"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection

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United States criminal justice policies have played a central role in the subjugation of persons of color. Under slavery, criminal law explicitly provided a means to ensure White dominion over Blacks and require Black submission to White authority. During Reconstruction, anticrime policies served to maintain White supremacy and re-enslave Blacks, both through explicit discrimination and facially neutral policies. Similar practices maintained racial hierarchy with respect to White, Latinx, and Asian-American populations in the western United States. While most state action no longer explicitly discriminates on the basis of race, anticrime policy remains a powerful instrument of racial subordination. Indeed, social scientists who study race find that contemporary racism is one of the strongest predictors of punitive sentiment. Specifically, persons who have strong implicit racial bias, racial resentment, or social dominance orientation are more likely to endorse harsh punishments. This research suggests that racism is inextricably connected with punishment. This connection could explain, in part, the continuation of deep racial inequality in criminal justice policies, despite the attainment of formal legal equality. The Supreme Court's equal protection doctrine that focuses narrowly on intentional discrimination is ill-equipped to combat racism associated with criminal justice practices. A more robust and effective doctrine would recognize the relevance of historical racism to contemporary anticrime policies; incorporate insightful conceptions of racism elaborated by social scientists; and recognize the racist dimensions of punitive sentiment. Given the current conservative composition of the Supreme Court, advocates of racial justice could pursue federal and state legislative and executive remedies and state judicial remedies to combat systemic racism associated with criminal law and enforcement.

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> [T]o shoot those Gr[****]rs ain't the best way. Give 'em a fair jury trial and rope 'em up with all the majesty of the law.[1]

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1. WILLIAM D. CARRIGAN & CLIVE WEBB, FORGOTTEN DEAD: MOB VIOLENCE AGAINST MEXICANS IN THE UNITED STATES, 1848–1928, at 28 (2013). "Gr[****]r" is a pejorative word used to describe Mexicans. ARNOLDO DE LEON, THEY CALLED THEM GR[****]RS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821–1900, at 16 (2010) (discussing "gr[****]r").

INTRODUCTION

During the summer of 2020, racial violence by law enforcement sparked social unrest in the United States. The conflict began after the May 25 killing of George Floyd, a Black man, by White Minneapolis police officer Derek Chauvin.[2] Floyd's encounter with police started after a store clerk called 911 to report that a customer allegedly purchased a package of cigarettes using a

2. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), https://www.nytimes.com/article/george-floyd-protests-timeline.html [https://perma.cc/PKP9-KW54]. Other police and civilian killings of Blacks also contributed to the unrest. These included the deaths of Breonna Taylor, Ahmaud Arbery, and many others who died prior to 2020. *See* Nicole Dungca, Jenn Abelson, Mark Berman & John Sullivan, *A Dozen High-Profile Fatal Encounters That Have Galvanized Protests Nationwide*, WASH. POST (June 8, 2020), https://www.washingtonpost.com/investigations/a-dozen-high-profile-fatal-encounters-that-have-galvanized-protests-nationwide/2020/06/08/4fdbfc9c-a72f-11ea-b473-04905b1af82b_story.html [https://perma.cc/76QM-LCLY].

counterfeit twenty-dollar bill.[3] Video footage captured by a witness shows Floyd on the ground while Chauvin kneels on Floyd's neck for at least seven minutes and forty-six seconds.[4] During the last minutes of his life, Floyd said he could not breathe over twenty times[5]—a plea made by victims in several widely scrutinized cases of police violence.[6] Chauvin continued to suffocate Floyd even though he did not resist.[7] Three other officers—J. Alexander Kueng, Thomas K. Lane, and Tou Thao—were present during Floyd's arrest and death.[8] None of the officers intervened to prevent Chauvin's use of force,[9] and at least two of them helped restrain Floyd.[10] Chauvin continued kneeling on Floyd's neck even after he became unresponsive.[11] Chauvin kneeled on Floyd's neck even as Kueng twice checked for, and failed to find, Floyd's pulse.[12] Chauvin stopped strangling Floyd only after emergency personnel arrived to administer aid.[13]

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3. Ivan Pereira, *Nationwide Protests Return Focus to Why George Floyd Was Initially Detained*, ABC NEWS (June 2, 2020), https://abcnews.go.com/US/nationwide-protests-return-focus-george-floyd-initially-detained/story?id=71004393 [https://perma.cc/UMA9-B338].

4. Many news media outlets initially reported, based on a review of video footage, that Chauvin restrained Floyd for eight minutes and forty-six seconds. Prosecutors later stated that the actual time was seven minutes and forty-six seconds. The *New York Times* reported that Floyd was restrained for at least eight minutes and fifteen seconds. *See* Nicholas Bogel-Burroughs, *8 Minutes, 46 Seconds Became a Symbol in George Floyd's Death. The Exact Time Is Less Clear*, N.Y. TIMES (June 18, 2020), https://www.nytimes.com/2020/06/18/us/george-floyd-timing.html [https://perma.cc/95AR-76EB].

5. Richard A. Oppel Jr. & Kim Barker, *New Transcripts Detail Last Moments for George Floyd*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2020/07/08/us/george-floyd-body-camera-transcripts.html [https://perma.cc/L8LU-XQ32].

6. *See, e.g.*, Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, NY. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html [https://perma.cc/8FBZ-EJBX] (discussing the murder of Eric Garner and his final words—"I can't breathe"—which became a rallying cry at subsequent protests). The *New York Times* found seventy cases over the last decade of individuals in police custody stating that they could not breathe prior to dying. More than half of those cases involved Black individuals. *See* Mike Baker, Jennifer Valentino-DeVries, Manny Fernandez & Michael LaForgia, *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe*,*'* N.Y. TIMES (June 29, 2020), https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html [https://perma.cc/NTH7-YGMY].

7. Martin A. Schwartz, *How the Supreme Court Enables Police Excessive Force*, N.Y.L.J. (June 5, 2020), https://www.law.com/newyorklawjournal/2020/06/05/how-the-supreme-court-enables-police-excessive-force/ [https://perma.cc/9Y8J-Z962]; Ewan Palmer, *What We Know About George Floyd's Death So Far*, NEWSWEEK (May 28, 2020), https://www.newsweek.com/what-we-know-about-george-floyds-death-so-far-1507107 [https://perma.cc/FB2R-7PK8].

8. Harmeet Kaur & Nicole Chavez, *What We Know About the Four Ex-police Officers Charged in George Floyd's Death*, CNN (June 5, 2020), https://www.cnn.com/2020/06/05/us/minneapolis-officers-background-george-floyd-trnd/index.html [https://perma.cc/8QHL-M8KV].

9. *Id.*

10. *Id.*

11. Tom Winter, *May 29 Coverage of Nationwide Unrest and Ongoing Protests*, NBC NEWS (May 30, 2020), https://www.nbcnews.com/news/us-news/blog/george-floyd-death-minneapolis-protests-live-updates-n1217886/ncrd1218406#blogHeader [https://perma.cc/ULT8-Z8NU].

12. Oppel & Barker, *supra* note 5.

13. Taylor, *supra* note 2.

Protests erupted in Minnesota after video footage of Floyd's killing became public.[14] Demonstrations spread rapidly across the United States.[15] The unrest deepened after Hennepin County Attorney Michael Freeman stated during a press conference that, notwithstanding the video, "there is other evidence that does not support a criminal charge."[16] In the midst of widespread criticism and escalating unrest, Freeman filed criminal charges against Chauvin the day after his press statements.[17] Public unrest worsened because Freeman filed charges that many believed were too lenient under the circumstances.[18] Subsequently, the medical examiner and a private forensic pathologist hired by Floyd's family classified his death as a homicide, concluding that the police restraint deprived him of oxygen, causing his demise.[19] Meanwhile, the Minnesota Attorney General's Office conducted an investigation and issued new charges against

14. *Tear Gas, Chaos, Rain: Protests Rage After Man Dies in Mpls. Police Custody*, MPR NEWS (May 27, 2020), https://www.mprnews.org/story/2020/05/26/protesters-rally-to-call-for-justice-for-man-who-died-in-mpls-police-incident [https://perma.cc/T3JE-FKJW].

15. Matthew Ormseth, *Protesters Return to Downtown Los Angeles to Decry Police Killing in Minneapolis*, L.A. TIMES (May 28, 2020), https://www.latimes.com/california/story/2020-05-28/protestors-return-to-downtown-los-angeles-to-decry-police-killing-in-minneapolis [https://perma.cc/UJC2-8526].

16. *The Situation Room*, CNN TRANSCRIPTS (May 28, 2020), http://transcripts.cnn.com/TRANSCRIPTS/2005/28/sitroom.02.html [https://perma.cc/3WCN-DXA3]. Many journalists reported that Minneapolis protests became more violent the night of Freeman's comments. In particular, protesters set the Third Precinct of the Minneapolis Police Department on fire, and many of them said they felt they lacked a voice and demanded accountability. *See, e.g.*, Solomon Gustavo, Carol McKinley & Matt Taylor, *'400 Years of Anger': Minneapolis Police Station Set Ablaze as Trump Threatens To 'Start Shooting*,*'* DAILY BEAST (May 29, 2020), https://www.thedailybeast.com/stabbing-gunfire-and-rage-as-protests-grow-over-modern-day-lynching-of-george-floyd [https://perma.cc/TN2R-DC35]; James Hohmann, *The Daily 202: Violent Minneapolis Protests Give Trump a Chance To Be the Law-and-Order Candidate He Ran as in 2016*, WASH. POST (May 29, 2020), https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2020/05/29/daily-202-violent-minneapolis-protests-give-trump-a-chance-to-be-the-law-and-order-candidate-he-ran-as-in-2016/5ed09e7b88e0fa32f822d432/ [https://perma.cc/G7VA-44RS]; *Floyd Protests: Mpls. Police Precinct Overrun in Night of Fury, Fire*, MPR NEWS (May 28, 2020), https://www.mprnews.org/story/2020/05/28/minneapolis-wakes-up-to-destruction-after-night-of-protests [https://perma.cc/63KM-PMWK].

