use as weapons in a discriminatory War on Crime. In the next Part, we propose a similarly grounded critique of felony murder generally. Reform is not just a matter of making technical changes in the law. It is a work of changing our community, by naming the injustice we correct.

Given our system's undue severity and pervasive inequality, any proposal to replace one standard of blame and punishment with another inevitably invites Abolitionist critique. The heart of that critique is that criminal law cannot solve the underlying social problems at which we aim it, and that every effort to align it with justice merely feeds its unjust power over poor and minority communities.[456] Yet that a criminal justice system is no substitute for the social infrastructure of a humane and democratic society does not mean it has no legitimate function in such a society. Even in a well-governed society, violent actions that harm others and deny their equal place as citizens require forceful repudiation. Other societies, although far from perfectly just, address this task with systems far smaller and more respectful of human dignity than ours. In short, there may be a long road reformers and abolitionists can travel together before they will need to part ways. So, too, this essay's two authors have walked a ways together, learned from our differences, and shared our conversation with you.

VI. Concluding Reflections: Applying a Racial Justice Critique of Felony Murder, Even Where it Hurts

A. From Agency Limits to Felony Murder Abolition

We have seen that felony murder has operated in many of our populous and apparently progressive states to obscure and excuse reckless and racially disparate police violence. But felony murder's race problem is larger in scope. The strikingly disparate patterns of felony murder charging and conviction recently documented in metropolitan Chicago and Minneapolis, and in Pennsylvania and Colorado, suggest that felony murder is a crime prosecutors have seen little need to punish when committed by whites. This suggests that the unexpected persistence of the academically despised felony murder in the late twentieth century recodification of criminal law reflected felony murder's appeal as a weapon in a racialized War on Crime. Felony murder liability—like recidivist sentencing—seemed attractive precisely because it

[456] For some canonical expressions see Angela Y. Davis, Are Prisons Obsolete? (2003); Mariame Kaba, We Do This Till We Free Us: Abolitionist Organizing and Transforming Justice (2021); Allegra M. McLeod, *Envisioning Abolitionist Democracy*, Harv. L. Rev. 1613–1649 (2019).

could inflict arbitrary and extreme punishment for criminality as an identity rather than an offense.

One reason why felony murder may be little used against white defendants is the availability in most states of other offenses—including involuntary manslaughter and depraved indifference murder—for unintended homicide. Those who commit felonies can also be punished for those crimes. So a strong argument for abolishing felony murder is that we seem to be able to do without it when the perpetrator belongs to a privileged majority. Deterring and denouncing *crime* does not require felony murder, however useful it may be in selectively attributing and denouncing *criminality*. We have proposed that every felony murder rule incorporate an agency limit as a prophylactic against displacing blame for racist police violence onto its victims. By a like logic, we should see abolition of felony murder itself as a racial justice remedy, a prophylactic against the kind of discriminatory prosecution and selectively disproportionate punishment described here.

Abolition of felony murder is far off, as 41 states, the federal system, and D.C. retain felony murder rules conditioned on no more than negligence towards death. Thus, felony murder abolition is not a single reform, but many reforms in many places. Abolishing felony murder as a prophylactic against discrimination is less a policy conclusion than a framework for investigation and advocacy. At this stage, it requires gathering data and collecting stories about prosecution and adjudication in particular jurisdictions. It is a job for community advocates, journalists, scholars, and, public officials—including hopefully, some in law enforcement. That work may yield particular reforms smaller—or larger—than repealing felony murder.

As in other areas of criminal justice, the goal of abolition need not be inconsistent with the path of incremental reform.[457] Take the death penalty as an historical example. Believing that our nation would abandon capital punishment if forced to impose it even-handedly, abolitionists attacked its discretionary and discriminatory procedures, and temporarily achieved abolition.[458] Since the death penalty's almost immediate restoration, death penalty abolitionists have waged a procedural war of attrition against every execution, reducing the appeal of capital prosecution to prosecutors and thereby eroding support among the penalty's most effective advocates.[459] So

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[457] *See* Yankah, *supra* note 11, at 684; Levine, *The Progressive Love Affair With the Carceral State*, *supra* note 15 at 1227-1228; 1241- 1245; Gruber, *The Feminist War on Crime*, *supra* note 15, at 46-50, 170, 199-204.

[458] *See* MICHAEL MELTSNER, CRUEL AND UNUSUAL 181–185 (1973).

[459] Brandon Garrett, *The Decline of the Virginia (And American) Death Penalty* 105 GEO. L.J. 661, 663-670, 674-679, 714-727 (2017) (explaining declining executions and death sentences in part based on expense of prosecuting a capital case, and effectiveness of state funded capital defense); R. Dieter, *Smart on Crime: Reconsidering the Death Penalty at a Time of Economic Crisis*, DEATH PENALTY INFORMATION CENTER (2009), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/smart-on-crime-reconsidering-the-death-penalty-in-time-of-economic-crisis [https://perma.cc/UT2J-NCKA] (estimating that death penalty costs taxpayers $30 million per execution); James Liebman & P. Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO STATE J. CRIM. L. 255 (2012) (noting the overwhelming majority of county prosecutors now eschew capital prosecution as a drain

too, the incremental reform and restriction of felony murder may diminish its appeal to prosecutors and pave the path to its eventual abolition.[460]

To be clear, we make no claim that this path to felony murder abolition is Abolitionist in the largest sense. Abolition of felony murder liability is far from a radical goal, having won the support of such architects of modern penality as Bentham and Wechsler. And we have considered other reforms here to better enable prosecution of police violence. These include introducing depraved indifference murder in jurisdictions without it, expanding depraved indifference murder to include deaths resulting from reckless and depraved endangerment of individuals in jurisdictions like Minnesota, and enacting civil rights violation felonies. As we have acknowledged, these proposals to punish unduly violent police presuppose the persistence of the penal state. And one of our motivating principles is neutral regarding the penal state: the imperative to deprivilege police and reaffirm the equal civil status of all. However many or few offenses we continue to punish, however often and however severely, we must also prosecute and punish police who commit them.

Nevertheless, as things stand, we can expect that shortcuts to punishment will not be deployed primarily against police. We have seen that Minnesota and Georgia are outliers in giving prosecutors less room for maneuver in cases of unintended homicide, surely one factor in explaining the felony murder charges against Chauvin and the initial charges against Rolfe. No doubt another factor is wanting to assure success in high profile prosecutions by making prosecution easy, a goal that, we next argue, comes at an underappreciated cost.

B. Felony Murder, Mens Rea and the Cloaking of Racial Contempt

Faced with the opportunity to convict police officers in high profile cases such as the killings of George Floyd and Rayshard Brooks, one might believe the prize of conviction worth these hidden costs. Whether proximate cause felony murder convictions shift blame in other sorts of cases does not erase its value in securing convictions of killer cops who might otherwise get away with their crimes. But even where felony murder is used to convict unjustifiable police killings we should hesitate to think a shortcut has won the day. Applying a felony murder rule deforms the meaning of the underly-

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on resources); *Joint Statement from Elected Prosecutors Pledging to Work Towards the Elimination of the Death Penalty*, FAIR AND JUST PROSECUTION (Mar. 2, 2022), https://fairandjustprosecution.org/wp-content/uploads/2022/02/FJP-Death-Penalty-Joint-Statement-2022.pdf [https://perma.cc/YVQ2-CTAW] (citing cost as well as justice concerns).

[460] Four District Attorneys and the Colorado District Attorneys' Council submitted testimony in support of Colorado's SB 21-124, imposing an agency limitation on felony murder, and reducing it from first to second degree murder. Senate Judiciary Committee hearing on SB21-124, Mar. 18, 2021, https://leg.colorado.gov/content/0178a65bd99864d28725869c0075618d-hearing-summary [https://perma.cc/8A4U-49BJ]; House Judiciary Committee hearing on SB21-124, Apr. 7, 2021, https://leg.colorado.gov/content/2922d0e88230e14b872586b0007a7593-hearing-summary [https://perma.cc/5H9E-9KGQ].

ing crime, leaving us unable to grapple with and condemn the *mens rea* of police who kill unjustifiably. Perhaps most importantly, in cases where our outrage centers on the history of police violence towards people of color, felony murder prosecution can render criminal law expressively silent and racist policing unaddressed.

Calling police killings felony murders is unsatisfying for reasons captured by the familiar criticisms of felony murder explored in Part II.[461] But those defects have special importance given the social salience of prosecuting police violence. Recall that felony murder imposes liability for murder for an unintended and even inadvertent killing during a dangerous felony.[462] The very point of such a rule is to elide the fact the defendant did not have the culpability otherwise required for murder, because the killer intended a different wrong. Whether we characterize felony murder liability as a "transfer" of intent from the felony to the killing, or as negligent homicide aggravated by a felonious motive, is immaterial. Either characterization implies that the killer's culpability towards death alone did not suffice for murder liability. That may be justified where a felon kills inadvertently for some other bad end.[463] But it cannot be justified where there is no secondary goal. This is precisely why the "merger rule" carves out some potential cases of felony murder from prosecution; in those cases the crime is too similar to less serious homicide offenses.[464] A predicate felony of assault or battery contributes insufficient additional *mens rea* to an unintended killing.[465] In such a case, a felony murder charge allows the prosecution to avoid its obligation to prove beyond a reasonable doubt that the defendant's killing was culpable enough to warrant condemnation as murder.[466]

This same deficiency can render felony murder convictions unsatisfying even when they lead to the conviction of rogue police. As we have seen, Judge Peter Cahill's sentencing memorandum appropriately considered the great wrong Derek Chauvin did.[467] Cahill concluded that Chauvin knowingly imposed an enormous risk of death, explicitly rejecting Floyd's pleas for his life, for the very purpose of degrading and terrorizing him.[468] At a more abstract level, the jury's verdict of depraved indifference murder expressed this as well. But sadly, the jury's verdict of felony murder predicated on assault—the only murder conviction likely to survive appeal—did not.

To watch Chauvin kneeling on George Floyd's neck, impervious to Floyd's begging for breath and the pleas by bystanders, is to watch someone kill with either intent or utter and cruel indifference. Recasting this as an unlawful assault with an unintended outcome likens this killing to an unlucky punch. Felony murder, by definition, does not require intentional or

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[461] *See* text accompanying nn. 76-111.
[462] *See* Binder, *The Culpability of Felony Murder*, *supra* note 13, at 966, 975-981.
[463] *Id.* at 1032-1046; Binder, *supra* note 12, at 433-437.
[464] *See, e.g.*, *People v. Ireland, 70 Cal. 2d 522, 538-540 (1969)*
[465] *Id.*
[466] *Id.*
[467] *See* text accompanying nn. 135-140 *supra*.
[468] *Id.*

reckless killing and so cannot capture the wrong Chauvin inflicted—or for that matter, the recklessness of so many of the police killings we have described.[469] By restricting depraved indifference murder to diffuse risks in the *Noor* case, Minnesota has effectively decided that sadistically and fatally forcing an individual to beg for his life, is not sufficiently culpable to count as murder.[470] But by imposing felony murder with no merger rule, the same court has decided that an unlucky punch is more naturally described as murder. Must we then hope that when Minnesota someday adopts a merger limit or abolishes felony murder, it does so only prospectively? In this case, in this place, felony murder was the only possible murder charge, leaving what was most blameworthy in Chauvin's conduct uncondemned.

Some might think this the quite ordinary trade-off at the heart of the felony murder doctrine. If the trade-off between giving prosecutors an easier road to punish rogue cops is a less bespoke measuring of their guilty mind, then so be it. After all, insisting on a conviction that centers Chauvin's *mens rea* or another officer's reckless and rash conduct may be much more difficult to prove; indeed, the challenge may leave prosecutors unable to secure a conviction. Would we be willing to risk the prosecution's success, to insist on a more precise match between culpability and punishment?

But in these important cases of police violence such a trade-off does not merely lack nuance; it surrenders the very expressive heart of criminal punishment.[471] To be sure, any unjustified police violence is lamentable; injury or death by the very agency we have collectively organized for public safety is disturbing. But we ought not mince words: the most destabilizing images of police violence over the past months and years have been of police shootings of Black and Brown men.[472] These cases of police violence read as part of a historical lament; Tamir Rice, Eric Garner, Michael Brown, Philando Castile, George Floyd, Rayshard Brooks, Jacob Blake. . . The litany feels endless. The pain enflamed by these killings is due to the conviction that police find deadly violence too easy and life too cheap when aimed at Black people. Generations of Black complaints about policing, stretching back throughout the nation's history, are being recognized by a broad cross-section of Americans.[473] Whether inspecting an individual officer's actions or broader police

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[469] *See* text accompanying note 64 *supra*

[470] Cannon, *supra* note 22.

[471] Jean Hampton, *Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of Law*, 11 CANADIAN J.L. & JURIS. 23 (1998); Joel Feinberg, *The Expressive Function of Punishment*, in DOING AND DESERVING (1970); R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2000).

[472] Alia Chugtai, *Know Their Names: Black People Killed by the Police in the US*, ALJAZEERA, https://interactive.aljazeera.com/aje/2020/know-their-names/index.html [https://perma.cc/X3JG-ABSR]; Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 21, 2021), https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns [https://perma.cc/PVG8-YAUC].

[473] *See generally* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 1 (2016); KHALIL GIBRAN MUHAMMAD,THE

tactics in minority neighborhoods, the nationwide swell of protest reflected a refusal to ignore the racism that drives so much police violence.

But this is precisely the cost of using felony murder to impose punishment on police violence. Casting police killings of minorities as unintentional, incidental killings, ignores the racism in case after case of lethal police violence. Prosecuting such killings, without inspection of the police officer's *mens rea*, hides away the precise feature nationwide protests have insisted we must face. By premising liability on an adjacent crime—the dangerous discharge of a weapon, for example—we are precluded not only from determining the critical *mens rea* as to the actual killing but also from inspecting the role of racism in that killing. The very central question of the current political conversation—would this officer have responded with similar violence were the now dead victim white?—becomes inaccessible and legally unimportant.

To be sure, proving that an officer's violence stemmed from racism is no small feat.[474] Some prosecutions may face the steep legal requirements to prove a Federal Civil Rights Violation. Other cases will be tried or sentenced under state hate crimes legislation. In other cases, the role race plays in determining reckless or irrational behavior may stretch our current hate crime regimes.[475] In many cases prosecutors are loathe to inject explosive questions of race into criminal cases. Despite these obstacles, we should do what we can to make racist violence more visible; to speak its name.

This may sound like an abstract diversion, of interest only to punishment theorists. It may seem a luxury to insist on not only the right punishment, but also the right justification for punishment. Yet the stakes here are not academic. If criminal law is legitimate at all, its purpose must be not to threaten but to persuade, protect and include. A political community's criminal laws should express the minimal standards of decent treatment it requires as a token of mutual respect. Such respect depends not only on how others treat us, but on what that treatment communicates. A central challenge of reforming policing has been the long-standing insistence from minority communities that racism in policing be directly addressed. Even successful prosecutions of unjustified police violence fail if they refuse to address its racism. Police violence is not only excessive. It has persisted because it is selectively excessive against our least privileged. If they leave what is understood unsaid, prosecutions of police can leave these targeted communities short-changed, deceived and unseen. Communities of color can hardly feel protected against racist violence by prosecutions that treat it as unintended.

CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN AMERICA 1 (2011).

[474] Yankah, *supra* note 11, at 693-696.

[475] *See id.*

Ending the Discriminatory Pretrial Incarceration of People with Disabilities: Liability Under the Americans with Disabilities Act and the Rehabilitation Act

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INTRODUCTION

For about a quarter of the huge number of people behind bars in the United States at any given time, the government's justification for incarceration is not punishment for crime.[1] Rather, our federal, state, and local governments lock up hundreds of thousands of people at a time—millions over the course of a year[2]—to ensure their appearance at a pending criminal or

[1] The most recent data published by the U.S. Bureau of Justice Statistics—in the middle of the COVID-19 pandemic, which significantly slowed new incarceration—tallied 1,691,600 people in jail and prison (1,215,800 in prison, 549,100 in jail). RICH KLUCKOW & ZHEN ZENG, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2020 – STATISTICAL TABLES (Mar. 2022), https://bjs.ojp.gov/content/pub/pdf/cpus20st.pdf [https://perma.cc/CNG4-KLKJ]. Of the individuals in jail (which excludes jail-equivalents in states with consolidated prison/jail systems), nearly 70% (380,700) were unconvicted, "awaiting court action on a current charge or held in jail for other reasons." ZHEN ZENG & TODD D. MINTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES IN 2020–STATISTICAL TABLES (Dec. 2021), https://bjs.ojp.gov/content/pub/pdf/ji20st.pdf [https://perma.cc/9K9S-C4WA]. Thousands more immigrants are incarcerated awaiting immigration adjudication or deportation (although more precise data are scarce). *See* Donald Kerwin with Daniela Alulema & Siqi Tu, *Piecing Together the US Immigrant Detention Puzzle One Night at a Time: An Analysis of All Persons in DHS-ICE Custody on September 22, 2012*, 3 J. ON MIGRATION & HUM. SEC. 330, 330 (2015) (about half of detained immigrants in 2012 had pending removal cases). We took data disclosed in response to FOIA litigation, ACLU Immigrants' Rights Project v. U.S. Immigr. & Customs Enf't, 1:19-cv-07058-GBD (S.D.N.Y.), and tallied the divide on Mar. 15, 2020; of 36,794 detained immigrants, over 60% were awaiting their removal proceedings. Data posted at Resources, Margo Schlanger, Univ. Mich. L. (2022), https://www.law.umich.edu/facultyhome/margoschlanger/Pages/Resources.aspx [https://perma.cc/5GCB-L6QB].

[2] RAM SUBRAMANIAN, RUTH DELANEY, STEPHEN ROBERTS, NANCY FISHMAN & PEGGY MCGARRY, VERA INSTITUTE OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 46 (2015).

immigration proceeding. This type of pretrial incarceration—a term we use to cover both pretrial criminal detention and immigration detention prior to finalization of a removal order—can be very harmful. It disrupts the work and family lives of those detained,[3] harms their health,[4] interferes with their defense,[5] and imposes pressure on them to forego their trial rights and accede to the government's charges in an effort to abbreviate time behind bars.[6] For people with disabilities, however, pretrial incarceration is often even worse; it can utterly destabilize their physical and mental health and devastate their ability to participate in their proceedings. Set aside whether that would be a justifiable imposition if pretrial incarceration were truly necessary for the criminal or immigration systems to process their cases or if it truly served public safety. We demonstrate in this article that existing antidiscrimination law demands alternatives to pretrial incarceration, when it is demonstrably unnecessary and undermines the equal access of people with disabilities to the criminal or immigration processes that purport to justify it. The argument is somewhat novel but founded firmly on existing law: the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973, their regulations, and well-developed, interpretive case law.

We proceed as follows: In Part I, we explain how people in pretrial incarceration are disadvantaged in their access to justice because of their disabilities. In Part II, we establish that the criminal and immigration legal systems are covered by the Rehabilitation Act and the ADA, which mandate that people with disabilities receive "meaningful access"[7] to government operations, including when providing such access requires reasonable modifications of ordinarily applicable policies and procedures. We set out the statutory, regulatory, and case law parameters for determining whether a proposed modification to defendant practices constitutes a "reasonable modification" required by statute, or a "fundamental alteration" not so required.

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[3] *Id.*; *see also* Nick Petersen, *Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas*, 31 CRIM. JUST. POL. REV. 1015, 1017–18 (2019); Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1356–57 (2013); Samantha Artiga & Barbara Lyons, *Family Consequences of Detention/Deportation Effects on Finances, Health, and Well-Being*, KAISER FAM. FOUND. (Sept. 18, 2018), https://www.kff.org/racial-equity-and-health-policy/issue-brief/family-consequences-of-detention-deportation-effects-on-finances-health-and-well-being/ [https://perma.cc/2RGK-66MG].

[4] *See* Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2151–52 (2017); U.S. Comm'n on C.R., With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities 32–36 (2015); Andrew P. Wilmer, Steffie Woolhandler, J. Wesley Boyd, Karen E. Lasser, Danny McCormick, David H. Bor & David U. Himmelstein, MD., *Health and Health Care of U.S. Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666 (2009); Joanne Csete, *Consequences of Injustice: Pre-Trial Detention and Health*, 6 INT'L J. OF PRISONER HEALTH 3 (2010).

[5] *See* Johanna Kalb, *Gideon Incarcerated: Access to Counsel in Pretrial Detention,* 9 U.C. IRVINE L. REV. 101, 121–28 (2018); Wiseman, *supra* note 3, at 1355; Marouf, *supra* note 4, at 2150–51.

[6] Petersen, *supra* note 3, at 1017–18 (2019); Wiseman, *supra* note 3, at 1356; Marouf, *supra* note 4, at 2151, 2151 n.57.

[7] Alexander v. Choate, 469 U.S. 287, 301 (1985).

And we analyze the issue of causation, explaining what it means for deprivations to be "by reason of . . . disability." Part III applies the law, demonstrating that providing alternatives to pretrial incarceration would constitute a reasonable modification to, not a fundamental alteration of, the underlying criminal/immigration processing systems. It also analyzes the differences between our proposals and two quite different disability-related interventions—competency restoration and the appointment of counsel. Part IV examines several specific counterarguments that government defendants might offer. For individuals facing state criminal charges, we suggest that *Younger* abstention poses no obstacle to ADA/Rehabilitation Act enforcement under our theory. For individuals in immigration detention, we rebut, seriatim, several counterarguments: we show that our proffered interpretation of the Rehabilitation Act is consistent with so-called "mandatory detention" Immigration and Nationality Act (INA) provisions and we address several INA jurisdiction-stripping provisions.

