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Through a Glass, Darkly: Systemic Racism, Affirmative Action, and Disproportionate Minority Contact

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THROUGH A GLASS, DARKLY: SYSTEMIC RACISM, AFFIRMATIVE ACTION, AND DISPROPORTIONATE MINORITY CONTACT[†]

Robin Walker Sterling*

This Article is the first to describe how systemic racism persists in a society that openly denounces racism and racist behaviors, using affirmative action and disproportionate minority contact as contrasting examples. Affirmative action and disproportionate minority contact are two sides of the same coin. Far from being distinct, these two social institutions function as two sides of the same ideology, sharing a common historical nucleus rooted in the mythologies that sustained chattel slavery in the United States. The effects of these narratives continue to operate in race-related jurisprudence and in the criminal legal system, sending normative messages about race and potential using the same jurisprudential trick: denial of our country's race-bound legacy. By juxtaposing the rhetoric and jurisprudence concerning the underrepresentation of white people in the criminal legal system with the rhetoric and jurisprudence concerning the underrepresentation of Black people in higher education, this Article illuminates a key feature of how systemic racism persists.

Obscuring the history of how both affirmative action and disproportionate minority contact came to be, the racially contorted narratives that we have adopted about affirmative action in both guises described here—affirmative action that benefits people of color by accepting them into institutions of higher learning and that which benefits white people by diverting them from the criminal legal system—allow systems to thrive under a guise of presumed racial

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[†] “Through a glass, darkly” is taken from Paul’s First Letter to the Corinthians: “For now we see through a glass, darkly; but then face to face: now I know in part; but then shall I know even as also I am known.” 1 *Corinthians* 13:12 (King James). Here, the phrase describes the mirror-like relationship between affirmative action in higher education and disproportionate minority contact with the criminal legal system.

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I dedicate this article to the memory of Professor Christopher N. Lasch. Professor Lasch was a brilliant scholar and clinician, and one of the best colleagues and friends I have ever been lucky enough to know. In short, he was my favorite. I miss him terribly. I am an immeasurably better teacher, lawyer, scholar, and person for having known him.

innocence. Unmoored from the force of history, we rudderlessly reinforce well-worn social norms, no matter how discriminatory they might be.

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INTRODUCTION

Law enforcement's underwhelming response to the breach of the United States Capitol on January 6, 2021, starkly contrasts with the heavy-handed reaction to Black Lives Matter protests in the summer of 2020.¹ January 6 marked the first time the Capitol had been breached since 1814, when British troops set fire to the building while it was still under construction.² Several hundred Trump supporters scaled the Capitol's walls, broke windows and doors, and used battering rams to gain entry to the building while congresspeople were certifying the electoral college results of the November 2020 presidential election. Many protestors wore bullet proof vests, armor, and riot gear.³ Protestors were armed with zip ties, flag poles, and bear spray.⁴ In addition to the weapons used at the Capitol, pipe bombs were later found at the headquarters of the Republican and Democratic National Committees just blocks away.⁵ The rioters quickly overwhelmed police officers to gain entry. Once the building was breached, congresspeople were evacuated or hidden for their own safety. Staff members blockaded themselves in offices with furniture and hid under tables. A noose had been erected outside; the rioters chanted "Hang Mike Pence,"⁶ "Fuck the Blue,"⁷ and called for House Speaker Nancy

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1. Rachel Chason & Samantha Schmidt, *The Freedom to Assemble in Two Acts: Lafayette Square, Capitol Rallies Met Starkly Different Policing Response*, WASH. POST (Jan. 14, 2021), <https://www.washingtonpost.com/dc-md-va/interactive/2021/blm-protest-capitol-riot-police-comparison> [perma.cc/9ZFF-HT4H].

2. Amanda Holpuch, *US Capitol's Last Breach Was More Than 200 Years Ago*, GUARDIAN (Jan. 6, 2021, 7:59 PM), <https://www.theguardian.com/us-news/2021/jan/06/us-capitol-building-washington-history-breach> [perma.cc/3GCM-J5ZL]. Although the Capitol has been the site of several attacks and bombings, the January 6, 2021, riot marked the first time since the War of 1812 that the building had been entered and taken by force. *Id.*

3. Tina Nguyen & Daniel Lippman, *How a Sparse Protest Became a Capitol Hill Riot*, POLITICO (Jan. 6, 2021, 7:52 PM), <https://www.politico.com/news/2021/01/06/how-capitol-hill-riots-started-455654> [perma.cc/LXM9-6DBB].

4. Mitchell Willets, *Blinded, Beaten, Screaming for Mercy: Police Officers Recount Capitol Riot*, MIA. HERALD (Jan. 15, 2021, 5:51 PM), <https://www.miamiherald.com/news/nation-world/national/article248542835.html> [perma.cc/W9W6-9SY8]; Spencer S. Hsu, *Tennessee Man with Zip Ties at Capitol Could Face Charges of Sedition, Other Felonies After Riot, Prosecutors Say*, WASH. POST (Jan. 24, 2021, 6:48 PM), https://www.washingtonpost.com/local/legal-issues/tennessee-man-with-zip-ties-at-capitol-could-face-charges-of-sedition-other-felonies-after-riot-prosecutors-say/2021/01/24/d9c3cc58-5e83-11eb-9430-e7c77b5b0297_story.html [perma.cc/4M6H-7NTP].

5. Dalton Bennett et al., *Pipe Bombs Found Near Capitol on Jan. 6 Are Believed to Have Been Placed the Night Before*, WASH. POST (Jan. 29, 2021, 1:27 PM), <https://www.washingtonpost.com/investigations/2021/01/29/pipe-bomb-suspect-video> [perma.cc/BQD9-U99F].

6. Lisa Mascaro, Eric Tucker, Mary Clare Jalonick & Jill Colvin, *Trump Trial Video Shows Vast Scope, Danger of Capitol Riot*, ASSOCIATED PRESS (Feb. 10, 2021), <https://apnews.com/article/trump-impeachment-trial-update-2-10-2021-4f49705a5f92bd4129941ec409642ecd>.

7. Jon Swaine, Dalton Bennett, Joyce Sohyun Lee & Meg Kelly, *Video Shows Fatal Shooting of Ashli Babbitt in the Capitol*, WASH. POST (Jan. 8, 2021, 12:57 PM), <https://www.washingtonpost.com/investigations/2021/01/08/ashli-babbitt-shooting-video-capitol> [perma.cc/MV6P-T85S].

Pelosi⁸ as they moved through the building. The police union would later report that 140 officers were injured, many of them seriously.⁹ Two responding Capitol Police officers died by suicide after the attack.¹⁰

This attack was not a surprise. In the days leading up to the insurrection, Parler and other social media platforms were “seething with references to potential violence,” plainly revealing the rioters’ intent.¹¹ Pronouncements of violence were so widespread that FBI intelligence privately warned of the coming insurrection.¹² The first barriers were breached between 12:53 p.m. and 1:03 p.m.¹³ The sergeant-at-arms would not deem the building secured until after 5:00 p.m., a full four hours later.¹⁴

In stark contrast, the police response to the preceding summer’s overwhelmingly peaceful Black Lives Matters demonstrations¹⁵ was so violent that police conduct seemed to reaffirm the need for protest.¹⁶ Examples of police violence abound, many of them recorded. On May 30, an NYPD officer approached an African American protestor who was wearing a mask over his nose and mouth as a COVID precaution.¹⁷ The civilian had his hands up. The officer walked up to the man and pulled down his mask to better pepper spray

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8. “Where Are You Nancy?: Rioters Search for Pelosi in Footage Shown by Impeachment Managers, NBC NEWS (Feb. 10, 2021), <https://www.nbcnews.com/video/house-impeachment-managers-show-footage-of-capitol-rioters-searching-for-pelosi-100824133975> [perma.cc/JH4Q-U6G6].

9. Tom Jackman, *Police Union Says 140 Officers Injured in Capitol Riot*, WASH. POST (Jan. 27, 2021, 7:47 PM), https://www.washingtonpost.com/local/public-safety/police-union-says-140-officers-injured-in-capitol-riot/2021/01/27/60743642-60e2-11eb-9430-e7c77b5b0297_story.html [perma.cc/QG9Y-2HRN].

10. *Id.*

11. Craig Timberg & Drew Harwell, *Pro-Trump Forums Erupt with Violent Threats Ahead of Wednesday’s Rally Against the 2020 Election*, WASH. POST (Jan. 5, 2021, 12:57 PM), <https://www.washingtonpost.com/technology/2021/01/05/parler-telegram-violence-dc-protests> [perma.cc/DUD3-HN7C].

12. Chason & Schmidt, *supra* note 1.

13. Lauren Leatherby et al., *How a Presidential Rally Turned into a Capitol Rampage*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/interactive/2021/01/12/us/capitol-mob-time-line.html> [perma.cc/74GG-B27Q].

14. *Id.*

15. Erica Chenoweth & Jeremy Pressman, *This Summer’s Black Lives Matter Protesters Were Overwhelmingly Peaceful, Our Research Finds*, WASH. POST (Oct. 16, 2020, 6:00 AM), <https://www.washingtonpost.com/politics/2020/10/16/this-summers-black-lives-matter-protesters-were-overwhelming-peaceful-our-research-finds> [perma.cc/HA86-RCE3].

16. USA: *Law Enforcement Violated Black Lives Matter Protesters’ Human Rights, Documents Acts of Police Violence and Excessive Force*, AMNESTY INT’L (Aug. 4, 2020, 6:00 AM), <https://www.amnesty.org/en/latest/news/2020/08/usa-law-enforcement-violated-black-lives-matter-protesters-human-rights> [perma.cc/N9EK-H82N] (“The unnecessary and sometimes excessive use of force by police against protestors exhibits the very systemic racism and impunity they had taken to the streets to protest.”).

17. Erica Byfield, *Protester Speaks Out After Mask Ripped off by NYPD and Pepper-Sprayed in Brooklyn*, NBC N.Y. (June 5, 2020, 1:26 AM), <https://www.nbcnewyork.com/news/local/protester-speaks-out-after-mask-ripped-off-by-nypd-and-pepper-sprayed-in-brooklyn/2448135> [perma.cc/7ZJ4-F89H].

him.¹⁸ On that same day, Atlanta police broke the windows of the car of two college students, tased one of them, then dragged them out of the car through the broken windows.¹⁹ The students were on their way home from buying food after the city's 9 p.m. curfew and got caught in traffic caused by a protest against police violence.²⁰ On June 4 in Buffalo, New York, an officer pushed a seventy-five-year-old man while "another extend[ed] his baton toward him with both hands."²¹ The elderly protester fell to the ground. As the elderly protester was lying motionless, blood flowing from his right ear, officers walked past without rendering aid.²² Perhaps the most infamous example of law enforcement's overreaction to Black Lives Matter protests²³ was the June 1 incident in which a phalanx of law enforcement officers removed a diverse group of peaceful protesters from Lafayette Square, near the White House, with chemical agents and rubber bullets.²⁴

Of all the possible reasons for the difference in law enforcement's response, the most obvious is also the most popular. The sea of faces the police would have seen when they looked out into the crowds looked very different in the two situations. While the pro-Trump protestors were predominantly white, a more diverse group protested police violence for Black Lives Matter.²⁵ While the BLM protests were meant to express explicit support for the worth of Black life, the Capitol insurrection expressed explicit support for a candidate who was endorsed by many far-right, white supremacist groups,²⁶ who

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18. *Id.*

19. Amir Vera, *2 Atlanta Officers Fired After Video Shows Them Tasing Man and Using 'Excessive Force' on Woman, Mayor Says*, CNN (June 4, 2020, 8:19 PM), <https://www.cnn.com/2020/06/01/us/atlanta-cops-fired-excessive-force/index.html> [perma.cc/NYM2-QSFH].

20. *Id.*

21. Neil Vigdor, Daniel Victor & Christine Hauser, *Buffalo Police Officers Suspended After Shoving 75-Year-Old Protester*, N.Y. TIMES (Feb. 23, 2021), <https://www.nytimes.com/2020/06/05/us/buffalo-police-shove-protester-unrest.html> [perma.cc/K27C-HB6J].

22. *Id.*

23. See, e.g., Katie Way, *Police Violence at Protests Is Undeniable. All the Videos Are Right Here*, VICE (June 5, 2020, 5:56 PM), <https://www.vice.com/en/article/7kpbmy/police-violence-at-protests-is-undeniable-all-the-videos-are-right-here> [perma.cc/956U-DRA5]. The list includes a video of a police officer trampling a BLM protester with his horse. *Id.*

24. Chason & Schmidt, *supra* note 1 ("In the early evening, shield-bearing riot officers and mounted Park Police brutally routed those gathered, apparently without provocation or audible warning as required by law. Shortly after, Trump strode through the cleared park with military leaders at his side to pose at a church whose leaders didn't want him there.").

25. Jon Greenberg & Noah Y. Kim, *Black Lives Matter Protests and the Capitol Assault: Comparing the Police Response*, POLITIFACT (Jan. 8, 2021), <https://www.politifact.com/article/2021/jan/08/black-lives-matter-protests-and-capitol-assault-co> [perma.cc/VS59-9Z3Q].

26. See John Haltiwanger, *Trump Has Repeatedly Been Endorsed by White Supremacist Groups and Other Far-Right Extremists, and They've Looked to Him as a Source of Encouragement*, INSIDER (Sept. 30, 2020, 3:59 PM), <https://www.businessinsider.com/trumps-history-of-support-from-white-supremacist-far-right-groups-2020-9> [perma.cc/3ZQD-YUBS].

won every white demographic,²⁷ and who lost every demographic of every other racial or ethnic group decisively.²⁸ And while the BLM protests were overwhelmingly peaceful,²⁹ Trump supporters came to the Capitol armed.³⁰ But while police officers met the BLM protesters with tear gas and rubber bullets, officers took selfies with the pro-Trump protesters and helped them down the stairs of the Capitol.³¹ The protests share an inverted relationship, as if reflected in a funhouse mirror. This distorted relationship is also reflected in the way race and underrepresentation are treated in our societal institutions.

Consider the following example. In March 2018, days after the mass shooting that killed seventeen people and injured seventeen others at Marjory Stoneman Douglas High School,³² high school students across the country mobilized to participate in a series of nationwide protests urging gun reform.³³ Many principals, spurred in part by the march's being scheduled for a school day, reacted by sending out notices threatening students who participated in the demonstrations with suspensions and other disciplinary action.³⁴ In response, Yale, MIT, Boston University, the University of Virginia, Dartmouth, Amherst, Brown, Smith, and dozens of other prominent colleges and universities posted tweets reassuring students that school discipline resulting from participation in antigun protests would not jeopardize their chances of admission.³⁵ A sample tweet from Brandeis read, "Brandeis supports students' right

27. Charles M. Blow, Opinion, *Exit Polls Point to the Power of White Patriarchy: Some People Who Have Historically Been Oppressed Will Stand with Their Oppressors*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/opinion/election-2020-exit-polls.html> [perma.cc/D76G-6W8A].

28. See *id.* I use Black and African American interchangeably throughout this Article, and I capitalize "Black" because, as Professor Kimberlé Crenshaw explains, "Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). By that same logic, I do not capitalize white because "whites do not constitute a specific cultural group." Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 n.6 (1991).

29. See Chason & Schmidt, *supra* note 1.

30. See Nguyen & Lippman, *supra* note 3.

31. See Chason & Schmidt, *supra* note 1.

32. *February 14 2018: Teen Gunman Kills 17, Injures 17 at Parkland, Florida High School*, HISTORY (Feb. 13, 2020), <https://www.history.com/this-day-in-history/parkland-marjory-stoneman-douglas-school-shooting> [perma.cc/66ZT-6BAK].

33. Sarah Gray, *Thousands of Students Walked Out of School Today in Nationwide Protests. Here's Why*, TIME (Mar. 14, 2018, 6:14 AM), <https://time.com/5195960/national-school-walkout-march-14> [perma.cc/R7T9-XEK4].

34. David Williams, *Schools Threaten to Punish Students Who Join Walkouts over Gun Control*, CNN (Feb. 21, 2018, 4:10 PM), <https://www.cnn.com/2018/02/21/us/student-walkout-punishment-trnd/index.html> [perma.cc/6NKW-JARK].

35. Julia Reinstein, *Colleges Are Promising High Schoolers That Getting Suspended for Protesting Guns Won't Hurt Their Admissions Chances*, BUZZFEED NEWS (Feb. 24, 2018, 11:24 AM), <https://www.buzzfeednews.com/article/juliareinstein/colleges-are-promising-high-schoolers-that-getting> [perma.cc/3UWL-GYRP].

to stand up for their beliefs. Those who participate in peaceful protests will not jeopardize their admission to Brandeis. Speak up, speak out.”³⁶ Attendees of these protests were predominantly white.³⁷ No arrests of the thousands of protesters who gathered were reported.³⁸ At least one of the organizers, a white teenager named David Hogg, went on to matriculate at Harvard,³⁹ one of the prestigious colleges that had promised amnesty for participants.

In the aftermath of Derek Chauvin’s murder of George Floyd in May 2020, protesters marched in cities all across the United States.⁴⁰ Floyd’s killing sparked peaceful protests, riots, and looting.⁴¹ The country has seen similar community reactions in the wake of the deaths of Michael Brown, Tamir Rice, Freddie Gray, Stephon Clark, and other unarmed Black men, women, and children at the hands of police—a mix of peaceful vigils and protests, sometimes accompanied by scattered destruction of property and looting.

Coming on the heels of the deaths of Ahmaud Arbery and Breonna Taylor, Floyd’s death led to a dramatic increase in white participation in protests against police brutality.⁴² Before George Floyd’s killing, participants in police-brutality protests were predominantly nonwhite.⁴³ Schools generally did not issue reassurances to any teenaged protesters who might have participated in these actions. They did not validate the choice of a student who might have taken part to “speak up” or “speak out.”

This story, of the predominantly white groups who participated in the gun-reform protests and the predominantly Black groups who participated in protests against police brutality before the summer of 2020, is an affirmative

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36. Abby Patkin, *Univ. Addresses Applicant Fears*, JUSTICE (Mar. 6, 2018, 11:00 AM), <https://www.thejustice.org/article/2018/03/tweet-protest-applicant-relief> [perma.cc/BJE3-3FPL].

37. German Lopez, *Teens Started March for Our Lives, but All Ages Participated*, VOX (Mar. 30, 2018, 10:00 AM), <https://www.vox.com/policy-and-politics/2018/3/30/17177432/march-for-our-lives-gun-control-children-age> [perma.cc/8WQB-L2M8].