17. Complaint, Minnesota v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. May 29, 2020), 2020 WL 2952878.

18. Freeman charged Chauvin with third-degree murder and second-degree manslaughter. *See id.* at 1.

19. *See* Press Release, Hennepin Cnty. Med. Exam'r, Floyd, George Perry (June 1, 2020), https://content.govdelivery.com/attachments/MNHENNE/2020/06/01/file_attachments/1464238/2020-3700%20Floyd,%20George%20Perry%20Update%206.1.2020.pdf [https://perma.cc/WG8L-NGLE]. The medical examiner classified Floyd's medical history and recent drug use as "other significant conditions," *id.*, which means they likely contributed to his death but did not cause it. *See, e.g.*, COLL. OF AM. PATHOLOGISTS, CAUSE OF DEATH AND THE DEATH CERTIFICATE 12 (Randy Hanzlick ed., 2006), https://www.health.state.mn.us/people/vitalrecords/physician-me/docs/capcodbook.pdf [https://perma.cc/KM23-DVW4]; Judy Melinek, *Forensic Pathologist Breaks Down George Floyd's Death*, MEDPAGE TODAY (June 5, 2020), https://www.medpagetoday.com/blogs/working-stiff/86913 [https://perma.cc/T6Q7-ZTL7]; Frances Robles & Audra D.S. Burch, *How Did George Floyd Die? Here's What We Know*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/article/george-floyd-autopsy-michael-baden.html [https://perma.cc/4LAX-MV2D].

Chauvin, including second-degree murder.[20] The Attorney General also filed charges against the other three officers.[21] A Minnesota jury later convicted Chauvin on all charges.[22]

Floyd's killing is part of a long history of racial injustice in criminal law and enforcement, and resistance to those abuses. Minneapolis activists had already organized around racial injustice,[23] and many local Blacks did not trust local police and prosecutors.[24] Black Lives Matter (BLM) played a central role in protests surrounding Floyd's death, locally and around the world. The Black Lives Matter movement formed after George Zimmerman's acquittal for the murder of Trayvon Martin.[25] Today it has evolved into an international social movement.[26] By engaging in protests, social media organizing, and other forms of activism, Black Lives Matter has gained political prominence.[27] Additionally,

20. Press Release, Off. of Minn. Att'y Gen. Keith Ellison, Attorney General Ellison Charges Derek Chauvin with 2nd-Degree Murder of George Floyd, Three Former Officers with Aiding and Abetting 2nd-Degree Murder (June 3, 2020), https://www.ag.state.mn.us/Office/Communications/2020/06/03_GeorgeFloyd.asp [https://perma.cc/6KZ4-6Q3J].

21. *Id.*

22. Eric Levenson & Aaron Cooper, *Derek Chauvin Found Guilty of All Three Charges for Killing George Floyd*, CNN (April 21, 2021), https://www.cnn.com/2021/04/20/us/derek-chauvin-trial-george-floyd-deliberations/index.html [https://perma.cc/WG4Q-2U3V]. Hennepin County Judge Peter Cahill stayed state criminal proceedings against the other three officers involved in Floyd's death pending a federal civil rights prosecution. Bill Chappell, *Minneapolis Trial Postponed for 3 Former Police Officers in George Floyd's Murder*, NPR (May 13, 2021), https://www.npr.org/2021/05/13/996562538/mpls-trial-for-former-police-officers-lane-thao-and-kueng-is-pushed-back-to-2022 [https://perma.cc/5K82-ZPDZ].

23. Kristoffer Tigue, *The Rise of Black Lives Matter Minneapolis*, MINNPOST (Mar. 24, 2015), https://www.minnpost.com/politics-policy/2015/03/rise-black-lives-matter-minneapolis/ [https://perma.cc/WNT4-JCU3].

24. Matt Furber, John Eligon & Audra D.S. Burch, *Minneapolis Police, Long Accused of Racism, Face Wrath of Wounded City*, N.Y. TIMES (May 27, 2020), https://www.nytimes.com/2020/05/27/us/minneapolis-police.html [https://perma.cc/B2AR-XJMV]; Richard A. Oppel Jr. & Richard Fausset, *Klobuchar Ramped Up Prosecutions, Except in Cases Against Police*, N.Y. TIMES (Feb. 26, 2020), https://www.nytimes.com/2020/02/26/us/klobuchar-prosecutor-myon-burrell.html [https://perma.cc/5D2J-9S3L].

25. Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS. L. REV. 541, 541.

26. Aleem Maqbool, *Black Lives Matter: From Social Media Post to Global Movement*, BBC NEWS (July 10, 2020), https://www.bbc.com/news/world-us-canada-53273381 [https://perma.cc/UGK5-BV9M].

27. *See, e.g.*, Theodore Schleifer & Allie Malloy, *Black Lives Matter Activists Join Obama at Forum on Policing*, CNN (July 14, 2016), https://www.cnn.com/2016/07/13/politics/obama-black-lives-matter-meeting/index.html [https://perma.cc/54TF-BQH7] (describing BLM activists' conversations with then-President Obama); Dana Liebelson & Ryan J. Reilly, *Black Lives Matter Activists Meet with Bernie Sanders to Make Sure He's on Board*, HUFFINGTON POST (Sept. 16, 2015), https://www.huffpost.com/entry/bernie-sanders-black-lives-matter_n_55f9ca9ce4b00310edf57b02 [https://perma.cc/MHV9-GYA5] (describing Senator Bernie Sanders's meeting with BLM activists); Dan Merica, *Black Lives Matter Videos, Clinton Campaign Reveal Details of Meeting*, CNN (Aug. 18, 2015), https://www.cnn.com/2015/08/18/politics/hillary-clinton-black-lives-matter-meeting/index.html [https://perma.cc/G2D2-WKFQ] (describing Hillary Clinton's meeting with BLM activists).

the movement has made police violence, racism, and lack of concern for Black bodies salient in public policy and politics.[28]

Although the Black Lives Matter movement seeks both nonlegal and legal remedies for systemic racism, the law remains ill-suited to redress racial subordination. In fact, many legal rules, doctrines, policies, and officials contribute to the subordination of persons of color and strengthen White supremacy.[29] The earliest systematic use of criminal law and enforcement to construct racial hierarchy in the United States occurred during slavery, when Slave Codes created discriminatory criminal law and punishment for Blacks—slave or free.[30] Judicial interpretation of criminal law mandated Black submission to Whites, while empowering Whites to exercise full dominion over Blacks.[31] During Reconstruction, Slave Codes reemerged as Black Codes. Though largely facially neutral, the Black Codes contained civil and criminal provisions primarily enacted to pursue the same objectives as the Slave Codes: to control Black bodies, preserve White supremacy, and extract unpaid labor to service the regional economy.[32] Despite the end of the Black Codes and the eventual demise of explicit race classifications in state action, the enforcement of anticrime policies continues to result in pronounced racial disparities. The nation has largely extricated formal race from the law, but racism remains intact.

This Article fills a substantial void in legal scholarship on race, constitutional law, and criminal justice policies by analyzing three critical concerns.

First, this Article extends social psychology theories of present-day racism to doctrinal analysis. Social scientists contend that after the Civil Rights Movement, expressions of racism mutated into subtle forms, often described as symbolic or new racism.[33] These modalities include, but are not limited to, implicit bias, racial resentment, and social dominance orientation (SDO).[34] While implicit bias research has greatly influenced legal scholarship on racial discrimination, scholarship has given insufficient consideration to other expressions of racism. However, these social psychology theories bolster findings made in implicit bias research and offer arguably stronger models for conceptualizing the complexity of racism.[35]

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28. *See* Katheryn Russell-Brown, *Critical Black Protectionism, Black Lives Matter, and Social Media: Building a Bridge to Social Justice*, 60 HOW. L.J. 367, 401–08 (2017); Garrett Chase, Note, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 NEV. L.J. 1091, 1111 (2018) ("Black Lives Matter has undoubtedly shaped the way Americans view racial inequality in the last three years.").

29. The harmful racial effects of facially neutral legal policies are especially pronounced within criminal law and enforcement. *See infra* Part I.C.3.

30. *See infra* Part I.A.

31. *See infra* Part I.A.

32. See *infra* Part I.B.

33. *See infra* text accompanying note 203.

34. *See infra* Part II.B.

35. *See infra* Part II.

Second, this Article analyzes social science research, finding a statistically significant positive correlation between racism and strong punitive sentiment or support for aggressive criminal justice polices, such as incarceration, law and order policing, and capital punishment.[36] Although this body of research has not established causation, scholars have almost consistently found that racism is a strong predictor of White punitive sentiment.[37] The relationship between racism and punitiveness is more robust than with other common correlates, such as fear of crime or status as a crime victim.[38] The positive and consistent correlation between racism and punitiveness raises many troubling concerns regarding the adjudication of race-equality claims. Numerous social science studies directly counter the Supreme Court's view that racism occurs consciously and rarely, and that criminal justice policies are presumptively race neutral.[39] But the Supreme Court has not cited any social science research demonstrating that the Court's understanding of race, expressed in equal protection doctrine, accurately reflects contemporary modes of racism and racial discrimination.

Third, this Article employs contemporary research on race and punitive sentiment to criticize judicial handling of race-equality claims. Presently, constitutional doctrine assumes that facially neutral state action, including criminal justice policies, normally does not discriminate against people of color, regardless of the magnitude or severity of resulting racial disparities. Court rulings also frequently reject the contention that historical racism provides a framework for interpreting racial disparities related to U.S. anticrime policies. This dismissal, however, ignores the centrality of anticrime policies in the construction and maintenance of racial inequality. It also fails to engage social science research that finds a strong correlation between racism and punitive sentiment. Judicial interrogation of the historical use of criminal law and its enforcement to subjugate people of color could permit a more informed and contextualized assessment of plaintiffs' cases. Courts constitutionalize systemic racial inequality when they refuse to follow such an approach. Given the limits of equality litigation in federal courts, advocates must continue pursuing political strategies for reform.

This Article proceeds in four principal parts. Part I analyzes the historical use of anticrime policies to subordinate persons of color and preserve racial hierarchy. Part I.A discusses the origins of racist criminal justice practice during slavery. Part I.B scrutinizes the continuation of racial subjugation through

36. *See, e.g.*, Jasmine R. Silver & Justin T. Pickett, *Toward a Better Understanding of Politicized Policing Attitudes: Conflicted Conservatism and Support for Police Use of Force*, 53 CRIMINOLOGY 650 (2015) (discussing positive punitive sentiment and support for aggressive policing and excessive use of force); Jasmine R. Silver, *Moral Foundations, Intuitions of Justice, and the Intricacies of Punitive Sentiment*, 51 LAW & SOC'Y REV. 413, 413–14 (2017) (discussing punitive sentiment or punitiveness).

37. *See infra* Part II.B.

38. *See infra* Part II.B.