This is all very lawyerly. But we want to begin by emphasizing the human stakes for persons such as John Doe, a client of one of the authors.[8] Mr. Doe is an asylum seeker from El Salvador. Like many trauma survivors, he self-medicated with alcohol to deal with his pain, and like many poor people of color in the United States, he came into contact with law enforcement and was arrested on a criminal charge. After a 65-day stint in criminal custody, he was transferred to immigration detention. ICE continued to incarcerate him for four years. During this time, his immigration case repeatedly bounced back and forth between the dockets of several immigration judges and the Board of Immigration Appeals, which remanded his case on three separate occasions for various legal errors.[9]

These four years changed Mr. Doe. He entered ICE custody with undiagnosed post-traumatic stress disorder. His mental health so deteriorated during his years of incarceration that he ultimately developed major depressive disorder with psychotic features.[10] Initially, Mr. Doe was able to work over the phone and in person with his immigration attorney to answer questions about his past and prepare a declaration. But eventually he could manage to communicate regarding traumatic events only in writing.[11] At times, he became unable to communicate at all.[12] He also attempted suicide on at least three occasions while in ICE custody.[13] A psychological evaluator determined that Mr. Doe had reached the very "edge of his capacity to emotionally cope with his current situation."[14]

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[8] Mr. Doe uses a pseudonym to protect his privacy. Temporary Restraining Order, Doe v. Barr, No. 1:20-cv-02263-RMI (N.D. Cal. Apr. 27, 2020), 2020 WL 1984266 [hereinafter Doe v. Barr TRO]; Preliminary Injunction Order, Doe v. Barr, No. 20-cv-02263-RMI (N.D. Cal. July 6, 2020), 2020 WL 3639649 [hereinafter Doe v. Barr PI Order].

[9] Doe v. Barr TRO, at *2; Doe v. Barr PI Order, at *3.

[10] Doe v. Barr TRO, at *3; Doe v. Barr PI Order, at *4.

[11] Records are on file with the authors.

[12] Doe v. Barr TRO, at *3.

[13] *Id.*; Doe v. Barr PI Order, at *4.

[14] Doe v. Barr TRO, at *3; Doe v. Barr PI Order, at *10.

ICE's incarceration of Mr. Doe not only jeopardized his well-being, it also threatened his ability to vindicate his immigration rights. On April 6, 2020, Mr. Doe filed a motion for a temporary restraining order, seeking his release from immigration custody in part as a reasonable accommodation under Section 504 of the Rehabilitation Act. Around one month later, a federal district court ordered his release from custody.[15] The district court never ruled on the Rehabilitation Act claim, but once Mr. Doe left detention and received appropriate treatment in a therapeutic setting, his mental health improved, and he was again able to work with his attorney on his immigration case. In August 2021, Mr. Doe finally won relief at his fourth immigration court hearing, ending his years-long immigration proceedings.[16]

John Doe is one of the lucky ones, because he had a lawyer, because he was released, and because—having been released—he was better able to vindicate his immigration rights and beat deportation. When pretrial incarceration undermines the ability of people with disabilities to participate in their criminal or immigration trials, their disabilities can cause grievous long-term disadvantage—often imprisonment or deportation. We write this article with the certainty that there are many people like Mr. Doe who have been and will continue to be unlawfully deported or imprisoned, absent the intervention of disability law. The argument we outline below offers a path for people with disabilities and legal practitioners to seek release from incarceration in order to obtain equality of opportunity in their judicial proceedings.[17]

I. How Pretrial Incarceration Undermines Equal Court Access for People with Disabilities

Some brief background on the types of institutions in which pretrial incarceration takes place may be useful context for the argument. In state criminal systems, people facing charges may be incarcerated pending granting of bond or, if they don't receive or can't make their bond, pending trial. They are usually held in city and county jails, but a few states with unified jail/prison systems[18] incarcerate them in state facilities.[19] Analogous defendants in the federal criminal system are housed in either federal jails[20] or in

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[15] Doe v. Barr TRO, at *1, *14.

[16] Records on file with the authors.

[17] Because we are analyzing equal access to the program of criminal/immigration adjudication, our argument does not apply to post-judgment incarceration. Disability antidiscrimination law certainly covers non-pretrial incarceration, and there may be viable decarcerative arguments in particular circumstances, but they are not our topic here.

[18] Six states have unified systems: Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont. *See* Nat'l Inst. Corr., State Statistics Information, https://nicic.gov/projects/state-statistics-information [https://perma.cc/L4FS-M8GS]. For background, see Nat'l Inst. Corr., A Review of the Jail Function within State Unified Corrections Systems (Sept. 1997), https://nicic.gov/sites/default/files/014024.pdf [https://perma.cc/4GUM-C4CF].

[19] *See* sources cited *supra* note 1.

[20] Federal jails are denoted "Metropolitan Correctional Centers," "Metropolitan Detention Centers," or "Federal Detention Centers." *See* U.S. Dep't of Just., Bureau of Pris-

city or county jails under a federal contract.[21] During immigration court proceedings, the federal government may detain people it seeks to deport in federal contract facilities devoted in part or entirely to immigration detention or in city or county jails under federal contract.[22] Some are there because they cannot make or are not granted bond; others are deemed statutorily ineligible for bond because of their criminal history.[23]

Pretrial incarceration obstructs court access for people with disabilities in a variety of ways beyond the experience of non-disabled people. Incarceration can interfere with detained people's physical access to court buildings. And even though lawyers are particularly important for people with disabilities, incarceration undermines their efforts to locate and retain an attorney, as well as their communication with lawyers they manage to retain and with court officials. For the large majority forced to move forward without an attorney, incarceration places often insurmountable obstacles to locating and speaking with potential witnesses, obtaining evidence, and conducting legal research. Equally important, incarceration can exacerbate people's disabilities, separating them from necessary treatment and undermining their disability-related coping strategies, rendering them too sick or injured to manage their court cases, cooperate with their counsel, or participate in their hearings. In the worst-case scenario, it can kill them, which obviously has the corollary effect of depriving them of the opportunity to fight their cases.

These kinds of effects are run-of-the-mill consequences of carceral conditions for people with disabilities. Across the United States, the agencies operating jails, prisons, and immigration detention centers frequently fail to implement basic disability accessibility measures.[24] Securing equipment needed for safety, mobility, and communication—hearing aids, eyeglasses, canes, special shoes, crutches, wheelchairs, etc.—often requires aggressive advocacy and is never guaranteed.[25] Incarcerated people are regularly denied

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ONS, PROGRAM STATEMENT 7331.04: PRETRIAL INMATES 3 (2003), https://www.bop.gov/policy/progstat/7331_004.pdf [https://perma.cc/QYR7-MRQU].

[21] *Defendant and Prisoner Custody and Detention*, U.S. MARSHALS SERV. (June 30, 2022), https://www.usmarshals.gov/prisoner/detention.htm [https://perma.cc/9EJZ-PJCK].

[22] *See Detention Facilities*, U.S. IMMIGR. & CUSTOMS ENF'T (2022), https://www.ice.gov/detention-facilities [https://perma.cc/V8YB-XVXS].

[23] *See infra* Section III.D.

[24] *See*, *e.g.*, Rachel Seevers, *Making Hard Time Harder: Programmatic Accommodations for Inmates with Disabilities Under the Americans with Disabilities Act*, DISABILITY RIGHTS WASH. (June 22, 2016), https://www.disabilityrightswa.org/making-hard-time-harder-programmatic-accommodations-inmates-disabilities-americans-disabilities-act/print/ [https://perma.cc/98ZT-MDZ7].

[25] For examples of prison/jail denials of mobility aids, see Complaint, Cardew v. N.Y. Dep't of Corr. and Cmty. Supervision, No. 6:21-cv-06557 (W.D.N.Y. 2021), http://clearinghouse.net/doc/112486 [https://perma.cc/KMY4-MVNX] (class action lawsuit against New York Department of Corrections for denying mobility aids and providing broken and unusable shared wheelchairs); Complaint, Terrill v. Oregon, No. 6:21-cv-00588-AA (D. Or. 2021), http://clearinghouse.net/doc/112037 [https://perma.cc/Y459-AYMX] (class action lawsuit against Oregon Department of Corrections for denying durable medical equipment to persons with disabilities who lack funds to pay for the device); DISABILITY RTS. CAL., REPORT ON THE INSPECTION OF THE SACRAMENTO COUNTY JAIL (CONDUCTED APRIL 13–14, 2015)

access to needed medication. The conditions of custody also make it more challenging for people with disabilities to self-accommodate. Zoe Brennan-Krohn, staff attorney at the ACLU Disability Rights Project, explains that many people with disabilities need stability and control over their own routines to self-accommodate and live fully with their disabilities.[26] The lack of adequate accommodations and treatment can be devastatingly destructive. Each of this article's authors knows this from up-close observation, and the interviews, reports, and other written sources cited in this section confirm those experiences.

There are infinite permutations in how pretrial incarceration undermines equal access to court proceedings for people with disabilities. Below, we overview some frequent consequences of incarceration on the lives of people with physical disabilities, visual and auditory disabilities, intellectual and psychiatric disabilities, and people with chronic illnesses.

A. Physical Disabilities

Incarceration disadvantages people with physical disabilities in their judicial proceedings in many ways. Perhaps most common is that it limits their ability to meet with counsel or attend court hearings. Corene Kendrick, Deputy Director of the ACLU National Prison Project, recounts a situation when the single accessible vehicle at one facility broke down; correctional officers directed defendants with ambulatory disabilities to either find a way to get into an inaccessible vehicle or delay their court hearings.[27] Similarly, ICE both denied any ambulatory aids to Emanuel Thiersaint, a detained immigrant with an amputated leg, and refused to help him get in and out of inaccessible vans and airplanes the government used to transport him between detention facilities and court hearings.[28] Another form of disadvantage accrues when the inaccessible features of carceral environments[29] injure people with physical disabilities; obviously this is problematic in itself, but it also

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19 (Oct. 15, 2015), https://www.disabilityrightsca.org/system/files/file-attachments/702701.pdf [https://perma.cc/9S37-UEX6] (jail-issued wheelchairs lack brakes); DISABILITY RIGHTS CALIFORNIA, REPORT ON INSPECTION OF THE SANTA BARBARA COUNTY JAIL (Conducted Apr. 2, 2015), https://www.disabilityrightsca.org/publications/report-on-inspection-of-the-santa-barbara-county-jail [https://perma.cc/N2VQ-H2MW] (jail-issued wheelchair has faulty brakes); Order Granting Plaintiffs' Motion, Armstrong v. Schwarzenegger, 261 F.R.D. 173, No. 94-cv-2307 CW (N.D. Cal. 2009), *aff'd in part, vacated in part,* 622 F.3d 1058 (9th Cir. 2010) (California department of corrections found to confiscate medically prescribed assistive devices).

[26] Zoom Interview by Roxana Moussavian with Zoe Brennan-Krohn, Staff Att'y at Disability Rts. Program, Am. C.L. Union (Jan. 26, 2022).

[27] Zoom Interview by Roxana Moussavian with Corene Kendrick, Deputy Dir., Nat'l Prison Project, Am. C.L. Union (Jan. 7, 2021).

[28] Complaint, Emanuel Thiersaint v. DHS, No. 1:18-cv-12406-PBS (D. Mass 2018), at 1, 8–18.

[29] *See, e.g.*, JAMELIA MORGAN, AM. C.L. UNION, CAGED IN: THE DEVASTATING HARMS OF SOLITARY CONFINEMENT ON PRISONERS WITH PHYSICAL DISABILITIES (2017), https://www.aclu.org/sites/default/files/field_document/010916-aclu-solitarydisabilityreport-single.pdf [https://perma.cc/XL26-5U8J].

limits their ability to meet with counsel or attend court hearings. Mr. Thiersaint was injured on multiple occasions by ICE's refusal to provide assistance; at least once, he was forced to soil himself.[30] The trauma of his discrimination compromised Mr. Thiersaint's ability to think about his immigration case, much less communicate with an attorney about exactly what was happening to him. It was not until after he was released from ICE incarceration and received years of quality medical and mental health care that he was able to tell his lawyer (one of the authors) the details of all that ICE had forced him to endure. Similarly, another one of an author's clients had limited mobility and suffered from a urinary infection in immigration detention. Ultimately, he spent several weeks in a hospital where he had no access to a telephone for attorney calls and could not receive visitors of any kind. The government also rescheduled a court hearing during the period of the client's hospitalization, prolonging the duration of his incarceration.

In addition, the incomplete accommodations that are sometimes offered can themselves be extremely unequal. Consider, for example, the case of Manuel Amaya Portillo,[31] who came to the United States seeking asylum based on the persecution and harms he faced in Honduras due to his physical disabilities.[32] Mr. Portillo was born with a congenital condition that stunted his height and the formation of his legs and hands. Because he was incarcerated, the first step of his asylum process took place over the telephone, which meant that the asylum officer could not see the ways in which his disabilities make him a target for persecution; the officer therefore deemed his request for asylum not credible. ICE continued to incarcerate Mr. Portillo under imminent threat of deportation for months, until lawyers, including attorneys with the American Civil Liberties Union, successfully intervened. Mr. Portillo's legal team advocated for him to appear before immigration officials over a video call, to make it possible for immigration officials to see the reality of his congenital condition.[33] Ultimately, in response to the request, immigration officials decided to find him credible without an additional interview, stopping Mr. Portillo's imminent deportation. Mr. Portillo's story is far from unique. Even represented individuals in pretrial incarceration may be sharply disadvantaged by it, because of their disability. And Mr. Portillo's pre-representation loss underscores the even greater disadvantage to incarcerated persons with physical disabilities who are forced to manage their own proceedings without help from advocates.

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[30] Complaint, *supra* note 28, at 11.

[31] Letter from Rachel L. Chappell, Att'y, Rozas & Rozas LLC, Eunice Cho, Senior Staff Att'y, Am. C.L. Union Nat'l Prison Project, & Katie Schwartzmann, Director, Am. C.L. Union La., to Deportation Officer Robert Gentry, Immigr. & Customs Enf't (Jan. 8, 2020), https://www.laaclu.org/sites/default/files/field_documents/2020-01-08_amaya_letter.pdf [https://perma.cc/BN24-BRLJ].

[32] *Id.*; Zoom Interview by Roxana Moussavian with Eunice Cho, Senior Staff Att'y at Nat'l Prison Project, Am. C.L. Union (Jan. 7, 2021).

[33] Zoom Interview with Eunice Cho, *supra* note 32.

B. Chronic Illnesses

The lack of adequate medical care provided by carceral facilities can be especially dangerous for people with chronic illnesses that require regular medical treatment. Deteriorating health often makes it far harder for individuals in pretrial incarceration to focus on or participate in their criminal or immigration cases. If worse comes to worst, their death is the ultimate bar to meaningful access to their court proceedings.[34]

This set of issues may affect many people, because the prevalence of chronic illness among incarcerated people is very high. In one key survey, the Department of Justice found that nearly 45% of people incarcerated in jail reported having been diagnosed with a (listed) chronic illness and 14% with a serious infectious disease, compared to 27% and 5% in non-incarcerated population:[35]

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[34] *See, e.g.*, Michael Barajas, *When Asthma in Jail Becomes a Death Sentence*, TEXAS OBSERVER (Sept. 2, 2020), https://www.texasobserver.org/when-asthma-in-jail-becomes-a-death-sentence/ [https://perma.cc/FVT4-36FZ].

[35] LAURA M. MARUSCHAK, MARCUS BERZOFSKY & JENNIFER UNANGST, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES 2011–12 (2015), https://bjs.ojp.gov/content/pub/pdf/mpsfpji1112.pdf [https://perma.cc/E8AV-N4HA]. Non-incarcerated population estimates were standardized to match the jail population by sex, age, race, and Hispanic origin. *See also* Margo Schlanger, *Prisoners with Disabilities, in* 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 295 (Erik Luna ed., 2017).

TABLE 1: SELF-REPORTED CHRONIC ILLNESSES IN JAIL COMPARED TO NON-INCARCERATED POPULATIONS (DOJ, 2016)

	Jail (%)	**Non-incarcerated (%)**
Ever had a chronic condition	**44.7**	**26.9**
Cancer	3.6	
High blood pressure/hypertension	26.3	13.9
Stroke-related problems	2.3	0.5
Diabetes/high blood sugar	7.2	4.5
Heart-related problems	10.4	1.9
Kidney-related problems	6.7	
Arthritis/rheumatism	12.9	
Asthma	20.1	11.4
Cirrhosis of the liver	1.7	0.1
Ever had an infectious disease	**14.3**	**4.6**
Tuberculosis	2.5	0.4
Hepatitis	6.5	0.9
Hepatitis B	1.7	
Hepatitis C	5.6	
STDs	6.1	3.5
HIV/AIDS	1.3	0.3

The consequences of medical neglect can be extremely dangerous. For example, an unfortunate body of case law demonstrates the difficulties faced by incarcerated people with diabetes, who may experience life-threatening symptoms and even die as a result of medical neglect in jail or prison.[36] Similarly, asthma someone keeps under control on the outside can become life threatening during a jail or prison stint,[37] because incarceration is accompanied by indoor allergens, exposure to infection, and poor access to on-de-

[36] For a sampling of cases in which plaintiffs with diabetes alleged or proved grave deterioration because of medical neglect behind bars, see Chapman v. Santini, 805 F. App'x 548 (10th Cir. 2020); Anders v. Bucks Cnty., 2014 WL 1924114, at *22 (E.D. Pa. 2014); Ortiz v. City of Chicago, 656 F.3d 523, 532 (7th Cir. 2011); Phillips v. Roane Cnty., 534 F.3d 531, 541 (6th Cir. 2008); Flowers v. Bennett, 123 F. Supp. 2d 595, 601 (N.D. Ala. 2000); Roberson v. Bradshaw, 198 F.3d 645, 646–47 (8th Cir. 1999); Weyant v. Okst, 101 F.3d 845, 849–50 (2d Cir. 1996).

[37] *See, e.g.*, Adams v. Poag, 61 F.3d 1537, 1539–41 (11th Cir. 1995) (describing how a "lifelong asthma sufferer" died of acute respiratory failure within a month of being incarcerated in a state prison); Hagan v. Cal. Forensic Med. Grp., No. 07-cv-1095 LKK/DAD, 2009 WL 728465, at *1–2 (E.D. Cal. 2009) (explaining how an inmate died "from complications relating to severe asthma shortly after being transferred" from a county jail to state prison).

mand devices like inhalers.[38] Immigration detention, too, creates risks to people with chronic illnesses because of those illnesses.[39] The ongoing COVID-19 pandemic underscores the point, for all kinds of incarceration. Comorbidities combined with dangerous incarcerative conditions have led to raging disease in carceral facilities. While COVID-19 infection rates and mortality in carceral facilities did not approach the devastating levels seen in nursing homes,[40] both have been far higher than in the community: infections among incarcerated people have been over five times the nonimprisoned rate; mortality rates have been triple the nonimprisoned rate.[41] Not every illness raises the claim this article explores. But where pretrial incarceration exacerbates chronic illness and concomitantly interferes with access to criminal or immigration proceedings, release is not merely humane but may be required by the ADA and Rehabilitation Act's guarantee of meaningful access to government programs.

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[38] Dale L. Morse, Morris A. Gordon, Thomas Matte & Gordon Eadie, *An Outbreak of Histoplasmosis in a Prison*, 122 AM. J. EPIDEMIOLOGY 253 (1985); Charles W. Hoge, Mary R. Reichler, Edward A. Dominguez, John C. Bremer, Timothy D. Mastro, Katherine A. Hendricks, Daniel M. Musher, John A. Elliott, Richard R. Facklam & Robert F. Breiman, *An Epidemic of Pneumococcal Disease in an Overcrowded, Inadequately Ventilated Jail*, 331 NEW ENG. J. MED. 643 (1994); Hernandez v. Cnty. of Monterey, 110 F. Supp. 3d 929, 951–52, 952 nn.169–70 (N.D. Cal. 2015) (describing the "significant evidence" provided by the plaintiffs that "inmates suffering from hyperternsion and asthma did not get their community prescriptions timely continued"); Olson v. Sherburne Cnty., No. 07-cv-4757JNE/JJG, 2009 WL 1766619, at *3 (D. Minn. June 22, 2009) (explaining how an inmate went into "respiratory failure triggered by allergens in his jail cell and inability to receive timely medical care").

[39] *See, e.g.*, Temporary Restraining Order, Vargas v. Jennings, No. 20-cv-5785-PJH, 2020 WL 5074312, at *1 (N.D. Cal. Aug. 23, 2020) (describing how a non-citizen from Mexico fell into a diabetic coma after roughly four months in immigration custody). *See generally* AM. C.L. UNION, DET. WATCH NETWORK & NAT'L IMMIGRANT JUST. CTR., FATAL NEGLECT: HOW ICE IGNORES DEATHS IN DETENTION (2016), https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnnijc.pdf [https://perma.cc/Q9CT-EKZ2].

[40] In the United States, nursing home residents have been forty-five times more likely to die of COVID-19 than the general population. *See COVID-19 Nursing Home Data*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Nov. 28, 2021), https://data.cms.gov/covid-19/covid-19-nursing-home-data [https://perma.cc/5WSP-E7C8] (reporting 140,794 total COVID-19 deaths among nursing home residents); *Total Number of Residents in Certified Nursing Facilities*, KAISER FAM. FOUND. (2022), https://www.kff.org/other/state-indicator/number-of-nursing-facility-residents/ [https://perma.cc/8K4J-FDSX] (1,290,177 residents in certified nursing facilities in the U.S. in 2020) and *COVID Data Tracker Weekly Review*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 10, 2021), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html#more-info [https://perma.cc/R4JC-CMAQ] (790,766 total COVID-19 deaths in the United States), *QuickFacts*, U.S. CENSUS BUREAU (2021), https://www.census.gov/quickfacts/fact/table/US# [https://perma.cc/7DDX-FL76] (estimating U.S. population at 328,239,523 as of July 1, 2019). As of November 25, 2020, "deaths in long-term care facilities account[ed] for 40% of all COVID-19 deaths" nationwide. Priya Chidambaram, Rachel Garfield & Tricia Neuman, *COVID-19 Has Claimed the Lives of 100,000 Long-Term Care Residents and Staff*, KFF (Nov. 25, 2020), https://www.kff.org/policy-watch/covid-19-has-claimed-the-lives-of-100000-long-term-care-residents-and-staff/ [https://perma.cc/6EQ6-EY8B].

[41] *See* Brendan Saloner, Kalind Parish, & Julie A. Ward, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 JAMA 602 (2020) (making both findings; mortality figures are after adjusting for age and sex distributions).