38. *No Arrests as Tens of Thousands Turn Out for Downtown LA Gun Control March*, NBC L.A. (Mar. 24, 2018, 8:21 PM), <https://www.nbclosangeles.com/news/los-angeles-to-join-nationwide-march-for-our-lives/36262> [perma.cc/92GA-ERKL].

39. *David Hogg Says He’ll Attend Harvard University in the Fall*, CBS NEWS (Dec. 22, 2018, 2:23 PM), <https://www.cbsnews.com/news/david-hogg-parkland-shooting-survivor-says-hell-attend-harvard-university-in-the-fall> [perma.cc/AJH2-ZHCM].

40. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/05/31/us/george-floyd-investigation.html> [perma.cc/B4J7-566K].

41. See Chason & Schmidt, *supra* note 1.

42. Jesse Washington, *Why Did Black Lives Matter Protests Attract Unprecedented White Support?*, UNDEFEATED (June 18, 2020), <https://theundefeated.com/features/why-did-black-lives-matter-protests-attract-unprecedented-white-support> [perma.cc/9ATZ-NDSA]. Ahmaud Arbery was jogging when he was shot and killed by white men who wrongly suspected him of committing burglaries in the neighborhood. Breonna Taylor was shot and killed while she slept in her bed in a botched execution of a warrant by Louisville police. See Richard Fausset, *Before Breonna Taylor and George Floyd, There Was Ahmaud Arbery*, N.Y. TIMES (Mar. 13, 2021), <https://www.nytimes.com/2021/02/28/us/ahmaud-arbery-anniversary.html> [perma.cc/2LZT-WB6U].

43. Washington, *supra* note 42.

action story, although not the kind that typically comes to mind when we think of affirmative action. Normally, we think of affirmative action as a policy that ensures that qualified members of traditionally underrepresented groups, like people of color and women, receive fair consideration by institutions such as corporations and universities.⁴⁴ In this atypical affirmative action story, David Hogg and the other mostly white protesters are the affirmative action beneficiaries. Not affirmative action including them in higher education—affirmative action diverting them from the criminal legal system.

White people are an underrepresented group in the criminal legal system. The mostly white March for Our Lives protesters were shown special solicitude that excluded them from the criminal community and from the consequences that school disciplinary actions and criminal arrests might have had on their futures.⁴⁵ These kinds of facially race neutral but functionally racially disparate actions that usher white people out of the criminal legal system go largely unnoticed. Hidden in plain sight, they act as a kind of affirmative action for white people, keeping them underrepresented in the criminal legal system.

In contrast, affirmative action in higher education, which aims to include people of color in higher education, is routinely disparaged. Although affirmative action policies seek to counteract the effects of past discrimination and exclusion on the participation of people of color in the academic community, their perceived effect is to give unqualified members of underrepresented groups an undeserved advantage in college admissions based solely on their race, gender, national origin, or ethnicity.⁴⁶ In May 2016, a group of organizations filed complaints with the United States Department of Education against Brown University, Dartmouth College, and Yale University, alleging race-based discrimination against Asian American applicants.⁴⁷ Several states, including Arizona, California, Florida, Michigan, and Washington, prohibit

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44. See, e.g., Precious D. Hall, *White Fragility and Affirmative Action*, 12 J. RACE & POL'Y 7, 8 (2017). Affirmative action policies also exist in workplaces and other institutions. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (involving a financial incentive for awarding government contracts to disadvantaged subcontractors on the basis of race); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (involving a school-board policy of using race when determining who is and is not laid off).

45. Of course, schools did not make their promises to only the white protesters. But since most of the protesters were white and most of the schools promising amnesty have predominantly white student bodies, white children were the main beneficiaries of the schools' promises. See Jeremy Ashkenas, 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> [perma.cc/PW3G-RVTP].

46. See Hall, *supra* note 44, at 14.

47. ASIAN AM. COAL. FOR EDUC., COMPLAINT OF THE ASIAN AMERICAN COALITION FOR EDUCATION V. YALE UNIVERSITY, BROWN UNIVERSITY, AND DARTMOUTH COLLEGE FOR UNLAWFUL DISCRIMINATION AGAINST ASIAN-AMERICAN APPLICANTS IN THE COLLEGE ADMISSIONS PROCESS 1 (2016), http://asianamericanforeducation.org/wp-content/uploads/2016/05/Complaint_Yale_Brown_Dartmouth_Full.pdf [perma.cc/5QH9-EXKG]; *AACE Applauds U.S. Departments of Education and Justice's Joint Investigation of Yale University and Urges All Colleges to Treat Asian American Applicants Fairly and Lawfully*, ASIAN AM. COAL. FOR EDUC. (Sept. 26, 2018), http://asianamericanforeducation.org/en/pr_20180926 [perma.cc/3F58-U9LH].

state universities from considering an applicant's race as a factor in admissions.⁴⁸ And Harvard and the University of North Carolina were recently sued by plaintiffs who alleged that the schools' use of race as a factor in admissions constitutes invidious, race-based discrimination in contravention of Title VI of the Civil Rights Act.⁴⁹

The criminal legal system, however, is one area in which most Americans seem to view the overrepresentation of people of color and the underrepresentation of white people as largely justified.⁵⁰ People of color, and Black and Latino people in particular, are overrepresented at every discretion point in the criminal legal system, from arrest and bail determination to plea negotiations and sentencing. Black and Latino suspects fare worse than white counterparts facing similar charges.⁵¹ Since rates of offending do not explain this discrepancy,⁵² this overrepresentation of people of color in the criminal legal system⁵³ necessarily means that white people who commit crimes are underrepresented in the criminal legal system. The overrepresentation of people of color in the criminal legal system is most commonly called disproportionate minority contact. Tellingly, there is no specific term for the underrepresentation of white people in the criminal legal system. But that underrepresentation could easily be called affirmative action. In the criminal legal system, instead of making sure that white people are included in numbers that represent their fair share of the population, affirmative action means that white people are underincluded. In this way, affirmative action in higher education that benefits the Black community and affirmative action in the criminal legal system that benefits white people share an inverted relationship.

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48. ARIZ. CONST. art. II, § 36; CAL. CONST. art. I, § 31; MICH. CONST. art. I, § 26; WASH. REV. CODE § 49.60.400 (2021); Fla. Exec. Order No. 99-281 (1999) (known as the "One Florida Initiative").

49. *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 14-cv-954 (M.D.N.C. Oct. 18, 2021), *appeal docketed*, No. 21-2263 (4th Cir. Nov. 10, 2021); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), *petition for cert. filed*, No. 20-1199 (U.S. Feb. 25, 2021).

50. Other areas in which many Americans seem to accept the overrepresentation of people of color and the underrepresentation of white people include school disciplinary proceedings and the immigration enforcement system.

51. See Gary Ford, *The New Jim Crow: Male and Female, South and North, from Cradle to Grave, Perception and Reality: Racial Disparity and Bias in America's Criminal Justice System*, 11 RUTGERS RACE & L. REV. 324, 324-26 (2010); see also JAMES AUSTIN ET AL., JFA INST., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION 1, 7 (2007). Although this Article focuses specifically on the narratives undergirding anti-Black racism, Latinos and other racial and ethnic minorities bear similar disparities in both higher education and in the criminal legal system. AUSTIN ET AL., *supra*, at 7. The dialogue concerning race relations in the United States is most often focused on the relationship between Black people and white people, but it is critical to note that the narratives animating the histories of anti-Latino racism, anti-Asian racism, and anti-Native American racism are potent as well.

52. See Ford, *supra* note 51, at 336.

53. See Nordia A. Campbell et al., *Disproportionate Minority Contact in the Juvenile Justice System: An Investigation of Ethnic Disparity in Program Referral at Disposition*, 16 J. ETHNICITY CRIM. JUST. 77, 78-79 (2017).

Juxtaposing the rhetoric and jurisprudence concerning the underrepresentation of white people in the criminal legal system with the rhetoric and jurisprudence concerning the underrepresentation of Black people in higher education, this Article illuminates a key feature of systemic racism using the lens of representation. By obscuring the history of each of these institutions, the racially contorted narratives that we have adopted about affirmative action in both guises described here—affirmative action that benefits people of color by accepting them into institutions of higher learning, and affirmative action that benefits white people by diverting them from the criminal legal system—allow systems to thrive under a guise of presumed racial innocence. Unmoored from the force of history, we rudderlessly reinforce well-worn social norms, no matter how discriminatory they might be.

This Article argues that, despite their ostensibly very different functions and goals, these two social institutions function as two sides of the same ideology, perpetuating, in concrete ways, long-held stereotypes about Black intellectual inferiority, Black criminality, white intellectual superiority, and white innocence. This Article further argues that the criminal legal system and higher education's common historical nucleus, based in the mythologies that sustained United States chattel slavery and in their parallel histories since the civil rights movement of the 1960s, reveals the depth of their connection, and that even though their respective race-related precedents suggest otherwise, each of these institutions sends the same normative messages about race and potential using the same jurisprudential trick: denial of our country's race-bound legacy.

Part I starts with an examination of both institutions' racialized origins dating back to American chattel slavery and continues with a discussion of their analogous evolution in the wake of the civil rights movement. Part II juxtaposes the race-related case law in the two systems. Part III assesses the effects of the Court's struthious disregard of historical context with a case study that contrasts the presumed innocence of white applicants who cannot benefit from admissions policies that include race as a factor with the presumed guilt that undergirds discussion of system-involved people of color.

I. THE PARALLEL ORIGINS, HISTORIES, AND CONSEQUENCES OF RACE-CONSCIOUS ADMISSIONS AND DISPROPORTIONATE MINORITY CONTACT

There are many reasons to juxtapose race-conscious admissions and disproportionate minority contact. As social institutions, higher education and the criminal legal system carry normative meanings that transcend their obvious functions. "Education," Glenn Loury argues, "is a special, deeply political, almost sacred, civic activity."⁵⁴ "[P]ublic schools serve as one of few interfaces with government and operate as a primary site for regular commu-

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54. Glenn C. Loury, *Foreword* to WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS*, at xxii (2d. prtg. 2000).

nity interaction” and “remain the site of intense social, political, and legal conflict.”⁵⁵ Because of education’s emphasis on potential, “the selection of young people to enter prestigious educational institutions amounts to a visible, high-stakes exercise in civic pedagogy.”⁵⁶ In other words, everyone knows that institutions of higher learning are where “access to influence and power is rationed.”⁵⁷ And so it makes perfect sense that choosing those who get to exploit these opportunities becomes a “political act[] with moral overtones.”⁵⁸

Similarly, involvement in the criminal legal system means more than breaking the law. The reality is that “the public, commonsense understanding of criminality retains . . . special moral and stigmatic weight.”⁵⁹ In other words, “[c]riminal convictions are not technocratic, bureaucratic incidents: they morally matter.”⁶⁰ The hundreds of successful crime-related television shows, movies, and podcasts show that “[c]riminal justice, more than almost any other area of law, is morally freighted in the popular imagination, and its moral significance is linked closely to its legitimacy.”⁶¹

But race-conscious admissions and disproportionate minority contact have more in common than their moral weight. Each is also deeply rooted in the mythology about Black inferiority and criminality that evolved, over decades marked by a constantly expanding and urgent need for labor, to legitimize United States chattel slavery. Below, I detail their common historical nucleus and their emergence after the civil rights movement of the 1950s and 1960s.

A. *Slave Rebellions, Fear, and the Birth of Stereotypes*

If all men were created equal, entitled to life, liberty, and the pursuit of happiness, then American chattel slavery was a great and inexcusable sin—a centuries-old sin that would become indispensable to the South’s labor-intensive agrarian economy, but a sin nonetheless. The rub was that the moral bankruptcy that allowed the South to build its economy on “the peculiar institution”⁶² was repaid thousands of times over by the South’s unprecedented economic success, so vital to the life of the young Union. But that economic success relied on slaves being denied fair wages, subjected to unsafe working conditions, subdued with violent punishment, and robbed of their freedom—

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55. Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 456 (2014).

56. See Loury, *supra* note 54, at xxii.

57. *Id.*

58. See *id.*

59. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 191 (2018).

60. *Id.*

61. STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE, at xxiv (2012).

62. See generally KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (Vintage Books 1989) (1956).

in other words, the southern economy was not forgiving enough to allow enslaved people to be equal.⁶³ If slaves could not be treated equally, and all men were created equal, then slaves must not be men. The cells of racialized conceptions of intellectual inferiority and criminality metastasized in tandem with the southern economy's desperate need for labor.⁶⁴

The first African slaves arrived on the shores of Virginia in 1619.⁶⁵ When they arrived, they were legally categorized as "servants," much like white servants in the colony.⁶⁶ In fact, Black people and non-English servants of European descent were circumscribed by similar legal limitations.⁶⁷ This "servant" designation was not significantly different from similar legal statuses then practiced in many other countries.⁶⁸ And while the early colonists recognized racial difference as a concept,⁶⁹ they were not as strictly segregated in work, friendships, and social status as they would become under chattel slavery.⁷⁰

Between 1641, when Massachusetts became the first colony to legalize slavery, and 1691, the year South Carolina passed the first comprehensive slave codes,⁷¹ the colonies slowly eroded the rights of Black people, constructing the caste system that would become American chattel slavery. The loss of rights and the change in status was gradual, happening over the course of a generation. In 1643, Massachusetts and Connecticut adopted a fugitive slave

63. See generally EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* (2014).

64. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1717 (1993) ("The construction of white identity and the ideology of racial hierarchy also were intimately tied to the evolution and expansion of the system of chattel slavery.").

65. A. LEON HIGGINBOTHAM, JR., IN *THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS; THE COLONIAL PERIOD* 20 (1978).

66. *Id.* at 21; see also Oscar Handlin & Mary F. Handlin, *Origins of the Southern Labor System*, 7 WM. & MARY Q. 199, 203 (1950) ("The status of the Negroes was that of servants; and so they were identified and treated down to the 1660's.").

67. Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 259 n.19 (1983).

68. For example, in the Spanish and Portuguese colonies, slavery was a type of indentured servitude that could end after a specific term. Influenced by Roman law, countries like Spain and Portugal considered slavery an accidental status that could ensnare anyone, regardless of race. In other words, "[Roman] slavery was fundamentally different from [United States chattel] slavery in being an equal opportunity condition—all ethnicities could be slaves—and in seeing slaves as primarily a social, not an economic, category." Philip D. Morgan, *Origins of American Slavery*, OAH MAG. HIST., July 2005, at 51, 51–52.

69. See WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812*, at 3–43 (2d ed. 2012) (describing early colonial racism).

70. See DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 24 (rev. ed. 2007) (noting examples of allegiances between Black and lower-class white colonists, including at integrated social functions and in urban slave revolts between 1607 and 1800). The earliest line of demarcation was religion, not race. See Diamond & Cottrel, *supra* note 67, at 259 n.19.

71. *The Law Steps In*, THIRTEEN, <https://www.thirteen.org/wnet/slavery/timeline/1641.html> [perma.cc/XN3R-EBP8].

law.⁷² In 1662, Virginia passed a law decreeing that children of Black mothers “shall be bond or free according to the condition of the mother.”⁷³ In that same year, Massachusetts, New York, Connecticut, and New Hampshire passed laws restricting Black people’s right to bear arms.⁷⁴ And in 1664, Maryland forbade marriage between Black men and white women.⁷⁵

In 1680, perhaps in response to Bacon’s Rebellion, Virginia forbade Black people and slaves from bearing arms,⁷⁶ prohibited Black people from assembling in large numbers,⁷⁷ and mandated harsh punishment for slaves who assaulted Christians or attempted escape.⁷⁸ Two years later, Virginia declared that all imported Black servants were slaves for life.⁷⁹ In 1684, New York made it illegal for slaves to sell goods.⁸⁰ This period, from 1680 to 1684, was a busy time for passage of the anti-Black provisions and slave codes that would “codify[] the extreme deprivations of liberty already existing in social practice,”⁸¹ including limiting Black people’s rights to travel without a permit, to own property, to assemble publicly, to be educated, and to own weapons.⁸² In 1691 Virginia passed the first antimiscegenation law, forbidding marriages between white people and Black people or white people and Native Americans; it also exiled manumitted slaves from the colony.⁸³ By the end of this period, “[r]acial identity was further merged with stratified social and legal status: ‘Black’ racial identity marked who was subject to enslavement; ‘white’ racial identity marked who was ‘free’ or, at minimum, not a slave.”⁸⁴

In the two centuries between the legalization of slavery in 1641 and the beginning of the Civil War, the South’s agrarian economy became a commercial juggernaut. Cotton, tobacco, and sugar cane were lucrative, labor-intensive crops, requiring hours of arduous, backbreaking work under the hot southern sun. The South did not just need a labor force. It needed a labor force it could compel. As the need for cheap, exploitable labor grew, so did false mythologies about Black people’s being “dumb, lazy, childlike, and in need of

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72. *Id.*

73. A. Leon Higginbotham, Jr., *Virginia Led the Way in Legal Oppression*, WASH. POST (May 21, 1978), <https://www.washingtonpost.com/archive/opinions/1978/05/21/virginia-led-the-way-in-legal-oppression/664bcd4f-8aaf-475f-8ea7-eb597aee7ecd> [perma.cc/2MPE-J5WX].

74. *The Law Steps In*, *supra* note 71.

75. *Id.*

76. *Emergent Conflict*, THIRTEEN, <https://www.thirteen.org/wnet/slavery/timeline/1676.html> [perma.cc/HW7J-4GZ3].

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Harris, *supra* note 64, at 1718.

82. *Id.*

83. *Emergent Conflict*, *supra* note 76.

84. Harris, *supra* note 64, at 1718.

[the] guidance and supervision” of “smart, hardworking, and more intellectually and morally evolved” white people.⁸⁵ The landed upper class loosened its grip on the white labor population, only to tighten its fist around Black labor. Laws linking rights to national origin sprung up to create a class that necessarily excluded Black people, and “their racial otherness,” in most instances impossible to hide, came to “justify the[ir] subordinated status.”⁸⁶ Of all the factors that contributed to the stratification of Black and poor white communities, the most impactful was that “[t]he economic and political interests defending Black slavery were far more powerful than those defending indentured servitude.”⁸⁷

White southerners, looking at the world through race-colored glasses, adopted beliefs and practices that morphed American chattel slavery from a regressive maw of rank exploitation into a benevolent act of enlightened charity that white southerners reluctantly, but valiantly, undertook. So certain were white southerners that “none but the [B]lack race can bear exposure” to the relentless tropical climate that cotton, tobacco, and sugar cultivation required that Mississippi included this language in its declaration of secession.⁸⁸ White southerners used dehumanizing language for the enslaved. Advertisements for slave auctions described Black men as “bucks,” Black women as “wenches,” and Black children as “pickaninnies.”⁸⁹ Many white southerners believed American chattel slavery was ordained by the parable of Noah’s son Ham in the Book of Genesis.⁹⁰ After Ham had seen Noah naked and drunk, Noah cursed

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85. 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, 7 (Angela J. Davis ed., 2017). In 1857, addressing the state legislature, Mississippi governor William McWillie described slavery this way:

[T]he institution of slavery, *per se*, is as justifiable as the relation of husband and wife, parent and child, or any other civil institution of the State, and is most necessary to the well-being of the negro, being the only form of government or pupilage which can raise him from barbarism, or make him useful to himself or others; and I have no doubt that the institution, thus far in our country, has resulted in the happiness and elevation of both races; that is, the negro and the white man.