39. *See infra* Parts II.A and II.B.

criminal law and enforcement during Reconstruction. Part I.C explores the continued use of criminal law and enforcement to preserve racial hierarchy from Jim Crow to the present. Part II examines social science research on contemporary manifestations of racism, the racist dimensions of punitive sentiment, and the inutility of Court doctrine in light of this research. Part II.A analyzes contemporary modalities of racism, including implicit bias, racial resentment, and social dominance orientation. Part II.B discusses research linking contemporary racism with a desire to punish. Part III employs contemporary modalities of racism to criticize Supreme Court equality doctrine. Part III.A discusses early Supreme Court cases that could support a substantive view of equality. Part III.B mobilizes social science research on subtle racism and racism's strong correlation with White punitive sentiment. From this, Part III.B argues that equality cases situated at the intersection of criminal law and race warrant close judicial scrutiny due to the history of brutal racism in this setting. Building from these themes, Part IV focuses on how contemporary judicial applications of formal equality doctrines legalize racial inequality in criminal law. Part IV.A constructs a reformed and more robust equality doctrine capable of combatting racial injustices caused by criminal law and enforcement, while suggesting other methods of reform. Part IV.B anticipates and responds to potential criticism, including that the proposed models could lead to judicial overreach, are unnecessarily narrow because other areas of social policy have longstanding histories of racism, and are insufficient because they promote reform rather than transformation.

I.
CRIMINAL JUSTICE AND RACIAL SUBORDINATION

In *Dred Scott v. Sandford*,[40] the Supreme Court held that legal enslavement and discrimination against persons of African descent in Europe, American colonies, the United States, and individual states, meant that Blacks, free or enslaved, were not "citizens of the United States" and held no constitutional rights.[41] The Court's historical analysis indicated "that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power."[42] The Court examined many forms of legally imposed racial discrimination, including in the criminal law. Specifically, the Court found that anti-miscegenation laws indicated that Whites considered Blacks "far below them in the scale of created beings."[43] Racial purity, as commanded by the

40. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

41. *Id.* at 403–27 (discussing global subordination of people of African descent and finding that Dred Scott was not a citizen of the United States).

42. *Id.* at 409.

43. *Id.*

criminal law, imposed a "stigma, of the deepest degradation, . . . upon the whole race."[44] As demonstrated by the Court's reference to anti-miscegenation laws to defend its exclusion of Blacks from the body of rights-endowed persons, historical and present-day practices illuminate the central role of criminal justice policies in the enforcement of White supremacy.

A. Crime, Slavery, and Racial Oppression

Laws in the American colonies and states regulated the behavior of slaves and subjected them to discriminatory criminal sanctions.[45] Though *Dred Scott* held that slaves were merely items of property,[46] courts relaxed this finding when slaves were accused of criminal conduct. If litigants challenged the capacity of slaves to commit crimes, courts held that they were persons, capable of committing crimes and receiving punishment.[47] A closer examination reveals that nineteenth-century case law construed the criminal law in a manner that preserved the superiority of Whites and the subordinate status of Blacks. Judicial application of provocation and self-defense doctrines in cases involving enslaved defendants showed that courts subjugated Blacks through the adjudication of criminal law.

Many criminal cases of the time addressed circumstances that did not permit slaves accused of violent crimes to assert a provocation defense.[48] The

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44. *Id.*; *see also Loving v. Virginia*, 388 U.S. 1, 11 (1967) (finding that the anti-miscegenation law was "designed to maintain White Supremacy").

45. *See, e.g.*, Vada Berger, Nicole Walthour, Angela Dorn, Dan Lindsey, Pamela Thompson & Gretchen von Helms, *Too Much Justice: A Legislative Response to* McCleskey v. Kemp, 24 HARV. C.R.-C.L. L. REV. 437, 440 (1989); Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1341–42 (1995); A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1021–22 (1992). This Article uses the word "slave," although "enslaved persons" is seen as humanizing Black victims of slavery. *See* E. Arnold Modlin, Jr., Stephen P. Hanna, Perry L. Carter, Amy E. Potter, Candace Forbes Bright & Derek H. Alderman, *Can Plantation Museums Do Full Justice to the Story of the Enslaved? A Discussion of Problems, Possibilities, and the Place of Memory*, 4 GEOHUMANITIES, 335, 339–40 (2018). The former, however, captures the brutality of the legal condition that this Article seeks to portray. American law and society reduced persons of African descent to items of property, despite their humanity. The word "slave" powerfully conveys this reality.

46. *Dred Scott*, 60 U.S. at 393 ("The only two clauses in the Constitution which point to this race, treat them as persons whom it was morally lawful to deal in as articles of property and to hold as slaves."). Contradictorily, the Court cited to anti-miscegenation laws as evidence of Blacks' inferiority to Whites. *Dred Scott*, 60 U.S. at 409. While the Court held that Blacks were property, it contemplated enforcement of criminal law against them.

47. *See* United States v. Amy, 24 F. Cas. 792, 810 (C.C.D. Va. 1859) (No. 14,445) (enslaved party); *see also* Walter Johnson, *Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery*, 22 LAW & SOC. INQUIRY 405, 417 (1997) (discussing how slaves were denied rights, except when it meant they could be prosecuted).

48. *See, e.g.*, Wesley v. State, 37 Miss. 327, 348–49 (1859) (enslaved party); State v. Cæsar, 31 N.C. (9 Ired.) 391, 406 (1849) (enslaved party); State v. Negro Will, 18 N.C. (1 Dev. & Bat.) 121, 160 (1834) (enslaved party); Jacob v. State, 22 Tenn. (3 Hum.) 493, 496 (1842) (enslaved party); Nelson v. State, 29 Tenn. (10 Hum.) 518, 525 (1850) (enslaved party). Historically, a murder charge could be reduced to manslaughter if the victim's conduct "would render any ordinarily prudent person for the

courts' rulings in these cases demonstrate that preserving White supremacy was a core function of criminal law. Courts frequently held that slaves accused of murdering slave owners, overseers, or other Whites could not assert provocation as a partial defense to reduce their charge to manslaughter.[49] The existence of slavery compelled legal norms that gave Whites dominion over Blacks and that required their submission to White authority.

In *Jacob v. State*,[50] the Supreme Court of Tennessee disallowed a provocation defense asserted by Jacob, a slave who killed his owner, Robert Bradford. The court found that Jacob fatally stabbed his owner, who "was in the act of attempting to chastise him for disobedience of orders, neglect of duty, and saucy, impertinent language."[51] The court reasoned that permitting Jacob to assert a provocation defense would undermine the institution of slavery, which depended upon the racial subjugation of Blacks. Accordingly, slaves had a duty of "[u]nconditional submission," while slave owners had "unlimited power."[52] The court held that slaves could only use force if an owner threatened to inflict "great bodily harm," such as "maiming or dismember[ment]," or any punishment that would place the slave's "life in great and useless peril."[53] In all other instances, however, law protected the owner's "right to obedience and submission" from slaves and "to inflict any punishment" required to effect that "submission."[54] Other courts reached similar results regarding White domination, finding that an owner's act of violence against a slave did not constitute provocation and that a slave's physical resistance did not amount to self-defense.[55]

Courts also recognized the authority of Whites who did not own slaves to nevertheless coerce slaves' submission by use of force, as exemplified by *State v. Mann*.[56] In *Mann*, the North Carolina Supreme Court held that except for "instances of cruelty and barbarity,"[57] owners of slaves and persons who legally controlled slaves did not commit battery when using force on them.[58] The defendant in *Mann* rented Lydia, a slave who allegedly committed some small offenses.[59] After the defendant tried to punish Lydia, she attempted to escape.[60]

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time being incapable of that cool reflection that otherwise makes it murder." Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 430 (1982) (quoting Addington v. United States, 165 U.S. 184, 186 (1897)).

49. *See infra* notes 52, 58 and accompanying text.
50. 22 Tenn. (3 Hum.) 493 (1842) (enslaved party).
51. *Id.* at 514.
52. *Id.* at 519.
53. *Id.*
54. *Id.* at 520.
55. *See, e.g.*, Wesley v. State, 37 Miss. 327, 348–49 (1859) (enslaved party); State v. Cæsar, 31 N.C. (9 Ired.) 391, 400 (1849) (enslaved party).
56. 13 N.C. (2 Dev.) 263 (1829) (enslaved person at issue).
57. *Id.* at 267.
58. *Id.* at 265.
59. *See id.* at 263.
60. *Id.*

The defendant then shot her.[61] The trial judge instructed jurors that because the defendant had only rented Lydia, he did not possess a broad right to use force on Lydia. Further, the judge instructed that if the defendant's use of force was excessive, they could convict him.[62] The North Carolina Supreme Court reversed the decision and rejected the distinction between owners and renters.[63] The court held that the law required complete submission by slaves and control by owners or others with authority.[64] Preservation of the institution of slavery meant that Whites must enjoy lawful authority to subjugate slaves.[65] The court held further that securing compliance could only happen if slaves had "no will" of their own and if slaveowners possessed "uncontrolled authority over the body."[66] To signal the magnitude of its ruling, the court firmly instructed lower courts that "while slavery exists," they would have an "imperative duty" to recognize the "full dominion of the owner over the slave" and that the "subordination" of slaves was vital to their "value . . . as property," "the security of the master," and "public tranquillity [*sic*]."[67]

Jacob strengthened White supremacy by narrowly defining the circumstances that conferred on slaves the right to use force against Whites who controlled them.[68] But courts in decisions like *Mann* found that a wide range of behaviors constituted provocation when slaves challenged Whites with force or even words.[69] The combined impact of these legal principles meant that slaveowners and other Whites could freely abuse slaves and that slaves could not resist. Furthermore, because slaves and free Blacks could not offer testimony against Whites in most jurisdictions, these rules extended impunity to Whites who acted violently against Blacks and convictions for Blacks who acted violently against Whites.[70]

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61. *Id.*

62. *See id.*

63. *Id.* at 265, 268.

64. *Id.* at 266.

65. *Id.* at 267; *see also* Nelson v. State, 29 Tenn. (10 Hum.) 518, 529 (1850) (enslaved party) (finding that "the same indignity which would excite the passions of a white man, would not have a like effect upon a slave," and that "a grievous provocation to the one, would provoke the other but slightly" due to "different habits of feeling, and modes of thought, of the two races").

66. *Mann*, 13 N.C. at 266.

67. *Id.* at 268; *see also* Luke v. State, 5 Fla. 185, 195 (1853) (enslaved party) (holding that "perpetuation" of slavery requires White "superiority" "over the African [individual] . . . be ever demonstrated," that "the degraded caste should be continually reminded of their inferior position" to secure "subjection to the authority of [Whites]," and that their crimes warrant "more degrading punishment" than Whites receive).

68. *See, e.g.*, *Mann*, 13 N.C. at 268.

69. Laura F. Edwards, *The Forgotten Legal World of Thomas Ruffin: The Power of Presentism in the History of Slave Law*, 87 N.C. L. REV. 855, 897 (2009).

70. Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 267 (1996) (discussing how slaves and free Blacks were prohibited from testifying against Whites).

B. Reconstruction-Era Racism

Following the Civil War, Reconstruction began. Southern states uniformly failed to provide meaningful assistance to Blacks suffering private violence. Instead, southern states continued to use criminal law to construct racial hierarchy, despite the ratification of the Thirteenth Amendment. Although the Amendment prohibits slavery and involuntary servitude, it exempts prison labor from this general prohibition.[71] This prison labor exemption gave states a legal avenue to re-enslave Blacks. The racialization of criminal law also impacted Chinese and Mexican individuals living in the West. They frequently experienced mob violence without redress.

1. Black Codes, Criminal Law, and Re-enslavement

After the Civil War, southern (and some northern) states used the law, including criminal law, to maintain White supremacy and to re-enslave Blacks.[72] Namely, states enacted Black Codes that subjected Blacks to a broad range of discriminatory treatment.[73] Some provisions in Black Codes explicitly discriminated against Blacks by restricting where they could live, denying them the right to own property, subjecting them to exploitative contractual relations, not permitting them to sue on any matter, and prohibiting groups of Blacks from engaging in disorderly conduct.[74] Other provisions were facially neutral, but they were still effective instruments of racial domination.[75] For example, Blacks were often sentenced to hard labor for crimes, including minor offenses, like failing to honor debts or perform contracts and lacking employment.[76] Laws that criminalized "vagrancy" imposed fines or hard labor as punishment.[77] Black Codes allowed third parties to pay these fines on behalf of the offenders, but this

71. *See* U.S. CONST. amend. XIII.

72. *See* Gen. Bldg. Contractors Ass'n v. Pennsylvania., 458 U.S. 375, 409 (Marshall, J., dissenting) (discussing the facially neutral status of many Black Codes); *see also* Darren Lenard Hutchinson, *"Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 75–76 (2014) (discussing Black Codes); Christopher R. Adamson, *Punishment After Slavery: Southern Penal Systems, 1865–1890*, 30 SOC. PROBS. 555, 558–59 (1983) (analyzing race and criminal law enforcement during Reconstruction).

73. Adamson, *supra* note 72, at 559.

74. *See* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 935–41 (2019) (discussing how Black Codes and the convict leasing system provided "vital labor" for the southern economy during the postbellum period).

75. *See Gen. Bldg. Contractors Ass'n*, 458 U.S. at 409.

76. Hutchinson, *supra* note 72, at 75; *see also* Adamson, *supra* note 72, at 559 ("Those without labor contracts or who broke their contracts were prosecuted as vagrants and sentenced to hard labor on local plantations.").

77. *See* DANIEL A. NOVAK, THE WHEEL OF SERVITUDE: FORCED BLACK LABOR AFTER SLAVERY 1–8 (1978) (analyzing compulsory labor provisions in Black Codes, including sections related to vagrancy); Joe M. Richardson, *Florida Black Codes*, 47 FLA. HIST. Q. 365, 374 (1968) ("Laws controlling labor were important provisions of the black codes. Vagrant freedmen could be arrested and sentenced to as much as twelve months labor.").

came with a price: compelled labor for the persons who paid the fine.[78] Black Codes also authorized compelled labor for Blacks who did not commit any crimes, including the "apprenticing" of minors who were orphans, who were born out of wedlock, or whose parents could no longer care for them.[79] Criminal law and apprenticeships were interrelated. If a child's parents were deemed vagrants or were serving a term of hard labor, their children were commonly coerced into apprenticeships.[80] These practices permitted southern states to extract uncompensated labor from many Blacks, often for the benefit of the same individuals who held them as property before emancipation.[81]

States enacted harsh penalties for economic crimes that poor people—former slaves and poor Whites—were more likely to commit. Mississippi enacted a "pig" law that made "theft of property" valued over ten dollars "punishable by up to five years of hard labor."[82] The Georgia Legislature "made stealing hogs a felony."[83] In North Carolina, petty larceny carried the same punishment as grand larceny.[84] Conviction under this statute could result in years of coerced labor for "stealing a couple of chickens."[85]

Furthermore, Black Codes required an enforcement mechanism, and police filled this need.[86] Originating in slavery, southern police forces participated in racial subjugation by surveilling and arresting Blacks for allegedly violating Black Codes.[87] The enforcement of Black Codes had a tremendous impact on the prison population in southern states, with the number of incarcerated individuals tripling in some jurisdictions during periods of two to four years.[88]

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78. *See, e.g.*, NOVAK, *supra* note 77, at 3 (discussing a provision in Mississippi's Black Codes permitting auctioning of Black labor to cover fines imposed by criminal law).

79. *See* Karin L. Zipf, *Reconstructing "Free Woman": African-American Women, Apprenticeship, and Custody Rights During Reconstruction*, J. WOMEN'S HIST., Spring 2000, at 8, 19 (examining North Carolina's apprenticeship laws); Robert L. Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last:* Jones v. Alfred H. Mayer Co., 55 VA. L. REV. 272, 278 (1969) ("[Black Codes] generally provided that [Black] orphans or abandoned children might be involuntarily bound out until they reached their majority.").

80. Some states specifically permitted apprenticeships for children whose parents were deemed "idle" (or vagrant). *See, e.g.*, NOVAK, *supra* note 77, at 4.

81. *See, e.g.*, Zipf, *supra* note 79, at 9 (observing that apprenticeship law gave priority to minors' former owners); NOVAK, *supra* note 77, at 3 (discussing Mississippi law).

82. Adamson, *supra* note 72, at 562.

83. *Id.*

84. *Id.*

85. *Id.*

86. *See* Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 449 (2018) ("With regard to Black life, the role of police expanded over time: from patrolling slaves and runaway slaves to enforcing of the Black Codes and Jim Crow.").

87. *See* Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 UCLA L. REV. DISCOURSE 200, 210 (2020) ("The Black Codes—criminal laws that applied only to Black people and were intended to control the Black body—allowed police to terrorize Blacks to enforce racial subjugation.").

88. Adamson, *supra* note 72, at 562.

2. Unequal Protection: Impunity for Racial Violence Against Blacks

Racialized violence surged after the Civil War.[89] Racial terror allowed Whites to maintain control over Black bodies and preserve racial hierarchy established by enslavement.[90] Local governments were complicit because they systematically failed to protect Blacks from criminal activity or to punish offenders.[91] The problem of systematic racial violence, the unwillingness of state and municipal governments to protect Blacks, and many other acts of racial discrimination motivated Congress to enact the Civil Rights Act of 1866[92] and to propose the Fourteenth Amendment.[93] If these abuses remained unchecked, emancipation would have meant very little to Blacks, and White supremacy would govern race relations. Despite these congressional efforts, a series of judicial opinions, southern resistance, and fading national support among Whites to protect Blacks and secure their rights led to the demise of Reconstruction and the start of Jim Crow.

Much of the violence during Reconstruction related to economic competition between freed Blacks and southern Whites, and efforts by Blacks to exercise political rights, such as voting. Southern Whites felt that these efforts were an affront to their manhood.[94] Incidents like the Colfax Massacre of 1873—

89. *See* GILLES VANDAL, RETHINKING SOUTHERN VIOLENCE: HOMICIDES IN POST-CIVIL WAR LOUISIANA, 1866–1884, at 67 (2000); Michael J. Pfeifer, *The Origins of Postbellum Lynching: Collective Violence in Reconstruction Louisiana*, 50 LA. HIST. 189, 194 (2009) ("Significantly, during the war and after, vigilante bands also made freedpeople their targets throughout Louisiana."); Gregg Cantrell, *Racial Violence and Reconstruction Politics in Texas, 1867–1868*, at 93 SW. HIST. Q. 333, 335 (1990).

90. *See* GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 22 (2007).

91. *See id.* at 21.

92. The Civil Rights Act of 1866 provided extensive rights:

> [A]ll persons born in the United States and not subject to any foreign power, excluding [Indigenous peoples] not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Civil Rights Act of 1866, ch. 31, 14 Stat. 27; *see also* John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1135–37 (1990) (describing how the Act was an "important factor in the protection of the rights of freedmen"); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1855 (2010) (discussing the motivations behind Congress's passage of the Civil Rights Act of 1866).

93. U.S. CONST. amend. XIV; *see also* Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 131–32 (1991) (discussing the Fourteenth Amendment).

94. *See* E.M. Beck & Stewart E. Tonlay, *Violence Toward African-Americans in the Era of the White Lynch Mob*, *in* ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE 121, 137 (Darnell F. Hawkins ed., 1995) (finding correlation between White mob violence against Blacks

during which Whites killed over two hundred Blacks—graphically demonstrated the level of racial terrorism in the South and the inadequacy of responses from legal authorities, including the Supreme Court.[95] The violence in Colfax occurred after Whites tried to eject recently elected Republicans from taking office.[96] A unit of "black veterans and militia officers" sought to maintain order.[97] A large group of Whites, armed with weapons that included a cannon, set fire to the county courthouse and killed many individuals who surrendered.[98]

The Colfax Massacre gave rise to the case *United States v. Cruikshank*,[99] involving prosecution of only a few of the ninety-eight Whites who participated in the violence and were initially indicted.[100] The State of Louisiana also filed criminal charges against perpetrators of the violence, but officials dropped the case after the prosecutor received death threats.[101] Only three defendants were convicted in the federal case, but the Supreme Court reversed those judgments on several grounds, including that the criminal complaint did not explicitly allege the violence resulted from racial animus, an element of the crime.[102] Although the historical context of the crimes and the statement of facts in the criminal complaint pointed squarely towards racial hostility, the Court shielded the defendants from criminal liability.[103] The Court also held that the Fourteenth Amendment only pertained to state action.[104] By limiting the scope of the

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and poor economic conditions); RABLE, *supra* note 90, at 22–23 (discussing the relationship between Black suffrage and racial violence).

95. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED BUSINESS 437 (1988) (discussing the Colfax Massacre).

96. *Id.*; *see also* James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 387–88 (2014) (discussing the Colfax Massacre).

97. FONER, *supra* note 95, at 437.

98. Michael T. Morley, *The Enforcement Act of 1870, Federal Jurisdiction over Election Contests, and the Political Question Doctrine*, 72 FLA. L. REV. 1153, 1177 (2020) (discussing the Colfax Massacre).

99. 92 U.S. 542 (1876).

100. *See* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876, at 175–78 (2005) (discussing *Cruikshank*); Pope, *supra* note 96, at 410.