C. Intellectual and Developmental Disabilities

For people with intellectual and developmental disabilities, pretrial incarceration may undermine equal access to court proceedings by disrupting their lives in ways they cannot manage. Carceral environments run on a set of inflexible rules that incarcerated people cannot control or change. The ability to comprehend or follow those rules is especially challenging for people with cognitive disabilities and they can impede their ability to access their court proceedings.[42] Disability rights attorney Pilar Gonzalez Morales reports, for example, that she has numerous clients with intellectual disabilities who have had trouble understanding the jail or detention facility's schedule of times that phones are available for clients to call their attorneys.[43]

People with developmental disabilities often have specific sensory needs that go unmet in a carceral environment. Gonzalez Morales recalls a specific client with autism whom a jail frequently punished for not standing up for a daily stand-up count, during which every detained person was required to recite his name and inmate number. The client found compliance very difficult: sometimes he was distracted by his (disability-related) need to compulsively and repeatedly wash his hands; sometimes various sensory distractions frustrated him; sometimes he would be rehearsing something in his mind at count time and was unable to put it aside and follow orders. His noncompliance often led to physical confrontations by jail guards, who did not understand that touching him was still more triggering, because of his autism. Gonzalez Morales recounts how it was difficult for her to focus on legal issues in the client's case because his incarceration created a whole set of emergency situations. She also explains that it was hard to do what the client wanted, because the client was constantly in a state of trauma response that compromised his ability to articulate his longer-term needs. The client was put into isolation several times as a result of these conflicts, where she could not reach him due to restricted phone access and rules prohibiting in-person visits, even by attorneys.[44]

D. Psychiatric Disabilities

For people with psychiatric disabilities, the way incarceration undermines court access is a little different. The most basic issue is that, for people with mental illness, pretrial incarceration may subvert its own purpose (facilitating court proceedings) by worsening their mental health to the point that

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[42] Chiara Eisner, *Prison Is Even Worse When You Have a Disability Like Autism,* MARSHALL PROJECT (Nov. 2, 2020), https://www.themarshallproject.org/2020/11/02/prison-is-even-worse-when-you-have-a-disability-like-autism [https://perma.cc/5P9S-YLCZ].

[43] Telephone Interview by Roxana Moussavian with Pilar Gonzalez Morales, Dir. of Accessibility Project, Civil Rights Education and Enforcement Center (Dec. 2, 2021).

[44] *Id.* Along similar lines, consider the case of Reginald Latson, described in detail in Jasmine E. Harris, *Reckoning with Race and Disability*, 130 YALE L.J. F. 916 (2021), https://www.yalelawjournal.org/forum/reckoning-with-race-and-disability [https://perma.cc/EVP6-SZH4].

they are no longer able to participate equally in their own criminal or immigration defense.

Common conditions of incarceration exacerbate mental health conditions.[45] For example, studies demonstrate that exacerbation of psychotic symptoms is predicted by prior exposure to increased noise and light levels.[46] Other studies show that factors known to disrupt normal sleep patterns, such as jet lag or shift work, are associated with increased severity of psychotic symptoms;[47] sleep disruption is common in detention. These non-incarceration studies offer a scientific foundation for the common observation by lawyers—including the authors—that clients can grow increasingly unable to work with counsel and access court proceedings due to incarceration's exacerbation of their mental illness.[48] Multiple individuals with schizophrenia-spectrum disorders have reported to one of the authors that their lived experiences while incarcerated are consistent with these studies. Clients reported increased psychotic symptoms, such as hallucinations or extreme paranoia, when they were unable to sleep for days on end due to a jail's chronic noise or policies mandating that lights remain on twenty-three to twenty-four-hours a day. Clients who are survivors of sexual violence were retraumatized by the invasive nature of mandatory pat searches. As some clients became increasingly symptomatic, they reported both increasingly intense and new

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[45] Xavier Becerra, *The California Department of Justice's Review of Immigration Detention in California*, CAL. DEP'T OF JUST., OFF. ATT'Y GEN. (Feb. 2019), https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/immigration-detention-2019.pdf [https://perma.cc/HYR9-3L5V]; Staff of Subcomm. on C.R. & C.L, Comm. on Oversight & Reform, 116th Cong., THE TRUMP ADMINISTRATION'S MISTREATMENT OF DETAINED IMMIGRANTS: DEATHS AND DEFICIENT MEDICAL CARE BY FOR-PROFIT DETENTION CONTRACTORS (2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-09-24.%20Staff%20Report%20on%20ICE%20Contractors.pdf [https://perma.cc/V6NT-E4RY]; CARLTON I. MANN, U.S. DEP'T OF HOMELAND SEC. MANAGEMENT OF MENTAL HEALTH CASES IN IMMIGRATION DETENTION (OIG-11-62) (2011), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_11-62_Mar11.pdf [https://perma.cc/G24L-SCFX]; JOHN ROTH, U.S. DEP'T OF HOMELAND SEC., ICE STILL STRUGGLES TO HIRE AND RETAIN STAFF FOR MENTAL HEALTH CASES IN IMMIGRATION DETENTION (OIG-16-113-VR) (2016), https://trac.syr.edu/immigration/library/P12191.pdf https://perma.cc/73RY-44PX]; JOHN V. KELLY, U.S. DEP'T OF HOMELAND SEC. CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES (OIG-19-47) (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf [https://perma.cc/AVA8-G7AT]; Jackie Gonzalez, Bianca Sierra Wolff & Richard Diaz, *Immigrant Detention in California: Opportunities for Accountability*, DISABILITY RTS. CAL. (Aug. 10, 2021), https://www.disabilityrightsca.org/system/files/file-attachments/Detention_Conditions_Report.pdf [https://perma.cc/ME9N-RTCH]; REBECCA GAMBLER, U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-596, IMMIGRATION DETENTION: ICE SHOULD ENHANCE ITS USE OF FACILITY OVERSIGHT DATA AND MANAGEMENT OF DETAINEE COMPLAINTS (2020).

[46] Rui Wang, Weichen Wang, Min S. H. Aung, Dror Ben-Zeev, Rachel Brian, Andrew T. Campbell, Tanzeem Choudhury, Marta Hauser, John Kane, Emily A. Scherer & Megan Walsh, *Predicting Symptom Trajectories of Schizophrenia using Mobile Sensing*, 1 PROCEEDINGS ACM ON INTERACTIVE, MOBILE, WEARABLE & UBIQUITOUS TECHS. 1–24 (2013).

[47] Gregory Katz, *Jet Lag and Psychotic Disorders*, 13 CURRENT PSYCHIATRY REPS. 187–192 (2011).

[48] *See*, *e.g.*, Complaint, Doe v. Barr, No. 3:20-cv-2263 (N.D. Cal. 2020), 2020 WL 2733928, at *1; Complaint, Domingo v. Barr, No. 3:20-cv-06089 (N.D. Cal. 2020), 2020 WL 5798238, at *1.

delusions. These harmful impacts of carceral environments increase with time; at least four studies of immigration detention in the United States and Australia have found that a lengthening duration of incarceration is associated with increased severity of mental health symptoms.[49]

In addition to the stressors of the detention environment, inadequate medical and mental health care behind bars can cause severe harm to detained peoples' mental health. The inadequacy of care in pretrial incarceration is widely reported,[50] and extended periods of untreated psychotic symptoms are associated with increased risk for treatment-resistant symptoms, more frequent and longer subsequent psychotic episodes, and poorer long-term functional outcomes.[51] Warning signs for psychiatric illnesses are often missed.[52] Each of the authors knows of many individuals with schizophrenia-spectrum disorder who have become actively psychotic while incarcerated.

In some circumstances, more robust mental health care may prevent decompensation in custody. But all too often, such care is either not on offer or insufficient. On the outside, additional modalities of care, medications, and family or community supports can change that result.

One of the authors has personally seen incarcerated clients' mental decompensation limit their access to court proceedings. Several clients initially able to answer basic questions about their past later had trouble recounting those same memories. And several clients previously able to answer questions over the phone in their first weeks of incarceration later avoided communicating with counsel or others about their lives. As described in the Introduction, Mr. Doe, who had post-traumatic stress disorder, ultimately found that he needed to communicate about the details of his past only in writing. For several others with schizophrenia-spectrum disorder, months of incarceration left them able to communicate only about their delusions, not their actual experiences. A successful outcome in these clients' cases de-

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[49] Janette P. Green & Kathy Eagar, *The Health of People in Australian Immigration Detention Centres*, 192 MED. J. OF AUSTL. 65 (2010); Allen S. Keller, Barry Rosenfeld, Chau Trinh-Shevrin, Chris Meserve, Emily Sachs, Jonathan A. Leviss, Elizabeth Singer, Hawthorne Smith, John Wilkinson, Glen Kim, Kathleen Allden & Douglas Ford, *Mental Health of Detained Asylum Seekers*, 362 LANCET 1721 (2003); Zachary Steel, Derrick Silove, Robert Brooks, Shakeh Momartin, Bushra Alzuhairi & Ina Susljik, *Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees*, 188 BRITISH J. PSYCHIATRY 58 (2018); Peter Young & Michael S. Gordon, *Mental Health Screening in Immigration Detention: A Fresh Look at Australian Government Data*, 24 AUSTRALASIAN PSYCHIATRY 19 (2016).

[50] *See, e.g.*, Andrea Craig Armstrong, *Prison Medical Deaths and Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 79 (2022); KELLY, *supra* note 45; *CODE RED The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention*, HUMAN RIGHTS WATCH (June 20, 2018), https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration [https://perma.cc/T8SA-TA65].

[51] Robin Emsley, Bonginkosi Chiliza & Laila Asmal, *The Evidence for Illness Progression after Relapse in Schizophrenia*, 148 SCHIZOPHRENIA RSCH 117 (2013).

[52] *See, e.g.*, Molly Grassini, Sophie Terp, Briah Fischer, Sameer Ahmed, Madeline Ross, Niels Frenzen,Elizabeth Burner & Parveen Parmar, *Analysis of Deaths Among Individuals in Immigration and Customs Enforcement (ICE) Detention, 2011-2018*, JAMA NETWORK OPEN, July 2021, at 1–11, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2781682 [https://perma.cc/QX9P-39H2].

pended on a written declaration or oral testimony of their stories. But despite multiple attempts, no such evidence could be prepared, because incarceration had so severely exacerbated their disabilities. In one case, the immigration judge cited the absence of testimony in denying relief that might otherwise have been available.[53] The same author has questioned whether her clients were able to make legal decisions conveying their true preferences, given how gravely pretrial incarceration had undermined their ability to think and communicate.

Finally, incarcerated people with mental illness are disproportionately assigned to extended solitary confinement, which is widely documented to cause physical and mental decompensation, and even lead to suicide.[54] Death by suicide is the starkest example of how a lack of disability accommodations can curtail the legal rights of individuals with disabilities in court.

E. Visual and Auditory Disabilities

Finally, incarcerated people who have visual and/or auditory disabilities face the already-described disadvantages, as well as others, in their court proceedings. Incarceration takes people away from the spaces in which they have implemented individualized methods to enable their own independence. So as with detained people with mobility impairments, incarceration can create obstacles for people with visual impairments to gain access to physical spaces important to protecting their legal rights, such as interview and hearing rooms and law libraries. Incarceration also limits the ability of blind and low-vision people to communicate with their attorneys.[55] Written communication may be particularly challenging for people who are blind or

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[53] Court transcript on file with authors.

[54] *See* Complaint, Youngers v. Mgmt. & Training Corp., No. 20-cv-00465 (D. N.M. 2020); *Complaint for Violations of Civil, Constitutional, and Disability Rights of Chuong Woong Ahn A# 042-028-791, at Mesa Verde ICE Processing Facility*, DISABILITY RTS. CAL. (Feb. 25, 2020), https://www.disabilityrightsca.org/system/files/file-attachments/2021-02-25_Ahn_Complaint.pdf [https://perma.cc/23YF-7DZL]; Jose Olivares, *ICE Review of Immigrant's Suicide Finds Falsified Documents, Neglect, And Improper Confinement*, INTERCEPT (Oct. 23, 2021), https://theintercept.com/2021/10/23/ice-review-neglect-stewart-suicide-corecivic/ [https://perma.cc/A3PN-SK8J]; Aaron J. Fischer, Rebecca Cervenak & Kim Swain, *Suicides In San Diego County Jail*, DISABILITY RTS. CAL. (Apr. 2018), https://www.disabilityrightsca.org/system/files/file-attachments/SDsuicideReport.pdf [https://perma.cc/79PZ-ZAEY]; MORGAN, *supra* note 29; Kayley Bebber, *Cruel But Not Unusual: Solitary Confinement in Washington's County Jails*, DISABILITY RTS. WASH. (Nov. 2016), https://www.disabilityrightswa.org/wp-content/uploads/2017/12/CruelButNotUnusual_November2016.pdf [https://perma.cc/2GRM-9Y6W]; Vega v. Davis, 572 F. App'x 611 (10th Cir. 2014); Cunningham v. Fed. Bureau of Prisons, 709 F. App'x 886 (10th Cir. 2017); Parveen Parmar, Madeline Ross, Sophie Terp, Naomi Kearl, Briah Fischer, Molly Grassini, Sameer Ahmed, Niels Frenzen & Elizabeth Burner, *Mapping Factors Associated with Deaths in Immigration Detention in the United States, 2011–2018: A Thematic Analysis*, 2 LANCET REG'L HEALTH – AMS. 100040 (2021); Sophie Terp, Sameer Ahmed, Elizabeth Burner, Madeline Ross, Molly Grassini, Briah Fischer & Parveen Parmar, *Deaths in Immigration and Customs Enforcement (ICE) Detention: FY 2018-2020*, 8 AIMS PUB. HEALTH 81 (2021).

[55] Zoom Interview by Roxana Moussavian with Eve Hill, Partner, Brown Goldstein & Levy (Jan. 11, 2022).

low-vision, but the accommodations typically made available—assignment of another detainee to "scribe"—undermine privacy and therefore court-access equality. For detained people who are deaf or hard of hearing, the absence of auxiliary aids and services such as hearing aids, amplifiers, video phones, and sign language interpreters can render attorney communication and court proceedings mostly or entirely inaccessible. Moreover, jail authorities typically disallow detained people with these kinds of needs to solve their own problems; they cannot bring in their own interpreters or use their own equipment. Thus they are far worse off in their court proceedings than if they were not incarcerated.

Interviews with disability rights lawyers concretizes each of these general points. For example, attorneys Eve Hill and Michael Nunez have represented blind people in jail. Hill and Nunez have both found that carceral environments generally lack the electronic communications and screen reader technologies many of their blind and low-vision clients rely on, eliminating or limiting client access to the print documents so crucial to legal cases—retainer agreements, complaints, answers, etc.[56] Both have also found that even in facilities where screen reader technologies are provided, they are not made available in confidential settings, so blind people who use those technologies are unable to communicate privately with their counsel. Where assistive technology or other electronic communications are out of reach, an attorney may try to substitute Braille or large print documents. But, Nunez explains, these steps help only for some: people who know Braille or who have sufficient vision for large print. This covers only a small portion of the blind or low vision population; knowledge of Braille is rare,[57] and even people who can read large print for a limited time may get headaches or otherwise be unable to read long legal documents.[58] Hill has used audio CDs to communicate with blind clients when facilities have CD players and permit clients to use them.[59] For most incarcerated people who are blind or low-vision, the usual accommodation their jails offer is to have a sighted officer or other detained person read documents aloud. This obviously eliminates the disabled individual's privacy and often provides only poor-quality access, depending on the care and qualifications of readers not trained to read legal documents.[60] Blind people's inability to communicate fully with their attorneys and to access legal documents makes them less likely to reach a positive outcome in their case, compared with their prospects with the avenues of communication available outside of custody. Both Nunez and Hill describe hearing from blind and low-vision people who were unrepresented that they

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[56] *Id*; Zoom Interview by Roxana Moussavian with Michael Nunez, Senior Counsel, Rosen Bien Galvan & Grunfeld LLP (Jan. 27, 2022) [hereinafter Nunez Interview].

[57] There are no reliable statistics on Braille literacy for blind people, though many sources estimate a rate of 10%. *See* Rebecca M. Sheffield, France M. D'Andrea, Valerie Morash & Sarah Chatfield, *How Many Braille Readers? Policy, Politics, and Perception*, 116 J. VISUAL IMPAIRMENT & BLINDNESS 14 (2022).

[58] Nunez Interview, *supra* note 56.

[59] Zoom Interview with Eve Hill, *supra* note 55.

[60] *Id.*

missed deadlines for asserting their rights and defending themselves in court because of communication challenges caused by incarceration.[61]

People who are deaf or hard of hearing and incarcerated are likewise disadvantaged in court proceedings because of their disability. Carceral environments routinely deprive people of adequate hearing aids, ensuring incarcerated people lack the aids for court proceedings.[62] In a typical example, after a client of one of the authors repeatedly told an immigration judge that he needed a hearing aid for court and that medical professionals in detention had denied him such an aid, the judge simply stated that the client's medical care in detention was not the judge's responsibility.[63] This client was also drastically limited in communications with his attorney because telephone calls were nearly impossible for him without a hearing aid. Other clients need but lack access to captioned telephones.[64] While some hard-of-hearing people may be better able to communicate with their lawyers if meetings are in person, telephonic communication is vitally important, particularly given the often remote locations of incarcerating facilities. And when individuals who are deaf or hard of hearing are held in solitary confinement, it is still more difficult for them to communicate with attorneys because they are so often denied legal visits and access to telephones.[65]

For detained people who use sign language to communicate, the situation is even worse. Claudia Center, the Legal Director of the Disability Rights Education & Defense Fund, reports that many jails and detention facilities frequently lack video communication technology or sign language interpreters;[66] carceral facilities across the country continue to refuse to offer

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[61] *Id*; Nunez Interview, *supra* note 56.

[62] TALILA A. LEWIS, #DEAFINPRISON CAMPAIGN FACT SHEET (2018), https://behearddc.org/wp-content/uploads/2018/11/DeafInPrison-Fact-Sheet-.pdf [https://perma.cc/NS2H-6LT2]; Rebecca Vallas, *The Mass Incarceration of People With Disabilities in America's Jails and Prisons*, DISABLED BEHIND BARS (July 18, 2016), https://www.americanprogress.org/issues/criminal-justice/reports/2016/07/18/141447/disabled-behind-bars/ [https://perma.cc/XN4Q-23MJ].

[63] Immigration court transcript on file with the authors.

[64] Zoom Interview by Roxana Moussavian with Claudia Center, Legal Dir., Disability Rts. Educ. & Def. Fund (Jan. 10, 2022).

[65] Telephone Interview with Pilar Gonzalez Morales, *supra* note 43; Order, *supra* note 25 (California department of corrections found to place people with disabilities in administrative segregation due to a lack of accessible housing); LEWIS, *supra* note 62; Talila A. Lewis, *HEARD Publishes Second Report on Abuse of Deaf Prisoners in Florida*, HELPING EDUC. TO ADVANCE THE RTS. OF THE DEAF (May 23, 2014), https://behearddc.org/heard-publishes-second-report-on-abuse-of-deaf-prisoners-in-florida/ [https://perma.cc/W259-4UK2]; James Ridgeway & Jean Casella, *Deaf Prisoners in Florida Face Abuse and Solitary Confinement*, SOLITARY WATCH (May 21, 2013), http://solitarywatch.com/2013/05/21/deaf-prisoners-in-florida-face-brutality-and-solitary-confinement [https://perma.cc/5NSD-MM7V].

[66] Zoom Interview with Claudia Center, *supra* note 64; Order, *supra* note 25 (California department of corrections found to deny sign language interpreters to people who need them); Complaint, Zemedagegehu v. Arthur, No. 1:15-cv-00057-JCCS-MSN (E.D. Va. 2015), 2015 WL 1930539 (Deaf Ethiopian-born American citizen sues Virginia Department of Corrections for denying him an ASL interpreter); Yeh v. U.S. Bureau of Prisons, No. 3:18-CV-943, 2000 WL 1505661 (M.D. Pa. Mar. 30, 2020) (request for videophone denied); U.S. DEP'T OF JUST., JUSTICE DEPARTMENT REACHES AGREEMENT WITH THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS TO PROVIDE EFFECTIVE COMMUNICATION TO INMATES

videophones or video interpretation until they are sued.[67] Without videophones, individuals who use sign language cannot talk to their lawyers except in person. Even facilities that have videophones sometimes drastically limit access. Disability rights attorney Rosa Lee Bichell tells of a deaf client who had access to the technology only on rare occasions during his year in custody, and only outside of business hours.[68] Lacking videophones or remote or in-person interpretation, facilities instead assign officers and other detained people to serve as communication aides for people with hearing impairments, regardless of whether the aides have any qualifications, training, or knowledge of sign language.[69] It's this kind of arrangement that led to one incarcerated deaf immigrant to inadvertently ratify her own deportation when an ICE officer presented a form for her signature without communicating that the contents of the form stated that she was voluntarily consenting to her deportation.[70] All of these kinds of situations mean, as with individuals with physical disabilities in pretrial incarceration, blind/low-vision and deaf/low-hearing individuals are often deprived of meaningful access to their criminal and immigration proceedings because of their disabilities.

In short, for all types of disabilities, the conditions of pretrial incarceration can and often do create obstacles to meaningful and equal participation in the very purpose of that detention—court proceedings. The disability rights statutes require reasonable modifications to avoid such discrimination.

WITH HEARING DISABILITIES (Mar. 29, 2018), https://www.justice.gov/opa/pr/justice-department-reaches-agreement-south-carolina-department-corrections-provide-effective [https://perma.cc/YM92-4F3M] (unfiled lawsuit in which plaintiffs alleged a failure to provide them with sign language interpreters and other auxiliary aids and services).

[67] For examples of such lawsuits, see Rogers v. Colorado Dep't of Corr., No. 1:16-cv-02733-STV-NRN, 2019 WL 1558081 (D. Colo. 2019) (summary available at *Case: Rogers v. Colorado Department of Corrections*, C.R. LITIG. CLEARINGHOUSE, http://clearinghouse.net/case/16222 [https://perma.cc/78L8-CEEE]); Heyer v. U.S. Bureau of Prisons, 849 F.3d 202 (4th Cir. 2017); Settlement Agreement, Smith v. Reinke, No. 12-cv-0030-BLW (D. Idaho 2014), 2014 WL 2203896 (summary of case available at *Case: Smith v. Reinke*, C.R. LITIG. CLEARINGHOUSE, http://clearinghouse.net/case/17035 [https://perma.cc/5GFM-MHZQ]); Settlement Agreement, Disability Rts. Fla. v. Jones, No. 4:16-cv-47-RH-CAS (N.D. Fla. 2017) (summary of case available at *Case: Disability Rights Florida v. Jones*, C.R. LITIG. CLEARINGHOUSE, http://clearinghouse.net/case/16480 [https://perma.cc/FWG3-8RFK]); Complaint, Coen v. Georgia Dep't of Corr., No. 5:16-cv-00353-MTT (M.D. Ga. 2019) (summary of case available at *Case: Coen v. Georgia Department of Corrections,* C.R. LITIG. CLEARINGHOUSE, http://clearinghouse.net/case/17001 [https://perma.cc/9ZQ6-Q23J]).