Id. (quoting *Impertinence of the Abolitionists. Slavery Forever!: Extracts from the Inaugural Message of Gov. McWillie, of Mississippi, to the Legislature of That State*, *LIBERATOR*, Dec. 11, 1857, at 1).

86. Harris, *supra* note 64, at 1717.

87. ROEDIGER, *supra* note 70, at 32; *see also* CHRISTOPHER LASCH, *THE WORLD OF NATIONS: REFLECTIONS ON AMERICAN HISTORY, POLITICS, AND CULTURE* 17 (1973) (arguing that the ideology of the “Negro” and “related . . . concepts of African, heathen and savage” became prominent “at the very point in time when large numbers of men and women were beginning to question the moral legitimacy of slavery” as a way to justify the institution).

88. *JOURNAL OF THE STATE CONVENTION, AND ORDINANCES AND RESOLUTIONS ADOPTED IN JANUARY, 1861*, at 86 (Jackson, Miss., E. Barksdale 1861) [hereinafter *MISSISSIPPI DECLARATION*].

89. *See Great Sale of Slaves: January 10, 1855*, AMERICA’S BLACK HOLOCAUST MUSEUM, <https://abhmuseum.org/wp-content/uploads/2012/04/Slave-Auction-1855.jpg> [perma.cc/UZ3U-XL7A] (depicting the slave-auction poster).

90. *See Genesis* 9:18–27 (King James); Felicia R. Lee, *From Noah’s Curse to Slavery’s Rationale*, *N.Y. TIMES* (Nov. 1, 2003), <https://www.nytimes.com/2003/11/01/arts/from-noah-s-curse-to-slavery-s-rationale.html> [perma.cc/DYM8-U453].

Ham's son Canaan to be "a servant of servants";⁹¹ slaves were the cursed descendants of Ham and Canaan.⁹² Conjured from fabricated physical differences, a practice of dehumanization, eugenics, religious interpretation, and the ever-growing demand for exploitable labor, justifications for American chattel slavery found tenacious purchase. With these narratives, white southerners made themselves the heroes of their own rapacious story, laundering the quest for economic exploitation through purported enlightened benevolence.

By the start of the Civil War, the South was producing 75 percent of the world's cotton and creating more millionaires per capita than anywhere else in the nation.⁹³ Slavery was such an efficient wealth generator that "[i]f the Confederacy had been a separate nation, it would have ranked as the fourth richest in the world at the start of the Civil War."⁹⁴ Mississippi's declaration of secession was not too far off when it named American chattel slavery as "the greatest material interest of the world."⁹⁵ Slavery made southern whites rich. And the South was the engine of the Union's economy.

In light of its outsized importance to the South's economy, slavery and the beliefs that supported it were woven into the fabric of the South's way of life.⁹⁶ By the beginning of the Civil War, the southern slave population was close to four million, and there were no white southerners alive who remembered a time before American chattel slavery.⁹⁷ According to the 1860 census, in the states that seceded from the Union, more than 32 percent of white families owned slaves on average.⁹⁸ Slavery was so accepted that white families who

91. *Genesis* 9:25 (King James).

92. See generally DAVID M. GOLDENBERG, *THE CURSE OF HAM: RACE AND SLAVERY IN EARLY JUDAISM, CHRISTIANITY, AND ISLAM* (2003) (arguing that there is no evidence of anti-Black racism in biblical and postbiblical Judaism and that the idea of Black inferiority developed as Black people were enslaved in different cultures).

93. Greg Timmons, *How Slavery Became the Economic Engine of the South*, HISTORY (Sept. 2, 2020), <https://www.history.com/news/slavery-profitable-southern-economy> [perma.cc/QRQ2-VSMF].

94. *Id.*

95. MISSISSIPPI DECLARATION, *supra* note 88.

96. See Roger L. Ransom, *The Economics of the Civil War*, EH.NET, <https://eh.net/encyclopedia/the-economics-of-the-civil-war> [perma.cc/KL3Z-KZF6] (describing the economic state of the South before and after the Civil War); Ta-Nehisi Coates, *No, Lincoln Could Not Have 'Bought the Slaves': For One Thing, There Wasn't Enough Money*, ATLANTIC (June 20, 2013), <https://www.theatlantic.com/national/archive/2013/06/no-lincoln-could-not-have-bought-the-slaves/277073> [perma.cc/R3YL-B56E].

97. See *Black and Slave Population of the United States from 1790 to 1880*, STATISTA, <https://www.statista.com/statistics/1010169/black-and-slave-population-us-1790-1880> [perma.cc/EH6P-3KM9].

98. Sarah Pruitt, *5 Myths About Slavery*, HISTORY (Jun. 23, 2020), <https://www.history.com/news/5-myths-about-slavery> [perma.cc/H75G-HH4Z]. Some states had far more slave owners (46 percent in South Carolina, 49 percent in Mississippi), while some had far less (20 percent in Arkansas). *Id.*; see Jamelle Bouie & Rebecca Onion, *Slavery Myths: Seven Lies, Half-truths, and Irrelevancies People Trot Out About Slavery—Debunked*, SLATE (Sept. 29, 2015, 2:37

could not afford slaves hoped to own slaves “in the same way that, today, most Americans want to own a home.”⁹⁹ In other words, the South was “a slave society, not just a society with slaves.”¹⁰⁰

The paradox of enshrining liberty as the bedrock principle of a nation that so widely profited from depriving liberty was glaring and widely discussed.¹⁰¹ Alexis de Tocqueville noted that by 1840, slavery seemed to be on the wane in some parts of the United States but that “the prejudice to which it has given birth is unmov[ing].”¹⁰² That prejudice was rooted in the two beliefs that formed the mainspring of the myths justifying Black enslavement: intellectual inferiority and criminality.

1. The Myth of Black Intellectual Inferiority

In an effort to entrench the southern racial caste system, educated white slave owners passed antiliteracy laws as prophylactic measures, sometimes in the aftermath of violent rebellions, to frustrate attempts to organize resistance. On September 9, 1739, a group of slaves in South Carolina tried to escape to Florida.¹⁰³ The attempt, later called the Stono Rebellion, would be the largest slave revolt in the history of the thirteen colonies.¹⁰⁴ “More than twenty white Carolinians and nearly twice as many [B]lack Carolinians were killed before the rebellion was suppressed.”¹⁰⁵ The slaves, many of whom had learned to fight in the Yamasee War or from “their experience in their homes in Angola, where they . . . had been trained in the use of weapons,” placed the white victims’ heads on the front steps of a warehouse for all to see.¹⁰⁶ As they progressed through the countryside chanting “Lukango,” Kikongo for “liberty,” many enslaved people joined them, so that the twenty original rebels became one hundred strong.¹⁰⁷ They fought off the white colonists for a week before the rebellion was put down.¹⁰⁸ There was another uprising the next year as

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PM), <https://slate.com/news-and-politics/2015/09/slavery-myths-seven-lies-half-truths-and-ir-relevancies-people-trot-out-about-slavery-debunked.html> [perma.cc/U9RS-ZJ9S].

99. Bouie & Onion, *supra* note 98.

100. *Id.* (emphasis omitted) (drawing on the work of Ira Berlin).

101. See, e.g., Edmund S. Morgan, *Slavery and Freedom: The American Paradox*, 59 J. AM. HIST. 5 (1972).

102. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 329 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835–1840).

103. HERBERT APTHEKER, *AMERICAN NEGRO SLAVE REVOLTS 187–88* (50th anniversary ed. 1993).

104. Henry Louis Gates, Jr., *100 Amazing Facts About the Negro: Did African American Slaves Rebel?*, PBS, <https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/did-african-american-slaves-rebel> [perma.cc/9WGE-5JRJ].

105. *Today in History - September 9: The Stono Rebellion*, LIBR. OF CONG., <https://www.loc.gov/item/today-in-history/september-09> [perma.cc/B2L2-R6BW].

106. Gates, *supra* note 104.

107. *Id.*

108. *Id.*

well, in which South Carolina executed fifty more slaves, a sizeable loss of wealth that must have been difficult for the state to bear.¹⁰⁹

The South Carolina legislature, suspecting that the rebellious slaves had communicated in writing, swung into action and passed the Negro Act of 1740.¹¹⁰ Warning that slave literacy “may be attended with great inconveniences,” the Act made teaching any slave to write or employing any slave in writing illegal.¹¹¹ Sixty years later, the legislature passed a new statute because the 1740 law had not “ke[pt] [B]lacks in ‘due subordination.’”¹¹² The revised Act outlawed any “mental instruction,” including reading and writing, of enslaved and free Black people.¹¹³

As more uprisings occurred,¹¹⁴ other states followed suit. In September 1829, David Walker, a Black man whose father was a slave and whose mother was free, wrote his *Appeal to the Coloured Citizens of the World*, a pamphlet that aimed to incite Black people to take up arms against slavery and slave owners.¹¹⁵ The Virginia legislature prohibited enslaved and free Black people from learning to read and write in the aftermath of Nat Turner’s Rebellion in 1831.¹¹⁶ Missouri and Mississippi also prohibited schools for enslaved and free Black people.¹¹⁷ Between 1829 and 1834, Alabama, Georgia, Louisiana, and North Carolina all enacted legislation making it illegal for slaves to learn to

109. *Id.*

110. See HEATHER ANDREA WILLIAMS, SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM 13 (Waldo E. Martin Jr. & Patricia Sullivan eds., 2005).

111. *Id.*

112. *Id.*

113. *Id.*

114. There were approximately 250 slave uprisings in the South, many of which were inspired by the Haitian Revolution. Gates, *supra* note 104. Led by Touissant Louverture, the Haitian Revolution was a terrifying cautionary tale for slave owners and a source of inspiration for the enslaved in the young Union. *Id.*

115. Walker wrote:

The man who would not fight under our Lord and Master Jesus Christ, in the glorious and heavenly cause of freedom and of God—to be delivered from the most wretched, abject and servile slavery, that ever a people was afflicted with since the foundation of the world, to the present day—ought to be kept with all of his children or family, in slavery, or in chains, to be butchered by his *cruel enemies*.

DAVID WALKER, APPEAL IN FOUR ARTICLES, TOGETHER WITH A PREAMBLE TO THE COLOURED CITIZENS OF THE WORLD, BUT IN PARTICULAR AND VERY EXPRESSLY TO THOSE OF THE UNITED STATES OF AMERICA 15 (Boston, David Walker 1829).

116. JANET DUTSMAN CORNELIUS, “WHEN I CAN READ MY TITLE CLEAR”: LITERACY, SLAVERY, AND RELIGION IN THE ANTEBELLUM SOUTH 33 (1991). Nat Turner’s Rebellion, on August 22, 1831, ended after two months, the deaths of between fifty-five and sixty White people, and Turner’s capture and vicious execution. Turner was also literate. Gates, *supra* note 104.

117. An Act Respecting Negroes and Mulattoes (1847), in LAWS OF THE STATE OF MISSOURI PASSED AT THE FIRST SESSION OF THE FOURTEENTH GENERAL ASSEMBLY 103–04 (n.p., James Lusk 1847); see WILLIAMS, *supra* note 110, at 18 (describing punishments for learning to read and write in Mississippi).

read and write.¹¹⁸ By the time of the Civil War, “[i]t was illegal in all but three slave-sanctioning states—Arkansas, Kentucky, and Tennessee—for African Americans, free or enslaved, to assemble for school purposes and for enslaved African Americans to learn how to read or write.”¹¹⁹

And these laws were enforced. Former slaves frequently described being punished for reading. As Belle Butler, who grew up as a slave in North Carolina, remarked,

No slave was ever allowed to look at a book, for fear he might learn to read. One day the old mistress caught a slave boy with a book, she cursed him and asked him what he meant, and what he thought he could do with a book. She said he looked like a black dog with a breast pin on, and forbade him to ever look into a book again.¹²⁰

Similarly, John W. Fields, who was enslaved in Indiana, reported,

In most of us colored folks was the great desire to [be] able to read and write. We took advantage of every opportunity to educate ourselves. The greater part of the plantation owners were very harsh if we were caught trying to learn or write. It was the law that if a white man was caught trying to educate a negro slave, he was liable to prosecution entailing a fine of fifty dollars and a jail sentence. . . . Our ignorance was the greatest hold the South had on us. We knew we could run away, but what then?¹²¹

There are also many instances of former slaves lamenting not being able to learn to read or write. According to Lissie Johnson, who was enslaved in Indiana, “The thing these early settlers wanted most, was for their children to learn to read and write. So many of them had been caught trying to learn to write, and had had their thumbs mashed, so they would not be able to hold a pencil.”¹²² Adeline Blakeley, enslaved in Arkansas, told her interviewer that “it sounds funny, but if I had a million dollars I would give it gladly to be able to read and write letters to my friends.”¹²³

The antiliteracy laws worked. By the Civil War, only 5 to 10 percent of the South’s four million slaves were literate.¹²⁴ The desperate fear of Black insurrections and the need to deprive Black people of the ability to communicate to coordinate rebellions came first; the state’s imprimatur in the form of laws forbidding Black literacy came second. Together, the two seeded the myth of Black intellectual inferiority.

118. WILLIAMS, *supra* note 110, at 13–16.

119. See Christopher M. Span, *Post-slavery? Post-segregation? Post-racial? A History of the Impact of Slavery, Segregation, and Racism on the Education of African Americans*, 114 NAT’L SOC’Y FOR STUDY EDUC., no. 2, 2015, at 53, 56.

120. 2 SLAVE NARRATIVES: A FOLK HISTORY IN THE UNITED STATES FROM INTERVIEWS WITH FORMER SLAVES 41 (1941).

121. 5 *id.* at 78.

122. *Id.* at 115.

123. 2 *id.* at 183.

124. Span, *supra* note 119, at 56.

2. The Myth of Black Dangerousness

Slave rebellions were also a source of beliefs about Black criminality. American chattel slavery was more than just a brutal means to a lucrative end. The “peculiar institution” was an entire worldview, built upon a Daedalean and near-indestructible alloy of individual, institutional, and structural racism.¹²⁵ The relationship between slave owners and the enslaved was “characterized by a paternalistic combination of hegemonic cultural control and violent discipline that was supposed to extract not only obedience but even consent from enslaved people.”¹²⁶ In spite of how panoramic this worldview was for white people, there was a constant strain of resistance from Black people. The major antislavery rebellions produced large-scale changes, like antiliteracy¹²⁷ and gun-control legislation.¹²⁸ But there were also smaller acts of resistance.

In the vast spectrum between consent and open rebellion¹²⁹ fell countless moments of defiance. “Theft, foot dragging, short-term flight, and feigning illness were commonplace acts in the Old South and are widely understood to be everyday forms of resistance—hidden or indirect expressions of dissent, quiet ways of reclaiming a measure of control over goods, time, or parts of one’s life.”¹³⁰

Because compliance was a prerequisite of chattel slavery, these acts of resistance assumed an outsized significance. They threatened to disrupt not only crop production but an entire way of life. Consider the findings of Samuel Cartwright, a widely published white doctor who practiced throughout the South. In the 1850s, Cartwright diagnosed enslaved Black Americans with two diseases that make sense only in light of the belief that Black people were meant to be subservient to white people.¹³¹ The first was “drapetomania,” a

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125. “Individual racism refers to an individual’s racist assumptions, beliefs or behaviours and is ‘a form of racial discrimination that stems from conscious and unconscious, personal prejudice.’” Institutional racism is “[r]acial discrimination that derives from individuals carrying out the dictates of others who are prejudiced or of a prejudiced society.” And structural racism refers to “inequalities rooted in the system-wide operation of a society that excludes substantial numbers of members of particular groups from significant participation in major social institutions.” *Forms of Racism: Individual vs. Systemic*, ALBERTA C.L. RSCH. CTR., <http://www.aclrc.com/forms-of-racism> [perma.cc/2WZV-8KE8].

126. STEPHANIE M.H. CAMP, *CLOSER TO FREEDOM: ENSLAVED WOMEN AND EVERYDAY RESISTANCE IN THE PLANTATION SOUTH* 3 (2004).

127. See *supra* Section I.A.1.

128. See Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL’Y 17, 23 (1994).

129. JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE* 136 (1990).

130. CAMP, *supra* note 126, at 2. “Foot dragging” is defined in this context as slaves “slow[ing] down the pace of their labor,” sometimes during a “critical time” like at harvest or just before the first frost, to cause slave owners to lose money. 1 *ENCYCLOPEDIA OF SLAVE RESISTANCE AND FREEDOM: A-N*, at xxxiv (Junius P. Rodriguez ed., 2007).

131. See Samuel Cartwright, *Diseases and Peculiarities of the Negro Race*, 11 DEBOW’S S. & W. REV. 331 (1851).

mental illness that caused slaves to run away.¹³² The second, “dysaesthesia aethiopica,” supposedly caused “rascality” or laziness in Black people and was “the natural offspring of negro liberty—the liberty to be idle, to wallow in filth, and to indulge in improper food and drinks.”¹³³ In the context of chattel slavery, Black people’s completely logical reactions to their brutal treatment and subjugation—running away and refusing to work—became symptoms of mental illness and criminality.