101. Pope, *supra* note 96 at 410 ("[T]he State of Louisiana had secured 140 indictments only to drop the cases after a crowd of armed defendants and supporters threatened its prosecutor with death.").

102. *See Cruikshank*, 92 U.S. at 556–59. For criticism of *Cruikshank*, see Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2155 n.168 (1993) ("The racial basis for the actions taken by the *Cruikshank* defendants could hardly have been clearer."); I. Bennett Capers, *On Justitia, Race, Gender, and Blindness*, 12 MICH. J. RACE & L. 203, 226 n.110 (2006) (criticizing the Court for reversing convictions even though the indictment described "the racial identities of the parties involved"); Pope, *supra* note 96, at 411 (observing that there was "abundant evidence of race hatred presented at trial"); *see also* Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 920–22 (2009) (discussing the Colfax Massacre and *Cruikshank*).

103. *See* Lawrence, *supra* note 102, at 2155 n.168; Capers, *supra* note 102, at 226 n.110; Hutchinson, *supra* note 102, at 920–22; Pope, *supra* note 96, at 411, 423.

104. *Cruikshank*, 92 U.S. at 554 ("The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of

Fourteenth Amendment to state action, the Court constrained Congress's ability to regulate private racial discrimination and violence by exercising its legislative powers contained in Section Five of the Fourteenth Amendment.[105] Constitutional doctrine and dwindling political support for Reconstruction led to a sharp decline in federal prosecution of individuals and mobs who engaged in racial violence against Blacks.[106] Federal recalcitrance, restrictive Supreme Court doctrine, and inaction from state and local authorities meant that Blacks who suffered from racial violence and other indignities could not rely on legal institutions to protect them.[107] Unchecked racial terror fortified White supremacy, while courts and law enforcement facilitated the process through systematic denial of protection. The disregard of Black lives by authorities tasked with enforcing criminal law preserved White supremacy against the disruption caused by the Civil War and Reconstruction. Black subjugation persisted, and criminal law and enforcement played a critical role.

3. Discrimination and Violence Against Latinx People and Asian Americans in the Western United States

This Article primarily examines racial domination of Blacks. An analysis of racial subordination of Asian Americans and Latinx communities through anticrime policies, however, allows for a richer accounting of the systematic use of criminal justice policies to preserve White supremacy. Even before Reconstruction, Latinx persons and Asian Americans were subject to widespread racialized violence in western and southwestern states and territories.[108] But federal, state, and local law enforcement provided little protection for them.[109]

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one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.").

105. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

106. *See* Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2350 & n.54 (2003) (listing scholarship that argues *Cruikshank* and other case law "thwarted federal power to protect the southern black population and facilitated the end of Reconstruction"); *see also* Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era*, 82 COLUM. L. REV. 835, 840 (1982) (contending that *Cruikshank* "left the right to vote in state elections in the grip of terror, at least so far as federal law was concerned"); Hutchinson, *supra* note 102, at 939–41 (discussing demise of political support among Whites for Reconstruction).

107. *See* RABLE, *supra* note 90, at 21 (discussing failure of legal institutions to redress violence against Blacks during Reconstruction).

108. *See* CARRIGAN & WEBB, *supra* note 1, at 130 (discussing prejudice and violence against Spanish speakers in the United States); D. MICHAEL BOTTOMS, AN ARISTOCRACY OF COLOR: RACE AND RECONSTRUCTION IN CALIFORNIA AND THE WEST, 1850–1890, at 169–201 (2013) (discussing prejudice and violence against Chinese Americans in California); Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297, 298 (2009) (examining "recent research" on the lynching of "Latin[x individuals], particularly Mexican Americans in the Southwest").

109. *See, e.g.*, CARRIGAN & WEBB, *supra* note 1, at 88 (discussing failure of federal government and Texas officials to protect Mexican Americans from mob violence); BOTTOMS, *supra* note 108, at 185, 187 (analyzing failure of federal and state legal authorities to protect Chinese Americans and

a. Mob Violence Against Latinx People

Groundbreaking research by historians William Carrigan and Clive Webb countered the conventional explanation for anti-Mexican mob violence in the Southwest.[110] The traditional view among historians attributed lynching in the Southwest to economic competition and the absence of a functioning legal system.[111] Clive and Carrigan, however, contended that intersecting racial prejudice and economic competition were the strongest motivating factors.[112] Economic competition partly explains why Mexicans were targets of racial violence, but this finding requires a multidimensional analysis that accounts for racism. If economic anxiety alone explained the violence, then mobs would have murdered and expelled other demographic groups to the same extent. "Mexicans and other Spanish speakers," however, were almost exclusively targeted by the mobs.[113] "Virulent prejudice" motivated and justified Whites' brutality against Mexicans.[114]

A formal judicial process might have reduced some lynching in the Southwest, but the existence of courts does not preclude racial terror. Southern police participated in racial domination by enforcing racist criminal laws, discriminatorily arresting Blacks, and failing to hold accountable Whites who victimized Blacks.[115] Furthermore, courts, judges, and juries rarely convicted Whites of racial violence.[116] Mobs in the Southwest would often attempt to replicate courts by conducting "trials," in which "juries" heard witness testimony.[117] These "vigilance committees,"[118] however, provided only a façade of due process.

Carrigan and Clive analyzed one case where a mob seized a Mexican man accused of stealing a horse.[119] Some members of the mob demanded his immediate death.[120] One person in the crowd dissented, however, stating that "to shoot those Gr[****]rs ain't the best way. Give 'em a fair jury trial, and rope 'em up with all the majesty of the law."[121] The argument proved effective, and the crowd organized a vigilance committee to determine the fate of the accused.

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finding that Whites knew that expelling Chinese Americans would not result in punishment). Indeed, these crimes were often seen as a form of justice. *See id.* at 23–24.

110. CARRIGAN & WEBB, *supra* note 1.

111. *Id.* at 23–24 (discussing the perspective that an undeveloped court system fostered and legitimized mob violence).

112. *Id.* at 33 ("[T]he two most important factors in generating conflict between Mexicans and Anglos were economic competition and racial prejudice, which were inextricably intertwined.").

113. *Id.* at 51.

114. *Id.*

115. *See supra* notes 70, 87 and accompanying text.

116. *See supra* notes 99–102 and accompanying text.

117. CARRIGAN & WEBB, *supra* note 1, at 27.

118. *Id.*

119. *Id.* at 28.

120. *Id.*

121. *Id.* "Gr[****]r" is a pejorative word used to describe Mexicans. DE LEÓN, *supra* note 1, at 16 (discussing "gr[****]r").

The committee returned with a decision of "not guilty," which angered the mob.[122] After a mob leader asked the committee to reconsider its decision, a second round of deliberation commenced.[123] The committee returned after "a half hour" and announced a "guilty" decision, which would result in execution.[124] The committee's ruling was redundant. The mob had already hanged the accused as the vigilance committee deliberated his fate.[125] Mob violence in the Southwest, like the lynching of Blacks in the South, functioned to control Mexican bodies and to reinforce racial hierarchy. One of the mob leaders made this goal explicit when, following the execution, he declared that "Mexicans'll know enough to let white men's stock alone after this."[126]

Law enforcement agents and public officials were complicit in racial violence. With a few exceptions, police generally did not arrest Whites who lynched Mexicans. In many instances, police defended or assisted the mobs.[127] Government officials were also complicit. In an 1881 case in the Arizona Territory, a lynch mob captured two Mexicans suspected in a string of horse thefts.[128] After the mob killed one of the men, they demanded that the surviving suspect reveal the location of the horses. He complied, but they hanged him nonetheless. When the Mexican Consulate demanded that the sheriff investigate, the sheriff defended the mob. He claimed that the "worst and most desperate class of outlaws" besieged the local community and that the hangings communicated a warning to potential criminals.[129] The Acting Territorial Governor, also asked by Mexico to investigate the crimes, offered a similar defense—that "the two men . . . were probably outlaws."[130] Even though the experiences of Latinx and Black populations (which overlap) are not identical, acts of racial violence in the Southwest followed a similar pattern as southern lynching. Racial violence and complicity among criminal law authorities helped to fortify White supremacy.

b. Codifying Xenophobia: Chinese Expulsion and Exclusion

Violence against Chinese immigrants and Chinese Americans in western states occurred frequently during and after Reconstruction.[131] Chinese Americans were subjected to mob violence and expulsion from their lands, and Chinese immigrants were excluded from entering the United States.[132] Racial

122. CARRIGAN & WEBB, *supra* note 1, at 28.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 131.
128. *Id.*
129. *Id.*
130. *Id.* at 132.
131. *See* BOTTOMS, *supra* note 108, at 182–201 (discussing mob violence against Chinese individuals).
132. *See id.* at 169–201 (discussing exclusion and expulsion of Chinese individuals).

prejudice and economic competition caused much of the violence and other forms of hostility.[133] Federal, state, and local governments and law enforcement authorities failed to prevent racist violence against persons of Chinese descent.[134] Instead, federal authorities responded to the racist demands of Whites in the West by enacting laws that marginalized persons of Chinese descent. In 1882, for example, Congress passed the Chinese Exclusion Act.[135] In particular, this law banned the entry of "Chinese laborers to the United States"[136] for ten years and made it a crime for those whose entry violated the statute to remain.[137] To secure strict adherence, the statute imposed criminal liability on persons who transported individuals to the United States in violation of the statute and allowed them to deboard.[138] Congress enacted the measure purportedly to protect "good order of certain localities"[139] in western states. The actual congressional purpose, however, was less admirable. Congress acted in response to racist demands for exclusion and codified xenophobia and racism into law.[140] Federal criminal law deemed Chinese immigrants, not Whites engaging in racial violence against them, hostile to the interests of the United States.[141]

With Congress, the President, and local officials collectively supporting their exclusion, Chinese immigrants turned to the Supreme Court. Their effort to find redress in the Court proved unavailing. In *Chae Chan Ping v. United States*,[142] the Court upheld the Chinese Exclusion Act, basing its decision on the principle that Congress had broad power over immigration and naturalization.[143] Employing the racist political rhetoric of the law's proponents, the Court purported to find that Chinese laborers were typically "industrious and frugal"

133. *See id.* at 184–85 (discussing interrelated racism and economic dimensions of Chinese expulsion).

134. *Id.* at 185, 187.

135. Act of May 6, 1882, ch. 126, 22 Stat. 58–61.

136. *Id.* at 59.

137. *Id.*

138. *Id.* (providing criminal liability for a "master of any vessel" who knowingly brings "any Chinese laborer, from any foreign port or place" and for any Chinese laborer who enters the country unlawfully).

139. *Id.* at 58.