[68] Zoom Interview by Roxana Moussavian with Rosa Lee Bichell, Staff Att'y, Disability Rts. Advocs. (Jan. 7, 2022).

[69] *See* Lewis, *supra* note 65.

[70] Zoom Interview with Rosa Lee Bichell, *supra* note 68.

II. The Rehabilitation Act and the ADA Sometimes Require Alternatives to Detention as a Reasonable Modification of Government Practice: Applicable Standards

As the Introduction and Part I begin to lay out, this article argues that pretrial incarceration of individuals with disabilities sometimes deprives them—because of their disabilities—of meaningful access to the criminal or immigration hearing that underlies their incarceration. Here, we set out the statutory framework under which a person with a disability who makes a showing to that effect can ask for an alternative to detention as a reasonable modification to ordinary government operations that have (or threaten to) put them behind bars. Denial of such a modification, in these circumstances, amounts to unlawful disability discrimination, unless release would actually threaten public safety. To be clear, it is not our claim that *no* person with a disability can lawfully be subjected to pretrial incarceration. The argument is more limited: where the conditions of pretrial incarceration specially undermine people with disabilities' access to legal proceedings and changes to those conditions will not adequately improve access, disability antidiscrimination law insists on alternatives to detention as a reasonable modification, absent individualized public safety risk that cannot otherwise be addressed.

An aside: There has been a good deal of deinstitutionalization litigation under the quite different ADA theory endorsed by *Olmstead v. L.C.*[71] There, the Supreme Court interpreted the ADA's antidiscrimination promise to limit the extent to which states may insist on providing disability-related services in isolated institutions rather than in community settings. The court explained,

> First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. . . . Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.[72]

Accordingly, the ADA disallows state insistence that "[i]n order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice."[73] *Olm-*

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[71] Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999).
[72] *Id.* at 600, 601.
[73] *Id.* at 600, 601.

stead-type arguments seem entirely applicable to some incarceration of some people with disabilities—for example, when the state puts individuals seeking mental health services in jail (without criminal charge or sentence).[74] Our argument applies to a different kind of incarceration, nominally auxiliary to a criminal or immigration proceeding.

A. Sources of Law and What They Cover

With overlapping coverage, Section 504 of the Rehabilitation Act of 1973 and Title II of the ADA both prohibit disability discrimination in the operation of government programs. The Rehabilitation Act of 1973[75] provides, in relevant part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[76]

And ADA Title II[77] similarly states:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[78]

Between the two statutes, every American governmental entity is covered. Federal agency activity, while not included under ADA Title II, is covered by the Rehabilitation Act.[79] The Rehabilitation Act also covers most state and local criminal programs, because they receive federal financial assistance.[80] ADA Title II also covers all non-federal government operations—its definition of "public entity" includes state and local government agencies without respect to federal support.[81] While their coverage is different, the

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[74] *See, e.g.*, First Report of the Court Monitor, United States v. Mississippi, 3:16-cv-00622, at 14, 15, 17, 21, 36 (S.D. Miss. Mar. 4, 2022), https://clearinghouse.net/doc/130690/ [https://perma.cc/UM44-XJUP](identifying problem of individuals waiting in jail for admission to psychiatric hospitals).

[75] 29 U.S.C. §§ 794 et seq.

[76] 29 U.S.C. § 794(a).

[77] 42 U.S.C. §§ 12131–12165.

[78] 42 U.S.C. § 12132.

[79] 29 U.S.C. § 794(a).

[80] *See* 29 U.S.C. § 794(b)(1)(A) (defining "program or activity" as "a department, agency, special purpose district, or other instrumentality of a State or of a local government").

[81] 42 U.S.C. § 12131(1).

substantive requirements of these two statutes are generally the same.[82] We address each separately for clarity, but as will be seen, the analysis is nearly identical.

The government programs and activities relevant here are those criminal or immigration proceedings to which pretrial incarceration is ancillary. As Part I developed, it is frequently the case that when people with disabilities are subjected to pretrial incarceration, they lose meaningful access to their criminal or immigration proceedings because of their disability.

There is no question that the ADA and Rehabilitation Act protect individuals with disabilities from discrimination in a variety of contexts—including in programs within both immigration and criminal systems. The statutory texts are extremely broad: the Rehabilitation Act, as already quoted, covers federally conducted or assisted "program[s] or activit[ies]," and the ADA covers "services, programs, or activities of a public entity." As the Justice Department explained in promulgating the lead Rehabilitation Act regulation (the model for other agencies' regulations), "a federally conducted program or activity is, in simple terms, anything a Federal agency does."[83]

Non-regulation governmental sources agree. For example, in a June 2016 publication titled Component Self-Evaluation and Planning Reference Guide, whose purpose was to "assist DHS Components in their efforts to strengthen compliance with Section 504 of the Rehabilitation Act of 1973," DHS wrote:

> There are two major categories of federally conducted programs or activities covered by Section 504: those involving general public contact as part of ongoing agency operations and those directly administered by the agency for program beneficiaries and participants. . . . Activities in the second category include programs that provide federal services or benefits. Examples include immigration and naturalization benefits, federal disaster services,

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[82] *See, e.g.*, Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1260 n.2 (D.C. Cir. 2008) (quoting Randolph v. Rodgers, 170 F.3d 850, 858 (8th Cir. 1999)) ("Further, the courts have tended to construe section 504 *in pari materia* with Title II of the ADA, 42 U.S.C. § 12132, reasoning that these statutory provisions are 'similar in substance' . . . and consequently 'cases interpreting either are applicable and interchangeable.'"); Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 908 (6th Cir. 2004); Washington v. Indiana High Sch. Athletic Ass'n, Inc., 181 F.3d 840, 845 n.6 (7th Cir. 1999); Weixel v. Bd. of Educ. of New York, 287 F.3d 138, 146 n.6 (2d Cir. 2002); Rodriguez v. City of New York, 197 F.3d 611, 618 ("Because Section 504 of the Rehabilitation Act and the ADA impose identical requirements, we consider these claims in tandem."); Cercpac v. Health & Hosps. Corp., 147 F.3d 165, 167 (2d Cir. 1998); Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003).

[83] Enforcement of Nondiscrimination on the Basis of Handicap in Federally Conducted Programs, 49 Fed. Reg. 35,725 (Sept. 11, 1984) (codified at 28 C.F.R. § 39). The ADA requires the Department of Justice (DOJ) to promulgate regulations implementing Title II, 42 U.S.C. § 12134, and it is these regulations that contain the specific prohibitions and requirements of Title II. With a few exceptions, Title II provides that the regulations must be consistent with the Department of Justice Section 504 "coordination regulations." 42 U.S.C. § 12134(b).

> airport security screening, federal building security screening, protective security at major events, customs activities, border protection activities, and enforcement of immigration laws and *operation of immigration detention facilities*.[84]

Likewise, consistent case law construes "the ADA's broad language [as] bring[ing] within its scope 'anything a public entity does.'"[85] Defendants sometimes claim an exemption from the disability antidiscrimination laws because of the nature of their activities. These claims generally fail. More specifically, both executive and judicial sources demonstrate that there is no exemption from the general antidiscrimination rules for programs related to criminal law/detention, immigration, or court processing.

The ADA made the Department of Justice the statute's lead implementing agency, responsible for issuing regulations,[86] "coordinat[ing] the compliance activities of Federal agencies with respect to State and local government components," and implementing compliance work involving "[a]ll programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions."[87] Not only are DOJ regulations entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*;[88] DOJ's interpretation of its own regulations also merits particular weight.[89] And DOJ has explained that Title II requires that "state and local government criminal justice entities . . . must ensure that people with mental health disabilities or I/DD [intellectual and developmental disabilities] are treated equally in the criminal justice system."[90] A DOJ guidance document states that Title II covers "the services, programs, and activities of . . . law enforcement, corrections, and justice system entities," including, among others: "assessing individuals for diversion programs, conducting arraignment, setting

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[84] MEGAN H. MACK, U.S. DEP'T OF HOMELAND SEC., GUIDE 065-01-001-01, COMPONENT SELF-EVALUATION & PLANNING REFERENCE GUIDE (2016), https://www.dhs.gov/sites/default/files/publications/disability-guide-component-self-evaluation.pdf [https://perma.cc/2JS9-MQY4] (emphasis added).

[85] Lee v. City of Los Angeles, 250 F.3d 668, 691 (9th Cir. 2001) (quoting Yeskey v. Pennsylvania Dep't of Corr., 118 F.3d 168, 171 (3d Cir. 1997), *aff'd*, 524 U.S. 206 (1998)); *see also* Johnson v. City of Saline, 151 F.3d 564, 569 (6th Cir. 1998) ("the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does."); Innovative Health Sys. v. City of White Plains, 117 F.3d 37, 45 (2d Cir. 1997) (stating that the phrase "programs, services, or activities" is "a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context"), *superseded on other grounds*, Zervos v. Verizon New York, 252 F.3d 163, 171 n.7 (2d Cir. 2001).

[86] 42 U.S.C. § 12134(a).

[87] 28 C.F.R. § 35.190 (2021).

[88] 467 U.S. 837 (1984).

[89] In the classic formulation, such interpretations are "controlling unless plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997). Note that the Supreme Court cautioned in Kisor v. Wilkie that *Auer* deference covers only "reasonable agency reading[s] of a genuinely ambiguous rule," and only where "the character and context of the agency interpretation entitles it to controlling weight." 139 S. Ct. 2400, 2404 (2019).

[90] U.S. DEP'T OF JUST., C.R. DIV., EXAMPLES AND RESOURCES TO SUPPORT CRIMINAL JUSTICE ENTITIES IN COMPLIANCE WITH TITLE II OF THE AMERICANS WITH DISABILITIES ACT (2017), https://www.ada.gov/cjta.html. [https://perma.cc/5VMK-KGMV]

bail or conditions of release, taking testimony, sentencing, providing notices of rights, determining whether to revoke probation or parole, or making service referrals, whether by prosecutors and public defense attorneys, courts, juvenile justice systems, pre-trial services, or probation and parole services"; "parole and release programs," and "detentions."[91] It offers as an example of ADA implementation that some jurisdictions have "[r]equired court staff to explore reasonable modifications to allow qualified individuals with these disabilities to participate in diversion and probation programs and specialty courts."[92]

Still more definitive, the Supreme Court rejected criminal system exceptionalism in a 1998 ADA Title II case, *Penn. Dep't of Corrections v. Yeskey*.[93] In a unanimous opinion by Justice Scalia, the Supreme Court comprehensively denied a prison system's effort to restrict antidiscrimination coverage to voluntary programs, or those that provide desired "benefits," holding that Title II of the ADA unambiguously covers state prisoners' access to prison programs, such as recreational activities, medical services, and educational and vocational offerings. Circuit courts have repeatedly confirmed *Yeskey*'s holding.[94]

As the DOJ guidance quoted above suggests, court proceedings are covered by the statutes as well. In *Tennessee v. Lane*, the Supreme Court, among other holdings, upheld Title II's application to safeguard access to justice for a paraplegic criminal defendant required to appear in an inaccessible courtroom.[95] The Court noted that Congress enacted the statute in part to prophylactically serve several access-to-courts constitutional rights, among them the "right to be present at all stages of the trial where [a defendant's] absence might frustrate the fairness of the proceedings" and "meaningful opportunity to be heard" in judicial proceedings.[96] Courts of Appeals have repeatedly recognized this right.[97]

Nor is there any immigration exclusion from the Rehabilitation Act or ADA Title II. Courts have found Rehabilitation Act coverage, for example, in cases about appointment of immigration counsel as a reasonable accom-

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[91] *Id.*

[92] *Id.*; *see also* 28 C.F.R. § 35.152 (setting out specific rules for jails, prisons, and detention centers).

[93] 524 U.S. 206, 210–11 (1998).

[94] *See, e.g.*, Wright v. New York State Dep't of Corr., 831 F.3d 64, 72 (2d Cir. 2016) ("Both the ADA and the RA undoubtedly apply to state prisons and their prisoners."); Key v. Grayson, 179 F.3d 996, 997 (6th Cir. 1999) ("it is now established that the ADA and the Rehabilitation Act apply to prisoners . . ."). For discussion, see SAMUEL R. BAGENSTOS, DISABILITY RIGHTS LAW: CASES AND MATERIALS 308–29 (3d ed. 2021).

[95] 541 U.S. 509, 523 (2004).

[96] *Id.*

[97] *See, e.g.*, McCauley v. Georgia 466 F. App'x 832, 837 (11th Cir. 2012) (recognizing plaintiff's right to seek access to the courts); Bedford v. Michigan, 722 F. App'x 515, 519 (6th Cir. 2018) (recognizing application of *Lane* to class of cases implicating access to justice); Crawford v. Hinds Cnty. Bd. of Supervisors, 1 F.4th 371, 374 (5th Cir. 2021) (finding person with disability who had twice been unable to complete jury service had standing to sue).

modation,[98] about immigration detention conditions,[99] and—most similar to the argument made here—about immigration proceedings for people detained during the COVID-19 pandemic.[100]

In short, like other people with disabilities, people with disabilities in both criminal and immigration pretrial incarceration can bring lawsuits under the ADA or the Rehabilitation Act if they can show that they are: (1) disabled within the meaning of the statutes;[101] (2) "qualified" to participate in the relevant program; and (3) "excluded from," "denied the benefits of," or otherwise "subjected to discrimination"[102] relating to a governmental program, (4) "by reason of . . . disability" ("solely by reason" under the Rehabilitation Act). As explained in the accompanying footnote, the first of these requirements is not controversial. The following sections address requirements (2)-(4) in turn: Section II.B addresses items (2) and (3), which are intertwined, both with each other and also with the antidiscrimination requirement that governments agree to "reasonable modifications" (but not to "fundamental alterations") to policies and practices that would otherwise exclude people with disabilities. Section II.C examines (4).

B. Qualified Individual/Reasonable Modification/Fundamental Alteration

1. The Standard: Meaningful Access

The foundational case explaining what kinds of exclusions from programs/services/activities constitute unlawful discrimination is *Alexander v. Choate*,[103] a unanimous 1985 Supreme Court opinion by Justice Marshall. In *Choate*, the Court rejected plaintiffs' argument that the state violated the Rehabilitation Act by reducing how many days of inpatient care Medicaid would cover. The Court first emphasized that discriminatory animus against

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[98] Franco-Gonzalez v. Holder, No. 2:10-cv-02211-DMG, 2013 WL 8115423, at *1 (C.D. Cal. Apr. 23, 2013).

[99] Moran v. U.S. Dep't of Homeland Sec., No. 20-cv-0696-DOC-JDE, 2020 WL 6083445, at *6 (C.D. Cal. Aug. 21, 2020).

[100] *See* Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d 709, 747–48 (C.D. Cal. 2020) (finding that Section 504 covered immigration proceedings and noting no counterargument from ICE), *rev'd on alternate grounds*, 16 F.4th 613, 650 (9th Cir. 2021) (reversing based on assessment of evidence, not disagreement with the liability theory).

[101] Under both the ADA and the Rehabilitation Act, a person has a disability if: (i) a physical or mental impairment substantially limits one or more of his or her major life activities; (ii) he or she has a record of such an impairment; or (iii) he or she is regarded as having such an impairment. 29 U.S.C. § 705(20)(B); 42 U.S.C. §§ 12102(1)–(2). Particularly relevant here, "mental" impairments are expressly included if they substantially limit major life activities. The ADA regulations on the definition of disability, 28 C.F.R. § 35.104(1)(i), are quite capacious. Moreover, in the ADA Amendments Act of 2008, Congress clarified and broadened the definition. Under the Amendments Act, an impairment constitutes a disability even if it: (1) only substantially limits one major life activity; or (2) is episodic or in remission, if it would substantially limit at least one major life activity if active. ADA Amendments Act of 2008, Pub. L. No. 110-325 Sec. 3, 122 Stat. 3553, 3556.

[102] 42 U.S.C. § 12132; 29 U.S.C. § 794(a).

[103] 469 U.S. 287 (1984).

people with disabilities was not a prerequisite to Rehabilitation Act liability: "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."[104] At the same time, the Court held, the statute required a showing of more than disproportionate effects caused by facially neutral policies. *Choate* announced the "meaningful access" standard: that "otherwise qualified" people with disabilities must be granted reasonable modifications so that they are "provided with meaningful access" to the program in question.[105] Moreover, the Court explained that "the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under the section would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs."[106]

So what is meaningful access? *Choate* pointed with approval to a Rehabilitation Act regulation that "meaningful access" does not mean merely some or minimal access but rather protects equal opportunity: While "aids, benefits, and services . . . are not required to produce the identical result or level of achievement for handicapped[107] and nonhandicapped persons, [they] must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement."[108]

Other federal departments' Rehabilitation Act regulations include similar language. After quoting or paraphrasing the Rehabilitation Act's statutory text, they endorse an "equal opportunity" standard with only slight variations in phrasing. For example:

- "A recipient may not discriminate on the basis of handicap in the following ways directly or through contractual, licensing, or other arrangements under any program receiving Federal financial assistance . . . (ii) Deny a qualified handicapped person an equal opportunity to achieve the same benefits that others achieve in the program or activity receiving Federal financial assistance."[109] (DOJ Rehabilitation Act regulation on federally assisted programs)

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[104] *Id.* at 296–97.
[105] *Id.* at 300–01.
[106] *Choate*, 469 U.S. at 299 n.19.
[107] Many disability statutes and regulations, including those cited here, use the outdated term "handicap," which is synonymous with "disability." This article uses the term "disability" throughout but leaves in "handicap" when directly quoting law or regulation.
[108] *Choate*, 469 U.S. at 305 (quoting the Department of Health Education and Welfare's Rehabilitation Act federally-assisted regulation, 45 C.F.R. § 84.4(b)(2)). In *Traynor v. Turnage*, the Court noted the deference owed the HEW regulation, stating: "We have previously recognized that the regulations promulgated by the Department of Health, Education, and Welfare (later the Department of Health and Human Services) to implement the Rehabilitation Act 'were drafted with the oversight and approval of Congress,' and therefore constitute 'an important source of guidance on the meaning of § 504.'" 485 U.S. 535, 550 n.10 (1988) (citations omitted).
[109] 28 C.F.R. § 42.503(b)(1).

- "The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap— . . . (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others."[110] (DOJ Rehabilitation Act regulation on federally conducted programs)

- "The Department, in providing any aid, benefit, or service, may not directly or through contractual, licensing, or other arrangements, on the basis of disability . . . (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others."[111] (Department of Homeland Security Rehabilitation Act regulation on federally conducted programs)

Leaning variously on *Choate* or the regulations, subsequent court of appeals case law reaches the "meaningful access" standard,[112] holding that the "meaningful access standard . . . ensure[s] an equal opportunity."[113]

Choate's "meaningful access" approach governs the Rehabilitation Act, of course. Congress then expressly adopted the same rules when it enacted the ADA, defining "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[114] In turn, the Title II ADA regulations incorporate the rest of *Choate*'s language, stating: "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making

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[110] 28 C.F.R. § 39.130(b)(1).

[111] 6 C.F.R. § 15.30(b)(1). There is no DHS federally assisted regulation.

[112] *See, e.g.*, Argenyi v. Creighton Univ., 703 F.3d 441, 449 (8th Cir. 2013) (denying summary judgment on the "meaningful access" issue because there was a genuine issue of material fact as to whether the defendant "denied [the plaintiff] an equal opportunity to gain the same benefit from medical school as his nondisabled peers by refusing to provide his requested accommodations."); Randolph v. Rodgers, 170 F.3d 850, 858 (8th Cir. 1999) (applying a "meaningful access" standard to a Rehabilitation Act claim brought by a hearing-impaired prisoner denied an interpreter during internal disciplinary proceedings, and affirming summary judgment for the prisoner because "although he ha[d] been provided some form of those benefits, he ha[d] not received the full benefits solely because of his disability."); Liese v. Indian River Cnty. Hosp. Dist., 701 F.3d 334, 343 (11th Cir. 2012) (the "proper inquiry" under the Rehabilitation Act to determine if a hospital had provided "necessary" auxiliary aids to a hearing-impaired patient was whether the proffered aids "gave that patient an equal opportunity to benefit from the hospital's treatment.").

[113] *Argenyi*, 703 F.3d at 449.

[114] 42 U.S.C. § 12131(2). Reasonable modification is thus ADA Title II's (and Title III's) equivalent of the more familiar "reasonable accommodation" requirement in Title I of the ADA, which addresses employment discrimination. *See* 42 U.S.C. §§ 12111(8)–(9).

the modifications would fundamentally alter the nature of the service, program, or activity."[115]

As under the Rehabilitation Act, "meaningful access" under the ADA has been interpreted to mean substantially equal access. Like the Rehabilitation Act regulations just quoted, the ADA Title II regulation states:

> A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability— . . . (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.[116]

And case law again endorses that meaningful access means equal access.[117]

Thus, under both the Rehabilitation Act and ADA Title II, liability attaches for disability discrimination based not on discriminatory intent but on failure, intentional or not, to provide individuals with disabilities an opportunity equal to that afforded nondisabled people to participate in or benefit from government programs, where—as the next section explains, equality could be accomplished by a reasonable modification to the rules or practices governing the service, program, or activity.

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[115] 28 C.F.R. § 35.130(b)(7)(i). The separate requirement of program accessibility has a similar defense that no "fundamental alteration in the nature of a service, program, or activity or . . . undue financial and administrative burdens" are required. 28 C.F.R. § 35.150(a)(3). Just as "reasonable modification" is the analog to Title I's "reasonable accommodation" requirement, "fundamental alteration" and "undue burden" are the analogs of Title I's "undue hardship."

[116] 28 C.F.R. § 35.130(b)(1).