Chattel slavery’s enforcement mechanisms outlived the system’s demise. On the plantation, disciplining of enslaved people had largely been the province of individual slave owners. Discipline encompassed everything from casual meanness to unspeakable violence. Any measure of Black defiance demanded a swift and crippling response. Statutes had given slave owners near-absolute control over their slaves—including the power to kill them.¹³⁴ But once chattel slavery was legally prohibited, slaveholders saw much of their “power[] . . . ascribed to the state.”¹³⁵

Slave patrols—roving bands that hunted, retrieved, and punished runaway slaves with the sanction of the law—evolved into the South’s first police forces.¹³⁶ The police enforced vagrancy laws¹³⁷ and nighttime curfews,¹³⁸ wielding the imprimatur of the state as their most effective weapon. As one former slave from North Carolina recalled long after slavery had ended, slave patrols had been “jes’ like policemen, only worsen.”¹³⁹ Unsurprisingly, there was then, and continues to be now, overlap between southern police forces and the Ku Klux Klan and other paramilitary groups dedicated to the idea that “terror [wa]s the only restraining influence that can be brought to bear upon vicious Negroes.”¹⁴⁰

The idea that any measure of Black defiance was to be met with brutality extended well past the end of slavery and into the first half of the twentieth

132. *Id.*

133. *Id.* at 333.

134. See, e.g., CODE NOIR, art. XXXIII (Fr. La. 1685); Act of May 10, 1740, No. 760, art. XXIV, reprinted in 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 397 (David J. McCord ed., Charleston, S.C., A.S. Johnston 1840); Act Concerning Servants and Slaves, ch. 49, art. XXXIV, reprinted in 3 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 447, 461 (Philadelphia, Thomas Desilver 2d ed. 1823).

135. CAMP, *supra* note 126, at 2–3.

136. SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 3–4 (2001).

137. NATAPOFF, *supra* note 59, at 154–55 (describing the racist history of vagrancy laws).

138. JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 95 (2017).

139. HADDEN, *supra* note 136, at 71.

140. JAMES ELBERT CUTLER, LYNCH-LAW: AN INVESTIGATION INTO THE HISTORY OF LYNCHING IN THE UNITED STATES 274 (1905); see GILBERT KING, DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA 17, 91, 139–41 (2012). For a discussion of the prevalence of white supremacy in modern-day police forces, see Vida B. Johnson, *The Epidemic of White Supremacist Police*, APPEAL (Aug. 7, 2017), <https://theappeal.org/the-epidemic-of-white-supremacist-police-4992cb7ad97a> [perma.cc/8Z55-Q22Y].

century. After Reconstruction's end, violence in general, and lynching in particular, became an indispensable tool in maintaining the racial caste system that had served the white South's economic interests for well over a century.¹⁴¹ For southern whites, lynchings were "festive community gatherings" at which "large crowds of whites watched and participated in the Black victims' prolonged torture, mutilation, dismemberment, and burning at the stake."¹⁴² For Black southerners, lynching was "a tactic for maintaining racial control by victimizing the entire African American community, not merely punishment of an alleged perpetrator for a crime."¹⁴³

Here again, the myth of Black criminality crumbles, as the range of pre-textual excuses for racial violence was so broad as to be capricious.¹⁴⁴ "Of the 4,084 African American lynching victims . . . nearly 25 percent were accused of sexual assault and nearly 30 percent were accused of murder."¹⁴⁵ Hundreds

141. Relying on accounts from local newspapers, historical archives, court records, interviews with local historians, survivors, victims' descendants, and contemporaneously published reports in African American newspapers and periodicals, the Equal Justice Initiative has catalogued over four thousand racial terror lynchings in twelve states across the South between the end of Reconstruction in 1877 and 1950. EQUAL JUST. INITIATIVE, *LYNCING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 4, 40 (3d ed. 2017) [hereinafter *LYNCING IN AMERICA*]. This represents at least eight hundred more lynchings in these states than had previously been counted. *Id.* at 4. In other words, there were an average of fifty-six lynchings a year across the South over the course of seventy-three years. *Id.* at 40. These do not include the countless threatened reprisals, cross-burnings, beatings, and other forms of terrorism visited upon Black people during this period. For example, Professor James Forman, Jr., recounts a story from his father's childhood growing up in Jim Crow Mississippi. In 1936, Forman's father, then eight years old, failed to answer "Yes, ma'am" to a store clerk. White men in the store threatened to lynch the little boy if his uncle brought him into town again. FORMAN, *supra* note 138, at 8.

142. *LYNCING IN AMERICA*, *supra* note 141, at 28. At some lynchings, pieces of the lynching victim's corpse or pictures of the victim's mutilated corpse were sold as "souvenirs." *Id.* at 33, 47.

143. *Id.* at 5. White people who bucked the social order were also lynched. *Id.* at 27. However, as the postslavery decades wore on, lynching became more and more racialized. As the Equal Justice Initiative explains:

By the end of the nineteenth century, Southern lynching had become a tool of racial control that terrorized and targeted African Americans. The ratio of Black lynching victims to white lynching victims was 4 to 1 from 1882 to 1889; increased to more than 6 to 1 between 1890 and 1900; and soared to more than 17 to 1 after 1900.

Id.

144. Equal Justice Initiative researchers found that most lynchings fell into the following categories:

- (1) lynchings that resulted from a wildly distorted fear of interracial sex;
- (2) lynchings in response to casual social transgressions;
- (3) lynchings based on allegations of serious violent crime;
- (4) public spectacle lynchings;
- (5) lynchings that escalated into large-scale violence targeting the entire African American community; and
- (6) lynchings of sharecroppers, ministers, and community leaders who resisted mistreatment, which were most common between 1915 and 1940.

Id. at 5.

145. *Id.* at 29 (footnotes omitted).

of others were lynched based on accusations of arson, robbery, assault, and vagrancy.¹⁴⁶ Others were lynched on accusations of behavior that contravened the rigid customs and expectations of the South's social caste system, like not addressing a white man or white woman with proper respect.¹⁴⁷ Still others were lynched because they were Black and in the wrong place at the wrong time—in the path of the mob when the target of the mob's anger could not be found.¹⁴⁸

Examples overwhelm. In 1908, in Hickman, Kentucky, David Walker, his wife, and their four children were lynched when Mr. Walker was accused of using inappropriate language with a white woman.¹⁴⁹ In 1930, in Thomasville, Georgia, Lacy Mitchell was lynched for testifying against a white man accused of raping an African American woman.¹⁵⁰ In 1940, in Luverne, Alabama, Jesse Thornton was lynched for referring to a white police officer with the officer's name without the title "Mister."¹⁵¹ In 1941, in Camp Blanding, Florida, a Black construction worker was lynched for asking a white coworker to return the Black worker's shovel.¹⁵² And Senator Ben 'Pitchfork' Tillman of South Carolina bragged that he and his Red Shirts, a paramilitary group that aimed to undermine Black political power, "ha[d] done [their] level best" to disenfranchise former slaves by any means they could imagine, including shooting them.¹⁵³ "We have scratched our head to figure out how we can eliminate the last one of them. We stuffed ballot boxes. We shot them [Negroes]. WE ARE NOT ASHAMED OF IT."¹⁵⁴

3. The Myths Take Hold

These mythologies remained so deeply rooted as southern values that they were codified into law. In *Plessy v. Ferguson*, which upheld the constitutionality of de jure racial segregation in the form of "separate but equal" public facilities and laid the legal foundation for the American system of apartheid that would become known as Jim Crow, Justice Harlan wrote in dissent:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power.

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146. *Id.*

147. *Id.*

148. *Id.*

149. Holland Cotter, *A Memorial to the Lingering Horror of Lynching*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/arts/design/national-memorial-for-peace-and-justice-montgomery-alabama.html> [perma.cc/3257-CKKX].

150. LYNCHING IN AMERICA, *supra* note 141, at 32.

151. *Id.*

152. Scott Dickman, *My Turn: 'The Legacy of Suffering and Injustice That Haunts Us,'* CONCORD MONITOR (June 7, 2020, 7:00 AM), <https://www.concordmonitor.com/Racial-injustice-in-America-34614805> [perma.cc/XY9L-UE5E].

153. FORMAN, *supra* note 138, at 66; Ben Tillman, ENCYCLOPEDIA BRITANNICA (Mar. 29, 2021), <https://www.britannica.com/biography/Benjamin-R-Tillman> [perma.cc/A5J3-ETWT].

154. FORMAN, *supra* note 138, at 66 (alteration in original).

So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our Constitution is color-blind*, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.¹⁵⁵

The sentence in which Justice Harlan describes the Constitution as color-blind is immediately preceded by his endorsement of White America's "great heritage" in having earned its status as the "dominant race," not just in 1896, but "for all time."¹⁵⁶ The ease of the juxtaposition is striking. Though it would seem that the reality that the "white race" was "dominant" in "prestige, in achievements, in education, in wealth and in power" would gainsay the ideal that the Constitution holds "all citizens [as] equal before the law," in Harlan's dissent, and in the community conscience of white Americans, these two principles coexisted.¹⁵⁷ The paradox was resolved thusly: white Americans were the dominant race because of their innate superiority, even if that status was acquired by subjugating other races through sedulously enforced social norms, arbitrary and brutal violence,¹⁵⁸ and vicious curtailments of civil rights.¹⁵⁹

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155. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (emphasis added). Justice Harlan likely borrowed the "color blind" descriptor from the brief filed on behalf of Plessy. In the brief, Plessy's attorney argued, "[j]ustice is pictured blind and her daughter, the Law, ought at least to be color-blind." C. Vann Woodward, *Plessy v. Ferguson: The Birth of Jim Crow*, AM. HERITAGE, Apr. 1964, at 52, 100–01.

156. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

157. *Id.*

158. LYNCHING IN AMERICA, *supra* note 141, at 33, 60 (stating that lynchings were public spectacles with a carnival atmosphere).

159. Jim Crow is most often associated with segregation of public facilities, like buses, trains, parks, public drinking fountains, and lunch counters. See James W. Fox Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 HOW. L.J. 113, 138 (2006) ("Racial subordination and segregation in public facilities, and especially in the most common facilities of railroads, streetcars, inns, and theaters, was one of the most pervasive ways in which [w]hites asserted their racial power."). But Jim Crow laws were meticulous and comprehensive in their scope, reaching beyond public facilities to regulate the most intimate of interactions. For example, a 1930 Alabama statute made it "unlawful for a negro and white person to play together or in company with each other in any game of cards or dice, dominoes or checkers," a 1903 Arkansas provision made it unlawful "for any white prisoner to be handcuffed or otherwise chained or tied to a negro prisoner," and a 1926 Georgia statute prohibited "colored barber[s]" from "serv[ing] as a barber to white women or girls." *Separate Is Not Equal: Brown v. Board of Education*, NAT'L MUSEUM OF AM. HIST., <https://americanhistory.si.edu/brown/history/1-segregated/detail/jim-crow-laws.html> [perma.cc/C5G3-2DC5]. As C. Vann Woodward explained, Jim Crow

For many Black Americans, however, Harlan's promise of equality before the law became a rallying principle. Jim Crow would stand as the law of the land for the next sixty years, until the Supreme Court ruled in *Brown v. Board of Education* that "[s]eparate" was "inherently unequal."¹⁶⁰ Even after the Court's rebuke of "separate but equal" cut Jim Crow off at the knees, these myths were so deeply held that Jim Crow's shadow would continue to loom large almost a century after the end of slavery.¹⁶¹ Not only would Black people still have far fewer educational opportunities than white people in the 1960s, but Black people would also begin to fill the nation's jails and prisons at an unprecedented rate.¹⁶² These deeply ingrained stereotypes concerning Black intellectual inferiority and Black criminality, which evolved over centuries to justify the particularly virulent American strain of chattel slavery, had taken on a life of their own.¹⁶³

Restlessness in Black communities at the intractableness of these narratives, their abiding affront to the collective dignity of the Black community, the constant threats of violence they justified, the limits they imposed on the promise of opportunity, and the enormous removal of wealth from the Black community that they enabled would fuel the mass protests of the African American civil rights movement of the 1960s and lead to the passage of the Civil Rights Act of 1964.¹⁶⁴ The intractability of these beliefs is not surprising.

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lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. . . . [T]hat ostracism eventually extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries.

C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 8 (1955). Jim Crow laws also prohibited interracial marriage, Black fishers from fishing with white fishers, Black people from using the same bathrooms as white people, and more. See *Examples of Jim Crow Laws*, JIM CROW MUSEUM OF RACIST MEMORABILIA, <https://www.ferris.edu/HTMLS/news/jimcrow/links/mislink/examples.htm> [perma.cc/VN7W-P4BN].

160. 347 U.S. 483, 495 (1954).

161. See ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* 3–4 (2009).

162. See Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246> [perma.cc/92BV-SAH4]; Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS INST. (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education> [perma.cc/A6PB-953S].

163. U.S. chattel slavery was different from other forms of slavery practiced in Africa. See Robert Harms, *An Ancient Practice Transformed by the Arrival of Europeans*, WALL ST. J. (Sept. 20, 2019), <https://www.wsj.com/articles/an-ancient-practice-transformed-by-the-arrival-of-europeans-11568993153> [perma.cc/B973-TFQK]; see also *Modern Abolition*, NAT'L UNDERGROUND R.R. FREEDOM CTR., <https://freedomcenter.org/learn/modern-day-abolition> [perma.cc/F99C-B3CP].

164. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.). Title VI of the Act prohibits recipients of federal funding, including private colleges and universities, from discriminating against students and applicants on the basis of race, religion, or national origin; Title VII proscribes discrimination on the basis of race or national origin in private employment and is one of the sources of the term "affirmative

“[R]acialized scripts become hidden in the contours of justice,” embedded in their own cultural ecosystem.¹⁶⁵ Far from being deliberately hidden by racists with malevolent intent, they instead evolve from practice, to belief, to the way things are.¹⁶⁶ In this way, “racism can infiltrate seemingly race-neutral institutions,”¹⁶⁷ even in the face of a Constitution that cannot tolerate prejudices.¹⁶⁸

B. *The Birth of Affirmative Action: Affirmative Action and De Jure Segregation*

Because the law was the instrument that reified these narratives, the law was the venue in which equality advocates chose to confront them. Unfortunately, in the hands of the Court, the law would ultimately be too easily sanitized of the stereotypes, customs, and lived experience that made it such an effective weapon for discrimination. *Brown* would be the first step toward affirmative action in higher education, requiring schools to take the affirmative action of desegregating.¹⁶⁹ Amelioration of de jure segregation—or the mandatory use of race as a factor in admissions by public education systems to eliminate the vestiges of historically lawful racial segregation—is the original meaning of affirmative action in higher education.¹⁷⁰ The South’s history of de jure segregation created an affirmative obligation for the states to address the effects of decades of legally imposed racial segregation in schools.¹⁷¹

Brown was the apotheosis of a decades-long litigation strategy. Instead of focusing on the fact that educational facilities were functionally unequal, as prior cases had done, *Brown* located its impermissible constitutional infirmity in the fact that school children were separated on the basis of race.¹⁷² Even if racially segregated educational facilities offered the same education, the Court wrote, “[t]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹⁷³

By requiring schools to desegregate, the Court did something it had not done before: it imposed upon white Americans the obligation to get proximate

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action.” Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 610–11, 619 (1998).

165. NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT 12 (2016).

166. See *id.* at 9–12 (describing the racialized courtroom as “business as usual”).

167. *Id.* at 11.

168. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”).

169. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493–95 (1954).

170. See *United States v. Fordice*, 505 U.S. 717, 721–23 (1992).

171. See *id.* at 721.

172. *Brown I*, 347 U.S. at 491–93.

173. *Id.* at 494.

to the issue of race relations. Proximity here, and in the way Professor Bryan Stevenson uses the term,¹⁷⁴ required more than surface-level engagement with the “problem we all live with.”¹⁷⁵ It required a collective acceptance that de jure segregation was deeply damaging to both Black and white Americans, that everyone touched by it had an obligation to remedy the harm it wrought, and that remedying that harm would happen only through widespread, cross-racial cooperation.¹⁷⁶ In other words, the Court’s desegregation order was radical not just because it offended centuries of southern tradition but because of the way it aimed to disrupt that tradition. Desegregation had the potential to start the rewriting of the obstinate, pernicious narratives about Black intellectual inferiority that had justified depriving generations of enslaved Black people of education altogether and then ensured that generations of Black Americans could not access education that matched their talent and potential.¹⁷⁷

C. Affirmative Action and De Facto Segregation

By 1961, states were grappling with implementing the Court’s ruling in *Brown*.¹⁷⁸ In 1955, Emmett Till, a fourteen-year-old African American boy visiting his family in Money, Mississippi, was brutally lynched for allegedly saying “Bye, baby” to a white woman.¹⁷⁹ The publication of the photos taken at Till’s open-casket funeral was the first media event of the civil rights movement.¹⁸⁰ The Montgomery bus boycott, the country’s first large-scale protest

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174. See Fortune Mag., *The Power of Proximity: CEO Initiative 2018*, YOUTUBE (June 27, 2018), <https://youtu.be/1RyAwZIH04Y>.

175. Norman Rockwell, *The Problem We All Live With*, oil on canvas (1964), <http://www.nrm.org/thinglink/text/ProblemLiveWith.html> [perma.cc/XS4S-5RCF].

176. See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300–01 (1955); see also *Brown I*, 347 U.S. at 495–96.

177. Before the civil rights movement, racial and ethnic minorities were largely excluded from accessing higher education and the social and economic benefits that accompany advanced degrees. DOUGLAS S. MASSEY, CAMILLE Z. CHARLES, GARVEY F. LUNDY & MARY J. FISCHER, *THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA’S SELECTIVE COLLEGES AND UNIVERSITIES 1* (2003) (“African Americans, in particular, were barred from most colleges and universities by a combination of de jure and de facto mechanisms, and they faced particularly severe barriers at the nation’s most selective institutions.”). Born of segregation, historically Black colleges and universities shouldered the responsibility of educating Black intellectuals. See *id.*

178. See generally WITH ALL DELIBERATE SPEED: IMPLEMENTING *BROWN V. BOARD OF EDUCATION* (Brian J. Daugherty & Charles C. Bolton eds., 2008) (surveying the implementation of *Brown*’s desegregation mandate in a variety of states).

179. Wade Goodwyn, *A Brutal Lynching and a Possible Confession, Decades Later*, NPR (Oct. 27, 2018, 8:13 AM), <https://www.npr.org/2018/10/27/661048613/a-brutal-lynching-and-a-possible-confession-decades-later> [perma.cc/N3U3-QHCF].