[117] *See, e.g.*, K.M. ex rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1097 (9th Cir. 2013) (holding, based on analogous communications-related provision, that "Title II and its implementing regulations, taken together, require public entities to take steps towards making existing services not just accessible, but *equally* accessible to people with communication disabilities . . . insofar as doing so does not pose an undue burden or require a fundamental alteration of their programs") (emphasis in original); Baughman v. Walt Disney World Co., 685 F.3d 1131, 1135 (9th Cir. 2012) (same, under ADA Title III); Profita v. Regents of the Univ. of Colorado, 709 F. App'x 917, 920 (10th Cir. 2017) (explaining that a reasonable accommodation must provide meaningful access "by permitting a qualified individual with a disability to 'obtain the same benefits made available to nondisabled individuals'" (quoting Taylor v. Colo. Dep't of Health Care Policy & Fin., 811 F.3d 1230, 1236 (10th Cir. 2016)); Doran v. 7-Eleven, 524 F.3d 1034, 1041 n.4 (9th Cir. 2008) ("[T]he ADA . . . outlaws discrimination based on disability 'in the full and equal enjoyment of the goods, services, [and] facilities' made available at places of public accommodation . . . and does not limit its antidiscrimination mandate to barriers that completely prohibit access."); Keller v. Chippewa Cnty., Michigan Bd. of Commissioners, 860 F. App'x 381, 387 (6th Cir. 2021), *cert. denied sub nom.* Keller v. Chippewa Cnty. Bd. of Commissioners, 142 S. Ct. 761 (2022) ("[T]he simple fact that [the plaintiff] successfully used [the toilet and sink] does not necessarily mean that he had meaningful access. Other courts have recognized that a plaintiff who succeeds in using a prison restroom only through an excessive or painful effort may have a valid ADA claim.").

2. The Standard: Reasonable Modification/Fundamental Alteration

If governmental rules or practices would otherwise deprive people with disabilities of meaningful (that is, equal) access to programs, services, or activities, the Rehabilitation Act and ADA require "reasonable modification." Again, it was *Choate* that set the point at which "a refusal to modify an existing program might become unreasonable and discriminatory," and found that such refusals violated the statute unless the requested modification would amount to a "fundamental alteration in the nature of a program," rather than a "reasonable modification[ ] the statute or regulations required."[118] We address in Section III.A the specific argument that release from detention falls on the "fundamental alteration" side of the line; here, we present the case law more generally.

We note that, in litigation procedure, the reasonable modification showing is part of the plaintiffs' case in chief, whereas it is the defendants' burden to assert and prove the "fundamental alteration" defense. The plaintiffs can make their showing of reasonableness by pointing to the general practicability of the requested modification—its (low enough) cost, workability, and the like. It is for defendants to plead and prove that notwithstanding practicalities, the requested modification is out of bounds in the specific case.[119]

As the Supreme Court explained in *PGA Tour, Inc. v. Martin*, a case interpreting ADA Title III (whose statutory text codifies the *Choate* reasonable modification/fundamental alteration divide), a modification is considered fundamental only if it alters a program's "essential aspect[s]."[120] In addition, parallel regulations that implemented the pre-*Choate* precedent of *Southeast Community College v. Davis*,[121] also require each federal agency to

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[118] Alexander v. Choate, 469 U.S. 287, 300–01 (1984).

[119] *See* Johnson v. Gambrinus Co., 116 F.3d 1052, 1059 (5th Cir. 1997):

> The plaintiff meets this burden by introducing evidence that the requested modification is reasonable in the general sense, that is, reasonable in the run of cases. While the defendant may introduce evidence indicating that the plaintiff's requested modification is not reasonable in the run of cases, the plaintiff bears the ultimate burden of proof on the issue. If the plaintiff meets this burden, the defendant must make the requested modification unless the defendant pleads and meets its burden of proving that the requested modification would fundamentally alter the nature of the public accommodation. The type of evidence that satisfies this burden focuses on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation. Under the statutory framework, such evidence is relevant only to a fundamental alteration defense and not relevant to the plaintiff's burden to show that the requested modification is reasonable in the run of cases.

Johnson was a Title III case, but courts have followed its lead in Title II cases as well. *See, e.g.*, Bailey v. Bd. of Commissioners of Louisiana Stadium & Exposition Dist., 484 F. Supp. 3d 346, 426–27 (E.D. La. 2020), *aff'd sub nom.* Bailey v. France, 852 F. App'x 852 (5th Cir. 2021); Nat'l Fed'n of the Blind, Inc. v. Lamone, 438 F. Supp. 3d 510, 528 (D. Md. 2020); Belancio v. Kansas Dep't of Health & Env't, No. 17-cv-1180, 2018 WL 4538451, at *8 n.38 (D. Kan. Sept. 21, 2018).

[120] 532 U.S. 661, 682-91 (2001).

[121] 442 U.S. 397 (1979).

ensure that each of its "program[s] or activit[ies] . . . when viewed in its entirety, is readily accessible to and usable by" individuals with a disability, but not "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens."[122]

Within these limits, a failure to implement a reasonable modification needed by a person with a disability constitutes a type of discrimination.[123] Fact-intensive analysis determines whether the particular change to a policy or practice an individual with a disability seeks is a reasonable modification, which the government is required to undertake, or rather a fundamental alteration, which it is not. Some examples of modifications courts have deemed required under the Rehabilitation Act and/or the ADA include:

- In *PGA Tour, Inc. v. Martin*, the Supreme Court held that a professional golfer's use of a golf cart during tournaments would not constitute a fundamental alteration and therefore had to be allowed.[124]

- In *American Council of the Blind v. Paulsen*, the D.C. Circuit required introduction of features to make currency accessible to blind people or those with low-vision. The court held that omitting this reasonable modification would deprive plaintiffs of "meaningful access" to a benefit available to the general public—the ability to engage in economic activity—in violation of the Rehabilitation Act.[125]

- In *Franco-Gonzalez v. Holder*, the District Court for the Central District of California held that the Rehabilitation Act required the federal government to ensure legal representation for all detained noncitizens facing removal proceedings whose psychiatric disabilities rendered them incompetent to represent themselves in removal or custody hearings, because otherwise plaintiffs would be unable to meaningfully participate in those hearings.[126]

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[122] 28 C.F.R. § 39.150(a) *see also* 6 C.F.R. § 15.50(a). In *Olmstead v. L.C.* ex rel. *Zimring*, a plurality opinion by Justice Ginsburg unpacked the "undue hardship" part of the test:

> the "undue hardship" inquiry requires not simply an assessment of the cost of the accommodation in relation to the recipient's overall budget, but a "case-by-case analysis weighing factors that include: (1) the overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) the type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) the nature and cost of the accommodation needed."

527 U.S. 581, 606 n.16 (1999) (plurality opinion of Ginsburg, J.).

[123] Tennessee v. Lane, 541 U.S. 509, 531–32 (2004).

[124] 532 U.S. at 690–91.

[125] Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1274 (D.C. Cir. 2008).

[126] Franco-Gonzalez v. Holder, 10-cv-02211-DMG, 2013 WL 3674492, at *4–6 (C.D. Cal. Apr. 23, 2013). For more information on the *Franco-Gonzalez* litigation, which included numerous pertinent district court opinions, see *Franco-Gonzalez v. Holder*, C.R. LITIG. CLEARINGHOUSE, http://clearinghouse.net/case/12744/ [https://perma.cc/R5GW-L2KV].

- In *Henrietta D. v. Giuliani* and *Henrietta D. v. Bloomberg*, a district court held, and the Second Circuit affirmed,[127] that "intensive case management and low case manager-to-client ratios" and other similar reasonable modifications were required to ensure people with HIV had meaningful access to the same benefits and services others received. Both the district court and the court of appeals expressly rejected the claim that these management modifications constituted "additional benefits, or better benefits, than the non-disabled receive, which the law does not compel." Rather, they were reasonable modifications "required to ensure meaningful access to the same benefits and services" as non-disabled people received.[128]

- In *Baughman v. Walt Disney World Co.*, the Ninth Circuit held that (absent a demonstration of a safety problem) Walt Disney could be required by the ADA's Title III to grant a waiver of its rule barring guest use of a Segway; reasonable modifications include steps "to provide [non-disabled and] disabled guests with a like experience."[129]

- In *Armstrong v. Davis*, the Ninth Circuit found that the State of California had deprived a class of disabled prisoner plaintiffs of meaningful access to parole processes, and affirmed in pertinent part an injunction mandating reasonable modifications to existing practice. The injunction included provisions, for example, that required the state to "redraft its policies to ensure that prisoners and parolees are . . . 'able to participate, to the best of their abilities, in any parole proceeding'"; and "to create and maintain a system for tracking disabled prisoners and parolees, and provide them with accommodations at parole and parole revocation proceedings."[130]

- In *Giebeler v. M & B Assocs.*, the Ninth Circuit found that the plaintiff—whose AIDS rendered him unable to work and therefore financially ineligible to be defendant's tenant—was entitled to waiver of the rule against co-signers; relying in part on Rehabilitation Act case law, the court found the waiver to constitute a reasonable accommodation under the Fair Housing Amendments Act.[131]

- In *Pashby v. Delia*, the Fourth Circuit held that the fundamental alteration defense did not bar requiring continuation of in-home services after a change in state Medicaid requirements put class members at risk of institutionalization.[132]

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[127] Henrietta D. v. Giuliani, 119 F. Supp. 2d 181, 212 (E.D.N.Y. 2000), *aff'd sub nom.* Henrietta D. v. Bloomberg, 331 F.3d 261 (2d Cir. 2003).
[128] *Henrietta D.*, 119 F. Supp. 2d at 212; *see also Henrietta D.*, 331 F.3d at 282–83.
[129] 685 F.3d 1131, 1135 (9th Cir. 2012).
[130] 275 F.3d 849, 859 (9th Cir. 2001).
[131] 343 F.3d 1143, 1159 (9th Cir. 2003).
[132] 709 F.3d 307 (4th Cir. 2013).

In each example, the court found both that the modification was needed to deliver equal access to the program in question, and that the modification's change to defendant practices was not profound enough to defeat the ADA/Rehabilitation Act claim. As the list makes clear, there are many different forms of reasonable modifications. Moreover, modifications need not simply waive disqualifications to count as reasonable—they frequently provide preferential treatment or other *advantages* to people with disabilities. The Supreme Court explained in an ADA Title I (employment) case that an argument to the contrary

> fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.[133]

In addition, while courts have occasionally emphasized the ADA and Rehabilitation Act's reference to "benefits," the Supreme Court has made clear that the statutes do not apply only to chosen or beneficial government programs. The Court rejected the "benefits" argument in *Yeskey*, emphasizing that the statutory "benefits" language is coupled with a more general textual reference to "exclu[sion] from participation" and in any event should be understood broadly:

> Petitioners contend that the phrase "benefits of the services, programs, or activities of a public entity," creates an ambiguity, because state prisons do not provide prisoners with "benefits" of "programs, services, or activities" as those terms are ordinarily understood. We disagree. Modern prisons provide inmates with many recreational "activities," medical "services," and educational and vocational "programs," all of which at least theoretically "benefit" the prisoners (and any of which disabled prisoners could be "excluded from participation in").[134]

3. What Is the Program?

Whether a modification is considered reasonable or, instead, fundamental because it alters a program or benefit's "essential aspect[s]," turns

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[133] US Airways v. Barnett, 535 U.S. 391, 397 (2002) (emphasis in original).
[134] Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 210 (1998) (citations omitted).

analytically on how the program or benefit in question is identified. Parties frequently contest the level of generality at which this identification should occur.[135] That is not the issue here, though. Rather, the question likely to arise is whether it is appropriate to identify the program at issue as the criminal/immigration proceedings, or whether, a claim for an alternative to detention must necessarily proceed by demonstrating discrimination (including deprivations of meaningful access) in existing bail or other non-detention gatekeeping practices themselves. There is no doubt that bail and other alternatives-to-detention programs *do* constitute programs to which the ADA and Rehabilitation Act guarantee meaningful access. Recall the DOJ guidance document quoted above, which explicitly says just that—that Title II covers programs "assessing individuals for diversion programs, conducting arraignment, setting bail or conditions of release."[136] When people with disabilities are discriminated against in the operations of bail and diversionary programs, that is surely a Title II or Rehabilitation Act violation. But it is wrong to think that either the ADA or the Rehabilitation Act allows only that framing.

As an analogy, consider the (more frequently litigated) arenas of educational or employment accommodation. Claimants in these areas often proceed on claims that some test or job requirement is being administered in a discriminatory matter—for example, that a test must be provided in a format accessible to participants who are blind or deaf. But where the test cannot be made fair, they and/or other claimants *also* bring claims that they are entitled to a waiver of the test or requirement in order to allow their meaningful access to the opportunity at stake.[137] So here, government agencies are required *both* to avoid discrimination in—including by providing meaningful access to—all their alternatives-to-detention programs *and* to avoid discrimination in their criminal/immigration proceedings, including by waiving existing alternatives-to-detention limits for people with disabilities if detention is obstructing or would obstruct equal access to the underlying proceedings.

Again building from *Choate*, case law addresses this "what is the program" issue by distinguishing between access to existing government programs—which is required—and new or expanded benefits, which are not.

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[135] Too low a level of generality would nullify the antidiscrimination laws. *See* Alexander v. Choate, 469 U.S. 287, 301, 301 n.21 (1985) ("The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made"; "Antidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is 'collapsed' into one's definition of what is the relevant benefit."). But too high a generality is, the Court warned in the same case, unduly "amorphous." *See id.* at 303. *See generally* Samuel R. Bagenstos, *The Future of Disability Law*, 14 YALE L.J. 1, 47–48 (2004).

[136] U.S. DEP'T OF JUST., EXAMPLES AND RESOURCES TO SUPPORT CRIMINAL JUSTICE ENTITIES IN COMPLIANCE WITH TITLE II OF THE AMERICANS WITH DISABILITIES ACT (2017), https://www.ada.gov/cjta.html [https://perma.cc/4K7Z-X8XF].

[137] For an example of such a claim, see Guckenberger v. Bos. Univ., 974 F. Supp. 106 (D. Mass. 1997), in which Boston University students with disabilities sought testing and coursework accommodations *and* waivers of certain degree requirements.

For example, in *Franco-Gonzalez v. Holder*, plaintiffs' claim was related to the one described in this article: those plaintiffs successfully sought a reasonable modification to DHS and DOJ practices—legal representation in immigration proceedings, where this article addresses alternatives to detention—in order to remove access barriers to those hearings for detained immigrants with mental disabilities. DHS and DOJ argued that granting plaintiffs' request "would do much more than remove a barrier to access; it would expand the scope of benefits provided to aliens in immigration court."[138] The district court's analysis rejecting the government's approach was dead on:

> [T]hose who are in full possession of their faculties already have the ability to participate in immigration proceedings or, at least, have the wherewithal to obtain access. . . . Thus, the provision of a Qualified Representative is merely the means by which Plaintiffs may exercise the same benefits as other non-disabled individuals, and not the benefit itself.

Defendants mischaracterize the nature of the benefit Plaintiffs seek. Plaintiffs here seek only to meaningfully participate in their removal proceedings. The opportunity to "examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government" is available to all individuals in immigration proceedings, but is beyond Plaintiffs' reach as a result of their mental incompetency. 8 U.S.C. § 1229a(b)(4)(B). Thus, the provision of a Qualified Representative is merely the means by which Plaintiffs may exercise the same benefits as other non-disabled individuals, and not the benefit itself . . . . Aspiring to a system that allows the mentally incompetent to similarly participate in the removal proceedings against them is not tantamount to "creating an entirely new system of benefits in immigration."[139]

Similarly, a district court in *Fraihat v. ICE* held that "the programmatic 'benefit' in this context is shared by all class members and is best understood as participation in the removal process."[140]

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[138] Franco-Gonzalez v. Holder, No. 10-cv-02211-DMG, 2013 WL 3674492, at *7 (C.D. Cal. Apr. 23, 2013). The current federal administration has eliminated this kind of non-statutory use of the word "alien," which many people find offensive. Joel Rose, *Immigration Agencies Ordered Not To Use Term 'Illegal Alien' Under New Biden Policy,* NPR (Apr. 19, 2020 2:51 PM), https://www.npr.org/2021/04/19/988789487/immigration-agencies-ordered-not-to-use-term-illegal-alien-under-new-biden-polic [https://perma.cc/T3EX-SJSM]. We use the terms "immigrant" or "non-citizen" except when directly quoting a statute or regulation.

[139] *Franco-Gonzalez*, 2013 WL 3674492, at *7–8.

[140] Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d 709, 748 (C.D. Cal. 2020), *rev'd*, 16 F.4th 613 (9th Cir. 2021). The Ninth Circuit neither affirmed nor reversed this approach. Although the court of appeals rejected the district court's liability finding in *Fraihat*, that rejection was based on evidentiary insufficiency, because "even assuming 'participation in the removal process' could fit within the statutory term 'benefit,' plaintiffs have not shown they were deprived of the ability to participate in their immigration proceedings." Fraihat v. U.S. Immigr. & Customs Enf't, 16 F.4th 613, 650 (9th Cir. 2021).

As in both of these cases, the program or benefit at issue in this article is the criminal or immigration proceeding. The reasonable modification claim seeks an alternative to pretrial incarceration where necessary to avoid the access obstacles faced by an incarcerated plaintiff with disabilities. The modification is all the more appropriate because pretrial incarceration is supposed to be in service of criminal/immigration proceedings, but is, in fact, undermining the fairness of those proceedings.

C. Causation

As stated previously, the argument this article presents is limited. Indeed, it may be analytically helpful to disavow several other claims. This article is *not* arguing that pretrial incarceration of people with disabilities always violates the ADA and/or the Rehabilitation Act, even if (as will often be true) the experience and impact of incarceration is worsened by an incarcerated person's disability. Nor is the article proposing a remedy of release from any form of incarceration when its conditions of confinement fail to accommodate disability or otherwise discriminate on account of disability (such a remedy may be appropriate in some circumstances, but is not our topic). This article's argument is limited to pretrial incarceration—pretrial detention related to criminal or immigration proceedings—where the impact of incarceration and its conditions is to deprive a person with a disability of meaningful access to those criminal or immigration proceedings, because of disability.

Causation is thus central to the analysis: has pretrial incarceration caused a deprivation of meaningful access? But what kind of causation is required? Recall that both the ADA and the Rehabilitation Act expressly require causation. The Rehabilitation Act covers program exclusion/denial/discrimination "solely by reason of . . . disability,"[141] and the ADA uses similar causal language of "by reason of such disability."[142]

The ADA's causation requirement is relatively straightforward, in theory if not necessarily in application: in *Bostock v. Clayton County*, the Supreme Court recently explained that "by reason of" (like "on account of" and "because of")

> incorporates the 'simple' and 'traditional' standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened 'but for' the purported cause. In other words, a but-for test directs us to change one potential cause at a time and see if the outcome changes. If it does, we have found a but-for cause."[143]

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[141] 29 U.S.C. § 794(a).
[142] 42 U.S.C. § 12132.
[143] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020) (citations omitted).

The Court emphasized that but-for cause "can be a sweeping standard" because "[o]ften, events have multiple but-for causes."[144]

In the Rehabilitation Act, however, Congress used the word "solely."[145] In the decision just quoted, *Bostock*, the Court suggested that a statutory requirement of sole causation constitutes "a more parsimonious approach," "indicat[ing] that actions taken 'because' of the confluence of multiple factors do not violate the law."[146] Courts have struggled to give content to the idea of sole causation, but some principles have emerged: First, the word "solely" does not require a discriminatory motive, animus, or ill-will. Second, "solely" cannot eviscerate the statute's reach. In a bankruptcy case, for example, the Supreme Court explained both requirements:

> [W]hen the statute refers to failure to pay a debt as the sole cause of cancellation ("solely because"), it cannot reasonably be understood to include, among the other causes whose presence can preclude application of the prohibition, the governmental unit's *motive* in effecting the cancellation. Such a reading would deprive § 525 of all force. It is hard to imagine a situation in which a governmental unit would not have some further motive behind the cancellation—assuring the financial solvency of the licensed entity, or punishing lawlessness, or even (quite simply) making itself financially whole. Section 525 means nothing more or less than that the failure to pay a dischargeable debt must alone be the proximate cause of the cancellation—the act or event that triggers the agency's decision to cancel, whatever the agency's ultimate motive in pulling the trigger may be.[147]

These principles dictate the same result here: whatever "solely" means in intentional discrimination cases under the Rehabilitation Act, the statutory causation requirement does not eliminate the type of reasonable modification liability authoritatively approved in *Choate*, in which an individual seeks a softening of a generally applicable rule in order to assure meaningful access to a government program.[148] In any such case, after all, the govern-

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[144] *Id.*

[145] Moreover, in the Rehabilitation Act Amendments of 1992, Congress stated that employment discrimination claims under Section 504 should use "the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12201–12204 and 12210), as such sections relate to employment." Pub. L. No. 102-569, § 502, 106 Stats 4344, 4424, and 4428 (amending Section 504), was intended to eliminate any disadvantageous differences between Section 504 and the other statutes cited—including, presumably, any higher causal standard. *See* 138 Cong. Rec. S16610 (Oct. 5, 1992) (remarks by Sen. Dole that amendment integrates disability policy into the philosophy and goals of the ADA); 138 Cong. Rec. S16610 (Oct. 5, 1992) (remarks by Sen. Harkin reciting that ADA standards are applicable, including "because of" language). But the 1992 change applies only to employment claims, not other Section 504 claims such as this article's topic.

[146] *Bostock*, 140 S. Ct. at 1739 (citing 11 U.S.C. § 525; 16 U.S.C. § 511).

[147] F.C.C. v. NextWave Pers. Commc'ns, 537 U.S. 293, 301–02 (2003).

[148] *See, e.g.*, Franco-Gonzalez v. Holder, No. 10-cv-02211-DMG, 2013 WL 3674492, at *4–6 (C.D. Cal. Apr. 23, 2013). As this opinion explains, the federal government argued that

ment's refusal to accommodate the plaintiff's disability could be said to serve its interest in uniformity, or in avoiding the costs of accommodation. To deem such concomitant interests liability-vitiating "causes" would contradict the statute and Supreme Court precedent. Instead, the right interpretation of the statute's causation language is that it requires attention to "rules . . . that hurt [people with disabilities] *by reason of their handicap*, rather than that hurt them solely by virtue of what they have in common with other people."[149]

III. Application of Law to Fact

A. Reasonable Modification, Not Fundamental Alteration

Section II.B.2, above, set out the "reasonable modification"/"fundamental alteration" dichotomy and its case law. Here, we apply the standard, demonstrating that release from pretrial incarceration constitutes a reasonable modification rather than a fundamental alteration of the criminal/immigration proceedings, when such incarceration prevents meaningful participation in a criminal or immigration case and in-custody conditions modifications cannot correct the problem.