180. See *Nation Horrified by Murder of Kidnaped Chicago Youth*, JET, Sept. 5, 1955, at 6–9 (content warning: graphic imagery). The photos of Till’s remains were seared onto the consciousness of an entire generation of African Americans; Till’s casket and this article are now housed in the National Museum of African American History and Culture. Abby Callard, *Em-*

against segregation, ended in 1956 with the Supreme Court's ordering Alabama to integrate its bus system and with the introduction of Martin Luther King Jr. to the national stage.¹⁸¹ In 1957, President Eisenhower sent federal troops to escort the Little Rock Nine, the group of African American students charged with integrating Central High School in Arkansas, past angry white mobs resisting segregation; federal troops also escorted six-year-old Ruby Bridges, who integrated William Frantz Elementary School in Louisiana.¹⁸² And in February 1960, four African American college students from North Carolina Agricultural and Technical State University, inspired by Dr. King and his example of nonviolent civil disobedience, themselves inspired a wave of sit-ins across the South when they refused to leave a whites-only lunch counter at Woolworth's without being served.¹⁸³

In response to this mounting unrest, President Kennedy threw the weight of the executive branch behind the courts' efforts to desegregate the South.¹⁸⁴ With Executive Order 10925, signed on March 6, 1961, President Kennedy required that government contractors "take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color, or national origin."¹⁸⁵ President

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mett Till's Casket Goes to the Smithsonian, SMITHSONIAN (Nov. 2009), <https://www.smithsonianmag.com/artsculture/emmett-tills-casket-goes-to-the-smithsonian-144696940> [perma.cc/43HL-K68C].

181. *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam); Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955–1957*, 9 LAW & HIST. REV. 59, 60 (1991).

182. Alex Chadwick, *Little Rock Remembers Troops' Arrival*, NPR (Sept. 24, 2007, 1:00 PM), <https://www.npr.org/templates/story/story.php?storyId=14654126> [perma.cc/V8RZ-3DM4]. Ruby Bridges would later be the subject of a famous Norman Rockwell painting, "The Problem We All Live With." In the painting, six-year-old Ruby, in a white dress and pigtails, is flanked by four members of the National Guard as she walks to school carrying her books. See Rockwell, *supra* note 175.

183. Deidre B. Flowers, *The Launching of the Student Sit-in Movement: The Role of Black Women at Bennett College*, 90 J. AFR. AM. HIST. 52, 53–55 (2005).

184. Cf. Judson MacLaury, *President Kennedy's E.O. 10925: Seedbed of Affirmative Action*, 2 FED. HIST. 42, 44 (2010) ("The increasing use of 'affirmative action' as a term, and its adoption as national policy in 1961, can be seen as responses to the more-than-affirmative assertions of their rights that African Americans in large numbers were taking in the late 1950s and early 60s.").

185. Exec. Order No. 10,925, 3 C.F.R. 448, 450 (1959–1963). President Kennedy's executive order was preceded by a series of executive orders forbidding race discrimination in employment by federal contractors dating back to President Franklin Roosevelt. Signed on June 25, 1941, Executive Order 8802 prohibited discrimination in the defense industry on the basis of "race, creed, color, or national origin, in the firm belief that the democratic way of life within the Nation can be defended successfully only with the help and support of all groups within its borders." Exec. Order No. 8,802, 3 C.F.R. 957 (1938–1943). Executive Order 8802 was the first federal action to endorse equal opportunity and to prohibit employment discrimination in the United States. See West, *supra* note 164, at 612. President Roosevelt issued this order to ensure opportunities for Americans from Italy and Germany, who were targeted because of their ethnicities in the leadup to and during World War II, and in response to pressure from African American civil rights activists, including A. Phillip Randolph, who had threatened to stage a march on Washington to protest the dearth of Black employees in the defense industry. See JOHN W.

Kennedy's order was the first to go beyond denouncing discrimination to requiring federal contractors to take affirmative steps to ensure nondiscrimination.¹⁸⁶ Though the order did include possible penalties for failure to comply, it did not enumerate many specific requirements or provide examples of affirmative actions employers might take.¹⁸⁷

But President Kennedy's executive order did little to quell the resistance to desegregation sweeping across the South. In his inaugural address in 1963, Alabama governor George Wallace earned national headlines, when, in defiance of federal law and in a ratification of white dominance reminiscent of Justice Harlan's dissent in *Plessy*, he declared, "[i]n the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny, and I say segregation now, segregation tomorrow, segregation forever."¹⁸⁸ In May 1963, hundreds of African American children marched through the streets of Birmingham, Alabama, protesting segregation, only to be set upon by police batons, German Shepherds, and water cannons strong enough to dislodge bricks from buildings.¹⁸⁹ A month later, Governor Wallace stood in the doorway of the Foster Auditorium at the University of Alabama to prevent two African American students from entering.¹⁹⁰ The nationally televised brutality of the Children's Crusade caused

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JEFFRIES, WARTIME AMERICA: THE WORLD WAR II HOME FRONT 125–26 (1996). In 1948, President Harry Truman integrated the armed forces with Executive Order 9,981. Exec. Order No. 9,981, 3 C.F.R. 722 (1943–1948).

186. West, *supra* note 164, at 612.

187. *Id.* at 612–13.

188. Gov. George Wallace, Inaugural Address 2 (Jan. 14, 1963), <https://digital.archives.alabama.gov/digital/api/collection/voices/id/2952> [perma.cc/L2VS-9RPD]. This phrase gained Governor Wallace national coverage. It was covered in the *New York Times*, the *Washington Post*, and *Newsweek*. *North Denounced by Gov. Wallace*, N.Y. TIMES, Jan. 15, 1963, at 9; *Alabama Gov. Wallace Asserts South Will Elect Next President*, WASH. POST, Jan. 15, 1963, at A4; 'Now . . . Forever,' NEWSWEEK, Jan. 28, 1963, at 31–32. It also earned Wallace the distinction of being the only person mentioned (though not by name) in Dr. King's famous "I Have a Dream" speech at the March on Washington at the Lincoln Memorial in 1963. See Martin Luther King Jr., *I Have a Dream* (Aug. 28, 1963).

189. See Steven Levingston, *Children Have Changed America Before, Braving Fire Hoses and Police Dogs for Civil Rights*, WASH. POST (Mar. 23, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2018/02/20/children-have-changed-america-before-braving-fire-hoses-and-police-dogs-for-civil-rights> [perma.cc/M8YJ-VL72].

190. Debra Bell, *George Wallace Stood in a Doorway at the University of Alabama 50 Years Ago Today*, U.S. NEWS (June 11, 2013, 2:05 PM), <https://www.usnews.com/news/blogs/press-past/2013/06/11/george-wallace-stood-in-a-doorway-at-the-university-of-alabama-50-years-ago-today> [perma.cc/3FJ8-AXE5]. This action was so prominent and symbolic that it was mentioned in Bob Dylan's iconic 1964 song "The Times They Are A-Changin'." See BOB DYLAN, *THE TIMES THEY ARE A-CHANGIN'* (Columbia Records 1964) ("Come Senators, congressmen, please heed the call / Don't stand in the doorway, don't block up the hall.").

President Kennedy to send in the National Guard to desegregate the university.¹⁹¹ In August 1963, 250,000 people gathered at the Lincoln Memorial for the March on Washington for Jobs and Freedom, drawing hope from Dr. King's "I Have A Dream" speech at the close of the demonstration.¹⁹² In September 1963, members of the Ku Klux Klan bombed the 16th Street Baptist Church in Birmingham, killing four young African American girls, leading to a rash of angry, anguished protests.¹⁹³ In November 1963, President Kennedy was assassinated, and Lyndon B. Johnson was sworn in as President.¹⁹⁴

In his June 4, 1965 commencement address at Howard University, later known as the "To Fulfill These Rights" speech, President Johnson famously stated:

[F]reedom is not enough. . . . You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair.

Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.¹⁹⁵

President Johnson had made his announcement at a university commencement, and universities answered the call. Title VI of the Civil Rights Act of 1964 outlawed discrimination on the basis of race, color, or national origin by any program or activity receiving federal financial assistance.¹⁹⁶ The sweep of Title VI therefore included colleges and universities relying on federally funded financial aid programs. In 1973, the Department of Health, Education,

191. Jeremy Gray, *Kennedy Federalized National Guard to Integrate Alabama Public Schools* (Sept. 10, 1963), AL.COM (Mar. 6, 2019), https://www.al.com/birmingham-news-stories/2013/09/kennedy_federalized_national_g.html [perma.cc/J6XF-TJ5].

192. *March on Washington*, HISTORY (Mar. 16, 2021), <https://www.history.com/topics/black-history/march-on-washington> [perma.cc/R7WT-9HED]. The March on Washington was the largest protest in U.S. history at the time. See Leeana Garfield, *The 11 Biggest Marches and Protests in American History*, INSIDER (Feb. 8, 2017, 1:40 PM), <https://www.businessinsider.com/largest-marches-us-history-2017-2> [perma.cc/9TP9-KKWE].

193. *Birmingham Church Bombing*, HISTORY, <https://www.history.com/topics/1960s/birmingham-church-bombing> [perma.cc/4HX7-8AN2].

194. *Assassination of John F. Kennedy*, HISTORY (June 14, 2019), <https://www.history.com/topics/us-presidents/jfk-assassination> [perma.cc/B9XK-ZUR3].

195. Commencement Address at Howard University: "To Fulfill These Rights," 1965 PUB. PAPERS 635, 636 (June 4, 1965). This speech is "widely known as the intellectual framework for affirmative action." Pamela Kirkland, *For Howard Grads, LBJ's 'To Fulfill These Rights' Remarks Are Still Relevant Half a Century Later*, WASH. POST (June 4, 2015, 10:57 AM), <https://www.washingtonpost.com/news/post-nation/wp/2015/06/04/for-howard-grads-lbjs-to-fulfill-these-rights-remarks-are-still-relevant-half-a-century-later> [perma.cc/G5W9-HNDF]. Many teaching tools use this race metaphor to great effect. See, e.g., Erica Pinto, *The Unequal Opportunity Race*, YOUTUBE (Nov. 15, 2010), https://youtu.be/vX_Vzl-r8NY (illustrating the obstacles to equality that affirmative action addresses).

196. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 252 (1964) (codified as amended in scattered sections of 42 U.S.C.) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

and Welfare revised the implementing regulations for Title VI to authorize “affirmative action” for the purpose of “overcom[ing] the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.”¹⁹⁷ To comply, colleges and universities devised and implemented affirmative action programs to increase student-of-color enrollment.¹⁹⁸ Just five years later, the first case testing the limits of race-conscious admissions in higher education would reach the Supreme Court, coinciding with the start of the mass incarceration boom that would incarcerate unprecedented numbers of Black and Latino Americans over the next five decades.¹⁹⁹

D. *A Brief History of Disproportionate Minority Contact*

1. 1972: The Boom Begins

As affirmative action evolved as a febrifuge for invidious race bias in employment and education, the criminal legal system emerged as a new situs of racial oppression. From 1925, the first year the number of people in prison in the United States was recorded, to 1974, the United States prison population was relatively stable, increasing at a rate of about 1.8 percent annually.²⁰⁰ In that almost sixty-year time span, the incarceration rate rose from 79 inmates per 100,000 people to 102 inmates per 100,000 people.²⁰¹ In 1973, the first year Allan Paul Bakke applied to and was rejected by the medical school at the University of California, Davis, there were just over 200,000 people incarcerated in state and federal prisons.²⁰² In 1974, the prison population began a steep

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197. 45 C.F.R. § 80.3(b)(6) (2019). The HEW regulations required affirmative action to remedy de jure segregation and encouraged affirmative action to address de facto segregation:

(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

Id.

198. See Anemona Hartocollis, *50 Years of Affirmative Action: What Went Right, and What It Got Wrong*, N.Y. TIMES (Mar. 30, 2019), <https://www.nytimes.com/2019/03/30/us/affirmative-action-50-years.html> [perma.cc/YK8C-T5QB].

199. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 13 (David Garland ed., 2001).

200. BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS, 1925–81, at 1 (1982), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=3414> [perma.cc/RW9R-MPQV].

201. *Id.*

202. *Id.* at 2 tbl.1.

rise, almost doubling in the next eight years. By 2013, the incarceration rate had risen to 716 inmates per 100,000 people, an almost fivefold increase.²⁰³

Perhaps surprisingly, the rising incarceration rate did not track crime rates. Sociologists have long noted that punishment has more to do with social control than with crime rates, and the United States is an example that proves this rule.²⁰⁴ The United States' prison population has shown constant growth, increasing "in years of rising crime and falling crime, in good economic times and bad, during wartime and while we were at peace."²⁰⁵ The current violent crime rate hovers around 1971 levels, when just under 200,000 people were incarcerated, and around when the incarceration explosion started.²⁰⁶ The data also reveal that the increased reliance on incarceration did not cause the decline in crime rates;²⁰⁷ in fact, the prison population has continued to increase even after crime rates began to decline in the mid-1990s.²⁰⁸

2. Superpredators, Mandatory Minimums, and the War on Drugs

Rising crime levels in the previous decade propelled mid-1990s legislators to embrace a false forecast of hardened criminals and a suite of tough-on-crime measures to stop them. An examination of the changes in procedures for system-involved youth provides an illustrative case study. Juvenile arrests for violent crimes and homicides increased sharply between 1986 and 1994.²⁰⁹ In the grip of this climate of fear, academics, sociologists, and criminologists hailed a coming generation of juvenile "super-predators,"²¹⁰ a new and vicious breed of youth who would "kill, rape, maim, and steal without remorse."²¹¹ And those youths, because of the criminogenic factors that contributed to creating a superpredator, would most often have Black faces.²¹² "My [B]lack crime problem, and ours," Professor DiIulio explained, "is that for most Americans, especially for average white Americans . . . the fear is enormous

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203. See *id.* at 1; ROY WALMSLEY, INT'L CTR. FOR PRISON STUD., WORLD PRISON POPULATION LIST 1 (10th ed. 2013).

204. See, e.g., MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 14 (2004) ("Governments decide how much punishment they want, and these decisions are in no simple way related to crime rates.").

205. AUSTIN ET AL., *supra* note 51, at 1.

206. See James Cullen, *The History of Mass Incarceration: From Alexis de Tocqueville to Ronald Reagan, the Forces That Have Shaped the Current State of Our Prison System.*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> [perma.cc/RZ94-J9KG].

207. See AUSTIN ET AL., *supra* note 51, at 5.

208. *Id.* at 4 fig.1.

209. Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 29 (2007).

210. John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, CITY J., Spring 1996, at 14.

211. *Id.* at 18.

212. See WILLIAM J. BENNETT, JOHN J. DI IULIO, JR. & JOHN P. WALTERS, BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 18-34 (1996) (discussing the perception of criminals as being Black).

and largely justifiable, and the [B]lack kids who inspire the fear seem not merely unrecognizable but alien.”²¹³

DiIulio’s philippic spread like a fever. He was the anti-Cassandra, making false predictions that everyone heeded. National politicians courted the “tough on crime” label by pressing for increased offender accountability.²¹⁴ State legislators, not to be outdone, passed “the broadest and most sustained legislative crackdown ever on serious offenses committed by youth within the jurisdictional ages of American Juvenile Courts.”²¹⁵ By 1997, new juvenile codes also allowed youths to be tried as adults at younger ages and for more offenses.²¹⁶

States, in reactionary mode, passed a battery of procrustean approaches to crime.²¹⁷ These included habitual-offender laws and statutes that targeted recidivism by punishing people with two or more felony convictions with increased sentences up to and including life in prison.²¹⁸ The most infamous of

213. DiIulio, Jr., *supra* note 210, at 18. In an episode of HBO’s critically acclaimed series *The Wire*, Poot, a young Black man who sells drugs, has an exchange that alludes to the super-predator rhetoric with Herc, a white police officer, and Carver, a Black police officer, who are warning Poot to be careful:

HERC: Well, you best watch your ass. ‘Cause the slingers out here? They’re like the crack babies’ babies.

POOT: Man, every year everybody’s like, “Yeah, these kids out here, they’re a new breed. I ain’t never seen nothing like this before. This the end of the world now.”

CARVER: Look around, fuckhead. This seem like the dawn of a new day to you?

The Wire: All Due Respect (HBO television broadcast Sept. 26, 2004).

214. The response in New York City, home of the Central Park jogger attack, was particularly fervent and vitriolic. Donald Trump, then a private citizen, took out a full-page ad in the *New York Times* calling for reinstatement of the death penalty. Donald J. Trump, Advertisement, *Bring Back the Death Penalty, Bring Back Our Police!*, N.Y. TIMES, May 1, 1989, at A13. Manhattan Borough President and mayoral candidate David Dinkins proposed an “antiwilding law” with increased penalties for anyone who committed a crime as part of a group. Michael Welch, Eric A. Price & Nana Yankey, *Moral Panic Over Youth Violence: Wilding and the Manufacture of Menace in the Media*, 34 YOUTH & SOC’Y 3, 9–10 (2002). Mayoral candidate Rudy Giuliani argued for severe measures to “combat ‘mindless violence’ perpetrated by marauding gangs on ‘wilding’ sprees,” and Mayor Ed Koch advocated for expanding the “death penalty” to “incidents of wilding.” *Id.* at 10.

215. Franklin E. Zimring, *The 1990s Assault on Juvenile Justice: Notes from an Ideological Battleground*, 11 FED. SENT’G REP. 260, 260 (1999).

216. Barry C. Feld, *Race, Youth Violence, and the Changing Jurisprudence of Waiver*, 19 BEHAV. SCIS. & L. 3, 5 (2001) (discussing waiver laws and harsher sentences in juvenile courts after the 1980s); see also Sara Sun Beale, *You’ve Come a Long Way, Baby: Two Waves of Juvenile Justice Reform as Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 521 (2009).

217. See FORMAN, *supra* note 138, at 7.

218. See Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 705, 728 (2006).

these was California's 1994 "Three Strikes" law, which enacted increased penalties for people with a felony conviction.²¹⁹ If a defendant had one prior felony conviction and was convicted of a second felony, the defendant's maximum sentence doubled.²²⁰ If the defendant was convicted of a third felony, the law mandated a state prison term of at least twenty-five years to life.²²¹ Other states around the country followed suit.²²² This period also saw the adoption of laws establishing mandatory minimum sentences for certain violent offenses.²²³ In addition, the victim's rights movement gained traction, leading to the passage of laws requiring victims to be included in the disposition of cases.²²⁴ Victims were now able to appear in court and on the record at sentencings.²²⁵ The crack cocaine epidemic ushered in aggressive street-level policing.²²⁶ States also passed a range of severe collateral consequences, like lifetime disenfranchisement for those convicted of a felony.²²⁷

Over the last sixty years, a range of factors have contributed to "an experiment in punitive criminal justice the likes of which the world ha[s] never seen."²²⁸ One contributor is status-regime modernization, in which the War on Drugs and its attendant racial profiling, over policing of communities of color, and discriminatory mandatory minimums for possession of drugs more likely to be found in poor, Black neighborhoods, evolved into a stunningly effective form of systemic racism.²²⁹ Another is the expansion of prosecutorial power, resulting from decades of rising crime rates, politicians who wanted to be seen as "tough on crime," and a strong, pro-prison lobby enabling prosecutors to win more convictions.²³⁰ A third factor is the unforeseen consequences that flowed from communities of color, vulnerable from years of

219. See *id.* at 728 n.107.

220. Anusua Datta, *California's Three Strikes Law Revisited: Assessing the Long-Term Effects of the Law*, 45 ATL. ECON. J. 225, 226 (2017).