A preliminary point: allowing someone to defend their criminal or immigration case from the community is less expensive than detention.[150] But even if that were not the case, budgetary concerns are relevant to ADA/Rehabilitation Act adjudication, but "financial constraints alone cannot sustain a fundamental alteration defense."[151]

Rather, following the lead of *PGA Tour, Inc. v. Martin,* in which the Supreme Court modeled application of the "fundamental alteration" defense, the appropriate focus is on the purpose of the affected program.[152] In the *Martin* case, the Court carefully assessed the purpose of the challenged rule and the affected program using intensive fact analysis[153] and concluded that the ADA required the sponsor of professional golf events to jettison its rule

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the plaintiffs—detained immigrants with mental disabilities were "not denied access [to their removal proceedings] 'solely by reason' of their disability because the Government does not intend to prevent them from full participation in their removal proceedings." The district court rejected this argument as irreconcilable with *Alexander v. Choate*'s "meaningful access" theory of Rehabilitation Act liability.

[149] Henrietta D. v. Bloomberg, 331 F.3d 261, 276 (2d Cir. 2003) (quoting Good Shephard Manor Found., Inc. v. City of Momence, 323 F.3d 557, 561 (7th Cir. 2003)).

[150] *See The Price of Jails,* Vera Inst. (May 2015), https://www.vera.org/publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration [https://perma.cc/K5GS-N6M6]. Detention is more expensive than release even if the would-be detained person is placed in subject to supervision in the community. *See* U.S. Gov't Accountability Off., Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness 18 (2014), https://www.gao.gov/assets/gao-15-26.pdf [https://perma.cc/H7SQ-SC58] (finding that alternatives to detention cost $10.55 a day compared to $158 for detention for people in the immigration system).

[151] Pashby v. Delia, 709 F.3d 307, 324 (4th Cir. 2013) (collecting cases).

[152] PGA Tour v. Martin, 532 U.S. 661, 682–91 (2001).

[153] *Id.* at 682–91.

disallowing player use of a golf cart, because the "walking rule" was not "such an essential aspect of the game of golf that [alteration] would be unacceptable even if it affected all competitors equally," and because eliminating the rule for a player with a disability did not "give a disabled player . . . an advantage over others and, for that reason, fundamentally alter the character of the competition.[154]

A similarly careful evaluation of the purpose of pretrial incarceration and court proceedings, criminal or immigration, demonstrates that release, perhaps with an alternative supervision method, is far from a "fundamental alteration" of the relevant program—court proceedings. The purpose of the proceedings is to determine guilt or innocence in a criminal context, and whether or not someone will be removed from the United States in an immigration one. Pretrial incarceration is not essential to the proceedings or the purpose. The most important fact supporting this conclusion is that for both criminal and immigration pretrial incarceration, a vast number of people go through their proceedings while free and living in their communities. Even among felony defendants, for example, the last data available (from 2007) suggests that only a minority are subjected to pretrial detention.[155] (Given the past decade's reforms,[156] that minority is likely smaller now.) Misdemeanor defendants, who constitute a large majority of arrestees, are still more unlikely to be detained prior to conviction or acquittal.[157] And for immigration detention, at any given time, the non-detained docket significantly overshadows the detained docket.[158] Indeed, for many individuals, the

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[154] *Id.* at 682–83.

[155] For statistics on pretrial criminal detention of felony defendants, see, for example, THOMAS H. COHEN, PH.D & BRIAN A. REAVES, PH.D, BUREAU OF JUST. STATS., PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS (2007), https://bjs.ojp.gov/content/pub/pdf/prfdsc.pdf [https://perma.cc/M9EX-EV24] ("From 1990 to 2004, an estimated 62% of State court felony defendants in the 75 largest counties were released prior to the disposition of their case."). They also constitute the majority of people in jail at any given point.

[156] For an overview of the state of bail reform, see generally Beatrix Lockwood & Annaliese Griffin, *The State of Bail Reform*, MARSHALL PROJECT (Oct. 30, 2020), https://www.themarshallproject.org/2020/10/30/the-state-of-bail-reform [https://perma.cc/RWW6-MEJE].

[157] *See, e.g.*, Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 732–33 (2017) (summarizing available data based on the authors' calculations: "[i]n New York City, . . . 14% of misdemeanor defendants remain in jail during the entire pretrial period . . . ."). Misdemeanant defendants make up the vast majority of people in the criminal legal system, though a minority of those in jail. *See* COURT STATS. PROJECT, NAT'L CTR. FOR STATE CTS., STATE COURT CASELOAD DIGEST: 2018 DATA 13 (2020), https://www.courtstatistics.org/__data/assets/pdf_file/0014/40820/2018-Digest.pdf [https://perma.cc/AW55-VQLU] (misdemeanor cases constituted over three-quarters of the criminal docket in the 32 state courts where data were available); MINTON & ZENG, *supra* note 1, at 11 tbl. 6 (at midyear 2020, about 77% of local jail inmates were held pursuant to felony charges; 17% pursuant to misdemeanor charges; 6% pursuant to civil infractions or unknown charges).

[158] U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 4 (2019), https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf [https://perma.cc/FJC5-NH9P] (noting that there were more than 3 million cases on the non-detained

incarcerating authorities themselves have already determined that release would be appropriate (and *a fortiori*, entirely consistent with the "essential aspect[s]" of court proceedings). These are individuals who are granted bond but cannot pay it.[159] It would be odd to find that releasing someone from incarceration pursuant to the ADA or the Rehabilitation Act alters an essential aspect of pretrial incarceration when it simply moves them into an existing enormous set of people facing criminal or immigration proceedings from the community.

In both criminal and immigration contexts, pretrial incarceration is justified as furthering one or both of two purposes: ensuring that defendants/respondents attend their proceedings and safeguarding public safety.[160] Begin with the first justification, ensuing attendance. Other tools—tools that do not undermine the meaningful and equal access of people with disabilities to their proceedings—can serve that same end. Non-detention methods of ensuring presence are extremely common. Among the methods used with many thousands of criminal defendants are release on recognizance, bail, electronic monitoring of various types, and pretrial check-ins (in person, via phone, or via text). The experience of states and the federal government demonstrates these processes can be effective in getting defendants to their

docket in fiscal year 2019, a far higher number than those detained and in immigration proceedings).

[159] *See, e.g.*, Will Dobbie, Crystal Yang & Jacob Goldin, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 202 (2018) (reporting, in a study focusing on Miami and Philadelphia, that less than 50% of defendants managed to post bail even when it was set at $5000 or less); MARY T. PHILLIPS, N.Y.C CRIM. JUST. AGENCY, A DECADE OF BAIL RESEARCH IN NEW YORK CITY 51 tbl. 7 (2012), https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf [https://perma.cc/T8KV-LCD9] (reporting that in New York City, only 26% of defendants who received bail under $500 posted bail at arraignment, while only 7% made bail that was set at $5,000). For information on ICE immigration bonds and how many detained noncitizens cannot pay them, see ACLU ANALYTICS & IMMIGRANTS' RIGHTS PROJECT, DISCRETIONARY DETENTION BY THE NUMBERS (2018), https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/discretionary-detention [https://perma.cc/4RY7-TA4H]; ACLU ANALYTICS, IMMIGRATION BOND ANALYSIS: METHODOLOGY (2018), https://www.aclu.org/report/immigration-bond-analysis-methodology [https://perma.cc/V4X2-C4X5].

[160] On criminal detention, *see* Bell v. Wolfish, 441 U.S. 520, 534 (1979) (recognizing that the "Government has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences, [and] confinement of such persons pending trial is a legitimate means of furthering that interest"); United States v. Salerno, 481 U.S. 739, 751 (1987) (upholding pretrial detention "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community"). Contrast this with post-adjudication incarceration, where the purpose is punishment. On immigration detention, see Demore v. Kim, 538 U.S. 510, 515 (2003) (crediting "the Government's two principal justifications for mandatory detention [of "criminal aliens"]: (1) ensuring the presence of criminal aliens at their removal proceedings; and (2) protecting the public from dangerous criminal aliens"); Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018) ("Congress has authorized immigration officials to detain some classes of aliens during the course of certain immigration proceedings" to allow "immigration officials time to determine an alien's status without running the risk of the alien's either absconding or engaging in criminal activity before a final decision can be made").

criminal court proceedings.[161] Similarly, the federal government has ample tools at its disposal short of detention to ensure immigration proceeding attendance by non-detained people. These include release on recognizance, parole, bond, periodic check-ins, and electronic monitoring.[162] Without necessarily endorsing all of these options (ankle monitors and invasive check-ins in particular may be very onerous for people with disabilities), we note that they are in very wide use;[163] millions of people appear for immigration proceedings without being detained.[164] And (as developed in Section IV.C, below), this is true even for many individuals covered by the Immigration and Nationality Act's so-called "mandatory detention" provisions.

Sometimes, a further purpose of pretrial incarceration is to safeguard public safety. (As already explained, pretrial incarceration often does not actually even purport to serve public safety, because it occurs after an incarcerated individual has been deemed appropriate for release, when he or she cannot afford bond.) Where the proffered justification for pretrial incarceration of a particular person with a disability is, indeed, safety-based, if he demonstrates that his incarceration is excluding him from meaningful access to his criminal or immigration proceedings because of his disability, the ADA and Rehabilitation Act demand that the government be put to its proof on any assertion of a "fundamental alteration" defense.[165] And if the

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[161] MICHAEL R. JONES, PRETRIAL JUST. INST., UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION (2013), https://www.nmcourts.gov/wp-content/uploads/2020/11/Unsecured_Bonds_The_As_Effective_and_Most_Efficient_Pretrial_Release_Option_Jones_2013.pdf [https://perma.cc/57F8-ANXU] (finding that unsecured bonds are as effective as secured bonds); Karla Dhungana Sainju, Stephanie Fahy, Katherine Baggaley, Ashley Baker, Tamar Minassian & Vanessa Filippelli, *Electronic Monitoring for Pretrial Release: Assessing the Impact*, 82 FED. PROB. 3, 9 (2018) (finding that "the use of [electronic monitoring] may have some positive impacts such as increasing the likelihood of returning to court"); ROSS HATTON & JESSICA SMITH, UNIV. OF N.C. SCH. OF GOV'T, RESEARCH ON THE EFFECTIVENESS OF PRETRIAL SUPPORT AND SUPERVISION SERVICES: A GUIDE FOR PRETRIAL SERVICES PROGRAMS (2021) (finding that existing literature on alternatives to pretrial detention suggests pretrial court date reminder systems, electronic monitoring, and supervised release can reduce failure to appear rates). *See also, e.g.*, N.J. REV. STAT. § 2A:162-15 (2014) (implementing New Jersey Criminal Justice Reform Act to primarily rely on pretrial release to assure a criminal defendant's appearance in court).

[162] For details on ICE's "alternatives to detention," see *Detention Management,* U.S. IMMIGR. & CUSTOMS ENF'T, (July 8, 2022), https://www.ice.gov/detain/detention-management [https://perma.cc/T8M9-M8CU].

[163] *See Immigration Detention Quick Facts: Immigration Detention Primer*, TRAC IMMIGRATION (2021), https://trac.syr.edu/immigration/quickfacts/ [https://perma.cc/LRB2-WJSP] (164,391 people were monitored in ICE's various alternatives to detention programs as of Jan. 15, 2022).

[164] *See FACT CHECK: Asylum Seekers Regularly Attend Immigration Court Hearings,* HUMAN RIGHTS FIRST (Jan. 25, 2019), https://www.humanrightsfirst.org/resource/fact-check-asylum-seekers-regularly-attend-immigration-court-hearings [https://perma.cc/T5SE-73DT].

[165] *See supra* note 121 and accompanying text; *cf.* US Airways, Inc. v. Barnett, 535 U.S. 391, 401–02 (interpreting ADA Title I "reasonable accommodation" provision: plaintiff "need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases," "[o]nce the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances"); Johnson v. Gambrinus Co./Spoetzl Brewery, 116 F.3d 1052, 1059 (5th

government wants to defend the exclusion as necessary for public safety (so that alteration would constitute a "fundamental alteration," its demonstration would necessarily turn on individual circumstances and evidence, unlike so many bond determinations that rest on generalizations purporting to suggest dangerousness.[166]

Moreover, the requirement that the government make an individualized showing of dangerousness is even sharper if an incarcerating authority has chosen to subject a person with a disability to pretrial incarceration *because of* that disability—if, for example, a bond schedule or bond decider weighs mental illness against bond on the stereotyped assumption that people with mental illness are dangerous, or particularly likely to abscond. Such a discriminatory practice constitutes its own violation of the ADA/Rehabilitation Act unless the jurisdiction succeeds in proving up the existence of a "direct threat"—a "determin[ation that] an individual poses a direct threat to the health or safety of others, [founded on] an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk."[167]

B. Existing Programs Are Not Adequate Substitutes

Release is not the only possible response to the damaging interaction of pretrial incarceration and disability. States and the federal government have long provided two other interventions for (some) individuals with psychiatric and intellectual disabilities—provision of counsel, and treatment to restore competency—to address potential unfairness of the ongoing court proceedings. Neither covers the ground we've described and, therefore, neither crowds out our theory.

Cir. 1997) (applying similar analysis to ADA Title III's fundamental alteration defense, and commenting "fundamental alteration is merely a particular type of undue hardship. Consequently, while the scope of the affirmative defense under Title III is more narrow than that provided by Title I, the type of proof—that is, proof focusing on the specific circumstances rather than on reasonableness in general—is the same.").

[166] *See*, *e.g.*, Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837, 866–71 (2016).

[167] 28 C.F.R. § 35.139; s*ee also* Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 287 n.16 (1987) (interpreting the Rehabilitation Act to disallow a teacher's firing unless she "pose[d] a significant risk of communicating an infectious disease to others in the workplace [and a] reasonable accommodation will not eliminate that risk"); Chevron U.S.A. Inc. v Echazabal, 536 U.S. 73, 86 (2002) ("The direct threat defense must be 'based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence.'"); Bragdon v. Abbott, 524 U.S. 624, 649 (1998) ("[T]he risk assessment must be based on medical or other objective evidence."); *see generally* Brittany Glidden & Laura Rovner, *Requiring the State to Justify Supermax Confinement for Mentally Ill Prisoners: A Disability Discrimination Approach*, 90 DEN. U. L. REV. 56, 69 (2012); Samuel R. Bagenstos, *The Americans with Disabilities Act As Risk Regulation*, 101 COLUM. L. REV. 1479, 1490–1513 (2001).

1. Counsel

Many, but far from all, people detained pretrial have counsel. For criminal defendants, the (eventually) counseled percentage must be fairly high—after all, criminal defendants may not be sentenced to a term of incarceration, including a suspended term, without criminal counsel.[168] But many months may pass prior to appointment.[169] The proportion is far lower in immigration detention,[170] where the government has a much more limited obligation to fund representation.[171] But where detained people have counsel, or if access to counsel were broadened, could legal representation substitute for the alternatives-to-detention modification proposed here? Our answer is no. Counsel are surely important, for all the reasons stated in the foundational cases guaranteeing counsel rights for criminal defendants.[172] But for access to criminal or immigration proceedings to be meaningful/equal, those in such proceedings need to be able to themselves participate, by testifying, identifying witnesses and evidence, assisting their counsel, and making decisions about their case—all abilities that decay under the stresses that prompted this article. If detention thus renders access unequal, our claim remains even for counseled clients.

In the immigration setting, the 2011 Board of Immigration Appeals decision *Matter of MAM* requires immigration judges to be alert to the possibility of mental incompetency, and where they see it, to provide "safeguards."[173]

Examples of appropriate safeguards include, but are not limited to, refusal to accept an admission of removability from an unrepresented respondent; identification and appearance of a family member or close friend who can assist the respondent and provide the court with information; docketing or managing the case to facilitate the respondent's ability to obtain legal representation and/or medical treatment in an effort to restore competency; participation of a guardian in the proceedings; continuance of the case for good cause shown; closing the hearing to the public; waiving the respondent's appearance; actively aiding in the development of the record, includ-

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[168] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972); Alabama v. Shelton, 535 U.S. 654 (2002).

[169] *See, e.g.*, DIANE DEPIETROPAOLO-PRICE, ACLU, SUMMARY INJUSTICE: A LOOK AT CONSTITUTIONAL DEFICIENCIES IN SOUTH CAROLINA'S SUMMARY COURTS (2016), https://www.aclu.org/report/summary-injustice-exposes-south-carolina-courts-convict-and-jail-many-defendants-without [https://perma.cc/CKQ3-KDHF].

[170] *See, e.g.*, Marouf, *supra* note 4, at 2150 ("In removal proceedings overall, forty-five percent of immigrants are unrepresented; but a 2007 study found that eighty-four percent of detainees did not have attorneys.").

[171] *See* Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034 (C.D. Cal. 2010) (requiring provision of legal representation to detained immigrants in California, Arizona, and Washington, if their mental disabilities render them unable to represent themselves).

[172] *See* sources cited *supra* note 168.

[173] *Matter of* M-A-M-, 25 I&N Dec. 474 (B.I.A. 2011), https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3711.pdf [https://perma.cc/AY4E-6H52].

ing the examination and cross-examination of witnesses; and reserving appeal rights for the respondent.[174]

The literature demonstrating the inadequacy of *Matter of MAM* safeguards in mitigating incompetency is voluminous and persuasive.[175] But even if immigration court safeguards were protecting the due process rights of people with competency limitations, that goal is different from what the Rehabilitation Act promises. While the Rehabilitation Act covers all people with disabilities, *Matter of MAM* safeguards are available only to the subset who lack a "rational and factual understanding of the nature and object of the proceedings" and cannot "consult with the attorney or representative." Even then, *Matter of MAM* promises only minimal access in immigration court, not an equal opportunity to benefit from immigration proceedings. The Rehabilitation Act guarantees more.

2. Restoration of Competency

Every state, and the federal government, has a system in place to evaluate and seek to "restore" competency of any criminal defendant thought to be incompetent to stand trial—that is, under *Dusky v. United States*, who lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him."[176] (No such restoration process is used in immigration proceedings.[177])

In practice, competency restoration systems are vastly under-resourced, and experts have cataloged the systems' many failings.[178] Individuals who spend months in hospitals receiving support to restore their competency may ultimately return from those hospitals with little change to their ability to understand the proceedings against them or work with their counsel. But even where competency restoration systems are functional and succeed in

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[174] *Id.* at 483.

[175] *See, e.g.*, Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929, 961–64 (2014); Sarah Sherman-Stokes, *Sufficiently Safeguarded?: Competency Evaluations of Mentally Ill Respondents in Removal Proceedings*, 67 HASTINGS L.J. 1023 (2016).

[176] Dusky v. United States, 362 U.S. 402, 402 (1960).

[177] *See* Sarah Sherman-Stokes, *No Restoration, No Rehabilitation: Shadow Detention of Mentally Incompetent Noncitizens*, 62 VILL. L. REV. 787, 790 (2017).

[178] *See, e.g.*, Lisa Callahan & Debra A. Pinals, *Challenges to Reforming the Competence to Stand Trial and Competence Restoration System*, 71 PSYCHIATRIC SERVS. 691 (2020); Debra A. Pinals & Lisa Callahan, *Evaluation and Restoration of Competence to Stand Trial: Intercepting the Forensic System Using the Sequential Intercept Model*, 71 PSYCHIATRIC SERVS. 698 (2020); Reena Kapoor, *Commentary: Jail-Based Competency Restoration*, 39 J. AM. ACAD. OF PSYCHIATRY & THE Law 311 (2011). *See also, e.g.*, Disability L. Ctr. v. Utah, 180 F. Supp. 3d 998 (D. Utah 2016); Trueblood v. Washington State Dep't of Social & Health Servs., No. 14-cv-1178-MJP, 2017 WL 4700326 (W.D. Wash. Oct. 19, 2017); Oregon Advoc. Ctr. v. Mink, 322 F.3d 1101 (9th Cir. 2002). For litigation summaries of these three complex cases, see, respectively, http://clearinghouse.net/case/16833/ [https://perma.cc/5GWF-TS58]; http://clearinghouse.net/case/18576/ [https://perma.cc/9F6T-XGLU]; http://clearinghouse.net/case/15314/ [https://perma.cc/RU9G-7CPW].

some degree of competency improvement, they safeguard the constitutional minima—due process rights of criminal defendants—not the antidiscrimination rights created by the Rehabilitation Act and ADA Title II.[179] The antidiscrimination statutes are not coincident with the constitutional law they implement; rather, as the Supreme Court has explained, they are broader, acting prophylactically to prevent, deter, and remedy constitutional violations.[180] And as established above, "meaningful access" does not mean "minimal access," but rather equal opportunity—a more plaintiff-friendly standard than *Dusky* and its progeny require.

IV. Special Considerations

The ADA/Rehabilitation Act anti-discrimination rights[181] we've been writing about could be implemented in any number of ways. In many juris-

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[179] *See* Mary Elizabeth Wood, Katherine M. Lawson, Jaime L. Anderson, Dominique I. Kinney, Stephen Nitch & David M. Glassmire, *Reasonable Accommodations for Meeting the Unique Needs of Defendants with Intellectual Disability*, 47 J. Am. Acad. Psychiatry L. 310, 311, 313–19 (2019) (urging implementation of ADA reasonable modifications to criminal court systems to supplement competency restoration).

[180] Tennessee v. Lane, 541 U.S. 509 (2004).

[181] The federal government is not covered by the ADA, but the Rehabilitation Act is sufficient. There is no damages cause of action against the federal government under the Rehabilitation Act. *See* Lane v. Peña, 518 U.S. 187 (1996). But prospective relief can be enforced under an implied cause of action or by way of an Administrative Procedures Act, or in habeas. For a convincing analysis of this issue, *see* Mendez v. Gearan, 947 F. Supp. 1364 (N.D. Cal. 1996). For opinions endorsing the existence of an implied cause of action, see, e.g., Nat'l Ass'n of the Deaf v. Trump, 486 F. Supp. 3d 45 (D.D.C. 2020); Am. Council of the Blind v. Paulson, 463 F. Supp. 2d 51 (D.D.C. 2006), *aff'd and remanded sub nom.* Am. Council of the Blind v. Paulson, 525 F.3d 1256 (D.C. Cir. 2008); Avila v. FCI Berlin, No. 19-cv-104, 2020 WL 4506727 (D.N.H. Apr. 7, 2020), *report and recommendation adopted*, 2020 WL 4504902 (Aug. 4, 2020); Gray v. Licon-Vitale, No. 3:19-cv-1291, 2020 WL 1532307 (D. Conn. Mar. 31, 2020); Yeh v. U.S. Bureau of Prisons, No. 3:18-cv-943, 2019 WL 3564697 (M.D. Pa. Aug. 6, 2019); Collins v. Pigos, No. 1:12-cv-232, 2013 WL 943119 (M.D. Pa. Mar. 11, 2013); Deron Sch. of N.J., Inc. v. U.S. Dep't of Agric., No. 09-cv-3477, 2012 WL 1079068 (D.N.J. Mar. 30, 2012); Hawk v. Fed. Bureau of Prisons, No. 1:18-cv-1768, 2019 WL 4439705 (M.D. Pa. Aug. 30, 2019), *report and recommendation adopted*, 2019 WL 4439883 (Sept. 16, 2019); Washington v. Fed. Bureau of Prisons, No. 5:16-cv-03913, 2019 WL 2125246 (D.S.C. Jan. 3, 2019), *report and recommendation adopted*, 2019 WL 1349516 (Mar. 26, 2019); Hopper v. Fed. Bureau of Prisons, No. 5:18-cv-01223, 2018 WL 3750553 (D.S.C. July 5, 2018), *report and recommendation adopted*, 2018 WL 3744981 (Aug. 7, 2018); McRaniels v. U.S. Dep't of Veterans Affs., No. 15-cv-802, 2017 WL 2259622 (W.D. Wis. May 19, 2017); Payne v. U.S. Marshals Serv., No. 15-cv-5970, 2018 WL 3496094 (N.D. Ill. July 20, 2018); Houck v. USA, No. 17-cv-474, 2017 WL 2733905 (S.D. Ill. June 22, 2017); Keller v. Walton, No. 16-CV-565, 2016 WL 4720459 (S.D. Ill. Sept. 9, 2016); Arkansas Adapt v. Johnson, 149 F.3d 1186 (8th Cir. 1998); Wood v. Smith, No. 2:17-cv-137, 2018 WL 1613799 (E.D. Ark. Mar. 12, 2018), *report and recommendation adopted*, 2018 WL 1610878 (Apr. 3, 2018); Am. Council of the Blind v. Astrue, No. 05-cv-04696, 2008 WL 1858928 (N.D. Cal. Apr. 23, 2008); Mendez v. Gearan, 947 F. Supp. 1364 (N.D. Cal.1996); Davis v. Astrue, No. 06-cv-6108, 2011 WL 3651064 (N.D. Cal. Aug. 18, 2011); Gray v. Golden Gate Nat'l Recreational Area, No. 08-cv-00722, 2012 WL 13140460 (N.D. Cal. July 3, 2012); Doe v. Astrue, No. 09-cv-00980, 2009 WL 2566720 (N.D. Cal. Aug. 18, 2009); Galvez-Letona v. Kirkpatrick, 54 F. Supp. 2d 1218 (D. Utah 1999), *aff'd on other grounds*, 3 F. App'x 829 (10th Cir. 2001); Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034 (C.D. Cal. 2010); Johnson v. United States, No. 3:18-cv-2178, 2021 WL 256811 (S.D. Cal. Jan. 25,

dictions, prosecutors and/or jailers have authority to release criminal defendants in appropriate circumstances. When executive officials have this kind of authority, they should—and indeed must, to comply with federal law—exercise it to vindicate the antidiscrimination rights of people with disabilities in their custody. So a first step in cases raising the fact patterns here examined is for the person whose access to court proceedings is being undermined by the interaction of incarceration and disability to—through his or her lawyer, if there is one—raise the issue with the executive official responsible for incarceration, explain the situation, and seek administrative release. Which officials have appropriate authority, and the procedural avenues to reach them, will vary by incarcerating jurisdiction. For example, detained noncitizens in immigration proceedings might raise their Rehabilitation Act right to release in a written letter to their local ICE Field Office Director, or as part of a motion for release on bond submitted to an Executive Office of Immigration Review immigration judge. In the authors' experiences, government officials often lack any background in disability rights, and are often unwilling to vary their normal procedures notwithstanding their reasonable modification responsibilities. So self-advocates and lawyers must be ready to explain thoroughly why and how the official at hand must act to prevent disability discrimination. If that doesn't work, other venues could include the proceedings for which pretrial incarceration is being used, or in a federal court ADA/Rehabilitation Act enforcement action brought as a habeas petition, or—if it's possible to navigate the Prison Litigation Reform Act obstacles discussed below—as an injunctive case.[182]

We cannot deal comprehensively with the hurdles to be managed for each procedural avenue, but we do address three groups of considerations in this Part. First, we lay out the obstacles posed by the Prison Litigation Reform Act and some potential paths through them; then, we address what we

2021); Wenrich v. Empowered Mgmt. Sols. LLC, No. 17-cv-00639, 2019 WL 3550835 (D. Colo. Aug. 3, 2019). For opinions endorsing an APA cause of action, see, e.g., Cousins v. Sec'y of the U.S. Dep't of Transp., 880 F.2d 603, 605 (1st Cir. 1989) (en banc); Clark v. Skinner, 937 F.2d 123, 126 (4th Cir. 1991); Moya v. U.S. Dep't of Homeland Sec., 975 F.3d 120, 128 (2d Cir. 2020) ("Nor does the statute reflect Congress's intent to imply a private right of action against executive agencies as regulators"; "[T]he APA provides an express cause of action for plaintiffs who wish to sue an executive agency for violating the Rehabilitation Act"); Kinneary v. City of New York, 358 F. Supp. 2d 356, 359 (S.D.N.Y. 2005); Wilson v. Seattle Hous. Auth., No. 09-cv-226-MJP, 2010 WL 1633323, at *5 (W.D. Wash. Apr. 22, 2010) ("HUD argues more convincingly . . . that Plaintiffs can only sue for Rehabilitation Act relief under the Administrative Procedures Act (APA)."); SAI v. Dep't of Homeland Sec., 149 F. Supp. 3d 99, 115 (D.D.C. 2015); Pereira v. U.S. Dep't of Just., No. 16-cv-2599-NRB, 2016 WL 2745850, at *19 (S.D.N.Y. May 11, 2016); Mathis v. GEO Grp., Inc., No. 2:08-cv-00021, 2009 WL 10736631, at *7 (E.D.N.C. Nov. 9, 2009) ("Notably, the APA may provide for judicial review of the BOP's alleged action and thereby undercut the need to imply a private right of action against the BOP under section 504.").

[182] *See* Barnes v. Gorman, 536 U.S. 181, 184–85 (2002) ("Section 202 of the ADA prohibits discrimination against the disabled by public entities; § 504 of the Rehabilitation Act prohibits discrimination against the disabled by recipients of federal funding, including private organizations, 29 U.S.C. § 794(b)(3). Both provisions are enforceable through private causes of action.").

think is the non-issue of *Younger* abstention, and, finally, we survey the bevy of statutory complications in the Immigration and Nationality Act.

A. State and Federal Criminal Incarceration: The Prison Litigation Reform Act[183]

Anyone bringing a federal civil case involving criminal (not immigration[184]) incarceration needs to worry about the 1996 Prison Litigation Reform Act,[185] a statute that limits access to courts for incarcerated people and constrains the remedies available in the cases they do manage to bring.[186]

1. Exhaustion of administrative remedies.

The PLRA requires incarcerated people bringing federal lawsuits to first pursue internal jail/prison grievance systems. It states: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."[187] Although the Supreme Court has been clear that exhaustion is *not* required when no remedy at all is available via the grievance system,[188] there is no exemption from the requirement just because the *preferred* remedy is unavailable.[189] Moreover, the Supreme Court has held that the PLRA imposes not just a ripeness-type timing rule but a procedural bar—exhaustion must be not merely complete but "proper," following all jail-imposed rules, such as time limits, use of specified forms, etc.[190] The PLRA exhaustion requirement has functioned to narrow access to courts because following the (often unclear, internally contradictory, or onerous) rules can be ex-

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[183] We lean heavily in this subsection on JOHN BOSTON, THE PLRA HANDBOOK: LAW AND PRACTICE UNDER THE PRISON LITIGATION REFORM ACT (2022).

[184] *See, e.g.*, Agyeman v. I.N.S., 296 F.3d 871, 887 (9th Cir. 2002) (immigration detainees not covered by the PLRA); LaFontant v. I.N.S., 135 F.3d 158, 165 (D.C. Cir. 1998) (same); Ojo v. I.N.S., 106 F.3d 680, 683 (5th Cir. 1997) (same); Cohen v. Clemens, 321 Fed. Appx. 739, 743 (10th Cir. 2009) (same).

[185] Prison Litigation Reform Act, Pub. L. No. 104–134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended at 11 U.S.C. § 523 (2012); 18 U.S.C. §§ 3624, 3626 (2012); 28 U.S.C. §§ 1346, 1915, 1915A, 1932 (2012); 42 U.S.C. §§ 1997a–c, e–f, h (2012)). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, 110 Stat. 1321.

[186] For in-depth examination of the PLRA's impact on damage actions, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003). For in-depth examination of the PLRA's impact on injunctive litigation, see Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006). For statistics on the statute's impact, see Margo Schlanger, *Trends in Prisoner Litigation, As the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015), and an update posted as Margo Schlanger, *Prison and Jail Civil Rights/Conditions Cases: Longitudinal Statistics, 1970-2021* (April 16, 2022), https://ssrn.com/abstract=4085142 [https://perma.cc/KP39-685C].

[187] 42 U.S.C. § 1997e(a).

[188] *See* Ross v. Blake, 578 U.S. 632, 642–46 (2016).

[189] *See* Booth v. Churner, 532 U.S. 731 (2001).

[190] *See* Woodford v. Ngo, 548 U.S. 81 (2006).

tremely difficult, particularly for incarcerated people with communications or intellectual disabilities or with mental illness.

One approach to PLRA exhaustion is to avoid it—that is, to choose procedural vehicles for ADA/Rehabilitation Act enforcement that lie outside of the PLRA exhaustion requirement. For example, assertion of ADA/Rehabilitation Act rights in criminal/bond proceedings is not an "action brought with respect to prison conditions."[191] Habeas actions may well also be excluded[192] because they are subject to their own exhaustion requirements (beyond the ambit of this article), and because courts have interpreted the exhaustion provision's reach with reference to the PLRA's prospective relief provisions, which cover "any civil action with respect to prison conditions,"[193] and define that term expressly to exclude "habeas corpus proceedings challenging the fact or duration of confinement in prison."[194] Finally, because only cases brought by "prisoner[s]" are covered, claims in cases brought by an incarcerated person's family or guardian, or by an organization (such as one of the federally-funded disability-focused Protection and Advocacy organizations) need not have exhausted grievance systems prior to filing.[195]

There's also a more general argument that exhaustion does not apply because a case hinging on denial of equal access to criminal proceedings is not one "brought with respect to prison conditions." In *Porter v. Nussle*, the Court rejected lower court precedent that the exhaustion provision's reference to "action[s] . . . brought with respect to prison conditions" did not limit single-incident or excessive force cases; it held that the exhaustion requirement covers conditions suits, "whether they involve general circum-

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[191] *See, e.g.*, United States v. Hashimi, 621 F. Supp. 2d 76, 84–85 (S.D.N.Y. 2008) (finding that a motion by a detainee in a government-initiated criminal case is not an "action" covered by PLRA exhaustion); United States v. Savage, 2012 WL 5866059, at *3 (E.D. Pa. Nov. 16, 2012) (no exhaustion required for motions that "affect[ ] Defendant's ability to prepare his defense").

[192] *See* Carmona v. U.S. Bureau of Prisons, 243 F.3d 629, 634 (2d Cir. 2001), and cases cited; Baez v. Moniz, 460 F. Supp.3d 78, 82–83 (D. Mass. 2020) (holding PLRA exhaustion inapplicable to habeas proceeding seeking release based on prison conditions); Martinez-Brooks v. Easter, 459 F. Supp. 3d 411, 437 n.19 (D. Conn. 2020) (same). Note, however, that in some but not all circuits, habeas is disallowed as a vehicle for conditions-related challenges. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1862–63 ("We have left open the question whether [detainees] might be able to challenge their confinement conditions via a petition for a write of habeas corpus."); Hallinan v. Scarantino, 466 F. Supp. 3d 587, 601–02 (E.D.N.C. 2020) (collecting lower court cases on both sides of the question). Whether the challenge described here would count as too "conditions-related" for habeas is unclear. If habeas is available, as stated in text, the PLRA by its terms does not apply to "habeas corpus proceedings challenging the fact or duration of confinement in prison." In our view, the challenge described, if brought under habeas, aligns with this description and therefore should be exempt from the PLRA. But—in the context of COVID claims brought in the past several years—courts are, again, all over the map. *Compare*, *e.g.*, Martinez-Brooks v. Easter, 459 F. Supp. 3d 411, *with*, *e.g.*, Alvarez v. Larose, 456 F. Supp. 3d 861, 866 (S.D. Cal. 2020) (holding PLRA applicable to Eighth Amendment habeas case seeking release based on COVID-risk).

[193] 18 U.S.C. § 3626(a)(1)(A).

[194] 18 U.S.C. § 3626(g)(2).

[195] *See, e.g.*, Rivera-Rodriguez v. Pereira-Castillo, No. 04–cv–1389, 2005 WL 290160, at *5–6 (D.P.R. Jan. 31, 2005) (prisoner's guardian); Ala. Disabilities Advoc. Program v. Wood, 584 F. Supp. 2d 1314, 1316 (M.D. Ala. 2008) (state Protection and Advocacy organization).

stances or particular episodes, and whether they allege excessive force or some other wrong."[196] In so doing, the *Porter* Court pointed to *Preiser v. Rodriguez*, which, it explained, "described [the] two broad categories of prisoner petitions: (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement."[197] Because claims asserting this article's theory challenge "the fact or duration of confinement," the *Preiser* divide might exclude them from PLRA exhaustion coverage.[198]

2. Prisoner Release Orders

As mentioned above, the PLRA limits prospective remedies in "any civil action with respect to prison conditions." This is defined as "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison."[199] ("Prison" is further defined to include pretrial detention.[200])

The prospective relief limits, which require provisions to be closely tailored and necessary to correct the federal law violation,[201] merely reflect general equitable principles, but their codification has clearly made courts more attentive to those ideals of restraint.[202] More drastically, the PLRA applies the same requirements to consent judgments, which otherwise can include whatever provisions the parties chose to agree to, as long as they had a visible relationship to the complaint.[203] More importantly, the statute makes it something between difficult and impossible to obtain a "prisoner release or-

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[196] 534 U.S. 516, 532 (2002).

[197] *Id.*

[198] It's for this reason that false arrest and wrongful conviction cases are not covered by PLRA exhaustion. *See, e.g.*, Cantu v. Bexar Cnty., No. SA-17-CA-306, 2018 WL 1419345 (W.D. Tex. Mar. 22, 2018), and other cases cited by JOHN BOSTON, THE PLRA HANDBOOK: LAW AND PRACTICE UNDER THE PRISON LITIGATION REFORM ACT 117 n.205 (2022). On the other hand, some courts have been more aggressive in their interpretation of the PLRA's coverage. *See, e.g.*, United States v. Carmichael, 343 F.3d 756, 761 (5th Cir. 2003) (holding that statutorily required collection of DNA is a prison condition); Martin v. Iowa, 752 F.3d 725, 727 (8th Cir. 2014) (holding challenge to lack of in-person parole interviews must be exhausted since it was a "civil action with respect to prison conditions," citing the definition from 18 U.S.C. § 3626(g), governing another part of the PLRA).

[199] 18 U.S.C. § 3626(g)(2).

[200] 18 U.S.C. § 3626(g)(5).

[201] 18 U.S.C. § 3626(a)(1).

[202] *See, e.g.*, Georgia Advoc. Off. v. Jackson, 4 F.4th 1200, 1209 (11th Cir. 2021), *vacated on other grounds*, 33 F.4th 1325 (11th Cir. 2022) (stating "the PLRA supercharges some of the traditional equitable principles of injunctive relief").

[203] *See* Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 525 (1986) (stating consent decree terms must only "spring from and serve to resolve a dispute within the court's subject-matter jurisdiction, . . . com[e] within the general scope of the case made by the pleadings, . . . further the objectives of the law upon which the complaint was based," (citations and internal quotation marks omitted)).

der"[204]—that is, an order "that directs the release from or nonadmission of prisoners to a prison."[205] Such an order can be granted only if "(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders," and only after a three-judge court finds (by clear and convincing evidence) that "(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right."[206] Defendants may appeal any prisoner release order, as of right, directly to the U.S. Supreme Court.[207]

If the PLRA's limits on prisoner release orders apply to the kind of remedy urged here—an order directing that a person with a disability not be incarcerated because that incarceration undermines equal access to a court proceeding—those limits might well pose an insurmountable barrier. But, as with exhaustion, there are occasions when the release order provisions should not apply. As with exhaustion, the statute does not cover immigration detention. And, again, even as to criminal detention, the prisoner release order provisions simply have no application to criminal proceedings (including bond/bail hearings).[208] (Their application to habeas cases is currently highly contested.)

When the PLRA covers a particular action, an order releasing prisoners from incarceration whose purpose is to limit population is certainly constrained. But some courts have held that orders serving other purposes are not. For example, an order banning the housing of juveniles in a jail for more than 15 days, entered because the jail's conditions were unacceptable for children, has been held not to be a prisoner release order.[209] Likewise, an order directing transfer of a quadriplegic prisoner to a civilian medical facility when the court concluded his care was so inadequate in prison that he would die if left there.[210] The district court explained that, when Congress limited entry of a prisoner release order to cases in which "crowding is the primary cause of the violation of a Federal right," it signaled that orders implement-

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[204] 18 U.S.C. § 3626(a)(3); *See* Brown v. Plata, 563 U.S. 493 (2011).
[205] 18 U.S.C. § 3626(g)(4).
[206] 18 U.S.C. § 3626(a)(3).
[207] *Id.*
[208] *See supra* note 192.
[209] Doe v. Younger, No. 91-cv-187, Op. and Order at 10–12 (E.D. Ky., Sept. 4, 1996), https://clearinghouse.net/doc/105408/ [https://perma.cc/J8P4-97X2].
[210] Reaves v. Dep't of Corr., 404 F. Supp. 3d 520, 522–23 (D. Mass. 2019) (noting that the order called for transfer, not release; that it involved only a single prisoner; and that it was not primarily intended to relieve crowding), *appeal dismissed as moot*, No. 19-2089 (1st Cir., Dec. 14, 2021). *See also* Plata v. Brown, 427 F. Supp. 3d 1211, 1222 (N.D. Cal. 2013) ("Defendants conceded that an order to transfer any single inmate out of a prison to correct the violation of a constitutional right caused by something other than crowding—for example, because transfer was necessary for the inmate to obtain appropriate medical care—would not be a 'prisoner release order.'").

ing other constitutional rights and entirely unrelated to crowding were not covered by this PLRA provision.[211]

B. State Criminal Cases: Younger Abstention

The Supreme Court held in *Younger v. Harris* that when a party in federal court is simultaneously defending a state criminal prosecution, federal courts "should not act to restrain [the state] criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[212] But such "*Younger* abstention" does not cover the theory presented here. In *Pugh v. Rainwater*, the Fifth Circuit explained that *Younger* abstention does not bar federal court adjudication of "procedural rights" if the plaintiff "seeks to challenge an aspect of the criminal justice system which adversely affects him but which cannot be vindicated in the state court trial." "Where . . . the relief sought is not 'against any pending or future court proceedings as such,' *Younger* is inapplicable."[213] Thus, *Younger* dictates abstention when a state court defendant challenges the merits of his criminal prosecution in federal court—for example, attempting to suppress the evidence presented in state court based on an unconstitutional search and seizure—but abstention is inappropriate where a federal case challenges "an aspect of the criminal justice system which adversely affects" him but is unrelated to the merits of the prosecution itself.[214]

The Supreme Court endorsed this approach in its review of *Pugh v. Rainwater*, re-captioned *Gerstein v. Pugh*, warning against over-abstention. Affirming an injunction ordering the state to provide "timely judicial determination of probable cause as a prerequisite to detention,"[215] the Court noted that *Younger* abstention was not appropriate because "[t]he injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution," and because "[t]he order to hold preliminary hearings could not prejudice the conduct of the trial on the merits."[216]

More generally, the Court has made clear that "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'"[217] The Courts of Appeals have similarly emphasized that "*Younger* abstention remains an ex-

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[211] *Reaves*, 404 F. Supp. 3d at 523. Schlanger has similarly argued in prior work that court orders whose purpose is protection, not population reduction—for example, orders "diverting classes of vulnerable persons from incarceration"—are not PLRA prisoner release orders. *See* Margo Schlanger, *Anti-Incarcerative Remedies for Illegal Conditions of Confinement*, 6 U. MIAMI RACE & SOC. JUST. L. REV. 1, 27–28 (2016).

[212] 401 U.S. 37, 43–44 (1971).

[213] *Id.* at 781–82.

[214] *Pugh*, 483 F.2d at 782.

[215] Gerstein v. Pugh, 420 U.S. 126 (1975).

[216] *Id.* at 108 n.9.

[217] Sprint Commc'ns v. Jacobs, 571 U.S. 69, 77 (2013) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

traordinary and narrow exception to the general rule."[218] In recent years, many federal courts have rejected *Younger* abstention arguments to entertain challenges to state court bail procedures, holding that abstention is incorrect just as in *Gerstein*.[219] Even in individual cases, federal courts have granted review and relief relating to unlawful bail proceedings. For example, the Ninth Circuit recently explained that habeas relief was warranted in one such case and that "*Younger* abstention is not appropriate in this case because the issues raised in the bail appeal are distinct from the underlying criminal prosecution and would not interfere with it. Regardless of how the bail issue is resolved, the prosecution will move forward unimpeded."[220]

In addition, case law emphasizes that *Younger* itself calls for abstention only "when the moving party has an adequate remedy at law *and* will not suffer irreparable injury if denied equitable relief."[221] The absence of a state court forum or the inability of that state court forum to grant relief before irreparable harm occurs both dictate non-abstention.[222]

While these precedents are currently under attack,[223] while they stand, they compel non-abstention in the circumstances here. A federal lawsuit could seek to vindicate the ADA rights in question in one of two ways. An injunctive case could seek reform of bail procedures to grant reasonable modifications where required by the ADA/Rehabilitation Act; such a lawsuit escapes abstention by following in the footsteps of *Gerstein* and the recent bail-procedure-modification cases. Or, a habeas case could seek release mandated by the ADA/Rehabilitation Act, if the state proceedings declined either to consider or grant such release. Such a case likewise escapes abstention on demonstration of the absence of an adequate state remedy at law and/or the presence of irreparable harm.