221. *Id.* The three-strikes law was amended in 2012 by Proposition 36. Charles Zone Tsuei, *A Substantial Relationship to Justify Use of Prior Adjudications as a "Strike": Reforming Penal Code Section 667 Subsection (d)(3) & Section 1170.12 Subsection (b)(3)*, 43 W. ST. L. REV. 41, 48 (2015).

222. White, *supra* note 218, at 705.

223. See James Cullen, *Sentencing Laws and How They Contribute to Mass Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 5, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/sentencing-laws-and-how-they-contribute-mass-incarceration> [perma.cc/BGB5-AZ3R].

224. See Jill Lepore, *The Rise of the Victims'-Rights Movement*, NEW YORKER (May 14, 2018), <https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement> [perma.cc/74S7-AD7S].

225. See *id.*

226. FORMAN, *supra* note 138, at 156.

227. *Id.* at 7.

228. *Id.* at 6–7.

229. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 110, 122–23 (10th anniversary ed. 2020).

230. See generally JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017) (discussing these factors in the context of the incarceration story).

underenforcement, desperately trying to keep their communities safe during the crack epidemic of the 1980s and 1990s.²³¹

Whatever its contributing factors, mass incarceration evolved over a forty-year period as the “result of small, distinct steps, each of whose significance becomes more apparent over time, and only when considered in light of later events.”²³² All these steps would conspire to ensure that the United States remains “the world’s largest jailer.”²³³

3. Hyperincarceration²³⁴

The result is that even though today’s incarceration rate is hovering at its lowest level in twenty years,²³⁵ the United States still has the largest prison population in the world.²³⁶ On any given day, the United States has more than 2.1 million people in prison.²³⁷ That number represents an almost 500 percent increase over the last forty years²³⁸ and an incarceration rate of 655 inmates

231. See FORMAN, *supra* note 138, at 35, 156–57.

232. *Id.* at 45; see Arit John, *A Timeline of the Rise and Fall of ‘Tough on Crime’ Drug Sentencing*, ATLANTIC (Apr. 22, 2014), <https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983> [perma.cc/RZ8H-FTCB].

233. FORMAN, *supra* note 138, at 18.

234. While this overreliance on incarceration is popularly referred to as “mass incarceration,” many scholars instead choose to call it “hyperincarceration,” to reflect the fact that the increased incarceration has largely been concentrated in communities of color. See, e.g., Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES, *supra* note 199, at 82; see also Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DAEDALUS, Summer 2010, at 74, 74 (“[T]he stupendous expansion and intensification of the activities of the American police, criminal courts, and prison over the past thirty years have been finely targeted, first by class, second by race, and third by place, leading not to mass incarceration but to the hyperincarceration of (sub)proletarian African American men from the imploding ghetto.”).

235. John Gramlich, *America’s Incarceration Rate Is at a Two-Decade Low*, PEW RSCH. CTR. (May 2, 2018), <https://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low> [perma.cc/C3Z4-84E5].

236. ROY WALMSLEY, INST. FOR CRIM. POL’Y RSCH., WORLD PRISON POPULATION LIST 2 (12th ed. 2018), https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf [perma.cc/283L-D2TR]. According to the World Prison Population List, China, with 18.91 percent of the world’s population, has the next largest prison population, with 1.65 million people. *Id.* China is followed by Brazil (690,000), Russia (583,000), India (420,000), and Thailand (364,000). *Id.* Fifty-three percent, or more than half, of all countries and territories for which data were available have incarceration rates below 150 prisoners per 100,000 people, making the world prison population rate 145 per 100,000. *Id.* The United States’ incarceration rate is 4.5 times the world incarceration rate. *Id.*

237. *Id.* The World Prison Population List indicates that 655 of every 100,000 Americans are in prison. *Id.* The countries with the next highest rates of incarceration per 100,000 people are El Salvador (604), Turkmenistan (552), the U.S. Virgin Islands (542), Thailand (526), Cuba (510), and the Maldives (499). *Id.*

238. THE SENT’G PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 2 (2020), <https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf> [perma.cc/2DUU-KRVX].

per 100,000 Americans. Despite having only 4.39 percent of the world's population, the United States has 19.75 percent of the world's incarcerated population.²³⁹ The United States currently spends \$80.7 billion each year on prisons, jails, parole, and probation.²⁴⁰

Black and Latino communities overwhelmingly bear the disproportionate brunt of the costs of overincarceration. According to Bureau of Justice Statistics data, in 2017, the last year for which information is available, the rate of imprisonment of Black adults was 1,549 per 100,000, the rate of imprisonment for Hispanic adults was 823 per 100,000, and the rate of imprisonment of white adults was 272 per 100,000.²⁴¹ The imprisonment rate for Black men who were convicted and sentenced (2,336 per 100,000 Black men) was almost six times that of white men who were convicted and sentenced (397 per 100,000 white men).²⁴² The imprisonment rate for Black women (92 per 100,000 Black women) was almost double that for white women (49 per 100,000 white women).²⁴³ Vestiges of the renounced superpredator predictions linger: young Black men between the ages of eighteen and nineteen were a whopping twelve times more likely to be imprisoned than young white men of the same age.²⁴⁴ And the disparity was not exclusive to youth. Black men ages sixty-five or older were 4.5 times more likely to be imprisoned than white men of the same age.²⁴⁵

II. RACE AS A FACTOR IN RACE-CONSCIOUS ADMISSIONS AND IN DISPROPORTIONATE MINORITY CONTACT

So excavated, the intertwining histories and evolutions of affirmative action and disproportionate minority contact provide a necessary context for the way the jurisprudence has developed for each. But the cases offer no assistance at all in illuminating this nexus. To the contrary, the Supreme Court's sanitized jurisprudence concerning affirmative action in both higher education and in the criminal legal system "ha[ve] conspired to turn our attention

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239. WALMSLEY, *supra* note 236, at 2.

240. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [perma.cc/QDA9-JFDT].

241. JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., PRISONERS IN 2017, at 9 tbl.5 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [perma.cc/U2UE-7D9P]. The World Prison Population List's data for United States prisoners, cited above, is different from the data collected by the Bureau of Justice Statistics (BJS). For example, the BJS counts the number of inmates per 100,000 adults ages 18 and older, while the World Prison Population List measures each country's incarceration rate as the number of inmates per 100,000 people of *any age*. The World Prison Brief also counts jail inmates differently from the way BJS counts them. See *id.* at 1; see also WALMSLEY, *supra* note 236, at 1.

242. BRONSON & CARSON, *supra* note 241, at 1.

243. *Id.* at 15.

244. *Id.*

245. *Id.*

away from our history” and “erode our shared understanding.”²⁴⁶ But a historic reasoning cannot quiet the echoes of centuries of stereotypes that present themselves in so many protean guises. Failing to meaningfully engage with the country’s racial history, the Court’s jurisprudence seems to “assume the existence of the very colorblind society that we have yet to achieve.”²⁴⁷

In race-conscious admissions jurisprudence, this omission has taken the form of casting the country’s racial history as a shameful but fortunately static period in our history that has been largely addressed and overcome.²⁴⁸ “From this perspective, antidiscrimination law appears as a portal through which contemporary Americans stepped through to a brand new present, a world free of the structural iniquities forged during the era of American apartheid.”²⁴⁹

A. Race as a Factor in Admissions

At least according to opponents of race-conscious admissions programs, such measures have an expiration date. The Supreme Court has issued five²⁵⁰ major decisions concerning the use of race-conscious admissions policies in higher education: *Regents of the University of California v. Bakke*,²⁵¹ decided in 1978; *Grutter v. Bollinger*²⁵² and *Gratz v. Bollinger*,²⁵³ decided on the same day in 2003; and two additional cases, both captioned *Fisher v. University of Texas at Austin*. The first, decided in 2013, is commonly referred to as *Fisher I*,²⁵⁴ and the second, decided in 2016, is commonly known as *Fisher II*.²⁵⁵

In a dictum that opponents of race-conscious admissions cite as a time limit on the employment of such policies, Justice O’Connor wrote, “[The

246. Lee C. Bollinger, Commentary, *What Once Was Lost Must Now Be Found: Rediscovering an Affirmative Action Jurisprudence Informed by the Reality of Race in America*, 129 HARV. L. REV. F. 281, 282 (2016).

247. *Id.*

248. Kimberlé W. Crenshaw, “Framing Affirmative Action,” 105 MICH. L. REV. FIRST IMPRESSIONS 123, 128 (2007).

249. *Id.* In a previous article, I have discussed how the Court’s failure to consider the realities of how Black children were treated by the juvenile justice system led to the Court’s establishing a right to counsel in juvenile court that falls short when it comes to protecting youth’s rights. Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607 (2013).

250. The first challenge to affirmative action since it was established in the 1960s was *DeFunis v. Odegaard*, 416 U.S. 312 (1974). In that case, the Court considered a challenge to the admissions policies of the University of Washington School of Law by Marco DeFunis, Jr., a white man who argued that he was rejected by the law school because the school admitted less-qualified minority applicants. *Id.* at 314. He sued and was admitted. *Id.* at 314–15. By the time the Court took up his case, he was in his last year of law school. *Id.* at 315. The Court ruled that the case was moot, without addressing the merits. *Id.* at 319–20.

251. 438 U.S. 265 (1978).

252. 539 U.S. 306 (2003).

253. 539 U.S. 244 (2003).

254. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297 (2013).

255. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016).

Court] expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”²⁵⁶ Justice O’Connor wrote that in 2003.²⁵⁷ As 2028 draws closer, calls to “take race out of” admissions in higher education persist.²⁵⁸ Abigail Fisher, the plaintiff in *Fisher I* and *Fisher II*, said she hoped that the Supreme Court would “take race out of the issue in terms of admissions and that everyone will be able to get into any school that they want no matter what race they are but solely based on their merit and if they work hard for it.”²⁵⁹ Cheryl Hopwood, the plaintiff in a case that reached the Fifth Circuit, said “[r]ace should just not be a determining factor in admissions policy at the level of law school.”²⁶⁰ And Kathleen Brose, plaintiff in a school testing race-conscious admissions in K-12 education, said that people need to “move beyond race.”²⁶¹

1. The Relegation of the Remedial Rationale

Tracking how the Court discusses the consideration of race in admissions in each of these cases reveals a dissonant, optimistic refrain about the state of race relations, even as the Court jettisoned the historical context of school segregation and relied on false equivalency to lament the unfairness of having race discrimination in dual roles as both disease and cure. Through these cases, the Court has considered different race-conscious admissions policies, as well as different rationales to defend schools’ reliance on such policies. To date, the Court has rejected the use of quotas, or earmarking a specific number of spots for people of color; rejected the remedial rationale, which defends race-conscious admissions policies as measures intended to address past and ongoing racial oppression; and endorsed the diversity rationale, which defends race-conscious admissions policies as measures intended to increase diversity in institutions of higher learning.²⁶²

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256. *Grutter*, 539 U.S. at 343.

257. *Id.*

258. Adam Liptak, *Race and College Admissions, Facing a New Test by Justices*, N.Y. TIMES (Oct. 8, 2012), <https://www.nytimes.com/2012/10/09/us/supreme-court-to-hear-case-on-affirmative-action.html> [perma.cc/AQ7B-73X6].

259. *Id.*

260. Richard Bernstein, *Racial Discrimination or Righting Past Wrongs?*, N.Y. TIMES (July 13, 1994), <https://www.nytimes.com/1994/07/13/us/racial-discrimination-or-righting-past-wrongs.html> [perma.cc/Z65R-LNMS]; *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 533 U.S. 929, 929 (2001).

261. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718 (2007); Mike Lewis, *Q&A: Woman Who Fought School District*, SEATTLE PI (Mar. 21, 2011, 3:21 PM), <http://www.seattlepi.com/local/article/Q-AWoman-who-fought-school-district-1242209.php> [perma.cc/UG4F-J54X].

262. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter*, 539 U.S. 306; *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297 (2013); *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016).

Early cases addressing affirmative action in employment spoke explicitly about redressing the legacy of past discrimination.²⁶³ One court struck down a seniority program on the grounds that “Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns.”²⁶⁴ Another court interpreted the Civil Rights Act of 1964 as “provid[ing] a remedy for a long-continued denial of vital rights of minorities and of every American.”²⁶⁵ Another court described affirmative action measures as “a method of presently eliminating the effects of past racial discriminatory practices and . . . making meaningful in the immediate future the constitutional guarantees against racial discrimination.”²⁶⁶ In its statement on affirmative action, the United States Commission on Civil Rights described that the goal of affirmative action is to “correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future.”²⁶⁷

One year later, in *Regents of the University of California v. Bakke*, the Court had the chance to endorse the remedial rationale as a constitutionally sound motivation for race-conscious admissions policies.²⁶⁸ In *Bakke*, the Court considered the admissions policy of the University of California, Davis, School of Medicine, which set aside sixteen of the one hundred seats in its first-year class for disadvantaged and minority students.²⁶⁹ Bakke challenged the admissions policy on Title VI and Fourteenth Amendment grounds.²⁷⁰ UC Davis’s quota system was ultimately ruled unconstitutional because it allowed minority applicants to be considered for every one of the one hundred possible seats in the first-year class, while limiting white applicants to only eighty-four of the one hundred possible spots.²⁷¹ But the *Bakke* Court was fractured. Six separate opinions were filed.²⁷² Four justices, Justice Stevens, Chief Justice Burger, Justice Rehnquist and Justice Stewart, agreed with Bakke that the university’s affirmative action policy violated Title VI because it amounted to a quota.²⁷³ And four other justices, Justices Blackmun, Brennan, White, and Marshall, argued that the college’s quota system was permissible under both Title VI and the Fourteenth Amendment.²⁷⁴ Justices White, Marshall, and

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263. See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 204–07 (1979).

264. *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 516 (E.D. Va. 1968).

265. *Weiner v. Cuyahoga Cmty. Coll. Dist.*, 238 N.E.2d 839, 844 (Ohio Ct. C.P. Cuyahoga Cnty. 1968).

266. *Carter v. Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971) (en banc).

267. U.S. COMM’N ON C.R., STATEMENT ON AFFIRMATIVE ACTION 2 (1977).

268. 438 U.S. 265 (1978).

269. *Bakke*, 438 U.S. at 274–75, 279 (1978) (detailing the school’s “special admissions” program for disadvantaged or minority applicants).

270. *Id.* at 270.

271. *Id.* at 289–90 (opinion of Powell, J.).

272. *Id.* at 267–68.

273. *Id.* at 408 (Stevens, J., concurring in the judgment in part and dissenting in part).

274. *Id.* at 324 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

Blackmun all filed separate opinions.²⁷⁵ Justice Powell announced the judgment of the Court.²⁷⁶

Justice Powell agreed with the four justices who voted to strike down the quota system but wrote on his own to endorse the notions that race can be taken into account in university admissions and that diversity is a constitutionally defensible rationale on which to base use of race-conscious admissions policies.²⁷⁷ “[T]he attainment of a diverse student body,” Justice Powell wrote, “clearly is a constitutionally permissible goal for an institution of higher education.”²⁷⁸ Justice Powell cast the pursuit of a diverse student population as a kind of academic freedom, observing that “universities must be accorded the right to select those students who will contribute the most to the ‘robust exchange of ideas.’”²⁷⁹ Justice Powell’s opinion described a vibrant campus that, in addition to racial diversity, contained many other kinds of diversity, like “exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, [and] a history of overcoming disadvantage.”²⁸⁰

The remaining four justices explicitly endorsed the remedial rationale.²⁸¹ The justices wrote that the Equal Protection Clause means that “[g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.”²⁸² The opinion started its narrative with chattel slavery as the “antithesis” of the principle that “all Men are created equal.”²⁸³ The opinion discussed the exegesis of the Fourteenth Amendment as it was first enacted to protect the newly freed Black people, then as it was contorted to justify the “separate but equal” doctrine

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275. *Id.* at 379 (White, J., concurring in the judgment in part and dissenting in part); *id.* at 387 (Marshall, J., concurring in the judgment in part and dissenting in part); *id.* at 402 (Blackmun, J., concurring in the judgment in part and dissenting in part).

276. *Id.* at 269 (opinion of Powell, J.).

277. *Id.* at 311–17.

278. *Id.* at 311–12. Justice Powell continued: “Academic freedom . . . long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.” *Id.* Some federal appellate courts considered Justice Powell’s opinion controlling and found that diversity was a compelling state interest. *See, e.g., Smith v. Univ. of Wash. L. Sch.*, 233 F.3d 1188, 1199–200 (9th Cir. 2000). Other federal appellate courts did not consider Justice Powell’s opinion to be controlling. *See, e.g., Hopwood v. Texas*, 236 F.3d 256, 275 n.66 (5th Cir. 2000) (“[W]e read *Bakke* as not foreclosing (but certainly not requiring) the acceptance by lower courts of diversity as a compelling state interest.”).

279. *Bakke*, 438 U.S. at 313 (opinion of Powell, J.).

280. *Id.* at 317. As an example, Justice Powell held up the Harvard College admissions program, which folded race into the admissions calculus as a “plus factor,” allowing all applicants to compete for all available seats. *Id.* at 316–17.

281. *Id.* at 325, 340–45 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

282. *Id.* at 325.