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[218] Cook v. Harding, 879 F.3d 1035, 1038 (9th Cir. 2018) (quoting Nationwide Biweekly Admin. v. Owen, 873 F.3d 716, 727 (9th Cir. 2017) (internal quotation marks omitted)).

[219] *See* Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018); O'Donnell v. Harris Cnty., 892 F.3d 147 (5th Cir. 2018); Arevalo v. Hennessy, 882 F.3d 763 (9th Cir. 2018); Parga v. Bd. of Cnty. Commissioners of Cnty. of Tulsa, No. 18-cv-0298, 2019 WL 1231675 (N.D. Okla. Mar. 15, 2019); Booth v. Galveston Cnty., 352 F. Supp. 3d 718 (S.D. Tex. 2019); Caliste v. Cantrell, No. 17-6197, 2017 WL 3686579 (E.D. La. Aug. 25, 2017), *aff'd* 937 F.3d 525 (5th Cir. 2019); Little v. Frederick, No. 17-cv-00724, 2017 WL 8161160 (W.D. La. Dec. 6, 2017), adopted in relevant part, 2018 WL 1221119 (Mar. 8, 2018); Welchen v. Cnty. of Sacramento, No. 16-cv-00185, 2016 WL 5930563 (E.D. Cal. Oct. 11, 2016); Rodriguez v. Providence Cmty. Corr., Inc., 155 F. Supp. 3d 758 (M.D. Tenn. 2015).

[220] Arevalo v. Hennessy, 882 F.3d 763, 766 (9th Cir. 2018); *see also* Atkins v. Michigan, 644 F.2d 543, 549 (6th Cir. 1981) ("The issue of whether the right to bail has been denied is collateral to and independent of the merits of the case pending against the detainee. . . .").

[221] Younger v. Harris, 401 U.S. 37, 43–44 (1971) (emphasis added).

[222] *See, e.g.*, *Arevalo*, 882 F.3d at 766–67; Page v. King, 932 F.3d 898, 903–04 (9th Cir. 2019).

[223] *See* Daves v. Dallas Cnty., Texas, 22 F.4th 522, 547–48 (5th Cir. 2022) (en banc) (remanding bail class action for plenary consideration of *Younger* abstention notwithstanding the rejection of an analogous claim for abstention in *O'Donnell v. Harris Cnty.*, 892 F.3d 147 (5th Cir. 2018), and retaining en banc jurisdiction, noting "After the remand, the en banc court will take a fresh look at Younger, at which time we will have authority to re-evaluate our own precedent.").

C. Immigration Cases

1. Mandatory Detention

A limited number of cases, involving immigration detention of noncitizens subject to so-called statutory "mandatory detention," present the possibility that our interpretation of the Rehabilitation Act could conflict with (later-in-time) provisions of the Immigration and Nationality Act.[224] The Supreme Court has repeatedly emphasized that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[225] Presented with two statutes, courts should harmonize them, "regard[ing] each as effective"—unless Congress's intention to repeal is "clear and manifest," or the two laws are "irreconcilable."[226]

The INA's "mandatory detention" provision directs the federal government to "take into custody any alien who [meets certain criteria related to criminal history] when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense."[227] Further, it limits subsequent release of such individuals to circumstances related to witness protection.

However, assuming in a given case that the mandatory detention statute is constitutional—and numerous courts have upheld as-applied challenges under the Due Process Clause, when detention has become prolonged[228]—an interpretation of the INA consistent with the understanding here offered of the Rehabilitation Act is readily available. The government has long and consistently implemented the statute with the understanding that it does not override agency discretion to avoid detention for humanitarian reasons. In a detailed declaration,[229] one former official canvassed the policies and parameters ICE has used to channel such discretion,[230] and summarized: "Even

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[224] *See* 8 U.S.C. § 1226(c).

[225] FCC v. NextWave Personal Commc'ns Inc., 537 U.S. 293, 304 (2003) (internal quotation marks omitted). *See also, e.g.*, Maine Cmty. Health Options v. United States, 140 S. Ct. 1308, 1323 (2020).

[226] Morton v. Mancari, 417 U.S. 535, 550–51 (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)).

[227] 8 U.S.C. § 1226(c).

[228] *See, e.g.,* German Santos v. Warden, Pike Cnty. Corr. Facility, 965 F.3d 203 (3d Cir. 2020).

[229] Declaration of Andrew Lorenzen-Strait, Fraihat v. U.S. Immigration and Customs Enforcement, Case 5:19-cv-01546-JGB-SHK Document 81-14, 92 (Mar. 24, 2020), https://www.splcenter.org/sites/default/files/documents/declarations.pdf [https://perma.cc/328M-4LTY].

[230] Para. 4, n.1 of the Declaration cited, as examples, *Detention Reform*, U.S. IMMIGR. AND CUSTOMS ENF'T, https://www.ice.gov/detention-reform#tabl [https://perma.cc/U4A8-74F7] (last updated July 24, 2018) (referencing use of risk classification assessment tools that "require[ ] ICE officers to determine whether there is any special vulnerability that may impact custody and classification determinations"); ICE ENF'T AND REMOVAL OPERATIONS, DIRECTIVE 11071.1: ASSESSMENT AND ACCOMMODATIONS FOR DETAINEES WITH DISABILITIES

individuals held under [§ 1226(c)] were released pursuant to ICE's guidelines and policies, particularly where the nature of their illness could impose substantial health care costs or the humanitarian equities mitigating against detention were particularly compelling."[231] Concretizing this government understanding, in case after case, ICE has released noncitizens facing serious medical risks due to immigration detention, deeming those releases lawful even though those individuals were covered by 8 U.S.C. § 1226(c).[232]

The government has only recently offered much analysis in support of its flexible interpretation of 1226(c).[233] While at least two district courts have found that interpretation contrary to law, focusing on the statutory use of the word "shall,"[234] the Sixth Circuit has disagreed.[235] It seems to us that flexibility is correct under either or both of two theories: First, "custody" for purposes of this provision of the INA is arguably not limited to detention,[236] but also includes "other forms of physical restraint"[237] such as travel restrictions or electronic monitoring,[238] typically imposed on the noncitizens released

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9 (Dec. 15, 2016), https://www.aila.org/infonet/ice-er-directive-detainees-with-disabilities [https://perma.cc/M4S4-274Y] (providing for release as an option for detainees with disabilities); DORIS MEISSNER, IMMIGR. AND NATURALIZATION SERVS., EXERCISING PROSECUTORIAL DISCRETION 11 (Nov. 17, 2000), https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf [https://perma.cc/VE54-2DNH]) (citing "aliens with a serious health concern" as a trigger for the favorable exercise of discretion).

[231] Declaration of Andrew Lorenzen-Strait, *supra* note 229, para. 11.

[232] *See* Br. of American Immigr. Council as Amicus Curiae in Supp. of Pet'rs-Appellees, Hope v. Warden York Cnty. Prison, No. 20-1784 (3d Cir. 2020) (describing such cases), https://www.americanimmigrationcouncil.org/sites/default/files/amicus_briefs/hope_et_al_v_doll_et_al_amicus_brief.pdf [https://perma.cc/LE9H-92C2].

[233] The most sustained defense of which we are aware appears in briefs filed in support of the Biden Administration's prioritization policy, in Texas v. United States, No. 6:21-cv-00016; *see* in particular Defs.' Mem. of P. & A. in Opp'n to Pls.' Mot. for Prelim. Inj., Doc. 42, at 22–24 (May 18, 2021), https://clearinghouse.net/doc/130692/ [https://perma.cc/DC2L-BKGY], and Defs.' Post-Trial Mem. of Law, Doc. 223, at 8–19 (Mar. 18, 2022), https://clearinghouse.net/doc/130691/ [https://perma.cc/K4G2-8N3Q].

[234] *See* Texas v. United States, 555 F. Supp. 3d 351 (S.D. Tex. 2021), *stay granted*, 14 F.4th 332 (5th Cir. 2021), *stay vacated*, 24 F.4th 407 (5th Cir. 2021), *appeal dismissed*, No. 21-40618, 2022 WL 517281 (Feb. 11, 2022); Arizona v. Biden, No. 3:21-cv-314, 2022 WL 839672 (S.D. Ohio, Mar. 22, 2022), *stay granted*, 31 F.4th 469 (6th Cir. 2022).

[235] *See* Arizona v. Biden, 31 F.4th 469, 480 (6th Cir. 2022).

[236] *See Matter of* Aguilar-Aquino, 24 I. & N. Dec. 747 (B.I.A. 2009), https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3634.pdf [https://perma.cc/QA79-5GWC] ("[W]e recognize that both a person who has been released on parole and one who remains incarcerated can be considered to be in "custody." On the other hand, the term "detain" generally refers to actual physical restraint or confinement within a given space."). The Board found that 8 U.S.C. § 1226(a) did not intend any such distinction, looking at its legislative history. But the legislative history of section 1226(c) has no similar hints.

[237] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 850 (2018).

[238] Textually, section 8 U.S.C. 1226(c)'s use of "custody" contrasts with references elsewhere in the INA to "detain" or "detention." *See, e.g.*, INA § 225(b)(1)(B)(ii), 8 U.S.C § 1225(b)(1)(B)(ii) (if an immigration "officer determines at the time" of an initial interview with an alien seeking to enter the United States "that [the] alien has a credible fear of persecution . . . , the alien shall be detained"); INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."). INA § 236(a), 8 U.S.C § 1226(a) ("On a warrant issued by the

from detention notwithstanding their apparent coverage by § 1226(c). Second, the Supreme Court has emphasized that "[a] well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes," and underscored more generally "the deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands."[239] To do otherwise with respect to immigration detention would present grave implementation difficulties to the executive agencies forced to detain individuals they have strong reason to prefer to leave at liberty, given limited incarcerative and prosecutorial capacity. The Sixth Circuit focused on this second issue, and also pointed out that § 1226(c)'s "shall" cannot plausibly be read as absolute, given § 1231(a)(2)'s even stronger dictate with respect to a different group of noncitizens that "[u]nder no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible."[240] Whichever the theory in support of the flexible interpretation that has guided federal practice since enactment of § 1226(c), plenty of room remains for the Rehabilitation Act theory described here. Indeed, it would constitute disability discrimination to allow flexibility for policy reasons but bar similar flexibility when required by the Rehabilitation Act theory.

2. Jurisdictional Limits

Four provisions of the Immigration and Nationality Act (INA) potentially pose jurisdictional obstacles to the approach just laid out for people in immigration detention. We argue that, under established jurisprudence, none of the four apply to the claim contemplated in this article. This subpart takes them in turn.

i. 8 U.S.C. §§ 1252(b)(9) ("the Zipper Clause") and 1252(a)(5)

In 8 U.S.C. § 1252(b)(9), the INA channels claims "arising from any action taken or proceeding brought to remove" noncitizens into immigration proceedings before an immigration judge, with appeal to the Board of Immigration Appeals and then review the court of appeals. When it applies, the clause forecloses petitions for habeas corpus and other lawsuits in the district court; the Supreme Court has dubbed it a "zipper clause,"[241] intended by

Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. . . ."). Structurally, the interpretation offered here preserves a distinction between 8 U.S.C. § 1226(a), which allows release on bond or without conditions, and 8 U.S.C. § 1226(c), which insists that (absent a humanitarian situation) ICE maintain "custody"—meaning, according to *Jennings*, that non-incarceration is allowed only if there are significant restraints on physical liberty. Likewise, our interpretation maintains the difference between section 1226(c) and section 1226A, which more clearly references incarceration, disallowing release under various circumstances and requiring that "detention pursuant to this subsection shall terminate" only if a noncitizen is deemed non-removable.

[239] Town of Castle Rock v. Gonzales, 545 U.S. 748, 760–61 (2005).

[240] Arizona v. Biden, 31 F.4th 469, 481 (6th Cir. 2022).

[241] *See* INS v. St. Cyr, 533 U.S. 289, 313 (2001).

Congress "to 'consolidate judicial review of immigration proceedings into one action in the court of appeals.'"[242] Even so, the Supreme Court explained in *Jennings v. Rodriguez* that the provision has no application in a case in which the noncitizens "are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined."[243] In *Jennings*, six members of the (fractured) Court held that the provision simply does not cover challenges to ongoing detention (for example, claims that detention had grown so prolonged as to violate the Due Process Clause). The three-Justice plurality decision, by Justice Alito, explained that an unduly broad reading of the words "arising from"—under which § 1252(b)(9) would bar every claim with any relation to removal—would improperly "make claims of prolonged detention effectively unreviewable," and cause "extreme" and "staggering results" "no sensible person could have intended."[244] The plurality wrote, similarly, that "cramming judicial review of" a claim "based on allegedly inhumane conditions of confinement" into "the review of final removal orders would be absurd."[245] Justice Breyer, writing for the three dissenters, argued more comprehensively that only direct challenges to orders of removal were covered.[246] Both before and since *Jennings*, the courts of appeals have implemented a simple detention/removal distinction: the zipper clause is about challenges to removal, not to ongoing detention.[247] Thus habeas claims at-

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[242] *See* Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1070 (2020) (quoting and citing *St. Cyr*, 533 U.S. at 313).

[243] Jennings v. Rodriguez, 138 S. Ct. 830, 841 (2018) (plurality).

[244] *Id.*

[245] *Id.* at 839–41. *See also* S. Poverty Law Ctr. v. U.S. Dep't of Homeland Sec., No. 18-cv-760, 2020 WL 3265533, at *14–18 (D.D.C. June 17, 2020), *appeal dismissed sub nom.* S. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec., No. 20–5257, 2021 WL 1438297 (D.C. Cir. Apr. 14, 2021); Malam v. Adducci, No. 20-cv-10829, 2020 WL 1672662, at *5 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020).

[246] True, concurring in part and in the judgment, Justice Thomas (joined by Justice Gorsuch) disagreed, resting weight on the fact that detention decisions both "congressionally authorized" and "meant to ensure that an alien can be removed." The concurrence concluded that the jurisdictional bar "covers an alien's challenge to the fact of his detention (an action taken in pursuit of the lawful objective of removal)" though not "claims about inhumane treatment, assaults, or negligently inflicted injuries suffered during detention (actions that go beyond the Government's lawful pursuit of its removal objective)." Jennings v. Rodriguez, 138 S. Ct. 830, 855 (2018) (Thomas, J., concurring in the judgment). It is not clear to us which side of this line describes the claim presented in this article—but in any event, six justices rejected this approach, both in 2018 in *Jennings* itself and the next year, in Nielsen v. Preap, 139 S. Ct. 954 (2019) (in which all the justices repeated their prior takes).

[247] *See, e.g.*, Gonzalez v. U.S. Immigr. & Customs Enf't, 975 F.3d 788, 810 (9th Cir. 2020); Tazu v. Att'y Gen. United States, 975 F.3d 292, 299 (3d Cir. 2020); Aguilar v. U.S. Immigr. & Customs Enf't Div. of Dep't of Homeland Sec., 510 F.3d 1, 11 (1st Cir. 2007) (reading "arising from" "to exclude claims that are independent of, or wholly collateral to, the removal process" and identifying "challenges to the legality of detention" as squarely outside § 1252(b)(9)'s scope); Hernandez v. Gonzales, 424 F.3d 42, 42–43 (1st Cir. 2005) (holding that detention claims are independent of removal proceedings and, thus, not barred by section 1252(b)(9)).

tacking immigration detention decisions as unduly prolonged[248] are, in fact, commonplace.[249]

Here, the Rehabilitation Act claim is that, due to the impacts of immigration detention, people with disabilities cannot meaningfully participate in bond proceedings. Under *Jennings*'s analysis, § 1252(b)(9) poses no obstacle; the claim falls clearly on the detention side of the line. Admittedly, challenges that rest on the right of disabled people in immigration detention to meaningfully access their removal proceedings have a causal connection to the underlying removal proceeding. Still, what is unlawful is the detention, under its actual conditions, and that illegality does not turn on whether the noncitizen wins or loses the removal case;[250] the relief sought neither forecloses nor dictates any immigration relief or protection.

Thus, the removal process claim that is the subject of this article is unlike *J.E.F.M. v. Lynch*,[251] in which the Ninth Circuit ruled that a juvenile's claims to an attorney in removal proceedings "arose from" removal proceedings and were barred from habeas review by § 1252(b)(9). Unlike our theory, *J.E.F.M.*'s claim had nothing to do with detention. Interpreting § 1252(b)(9) to exempt detention challenges makes sense because, the *Jennings* opinions suggest, "[§] 1252(b)(9) is a judicial channeling provision, not a claim-barring one," allowing claims that would otherwise escape Article III judicial review to be brought separately. As the Third Circuit has explained, relying heavily on *Jennings*, "[t]he point of the provision is to channel claims into a single petition for review, not to bar claims that do not fit within that process." The Third Circuit framed the test as whether the claim is one that must be asserted "now or never:" whether the noncitizen "seek[s] relief that courts cannot meaningfully provide alongside review of a final order of removal."[252] The claim here fits this analysis to a T: without access to a collateral proceeding, as through an injunctive or habeas action, a person in preorder immigration detention cannot obtain meaningful review of the Reha-

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[248] *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[249] *See, e.g.*, Anariba v. Dir. Hudson Cnty. Corr. Ctr., 17 F.4th 434 (3d Cir. 2021).

[250] Thus the theory is unlike challenges to conditions of confinement noncitizens have offered to undermine the validity of their removal orders; such challenges are "inextricably linked to the order of removal," Martinez v. Napolitano, 704 F.3d 620, 623 (9th Cir. 2012) (internal quotation marks and citation omitted), and constitute "attempt[s] to reverse the agency's decisions." Vetcher v. Sessions, 316 F. Supp. 3d 70, 75 (D.D.C. 2018). *See also* So. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec., No. 18-cv-760, 2020 WL 3265533, at *17–18 (D.D.C. June 17, 2020), *appeal dismissed sub nom.* So. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec., No. 20-5257, 2021 WL 1438297 (D.C. Cir. Apr. 14, 2021); P.L. v. U.S. Immigr. & Customs Enf't, No. 1:19-cv-01336, 2019 WL 2568648, at *3 (S.D.N.Y. June 21, 2019).

[251] 837 F.3d 1026 (9th Cir. 2016).

[252] *Id.* at 184. *See also* Aguilar v. U.S. Immigr. & Customs Enf't Div. of Dep't of Homeland Sec., 510 F.3d 1, 11 (1st Cir. 2007) (explaining that § 1252(b)(9) does not reach "claims that are independent of, or wholly collateral to, the removal process," like "claims that cannot effectively be handled through the available administrative process"); Gicharu v. Carr, 983 F.3d 13, 16 (1st Cir. 2020) (same).

bilitation Act claim we describe; waiting until a petition for review would prolong the period discriminatory detention by months or even years.[253]

Similarly, 8 U.S.C. § 1252(a)(5) poses no bar. Under this "exclusive means of review" provision, "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e)." But it is evident from the text and established in case law that (a)(5) does "not preclude habeas review over challenges to detention that are *independent of challenges to removal orders*."[254] Here, the relief contemplated is unrelated to any immigration outcome. Determining whether a challenge is independent "will turn on the substance of the relief that a plaintiff is seeking."[255]

ii. 8 U.S.C. § 1252(g)

A second INA provision, 8 U.S.C. § 1252(g), strips district court jurisdiction over "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to *commence proceedings*, *adjudicate cases*, or *execute removal orders* against any alien under this chapter."[256] The Supreme Court has made clear that italicized words mean what they say:

> We did not interpret this language to sweep in any claim that can technically be said to "arise from" the three listed actions of the Attorney General. Instead, we read the language to refer to just those three specific actions themselves.[257]

Decisions to use pre-order detention do not "commence proceedings," "adjudicate cases" or "execute removal orders," so § 1252(g) has no application.

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[253] If a disabled noncitizen was deprived of meaningful access to his immigration proceedings because of his disability, and lost his claim for protection or relief for that reason, he might, however, be able to seek review of that *immigration* claim in a PFR, alleging a Rehabilitation Act violation. Of course this could not cure unlawful detention, because such detention already took place.

[254] *See* Singh v. Gonzales, 499 F.3d 969, 978 (9th Cir. 2007); *see also* Gbotoe v. Jennings, No. 17-cv-06819-WHA, 2017 WL 6039713, *2–4 (N.D. Cal. Dec. 6, 2017).

[255] Martinez v. Napolitano, 704 F.3d 620, 622 (9th Cir. 2012) (quoting Delgado v. Quarantillo, 643 F.3d 52, 55 (2d Cir. 2011)). The analysis in Southern Poverty Law Center v. United States Dep't of Homeland Security, No. 18-cv-760, 2022 WL 1801150, at *6 (D.D.C. June 2, 2022), is slightly different—and slightly worse for our argument. There, the district court barred Fifth Amendment access-to-counsel claims that, it said, revolved entirely around the conditions' effects on Fifth Amendment rights as to removal proceedings, but allowed access-to-counsel claims related to bond or non-immigration proceedings.

[256] (emphasis added).

[257] Jennings v. Rodriguez, 138 S. Ct. 830, 841 (2018) (quoting Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 482–83 (1999)).

iii. 8 U.S.C. § 1252(f)

A final INA provision, 8 U.S.C. § 1252(f), deprives any court "(other than the Supreme Court)" of "jurisdiction or authority to enjoin or restrain the operation of the provisions of Part IV of this subchapter, . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." The Supreme Court has noted that this language "prohibits federal courts from granting classwide injunctive relief . . ., but specifies that this ban does not extend to individual cases."[258] Moreover, it may not prohibit classwide declaratory relief.[259]

Conclusion

When pretrial incarceration discriminates against individuals with disabilities, unequally undermining their access to their criminal or immigration cases without a persuasive public safety need, federal antidiscrimination law requires their release. The precise argument we have made is novel, but it rests solidly on existing statutory and regulatory provisions, and their judicial elaboration. We have, ourselves, worked several times with people in pretrial incarceration to raise the argument, with good (though not precedential) results. We conclude with our hope that many more legal practitioners—including individuals representing themselves—will use and build on our argument to mitigate the injury unnecessary pretrial incarceration is, right now, causing thousands of people with disabilities, harming their health and livelihoods and their access to the legal processes that purport to justify their incarceration.

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[258] *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 481–82.

[259] *See* Garland v. Aleman Gonzalez, 142 S. Ct. 2057, 2065 n.2 (2022); *id.* at 2077–78 (2022) (Sotomayor, J., concurring in the judgment in part and dissenting in part).