283. *Id.* at 326.

that formed the legal basis for American apartheid, and finally as it reemerged in *Brown v. Board of Education* to strike down that same doctrine.²⁸⁴ The justices were clear that the lingering effects of segregation, only recently prohibited, were still very real.²⁸⁵ “[W]e cannot,” they wrote, “let color blindness become myopia which masks the reality that many ‘created equal’ have been treated within our lifetimes as inferior both by the law and by their fellow citizens.”²⁸⁶

Justice Blackmun was of the unambiguous view that “[i]n order to get beyond racism, we must first take account of race. There is no other way.”²⁸⁷ He added, “[I]n order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.”²⁸⁸

Nonetheless, with Justice Powell providing the fifth vote to strike down the policy, the diversity rationale seemed to have won the day.²⁸⁹ Because of the significant differences between the remedial and diversity rationales, this choice by the Court represented a critical missed opportunity. First, of course, the rationales’ different goals mean different routes to successfully achieving those goals. The remedial rationale set a goal of addressing past inequitable treatment based on race, while the diversity rationale set a goal of enriching a given institution or community. The diversity rationale requires only that Black people be present at a particular institution, and so an affirmative action program under the diversity rationale is considered successful if it can be shown to have increased the number of Black people at a school, for example. The remedial rationale, on the other hand, “aim[ed] to correct for past injustice, and so a successful remedial program must actually improve the situation of nonwhite individuals.”²⁹⁰ Such improvement would require “meaningful institutional efforts at inclusion that make such progress possible.”²⁹¹ Like the proximity that the Court seemed to encourage in *Brown v. Board of Education*, the remedial rationale, by connecting present practices to past injustices, had far more potential than the diversity rationale to effect meaningful improvement in race relations. Urging a constant remembrance of our past, the remedial rationale would not allow us to “let the Equal Protection Clause perpetuate racial supremacy.”²⁹²

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284. *Id.* at 326–27.

285. *Id.* at 327.

286. *Id.*

287. *Id.* at 407 (Blackmun, J., concurring in the judgment in part and dissenting in part).

288. *Id.*

289. *See id.* at 271 (opinion of Powell, J.).

290. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2170 (2013).

291. *Id.*

292. *Bakke*, 438 U.S. at 407 (Blackmun, J., concurring in the judgment in part and dissenting in part).

2. The Diversity Rationale Prevails

The question of whether diversity was a compelling state interest that could justify the narrowly tailored use of race in admitting students to public universities would be settled twenty-five years later, in *Grutter v. Bollinger*.²⁹³ Barbara Grutter applied to the University of Michigan Law School in April 1996, four years after the school had adopted a new admissions policy that explicitly incorporated a commitment to diversity, in the form of “the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in [the] student body in meaningful numbers.”²⁹⁴ The policy aimed to admit a “critical mass” of historically underrepresented populations and anticipated an individualized, holistic review of each applicant’s candidacy.²⁹⁵ The policy also relied on the typically accepted predictors of student success, the student’s LSAT score and undergraduate GPA.²⁹⁶ Grutter, a working mother with a 3.81 GPA and LSAT scores in the eighty-sixth percentile,²⁹⁷ sued, stating “I think that I was discriminated against in the admission process, very specifically, because I believe they have different criteria based on race.”²⁹⁸

The *Grutter* Court upheld Michigan Law School’s admissions policy.²⁹⁹ Adopting Justice Powell’s defense of diversity as a form of academic freedom, the *Grutter* majority explicitly endorsed diversity as a state interest compelling enough to survive strict scrutiny.³⁰⁰ The Court further found that seeking a “critical mass” of diverse students was a permissible goal, not an unconstitutional quota.³⁰¹ It also concluded that the law school’s admissions policy was narrowly tailored, largely because the policy incorporated an individualized, comprehensive review of each applicant that included consideration of both racial and nonracial attributes.³⁰² In other words, race was permissible as one of many factors schools might fold into their admissions decisions. And, of course, the Court looked forward to the day, twenty-five years in the future, when programs like Michigan’s would no longer be necessary.³⁰³

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293. *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003).

294. *Id.* at 314, 316.

295. *Id.*; Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins*, in *EDUCATION LAW STORIES* 83, 87 (Michael A. Olivas & Ronna Greff Schneider eds., 2008).

296. Parker, *supra* note 295, at 86.

297. *Id.* at 83.

298. Elizabeth Brackett, *Admitting Diversity: University of Michigan’s Law School*, PBS NEWSHOUR (Aug. 21, 2001, 12:00 AM), <https://www.pbs.org/newshour/show/admitting-diversity-university-of-michigans-law-school> [perma.cc/Z8UR-VAPB].

299. *Grutter*, 539 U.S. at 343–44.

300. *Id.* at 325.

301. *Id.* at 330.

302. *Id.* at 341.

303. *Id.* at 343.

Nine years later, in 2012, Abigail Fisher challenged the admissions policy at the University of Texas.³⁰⁴ In *Fisher I*, the Court considered the constitutionality of the university's undergraduate admissions policy, which took a hybrid approach to creating a diverse college community, combining a percentage plan and an individualized, holistic review plan.³⁰⁵ In response to earlier litigation in the Fifth Circuit, in 1996 the university adopted the Ten Percent Plan, which offered automatic acceptance to any state university to any student from Texas who graduated within the top ten percent of her, his, or their high school class.³⁰⁶ This plan, which accounted for over 75 percent of the admitted students,³⁰⁷ helped to ensure a diverse community because Texas public schools, like the public schools in states all across the country, reflected the segregated reality of the neighborhoods they served.³⁰⁸ The Top Ten Percent Plan relied on the cynicism of post-*Brown* resegregation to engineer a diverse college community.

All students not admitted pursuant to the Top Ten Percent Plan were admitted through a process that, by the time Fisher applied in 2008, prioritized individualized review and allowed for consideration of many factors, including the applicant's race.³⁰⁹ Fisher, not in the top 10 percent of her class, applied to UT with a 3.59 GPA and a score of 1180 on the SAT and was denied admission.³¹⁰ Fisher sued UT because its admissions scheme included consideration of the applicant's race as part of the school's holistic assessment of the student's candidacy.³¹¹ In arguing against the school's inclusion of race as a factor, she took the position that UT's earlier admissions policies had created such "substantial and growing levels of Hispanic and African-American enrollment" that a race-conscious admissions policy was no longer needed.³¹²

Fisher I left *Grutter's* endorsement of the diversity rationale intact.³¹³ Instead of jettisoning the diversity rationale, the Court took the case as an opportunity to address a procedural question, underscoring that courts should

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304. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 300–03 (2013).

305. *Id.* at 304–05.

306. *Id.* (citing *Texas v. Hopwood*, 78 F.3d 932 (5th Cir. 1996)).

307. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2206 (2016).

308. *See Fisher I*, 570 U.S. at 305.

309. *Id.* at 304–06. These factors included attributes like work experience, leadership, extracurricular activities, community service, awards, and other unique circumstances that indicate the student's potential to make a meaningful contribution to the UT campus community. *Id.* at 304. Additionally, in its brief, the university explained that race is "a factor of a factor of a factor" in this individualized review. Brief for Respondents at 13, *Fisher I*, 570 U.S. 297 (No. 11-345). UT also explained that it does not assign any "automatic advantage or value" to race or any other factor. *Id.* at 14. Instead, in accordance with *Grutter*, "[e]ach applicant is considered as a whole person," with race considered as one of many factors. *Id.*

310. Brief for Respondents, *supra* note 309, at 15.

311. *Fisher II*, 136 S. Ct. at 2207.

312. Brief for Petitioner at 35, *Fisher I*, 570 U.S. 297 (No. 11-345).

313. *See Fisher I*, 570 U.S. at 311–12.

review universities' race-conscious admissions plans de novo.³¹⁴ The Court remanded to the Fifth Circuit.³¹⁵ The Fifth Circuit upheld the UT admissions policy's inclusion of race as part of a comprehensive review as necessary to create the diverse community that would support its educational mission.³¹⁶ Fisher appealed again.³¹⁷ In *Fisher II*, the Court again upheld UT's admissions scheme, holding that its race-conscious admissions policy survived the Court's strict scrutiny inquiry.³¹⁸ The university clearly defined the state's compelling interest in ensuring a diverse college community, listing some of the benefits as preparing students for diverse workplaces, countering stereotypes, increasing cross-racial understanding and communication, burnishing the school's legitimacy in creating leaders and contributing community members, encouraging the rigorous exchange of ideas, and fostering cross-cultural learning and experiences.³¹⁹

3. The Effects of Elevating the Diversity Rationale

The effects of elevating the diversity rationale continue to shape current equal protection jurisprudence. There are two competing ways of understanding the constitutional guarantee of equal protection: as announcing an anti-subordination principle, on the one hand, or imposing merely an anticlassification principle on the other.³²⁰ Antisubordination holds that "it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups."³²¹ Anticlassification, however, prioritizes a "commitment to protect individuals against all forms of racial classification, including 'benign' or 'reverse' discrimination."³²² For those who subscribe to the anticlassification concept, there is little tension between opposing affirmative action and accepting disproportionate minority representation in the criminal legal system. As to both institutions, the anticlassification view would say that the government must simply forego the explicit use of racial classifications and its equal protection obligations will be satisfied. The anticlassification view rarely concerns itself with the results of a facially neutral system,

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314. See *id.* at 312–14.

315. *Id.* at 315.

316. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 660 (5th Cir. 2014).

317. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2207 (2016).

318. See *id.* at 2210–14.

319. *Id.* at 2210–11.

320. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004) [hereinafter *Equality Talk*]; Darren Lenard Hutchinson, "Unexplainable on Grounds Other Than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 672; Darren Lenard Hutchinson, Comment, *Factless Jurisprudence*, 34 COLUM. HUM. RTS. L. REV. 615, 625 (2003); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136 (1997).

321. *Equality Talk*, *supra* note 320, at 1472–73.

322. *Id.* at 1473.

no matter how racially stratified. In other words, government decisionmaking can produce a grossly disparate set of results and still be perfectly constitutional. While scholars have offered valuable critiques that expose the evasions, biases, and other flaws of the anticlassification view, for the time being the idea that government decisionmaking can legally perpetuate racially disparate results unfortunately remains a *précis* of current doctrine.³²³

B. *Race as a Factor in Disproportionate Minority Contact*

Far from setting a deadline for the end of racial disparities in the criminal legal system, the Court has pronounced such bias to be “inevitable.”³²⁴ In a 1987 challenge to administration of the death penalty in Georgia, the Court held that racial bias in capital sentencing, proved through rigorous statistical evidence, is not constitutionally significant absent clear evidence of a specific, racially discriminatory intent.³²⁵

Warren McCleskey was an African American man who had been sentenced to death for killing a white police officer during an armed robbery.³²⁶ McCleskey argued that his death sentence contravened the Eighth and Fourteenth Amendments because it was tainted by racial bias.³²⁷ To support his claim, he offered a comprehensive study of over two thousand murder cases in Georgia.³²⁸ The study revealed that Black lives mattered less than white lives: defendants charged with killing white victims were eleven times more likely to be sentenced to death than defendants charged with killing Black victims.³²⁹ The Court answered McCleskey’s argument with the observation that “[a]pparent disparities in sentencing,” including “a discrepancy that appears to correlate with race,” are an “inevitable part of our criminal justice system.”³³⁰ The majority knew that its opinion in this case could have far-reaching consequences:

[T]aken to its logical conclusion, [the defendant’s claim] throws into serious question the principles that underlie our entire criminal justice system. . . . [I]f we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.³³¹

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323. See *id.* at 1472–73.

324. *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987).

325. *Id.* at 298.

326. *Id.* at 283. In 2017, Northwestern Law School held a symposium examining the *McCleskey* decision. See Symposium, “A Fear of Too Much Justice”: *Equal Protection and the Social Sciences Thirty Years After McCleskey v. Kemp*, 112 NW. U. L. REV. 1259 (2018).

327. *McCleskey*, 481 U.S. at 286.

328. *Id.*

329. See *id.* at 286–87.

330. *Id.* at 312.

331. *Id.* at 314–15.

The Court did not just decline Warren McCleskey's invitation to set a deadline for the end of invidious race bias in the criminal legal system; it went so far as to reject his argument, even as it accepted the validity of the study's findings.³³²

Responding to the majority's expressed concern that granting relief in this case would open the floodgates to similar relief in other categories of crimes, Justice Brennan's dissent observed that it was as though the majority had a "fear of too much justice."³³³ Considered by some to be the "Dred Scott decision of our time,"³³⁴ the *McCleskey* decision seemed to "condone[] the expression of racism," not racial preferences meant to correct past injustice, but racism meant to perpetuate past injustice, "in a profound aspect of our law."³³⁵

The Court has decided dozens of cases that concern the intersection of race and criminal justice. Here, I will highlight three that specifically address the consideration of race at three different discretionary points in the criminal justice process. These cases, *Whren v. United States*, *United States v. Armstrong*, and *Batson v. Kentucky*, have an important through line: reification of *McCleskey*'s grim pronouncement with reliance on pretext that glamours the reality of the criminal legal system's demographics, how those demographics are achieved, and the message that those demographics send.

In *Whren*, the Court held that pretextual traffic stops are constitutional.³³⁶ A pretextual traffic stop is one that is prompted by suspicion first and traffic violations second.³³⁷ For example, police officers can tail a motorist who they suspect is traveling with contraband and pull the motorist over once she commits a traffic violation.³³⁸ Once an officer has stopped a car, the officer is able to search for contraband even if there has not been any indication that there is contraband in the car.³³⁹

This was the situation Michael Whren and James Brown, two African American men, found themselves in Washington, D.C., in June 1993. At their suppression hearing before their criminal trial on drug charges, a vice-squad police officer testified that his squad saw Brown and Whren in a dark Pathfinder truck with temporary license plates while the squad was patrolling a "high-drug area."³⁴⁰ The officer testified that Brown and Whren drew the

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332. See *id.* at 312–20.

333. *Id.* at 339 (Brennan, J., dissenting).

334. Adam Liptak, *New Look at Death Sentences and Race*, N.Y. TIMES (Apr. 29, 2008), <https://www.nytimes.com/2008/04/29/us/29bar.html> [perma.cc/GVX9-QAGJ].

335. Anthony Lewis, Opinion, *Bowing to Racism*, N.Y. TIMES (Apr. 28, 1987), <https://www.nytimes.com/1987/04/28/opinion/abroad-at-home-bowing-to-racism.html> [perma.cc/K9GX-NW2A].

336. See *Whren v. United States*, 517 U.S. 806, 808, 813, 817–19 (1996) (holding that the failure to put on a turn signal was a sufficient basis for a police stop).

337. *Id.* at 808–09.

338. *Id.*

339. See *Wyoming v. Houghton*, 526 U.S. 295, 301 (1999) ("[When] probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of *every part of the vehicle and its contents* . . . ." (emphasis added by court) (quoting *United States v. Ross*, 456 U.S. 798, 825 (1982))).

340. *United States v. Whren*, 53 F.3d 371, 372 (D.C. Cir. 1995); *Whren*, 517 U.S. at 808.

squad's attention because the two "youthful occupants" were stopped for an unusually long time at a stop sign and seemed to be looking at something in Whren's lap.³⁴¹ When the officers made a U-turn in the truck's direction, the Pathfinder sped off at an "unreasonable" speed.³⁴² The officer testified that the police pulled up alongside to give the driver "a warning concerning traffic violations."³⁴³ Once the officers pulled the truck over and asked Brown to put the car in park, one of them subsequently saw two large plastic bags of what looked like cocaine in Whren's hands.³⁴⁴

The Court rejected Whren's proposed Fourth Amendment test for traffic stops: "[W]hether a police officer, acting reasonably, would have made the stop for the reason given."³⁴⁵ Because driving is so heavily regulated, Whren argued, allowing police to make stops based on any traffic violation would enable officers motivated by invidious discrimination to hide their intent behind bogus traffic infractions.³⁴⁶ Whren's proposed test sought to undermine potential race-based motivation for effecting a traffic stop. Although Whren's proposed test could be addressed with objective evidence (How many traffic stops for this infraction have there been in the last year? Where did those stops happen in relation to the stop at issue?), the Court took Whren's proposal as an invitation to fold a police officer's subjective motivation into the Fourth Amendment analysis. The Court instead held that the "constitutional reasonableness of traffic stops" does not "depend[] on the actual motivations of the individual officers involved."³⁴⁷

Another example of the Court's shielding of racially tinged discretion in the criminal legal system is its holding in *Armstrong* that defendants who suspect racial bias in prosecutorial decisions must first proffer enough evidence to make out their claim before they will be entitled to discovery from the government.³⁴⁸ Christopher Lee Armstrong was arrested on federal drug charges after a sting operation by a joint federal-state task force.³⁴⁹ Armstrong's federal public defenders realized that every defendant facing crack cocaine-related offenses represented by their office during the past year was Black or Latino.³⁵⁰ This disparity was all the more suspicious because most crack offenders are

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341. *Whren*, 53 F.3d at 372; *Whren*, 517 U.S. at 808.

342. *Whren*, 517 U.S. at 808.

343. *Id.* at 809–10 (citing D.C. Mun. Regs. tit. 18, § 2213.4 (1995) ("An operator shall . . . give full time and attention to the operation of the vehicle."); then citing *id.* § 2204.3 ("No person shall turn any vehicle . . . without giving an appropriate signal."); and then citing *id.* § 2200.3 ("No person shall drive a vehicle . . . at a speed greater than is reasonable and prudent under the conditions.")).

344. *Id.* at 808–09.

345. *Id.* at 810.

346. *Id.*

347. *Id.* at 813.

348. *United States v. Armstrong*, 517 U.S. 456, 463, 465 (1996).

349. *Id.* at 458–59.

350. *Id.* at 459.

white.³⁵¹ The public defenders hypothesized that the prosecutors were diverting white defendants to California's state courts, where the penalties for crack cocaine possession and distribution are far more lenient.³⁵² Armstrong's federal public defenders filed a motion for discovery of the prosecutors' files detailing their decisions concerning whom to prosecute and in what forum.³⁵³ The prosecutors refused to comply and appealed the defense's discovery request to the Supreme Court.³⁵⁴

The *Armstrong* Court held that because Armstrong could not point to any similarly situated white defendants who should have been charged in federal court but were not, he was not entitled to discovery on his selective prosecution claim.³⁵⁵ But of course the only way Armstrong would know of any similarly situated white defendants would be from discovery. The Court required Armstrong to produce the very evidence Armstrong was trying to acquire. The result is that prosecutors' charging decisions are essentially unassailable.³⁵⁶

Finally, the Court has upheld reliance on pretextual reasons to defend peremptory strikes based on invidious race discrimination in jury selection. In *Batson v. Kentucky*, the Court held that a prosecutor cannot exclude a potential juror because of their race, and it crafted a three-step process by which a defense attorney might mount a challenge to such discriminatory behavior during jury selection.³⁵⁷ First, defense counsel must establish that the prosecutor's behavior during voir dire, including the prosecutor's questions, questioning patterns, and deployment of strikes, raise an inference, or a "prima facie" case, of race discrimination.³⁵⁸ Then, the burden shifts to the prosecutor to defend the government's actions by offering race-neutral explanations for

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351. *Id.* at 479–80 (Stevens, J., dissenting).

352. ALEXANDER, *supra* note 229, at 145.

353. *See Armstrong*, 517 U.S. at 459.

354. *Id.* at 459–61.

355. *Id.* at 470.

356. In 2014, the University of Chicago Law School's Federal Criminal Justice Clinic filed a racial-discrimination challenge on behalf of forty-three indigent criminal defendants alleging that the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) unconstitutionally discriminated on the basis of race in targeting people of color for its stash-house sting operations. Shayna Jacobs, *10 Years. 179 Arrests. No White Defendants. DEA Tactics Face Scrutiny in New York*, WASH. POST (Dec. 14, 2019, 8:05 PM), https://www.washingtonpost.com/national-security/10-years-179-arrests-no-white-defendants-dea-tactics-face-scrutiny-in-new-york/2019/12/14/f6462242-12ce-11ea-bf62-eadd5d11f559_story.html [perma.cc/2Y3E-TAH5]; Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987 (2021).

In *United States v. Davis*, the Seventh Circuit authorized discovery to support the defendants' claims of racially selective law enforcement by the ATF. 793 F.3d 712 (7th Cir. 2015) (en banc). A similar discovery request in the case of a Latino defendant charged as a result of a reverse-sting operation similar to the one at issue in *Davis* was recently granted by the Southern District of New York. *United States v. Lopez*, 415 F. Supp. 3d 422 (S.D.N.Y. 2019); *see also United States v. Washington*, 869 F.3d 193, 217–22 (3d Cir. 2017); *United States v. Sellers*, 906 F.3d 848, 854–56 (9th Cir. 2018).

357. 476 U.S. 79, 89, 96 (1986).

358. *Batson*, 476 U.S. at 97.

the strikes that the defense has challenged.³⁵⁹ Finally, the trial court decides whether defense counsel has shown that the prosecutor's action was motivated by invidious race discrimination.³⁶⁰ *Batson* was meant to vindicate the rights of not just the defendant but also of the venire members who came to the courthouse to do their civic duty only to suffer exclusion because of their race.³⁶¹

The biggest problem with *Batson* is that the burden the prosecutor must meet to defend a challenged strike is shamefully low. Courts have accepted reasons for peremptory strikes that were implausible at best and baldly bigoted at worst. For example, one common reason offered to strike Black jurors is a juror's supposed "low intelligence" or "lack of education."³⁶² Strikes because of "low intelligence" have been struck down in some cases, particularly in light of "the role that the claim of 'low intelligence' has played in the history of racial discrimination from juries."³⁶³ In other cases, like a case in Louisiana where a prosecutor said that the prospective juror was "too stupid to live[,] much less be on a jury,"³⁶⁴ peremptory strikes based on this odious, facially race-neutral explanation have been upheld. An Arkansas prosecutor was able to defend his use of a peremptory strike by explaining he had a "hunch" that a potential African American juror would be hostile to the State's case even though the prosecutor had not asked the juror about her views.³⁶⁵ Courts have also excluded Black jurors for reasons ranging from having dyed red hair³⁶⁶ to "wearing a large white hat and sunglasses."³⁶⁷ This flaw has ultimately reduced *Batson* to a message without any muscle behind it.³⁶⁸

In these cases, in contrast to the race-conscious admissions cases, there is a decided lack of optimism about future improvement of race relations. In each of these cases, the Court has been unmoved by arguments that its pronouncement would disproportionately burden communities of color, not because the Court was unconvinced but because it had lost the conviction that it had a responsibility to make a difference. In the affirmative action cases, the Court has endorsed the explicit inclusion of race as part of a nuanced, holistic review of each applicant to create a diverse academic environment, and it has forecasted that there will eventually be an end to the need for race-conscious

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359. *Id.* at 97–98.

360. *Id.* at 98.

361. *See* *Powers v. Ohio*, 499 U.S. 400, 409 (1991) (holding that venire members have the right not to be excluded based on their race).

362. EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 17 (2010), <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf> [perma.cc/T9PL-6T83].

363. *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1265 (11th Cir. 2009).

364. *State v. Crawford*, 873 So. 2d 768, 776 (La. App. 2004), *writ denied sub nom. State ex rel. Crawford v. State*, 901 So. 2d 1083 (La. 2005).

365. EQUAL JUST. INITIATIVE, *supra* note 362, at 18.

366. *Id.*

367. *Id.*

368. Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1281 (2000).

admissions.³⁶⁹ By contrast, the Court has endorsed implicit reliance on racial stereotypes in *McCleskey* and the other criminal legal system cases—even if reliance on those stereotypes produces racially disparate results—and suggested that those stereotypes are unavoidable.³⁷⁰

III. INNOCENCE AND GUILT IN THE MIRROR

We have seen how arguments against affirmative action in higher education appear as funhouse versions of themselves in the disproportionate-minority-contact debate. So while affirmative action jurisprudence holds that race and its attendant social and cultural implications can and will be amputated from consideration of a student's candidacy, criminal justice jurisprudence holds that because of the exercise of prosecutorial discretion and because jurors decide cases using their range of life experiences, invidious racial discrimination is “an inevitable part of our criminal justice system.”³⁷¹

Next, we will examine another contradiction. Affirmative action opponents argue that innocent white applicants who have not contributed to the underrepresentation of Black students in colleges should not be made to suffer the consequences of that inequity by losing a spot at the college of their choice.³⁷² Meanwhile, those who question the inequity of disproportionate minority contact ignore alarming statistics involving innocent nonwhite defendants wrongfully convicted on the basis of dubious evidence.³⁷³

A. *Innocence in Race-Conscious Admissions*

Social movements grow from a cultural nucleus of shared narratives. “[S]hared experiences and beliefs” based on “shared social and political perspectives” create a widely accessible cultural shorthand.³⁷⁴ When there is a

369. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

370. See *McCleskey v. Kemp*, 481 U.S. 279, 312–13 (1987).

371. *McCleskey*, 481 U.S. at 312.

372. Professor Randall Kennedy has observed a similar connection between affirmative action and race-based police stops:

Many of the same arguments against race-based affirmative action are applicable as well in the context of race-based police stops. . . . With affirmative action, many adversely affected whites claim that they are *innocent* victims of a policy that penalizes them for the misconduct of others who also happened to have been white. With race-based police stops, many adversely affected people of color maintain that they are *innocent* victims of a policy that penalizes them for the misconduct of others who also happen to be colored. . . . There exist, however, a remarkable difference in reactions to these racial policies, both of which involve race-dependent decisionmaking. While affirmative action is under tremendous pressure politically and legally, racial policing is not.

RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 159–60 (1997).

373. See *id.* at 160.

374. James, *supra* note 55, at 482 (quoting Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 924 (2008)).

dominant group in a given society, the dominant group “legitimize[s] inequality by attributing group disparities to individual shortcomings instead of domination or bias.”³⁷⁵ As Justice Harlan observed in *Plessy*, “[t]he white race” is “the dominant race” in the United States “in prestige, in achievements, in education, in wealth and in power.”³⁷⁶ Predictably, then, much of the rhetoric critiquing race-conscious admissions policies tries to address the “unfairness” of those policies to “innocent” white applicants³⁷⁷ who lose out on a spot at an elite university to a less qualified person of color.³⁷⁸ In affirmative action jurisprudence, the idea of innocence most often refers to white applicants who do not gain admission where affirmative action policies include race as an option.³⁷⁹ The concept of innocence is turned on its head in race-conscious admissions and in the criminal legal system.

The concept of white innocence appears repeatedly in the Supreme Court’s discussions of race-conscious admissions and employment policies. Here are two examples of the *Bakke* Court referencing “innocence.” First, it noted the unfairness of asking “*innocent* persons . . . to endure . . . [deprivation as] the price of membership in the dominant majority,”³⁸⁰ and then it stated the Court had “never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other *innocent* individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”³⁸¹ In *Wygant v. Jackson Board of Education*,³⁸² the Court struck down a collective bargaining agreement because, “as the basis for imposing discriminatory legal remedies that work against *innocent* people, societal discrimination is insufficient and over-expansive.”³⁸³ The *Grutter* Court worried that it had to be sure to “work the least harm possible to other *innocent* persons competing for the benefit.”³⁸⁴

The “innocence narrative”³⁸⁵ and the idea that race-conscious admissions programs are unfair to white people have both found traction beyond the four corners of the Supreme Court’s decisions. White innocence is multilayered, based in whites’ belief that their own “colorblind” upbringing does not in any way contribute to the uneven distribution of opportunity in our society and in whites’ deep misunderstanding that all discrimination is created equal. For example, as Abigail Fisher explained, “I was taught from the time I was a little

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375. *Id.* (alteration in original).

376. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

377. James, *supra* note 55, at 482 & nn.276–77.

378. *Id.* at 483.

379. See *infra* notes 380–384 and accompanying text.

380. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34 (1978) (opinion of Powell, J.) (emphasis added).

381. *Id.* at 307 (emphasis added).

382. 476 U.S. 267, 276 (1986).

383. *Wygant*, 476 U.S. at 276 (emphasis added).

384. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (emphasis added).

385. James, *supra* note 55, at 481–89.

girl that any kind of discrimination was wrong.”³⁸⁶ Barbara Grutter also noted that she had learned that racial discrimination was wrong³⁸⁷ and cast herself as a hero for challenging it.³⁸⁸ And one of the parent-plaintiffs in *Parents Involved in Community Schools*³⁸⁹ stated that “[i]t is clear that [white people] were really treated unfairly” because “[o]nly 7.5% of students from Blaine School who are white were assigned to their first-choice school.”³⁹⁰ Since the diversity rationale stands alone as the sole compelling interest available to state institutions implementing affirmative action programs, equal protection jurisprudence has staked out a clear position on when “discrimination” is permissible—not to remediate past discrimination against marginalized groups but to create a multicultural environment for the benefit of white people.

This innocence narrative thrives even though white people are complicit in the educational inequities that make race-conscious admissions policies necessary. For a range of reasons, white people do not see the role they played and continue to play in undermining quality education for children of color.³⁹¹ In the years after *Brown v. Board of Education* prohibited school segregation, white people abandoned public schools in urban centers and resettled in the surrounding municipalities.³⁹² This phenomenon, called “white flight,” left public schools in urban centers woefully underresourced and re-segregated.³⁹³ White parents opposed plans meant to encourage integration³⁹⁴ and instead supported plans that cemented segregation, like discriminatory tracking policies³⁹⁵ and admissions schemes that depended heavily on standardized test scores.³⁹⁶ These educational disparities, consistent across jurisdictions around the country, have been “dismissed as derivative of nonracial factors, such as individual effort and merit,” with imperfect internalization of the reality that “[s]ubordination today . . . is less likely to take the form of intentional discrimination, operating instead as less visible systematic and structural racism.”³⁹⁷ White people are no freer of the country’s racist past than Black people and other people of color. When it comes to the legacy of, and continuing inequities in, educational disparities, almost no one is innocent.³⁹⁸

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386. *Id.* at 484–85.

387. *Id.* at 485.

388. *Id.*

389. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

390. James, *supra* note 55, at 485 & n.293.

391. *Id.* at 485–86.

392. Erika K. Wilson, *The New White Flight*, 14 DUKE J. CONST. L. & PUB. POL’Y 233, 243 (2019).

393. *Id.* at 486 & nn.296–98.

394. *Id.* at 487, 486 n.301.

395. *Id.* at 487.

396. *Id.*

397. *Id.* at 488–89.

398. The five-episode podcast *Nice White Parents* investigates complicity and perpetuation in education, examining the effects of gentrification on the School for International Studies in

B. *Innocence in the Criminal Legal System*

A more than cursory glance in the funhouse mirror reveals that innocent people are convicted all the time in the criminal legal system.³⁹⁹ Take, for example, the National Registry of Exonerations, which tracks exonerations since 1989. Today, the registry has recorded over 2,700 felony exonerations, among them over 130 capital defendants.⁴⁰⁰ These are just the felony trials, in which the accused often faces a substantial prison sentence or even death. Assuming that felony trials concern “the most serious allegations, the most careful investigation, and the most vigorous defense,” the number of potential exonerees in misdemeanor and municipal cases must be sky-high.⁴⁰¹ The “lax procedural standards, prioritization of judicial efficiency, and over-reliance on plea agreements” in misdemeanor court must all lead, ineluctably, to convictions of innocent people.⁴⁰²

Actual innocence stalks misdemeanor practice because there are so many ways for a person accused of a crime to be wrongfully convicted. For example, many kinds of forensic evidence, like on-scene drug tests, are very unreliable. In 2016, *ProPublica* and the *New York Times* investigated the accuracy of field drug tests.⁴⁰³ The results were alarming. In one test, the chemical that detects cocaine produces a false positive for 80 additional compounds, some of them common household cleaners or medications.⁴⁰⁴ To make matters worse, the patina of scientific validity of these field tests bootstraps their high potential for inaccuracy. It is estimated that at least one hundred thousand convictions each year are based on field drug test results.⁴⁰⁵

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the Cobble Hill neighborhood in Brooklyn. *Nice White Parents*, N.Y. TIMES (May 5, 2021), <https://www.nytimes.com/2020/07/23/podcasts/nice-white-parents-serial.html> [perma.cc/WCS2-D3U4].

399. These erroneous convictions happen even though a defendant is presumed to be innocent of the crime until convicted. See *Presumption of Innocence*, BLACK’S LAW DICTIONARY (11th ed. 2019).

400. NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> [perma.cc/3BY3-WLND] (tracking exonerations across the country and the number of years of prison time served by exonerees since 1989). It reported that there have been 2,783 exonerations, of which 2,701 were felony convictions, and that exonerees have served, or, as the website describes, “lost,” 24,915 years. *Id.*

401. Robin Walker Sterling, *Invisible Injustice*, 48 J. CMTY. PSYCH. 142, 147 (2019) (reviewing ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME* (2018)).

402. *Id.*

403. Ryan Gabrielson & Topher Sanders, *Busted*, PROPUBLICA (July 7, 2016), <https://www.propublica.org/article/common-roadside-drug-test-routinely-produces-false-positives> [perma.cc/6WWA-XGZA].

404. *Id.* In 2019, Cody Gregg pled guilty to cocaine possession only to be exonerated two days later when lab tests revealed that he had actually possessed powdered milk. Maurice Possley, *Cody Gregg*, NAT’L REGISTRY OF EXONERATIONS (Oct. 18, 2019), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5626> [perma.cc/7QGD-5PW8].

405. Gabrielson & Sanders, *supra* note 403.

Reliance on gang data bases, warrant data bases, and other kinds of electronic data also lead to wrongful convictions.⁴⁰⁶ These include errors like showing that someone's license is suspended when it is not or someone's car registration has expired.⁴⁰⁷ Thanks to *Atwater v. City of Lago Vista*, each of these errors, even if it is incorrect, can provide the basis of an arrest.⁴⁰⁸ Driving is so common that "even a very low rate of error could produce thousands of wrongful convictions."⁴⁰⁹ And criminal records are even less reliable than DMV databases.⁴¹⁰

Order-maintenance policing, when someone is arrested for a quality-of-life crime like loitering, failing to obey a police officer, or disorderly conduct, can also lead to wrongful convictions.⁴¹¹ These kinds of cases are vulnerable to wrongful conviction because they rely entirely upon the alleged observations of the witness, usually a police officer. The evidence rises and falls on the police officer's credibility.⁴¹² But officers have many motivations to make arrests, like arrest quotas.⁴¹³ Because it is so discretionary, order-maintenance policing is also rife with racial bias. For example, in 2011's Operation Clean Halls initiative, New York police officers arrested people, mostly African American and Latino men, for trespassing onto housing projects even though many of the arrestees were not in fact trespassing.⁴¹⁴ A public defender who represented many of these men admitted that he had "a disgraceful number of innocent clients."⁴¹⁵

So the one institution that ostensibly exists to prioritize innocence, the criminal legal system, does not. As is demonstrated by the fact that over 90 percent of criminal cases are resolved by plea agreements, defendants are very likely to be convicted even though the law ascribes to them the presumption of innocence.⁴¹⁶ Meanwhile, in civil litigation of affirmative action issues in education, innocence is ascribed to white people challenging affirmative action, even though the de facto segregation that affirmative action seeks to correct can persist only with white cooperation.

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406. NATAPOFF, *supra* note 59, at 95–96 ("A 2000 Florida legislative study of DMV insurance records found error rates as high as 35 percent . . .").

407. *See id.*

408. *See* 532 U.S. 318 (2001).

409. NATAPOFF, *supra* note 59, at 96.

410. *Id.*

411. *Id.* at 98, 102.

412. *Id.* at 98.

413. *Id.*

414. *Id.* at 98–99.

415. *Id.* at 99.

416. *See* U.S. SENT'G COMM'N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56 (2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf> [perma.cc/3XMJ-DR7A] (noting that 97.8 percent of federal criminal convictions resulted from guilty pleas).

CONCLUSION

The last American slave ship, the schooner *Clotilda*, was discovered in Alabama's Mobile River in May 2019.⁴¹⁷ Chartered on a bet, the *Clotilda* disembarked from Mobile, Alabama, on March 4, 1860.⁴¹⁸ It arrived at the slave trading port at Ouidah, in Benin, on May 15, 1860.⁴¹⁹ It left Ouidah on May 24, 1860, with 110 African young men, women, and children, and arrived in Mobile, Alabama, on July 9, 1860, with 109.⁴²⁰

In the decades during which the *Clotilda* was submerged, we have dismantled the legal scaffolding that supported chattel slavery and then Jim Crow. But the tenacious narratives about Black intellectual inferiority and criminality that justified chattel slavery continue to find expression in both popular discourse and in legal doctrine. There are many possible foils to these narratives: perhaps, at the bail stage, requiring prosecutors to undertake the same kind of holistic review of potential defendants that admissions officers are expected to perform; contrasting the results of standardized tests for college admission with the results of risk assessment instruments to reveal, once and for all, that these are flawed instruments that do not actually assess what they purport to measure; and teaching a more complete history in public schools that offers a full picture of both the barbarities of chattel slavery and the unknowable ways enslaved people rebelled. By contrasting affirmative action in higher education and disproportionate minority contact in the criminal legal system, we can exploit the inconsistencies in how we understand Black underrepresentation in the first and white underrepresentation in the second. In so doing, we can accurately see how important legal principles in constitutional law and criminal law intersect to perpetuate inequality.

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417. See Joel K. Bourne, Jr., *Last American Slave Ship Is Discovered in Alabama*, NAT'L GEOGRAPHIC (May 22, 2019), <https://www.nationalgeographic.com/culture/2019/05/clotilda-the-last-american-slave-ship-found-in-alabama> [perma.cc/DN95-HF4Y].

418. *Id.*

419. *Id.*

420. *Id.*