140. *See* ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT 211–25 (1998) (analyzing racist political rhetoric among supporters of the Chinese Exclusion Act); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 38 (1998) ("Proponents of the Chinese Exclusion Act spoke of the Chinese 'question' . . . [that] was whether there should be any Chinese in the United States."); Julian Lim, *Reconceptualizing Asian Pacific American Identity at the Margins*, 3 U.C. IRVINE L. REV. 1151, 1175 (2013) (arguing that racism inspired "national politics that resulted in the Chinese Exclusion Act").

141. GYORY, *supra* note 140, at 242–43 (arguing that supporters of exclusion depicted Chinese immigrants as invaders and Whites as victims).

142. 130 U.S. 581 (1889).

143. *Id.* at 603–04 ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation.").

and not "accompanied by families, except in rare instances."[144] The Court also described Chinese immigrants as being "content with the simplest fare," which "would not suffice for our laborers and artisans."[145] These characteristics of Chinese immigrants gave "them" a comparative advantage when they competed with "our people."[146] Chinese immigrants' economic success led to "deep and bitter" "irritation," "open conflicts," and "great disturbance of the public peace."[147]

The Court also explained that "differences of race added greatly to the difficulties of the situation."[148] Although the United States had extended "most favored nation" status to China, the Court found that Chinese immigrants failed to assimilate. Instead, "they remained strangers in the land" and lived "apart by themselves," while "adhering to the customs and usages of their own country."[149] The Court expressed empathy for White supporters of exclusion, finding that they feared "*our* country would be overrun by them" in the absence of "prompt action . . . to restrict their immigration."[150] This fear led Whites to seek a legal remedy.[151] Although the Court acknowledged that race fueled conflict between Whites and Chinese immigrants, the opinion depicted Chinese immigrants as hostile invading foreigners and Whites as victims.[152] Local officials, Congress, the President, and the Supreme Court collectively failed to protect Chinese immigrants from White racial terror. Instead of enforcing criminal law to end acts of violence by Whites in the region, legal authorities targeted Chinese immigrants for abuse. The failure to use criminal law to protect people of color from White subjugation is a deeply embedded aspect of policing in the United States.

C. Race and Crime from Jim Crow to the Present

During the earliest periods of United States history, anticrime policies subjugated persons of color by punishing them unfairly, denying them protection from racial violence, and re-enslaving them. This pattern of racial domination

144. *Id.* at 596.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* (emphasis added).
151. *Id.* at 596.
152. *See id.* The Court's use of "our," "them," and "their" indicates its treatment of Chinese immigrants as unwanted foreigners. *See* Janel Thamkul, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 CALIF. L. REV. 553, 570 (2008) (arguing that *Chae Chan Ping* employed the racist stereotype of Asian-American foreignness).

through the criminal law persisted through Jim Crow and the Civil Rights Movement and continues to exist in the present day.[153]

1. Continuation of Past Practices

Lynching of Blacks and Latinx individuals continued past Reconstruction. Law enforcement officers played a large role. In many instances, southern police turned Blacks over to mobs, participated in the violence, or ignored it.[154] Presidents, Congress, and state and federal courts and governments did not create a systematic response to lynching to protect the lives of people of color subject to racial terror.

Lynching began to decline during the twentieth century, becoming very rare by the 1960s. Historians attribute the decline to numerous factors, including a lessening of public approval, need for regional stability, decline in southern insularity, antiracist activism, improvement of economic conditions, and reliability of guilty verdicts and death sentences.[155] The use of capital punishment as a factor contributing to a decline in lynching has substantial academic support,[156] and this explanation provides an additional example of the role of criminal law in maintaining racial inequality. As lynching declined, executions increased.[157] Capital punishment disproportionately impacts Black defendants and privileges White victims, as confirmed by numerous studies.[158]

153. *See, e.g.*, Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 52–55 (2000) (discussing racism in criminal law and enforcement during the interwar period).

154. *See, e.g.*, United States v. Shipp, 203 U.S. 563, 572, 575 (1906) (finding that several police officers' failure to comply with a court order to protect a Black rape suspect from mob violence could constitute contempt, where testimony could ascertain whether law enforcement had direct involvement in lynching the defendant as alleged).

155. Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 92–97 (2002); Klarman, *supra* note 153, at 55–56.

156. *See, e.g.*, Scott W. Howe, *Atoning for* Dred Scott *and* Plessy *While Substantially Abolishing the Death Penalty*, 95 WASH. L. REV. 737, 741 (2020) ("Leading scholars have frequently contended that the modern use of the death penalty links to the long era of violent degradation of African Americans."); Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163, 1171–72 (2019) (discussing how the executions that quickly followed death sentences in the South were "legal lynchings"); Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 648 (2010) ("The ever-present threat of lynching led reformers to urge speeding up the criminal process to allow for immediate trials followed by instant executions, pressures that created the practice known derogatorily as 'legal lynching,' a process that was often only a hairsbreadth away from the illegal version."); Timothy V. Kaufman-Osborn, *Capital Punishment as Legal Lynching?*, *in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 21, 36–39 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) (discussing how legal lynchings took the place of "spectacle" lynchings once White dominance was assured).

157. Kirchmeier, *supra* note 155, at 94.

158. Mario L. Barnes & Erwin Chemerinsky, *What Can* Brown *Do for You?: Addressing* McCleskey v. Kemp *as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias*, 112 NW. U. L. REV. 1293, 1309–10 (2018).

Statistics regarding the use of capital punishment in rape cases, for example, document the racist nature of the death penalty and the multidimensional nature of sexual violence. Nationally, 90 percent of men executed for rape between 1937 and 1951 were Black.[159] Meanwhile, during a similar time period, almost all of the victims in rape cases before the Alabama Supreme Court and Alabama Court of Appeals were White women.[160] That most rapes are intra-racial crimes[161] makes it difficult to conclude that the statistics do not prove racial discrimination—even though death penalty statutes are facially neutral with respect to race. Furthermore, the racialized and gendered use of capital punishment is seen in the lack of punishment for men who raped Black women. This crime was rarely prosecuted, and, in the rare event of a prosecution and conviction, the defendant almost never received a death sentence.[162]

The creation of special judicial terms to provide expedited trials and punishment also validates the contention that the death penalty supplanted lynching. Arkansas, for example, created an expedited judicial process to prosecute and punish individuals accused of murder, rape, attempted rape, "or any other crime calculated to arouse the passions of the people" if the county sheriff "believes that mob violence will be committed."[163] The statute required a trial within ten days of the sheriff communicating the risk of mob violence to the court.[164] This ten-day window would include all pretrial activity, such as impanelment of a grand jury, arraignment, investigation, and trial preparation.[165] Blacks were often prosecuted and sentenced to death under circumstances that could not permit the development of a reasonable defense.[166] Also, in many of

159. John Charles Boger, McCleskey v. Kemp*: Field Notes from 1977–1991*, 112 NW. U. L. REV. 1637, 1641 (2018).

160. *See, e.g.*, Iris Halpern, *Rape, Incest, and Harper Lee's* To Kill A Mockingbird*: On Alabama's Legal Construction of Gender and Sexuality in the Context of Racial Subordination*, 18 COLUM. J. GENDER & L. 743, 784 (2009) (describing how a survey of reported opinions from rape cases before the Alabama Supreme Court and Alabama Court of Appeals between 1930 and 1960 showed that "all but two involved white female victims, and that all but five involved black defendants").

161. *See* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 3 (1977) (arguing that "paranoia" of Black men raping White women "persists despite hard statistical evidence portraying rape as an overwhelmingly intraracial crime"); Catharine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135, 144 (2000) ("Most rapes occur within rather than across racial groups, even as the American legal system has often had an exaggeratedly punitive reaction to accusations of rape of white women by Black men."); I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1370 (2010) (observing that "the vast majority of rapes involving white victims are intraracial").

162. *See, e.g.*, Halpern, *supra* note 160, at 784–88 (describing how in rape cases before the Alabama Supreme Court and Alabama Court of Appeals between 1930 and 1960, the death penalty was imposed "exclusively—and almost uniformly—when the defendant was black and the victim white"); Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 248; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 600 (1990).

163. Bettis v. State, 261, S.W. 46, 47 (Ark. 1924) (quoting Act 258, 1909 Ark. Acts 776).

164. *Id.*

165. *Id.*

166. *See* Henderson v. Bannan, 256 F.2d 363, 368 (6th Cir. 1958) (noting that the Black male defendant was arrested and sentenced to death after confessing to raping a White woman, all in the same

these trials, sheriffs offered explicit assurances to members of lynch mobs that, if they desisted, the accused would meet swift and severe justice in court.[167] Despite these representations, mobs often continued to harass and threaten defendants, juries, and "anyone interfering with the desired result."[168] Because people of color were systematically excluded from juries,[169] most of these cases were tried before all-White juries. In extreme cases, defendants were convicted and sentenced to death on the same day—without assistance of counsel.[170] Racial boundaries previously policed through mob violence mutated into legalized lynching involving courts, juries, law enforcement, and the watchful eyes of lynch mobs.

2. Judicial and Legislative Changes in the Mid-Twentieth Century

During the mid-twentieth century, domestic and international social movements and other political activities led to changes in judicial and legislative responses to racial inequality. Racial change was influenced by the growing voting power of persons of color, caused in large part by migration of southern Blacks to the Midwest and Northeast,[171] waning of biological notions of race following World War II,[172] antiracist social movement activity,[173] and concern among federal officials that racism undermined efforts to depict the United States as the morally superior counterpart to the Soviet Union during the Cold War.[174] Despite this progress, one of the most horrendous uses of criminal law to subjugate people of color occurred during World War II when the United States subjected Japanese Americans to internment due to xenophobia, stereotypes of Asian Americans as foreigners, and preexisting historical racism against Asian

day; defendant argued confession was coerced by law enforcement, who threatened to turn him over to mob); Liggon v. State, 200 S.W. 530, 534–35 (Tex. Crim. App. 1918) (granting a new trial for a Black male defendant accused of murdering a White man, where the facts indicated that a mob had harassed the defendant and jury, that counsel was appointed the night before trial, and that the defendant was tried and sentenced to death in two days).

167. Graham v. State, 82 S.E. 282, 283 (Ga. 1914) (reversing the denial of a change in venue for a Black defendant accused of murder, due to widespread support in the community for lynching and the sheriff's promise to a mob that the defendant would receive the "severest penalty known to the law" if the crowd dissipated).

168. Moore v. Dempsey, 261 U.S. 86, 87–90 (1923).

169. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 50 (1932).

170. *See, e.g.*, *id.* (reversing the conviction and death sentence of Black males who had been accused of raping White women and who were convicted of doing so without assistance of counsel after a one-day trial with an all-White jury).

171. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 100 (2004).

172. *See* PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 175 (1999).

173. *See* Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1522–24 (2005).

174. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 27–46 (2000); Hutchinson, *supra* note 102, at 949–50.

Americans in western states.[175] The Supreme Court validated this racist use of criminal law in *Korematsu v. United States*.[176]

Racial progress continued through the mid-century with advances for people of color, women, LGBTQ populations, and people suffering economic deprivation. The Civil Rights Movement led to the final dismantling of most formal racial discrimination in state and federal law.[177] Judicial changes occurred as well. The Warren Court is known for its civil rights rulings, but during this same time period, the Supreme Court issued liberal rulings expanding requirements of due process to state and local governments. This "criminal procedure revolution" broadened civil liberties related to criminal law and enforcement.[178] Because many of these cases involved mistreatment of persons of color, some scholars have regarded them as a form of "race law."[179] Despite the revolution, racial inequality has persisted.[180]

3. Contemporary State of Criminal Justice Practice

The Warren Court's liberal treatment of criminal law practices came to a halt during the early-1980s as the Burger Court issued more conservative rulings.[181] Scholars point to several factors to explain the demise of the criminal justice revolution and subsequent dramatic rise in punitiveness, incarceration, and expansive surveillance. Although no consensus exists, many researchers attribute the law-and-order shift to national disdain for criminal procedure reforms, backlash to 1960s social movement gains, racism, and an increase in violent crime and drug use.[182] State and federal lawmakers responded to these

175. *See* Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 955–58 (2004).

176. 323 U.S. 214, 223 (1944) (validating exclusion of all persons of Japanese descent because "[t]here was evidence of disloyalty on the part of some"). The government distorted and fabricated claims of disloyalty and threats to national security in documents submitted to the Court. *See* Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J.F. 688, 693–98 (2019).

177. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378 (1988) ("The response to the civil rights movement was the removal of most formal barriers and symbolic manifestations of subordination.").

178. Donald A. Dripps, *Does Liberal Procedure Cause Punitive Substance? Preliminary Evidence from Some Natural Experiments*, 87 S. CAL. L. REV. 459, 474 (2014).

179. *See, e.g.*, Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 106 (2005); *see also* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1388 (2004); Mark Tushnet, *Observations on the New Revolution in Constitutional Criminal Procedure*, 94 GEO. L.J. 1627, 1627 (2006); Klarman, *supra* note 153.

180. Crenshaw, *supra* note 177, at 1378–79 (arguing that formal equality cannot undo racial hierarchy).

181. George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 191 n.112 (2005).

182. *See, e.g.*, Hadar Aviram, *What Were "They" Thinking, and Does It Matter? Structural Inequality and Individual Intent in Criminal Justice Reform*, 45 L. & SOC. INQUIRY 249, 252 (2020) (discussing racism); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth*

concerns by lengthening sentences, eliminating parole, expanding the number of crimes, and enacting measures to sentence recidivists to life.[183] Prosecutors dramatically increased the amount and severity of charges against defendants and the frequency of prosecution.[184]

The more punitive approach to crime led to a pronounced rise in the incarcerated population in the United States, which now consists of 2.3 million people.[185] In the last forty years, the rate of incarceration has increased by a measure of 400 percent, making the United States the leading country for incarceration.[186] Studies on race and crime show substantial racial disparities across a broad spectrum of criminal justice practices. These inequities are particularly large with respect to Blacks and Latinx populations.[187] Persons of color are disproportionately policed;[188] arrested;[189] subjected to pretrial detention,[190] which enhances likelihood of conviction;[191] and sentenced to

Amendment: A Revisionist Account, 94 N.Y.U. L. REV. 1465, 1532 (2019) (same); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 24–25 (2012) (discussing how mass incarceration was fueled not only by the War on Drugs, but also by violent crime); Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230 (2007) (discussing 1960s social change, rising crime, and race).

183. *See* Traci Schlesinger, *The Failure of Race Neutral Policies: How Mandatory Terms and Sentencing Enhancements Contribute to Mass Racialized Incarceration*, 57 CRIME & DELINQ. 56, 56–61 (2011) (discussing enhanced and mandatory sentences); Jeffrey Lin, *Parole Revocation in the Era of Mass Incarceration*, 4 SOCIO. COMPASS 999, 1001–07 (2010) (linking revocation of parole to increased incarceration).

184. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 127–59 (2017) (discussing prosecutorial discretion and its contribution to mass incarceration).

185. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/PS76-WT5M].

186. Mirko Bagaric, Sandeep Gopalan & Marissa R. Florio, *A Principled Strategy for Addressing the Incarceration Crisis: Redefining Excessive Imprisonment as a Human Rights Abuse*, 38 CARDOZO L. REV. 1663, 1670 (2017).

187. April D. Fernandes & Robert D. Crutchfield, *Race, Crime, and Criminal Justice: Fifty Years Since* The Challenge of Crime in a Free Society, 17 CRIMINOLOGY & PUB. POL'Y 397, 407–08 (2018) (discussing criminal justice policies that disparately impact Blacks and Latinx persons).

188. Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1485 (2016) (discussing Blacks' "disproportionate contact with the police").

189. Vida B. Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violates* Batson, 34 YALE L. & POL'Y REV. 387, 389 (2016) ("A significantly higher percentage of people of color have arrest records due to the disproportionate number of stops, searches, and arrests of people of color.").

190. Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 895 (2003) ("[Latinx] and black defendants are "more likely than white defendants to be denied [pretrial] release."); Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 KAN. L. REV. 879, 898 (2009) (finding that "black offenders were more likely than white offenders, and male offenders were more likely than female offenders, to be held in custody prior to the sentencing hearing").

191. *See* Demuth, *supra* note 190, at 876 ("[P]retrial detention may interfere with the defendant's ability to prepare an adequate defense and may lead to more severe sanctions upon conviction." (internal citations omitted)).

incarceration.[192] Furthermore, persons of color receive less-favorable plea offers from prosecutors[193] and longer prison sentences than similarly situated Whites.[194] People of color are vastly overrepresented in U.S. prison populations,[195] and they suffer substantially higher economic detriment from incarceration than Whites.[196] Former offenders of color have far greater difficulty obtaining jobs than White offenders,[197] which means that incarceration exacerbates preexisting racial inequality. Incarceration greatly impacts educational opportunity and contributes to inherited inequality.[198] Furthermore, the trauma of incarceration causes many long-lasting harms to one's health.[199] Criminalization also disproportionately exposes persons of color to the same types of historical past practices prohibited by formal racial equality norms. These include coerced and unpaid labor;[200] the deprivation of the right to vote,

192. *See* William D. Bales & Alex R. Piquero, *Racial/Ethnic Differentials in Sentencing to Incarceration*, 29 JUST. Q. 742, 743, 747 (2012) (finding a higher rate of sentencing to incarceration for Blacks and Latinx persons relative to Whites).

193. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 805–22 (2012) (discussing the disparate racial impact of prosecutorial decisions).

194. *See* Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 283–85 (2010) (discussing race-based sentencing disparities).

195. Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 140 (2018); *see also* Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners' Political Representation*, 45 FORDHAM URB. L.J. 323, 327 (2018) ("Mass incarceration and its collateral consequences, such as loss of voting rights, disproportionately affect people of color."); Beth Ribet, *Naming Prison Rape as Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy*, 17 VA. J. SOC. POL'Y & L. 281, 292 (2010) (discussing "disproportionate racial composition of the prison population by people of color").

196. *See* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 939, 952 (2003) (finding that incarceration detrimentally impacts job opportunities); Christy A. Visher, Sara A. Debus-Sherrill & Jennifer Yahner, *Employment After Prison: A Longitudinal Study of Former Prisoners*, 28 JUST. Q. 698, 712 (2011) (discussing obstacles to formerly incarcerated persons finding employment).

197. *See* Pager, *supra* note 196, at 937; Visher et al., *supra* note 196, at 712 (finding that "nonwhite ex-prisoners . . . had poorer employment outcomes and may have experienced discrimination in their search for jobs after release").

198. *See* David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOCIO. EDUC. 36, 54–55 (2013) (finding that juvenile arrests impair educational attainment of the defendants by increasing the likelihood of high school dropouts and reducing the likelihood of college enrollment); Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DÆDALUS, Summer 2010, at 8, 13–14 (finding that mass incarceration exacerbates disadvantage, stifles social mobility for society's most marginalized, and contributes to "intergenerational inequality"); *see also* Sara Wakefield & Christopher Uggen, *Incarceration and Stratification*, 36 ANN. REV. SOCIO. 387, 388–89 (2010) (discussing studies that demonstrate how incarceration deprives inmates of opportunities to find work or educational training).

199. Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 LAW & SOC'Y REV. 275, 294 (2008) (finding "strong negative effect of incarceration on health").

200. The Thirteenth Amendment prohibition of slavery and involuntary servitude does not apply to "punishment for crime." U.S. CONST. amend. XIII, § 1; *see also* Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 606 (1989) ("Specifically, courts have uniformly

hold office, or serve on juries;[201] and diminished opportunities for education.[202] The racial distribution of the negative effects of criminal law and enforcement implicates equal protection—a concern that lies at the heart of the Fourteenth Amendment and the history surrounding its ratification.

II.
CONTEMPORARY THEORIES OF RACISM AND JUDICIAL VALIDATION OF RACIALLY DISCRIMINATORY CRIMINAL JUSTICE POLICIES

Criminal justice policies continue to subjugate persons of color, despite the move to race neutrality within the law and the societal embrace of egalitarianism. Social scientists have developed theories that explain why racism continues. This research also links new forms of racism to punitive sentiment.

A. New Racism Theories and the Persistence of Racial Inequality

In 1987, Charles Lawrence published his influential work on unconscious bias.[203] Lawrence was one of the first legal scholars to contend that racial prejudice existed beyond the realm of conscious awareness. Borrowing from Freudian theories of psychology, Lawrence argued that Supreme Court doctrine that assumed the legitimacy of racially disparate state action resulted due to the Court's failure to grapple with unconscious racism.[204] Subsequent to Lawrence's research, social scientists, primarily in the fields of sociology and social psychology, have published a wide body of works seeking to explain the persistence of racial inequality and other forms of social hierarchy despite pervasive acceptance of formal equality as a legal and cultural norm.

Three of the leading social science theories of contemporary racism include implicit bias, racial resentment, and social dominance theory.

1. Implicit Bias

Implicit bias research builds upon findings in psychology on the nonconscious or implicit influences of human behavior,[205] like stereotypes and

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rejected claims that the prison-labor system imposes involuntary servitude in violation of the thirteenth amendment.").

201. Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1852–53 (1999) ("[M]any states still deny ex-felons basic rights that define membership in the community, like the right to run for office, to serve on a jury, or even to cast a vote.").

202. Kirk & Sampson, *supra* note 198, at 54 (finding that juvenile arrests substantially reduce the probability of arrestees enrolling in college).

203. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

204. *Id.* at 318–27.

205. Nonconscious and implicit are used interchangeably. *See* Valentina Stoycheva, Joel Weinberger & Emily Singer, *The Place of the Normative Unconscious in Psychoanalytic Theory and Practice*, 31 PSYCHOANALYTIC PSYCH. 100, 101 (2014) (explaining that the terms "nonconscious" and "implicit" are equivalent, and that both accurately describe unconscious processes that are neither dynamically nor conflict driven).

attitudes. An implicit stereotype is "a mental association between a social group or category and a trait" occurring outside of a person's conscious awareness.[206] Implicit attitudes are nonconscious favorable or unfavorable dispositions towards something or someone.[207] While implicit bias refers to "discriminatory biases based on implicit attitudes or implicit stereotypes,"[208] implicit racial bias is a more specific category of racial prejudice that arises from nonconscious stereotypes and attitudes regarding racial groups.[209]

Researchers find that implicit biases are widespread and exist even when persons consciously embrace formal equality.[210] Implicit bias research has greatly influenced legal scholarship related to discrimination. Legal scholars contend that implicit bias could explain discriminatory behavior in a number of policy settings.[211]

It is also important to note that implicit bias correlates with racial hierarchy and other forms of group-based inequality. For example, members of more powerful social classes exhibit higher implicit bias towards outgroup members, while people in marginalized classes show lower levels of ingroup favoritism.[212] The pervasiveness of ingroup preferences among dominant classes could partly explain stratification along disparaged identity characteristics, including race.

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206. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 949 (2006).

207. *Id.* at 948.

208. *Id.* at 951.

209. Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765, 819–20 (2017).

210. *See* Greenwald & Krieger, *supra* note 206, at 966 ("[A] substantial and actively accumulating body of research evidence establishes that implicit race bias is pervasive and is associated with discrimination against African Americans."); L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 864, 876–77 (2017) ("Implicit racial biases are activated by cues present in the environment such as skin color. Once activated, they can influence the behaviors and judgments of even the most egalitarian individuals in ways that sustain problematic and unwarranted racial disparities."); Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 429 (2007) (describing how the body of research on implicit bias has uncovered its pervasive nature, and how often such bias diverges from consciously reported beliefs and preferences).

211. *See generally* Charles R. Lawrence III, *Education Law: Unconscious Racism and the Conversation About the Racial Achievement Gap*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 113 (Justin D. Levinson & Robert J. Smith eds., 2012) [hereinafter ACROSS THE LAW] (discussing implicit racial bias in the education setting); Nancy Gerter & Melissa Hart, *Employment Law: Implicit Bias in Employment Litigation*, *in* ACROSS THE LAW, *supra*, at 80 (in employment litigation); Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1 (2009) (in election administration); Charles Ogletree, Robert J. Smith & Johanna Wald, *Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice*, *in* ACROSS THE LAW, *supra*, at 45 (in the criminal justice system); Robert J. Smith & G. Ben Cohen, *Capital Punishment: Choosing Life or Death (Implicitly)*, *in* ACROSS THE LAW, *supra*, at 229 (in capital sentencing procedures); R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169 (2006) (in the criminal justice system and contemporary society, more generally).

212. Lane et al., *supra* note 210, at 433–34.

2. Racial Resentment

Social scientists contend that a "new" form of racism impacts contemporary U.S. race relations.[213] According to this research, new racism differs from the pre-civil rights landscape in two important respects. Before the Civil Rights Movement, racism rested largely on biological notions of white superiority; it was also more overtly expressed.[214] Contemporary racism legitimizes the unequal racial status quo by portraying Blacks and other persons of color as transgressing "such traditional American values as individualism and self-reliance, the work ethic, obedience, and discipline."[215] Accordingly, biological inferiority no longer explains racial inequality, but Blacks' failure to engage in "hard work and diligent service" does.[216]

Racial resentment is one of the more theorized categories of new racism.[217] People who harbor racial resentment believe individual shortcomings—not systemic racism—cause racial inequality.[218] Racial resentment stems from Whites' belief that equal opportunity exists in the United States for all races.[219] Racial resentment also justifies opposition to policies that promote a racially egalitarian distribution of socially desirable resources.[220] Believing that racism no longer harms persons of color, "the racially resentful person is offended by claims of racism and racial discrimination and other racial justifications for

213. Adam M. Enders, *A Matter of Principle? On the Relationship Between Racial Resentment and Ideology*, 43 POL. BEHAV. 561, 563–64 (2021) (discussing new racism theories).

214. *See id.*

215. Donald R. Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 J. PERSONALITY & SOC. PSYCH. 414, 416 (1981).

216. *Id.*

217. *See* Katherine Cramer, *Understanding the Role of Racism in Contemporary US Public Opinion*, 23 ANN. REV. POL. SCI. 153, 154 (2020) ("In the past several decades, the dominant measure of symbolic racism in political science has been the racial resentment scale."); Enders, *supra* note 213, at 564 ("Racial resentment is, perhaps, the most widely employed operationalization of symbolic racism."). Others include "laissez-faire" and "color-blind" racism. *See, e.g.*, Lawrence Bobo, James R. Kluegel & Ryan A. Smith, *Laissez-Faire Racism: The Crystallization of a Kinder, Gentler, Antiblack Ideology*, *in* RACIAL ATTITUDES IN THE 1990S 15, 16 (Steven A. Tuch & Jack K. Martin eds., 1997) (arguing that entrenched racial inequality is now "accepted and condoned under a modern free market or laissez-faire racist ideology"); EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 53–76 (5th ed. 2017) (situating "color-blind racism" within "new racism" theories).

218. Steven A. Tuch & Michael Hughes, *Whites' Racial Policy Attitudes in the Twenty-First Century: The Continuing Significance of Racial Resentment*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 134, 135–36 (2011) (discussing how the individualist framing in racial resentment theory leads adopters to attribute racial inequality to factors such as individual ability or motivation).

219. *Id.*

220. Antoine J. Banks & Nicholas A. Valentino, *Emotional Substrates of White Racial Attitudes*, 56 AM. J. POL. SCI. 286, 288 (2012) ("The politics-centered approach suggests people oppose racial policies such as affirmative action not because the recipients are black, but because they . . . undermine individual initiative. Violating these values via government policy could generate anger if people believe blacks are intentionally demanding unfair treatment in comparison to other groups.").

[remedial programs]."[221] They feel that "attempts to present race as a rationale for social problems, inequality, or celebration are invalid and unfair."[222]

3. Social Dominance Theory

Social dominance theory could also potentially explain the persistence of racial hierarchy, despite the legalization of formal equality. In their pathbreaking work on the subject, Jim Sidanius and Felicia Pratto observed that group-based hierarchy exists in every human society and that such social arrangements are inevitable.[223] Resource distribution is skewed in hierarchical societies. Powerful groups have more meaningful social resources, such as higher-paying jobs, superior education, desirable housing, and quality healthcare, while powerless groups have access to inferior goods and services and are disproportionately susceptible to severe social sanctions.[224] Widely held "legitimizing myths"—or "attitudes, values, beliefs, stereotypes, and ideologies"—justify substantive inequality.[225] For example, the racist ideology and belief that merit determines social status is widely held and used to justify racial inequality and discrimination in the United States.[226] Scholars describe an individual's preference for socially dominant class relations as "social dominance orientation" (SDO).[227] A higher SDO score means the individual prefers socially dominant societies and opposes egalitarian policies. Consistent with implicit bias and racial resentment, privileged group members support policies that reinforce the subordinate status of outgroup members; they also have higher levels of SDO.[228]

B. Contemporary Theories of Racism and Punitive Sentiment

Social scientists have examined the relationship between racism and punitive sentiment. These scholars consistently find that implicit racial bias, racial resentment, and social dominance orientation strongly suggest Whites' support for harsh criminal sanctions and aggressive policing. Although these studies do not prove causation, the consistency of the findings raises compelling concerns regarding racial inequities resulting from anticrime policies. If racism predicts punitive sentiment, many criminal justice policies that disparately harm

221. David C. Wilson & Darren W. Davis, *Reexamining Racial Resentment: Conceptualization and Content*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 121 (2011).

222. *Id.*

223. JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION 31 (1999).

224. *Id.* at 31–32.

225. *Id.* at 45 (describing how these legitimizing myths provide moral and intellectual justifications for how resources are distributed within the social system).

226. *See* Jim Sidanius, Erik Devereux & Felicia Pratto, *A Comparison of Symbolic Racism Theory and Social Dominance Theory as Explanations for Racial Policy Attitudes*, 132 J. SOC. PSYCH. 377, 381 (1992).

227. SIDANIUS & PRATTO, *supra* note 223, at 61.

228. *Id.* at 77.

persons of color could result from racial bias, which would challenge the Supreme Court's presumption of constitutionality to facially neutral but racially injurious criminal justice practices.

1. Implicit Bias and Punitiveness

Research on the correlation between implicit bias and punitiveness often involves simulations. The well-cited shooter studies, for example, require participants to look at a screen and watch for images of persons to appear.[229] Participants are instructed to shoot the person on the screen if they have a gun; this is done by pressing a button. These studies have consistently found that participants mistakenly shoot unarmed Black and fail to shoot armed Whites.[230] Other implicit bias studies involve participants witnessing certain encounters and rating the behavior as horseplay or aggression. These studies find that Whites are typically described as engaging in playful activity, while Blacks are rated as being violent or aggressive.[231] This holds true even when the actors are engaging in the same level of aggression or playfulness.[232] Implicit bias studies have also measured participants' nonconscious biases and then asked them to issue sentences for hypothetical criminal defendants. The jury simulations usually find that when Whites and Blacks commit the same crimes, the mock jurors give more leniency to Whites.[233] Recent research by Justin D. Levinson, Robert J. Smith, and Koichi Hioki replicates findings in previous jury studies.[234] Levinson and his colleagues assembled a participant pool of 522 jury-eligible persons from around the United States and designed a test to measure correlation between implicit racial bias and desire for retribution or mercy, including preference for

229. Lane et al., *supra* note 210, at 429–30.

230. *Id.*

231. *See, e.g.*, Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCH. 590, 596 (1976) ("The findings are disquieting, though they confirm intuitions and social indicators. White university subjects perceived the 'somewhat ambiguous,' certainly less than blatant shove as violent (and labeled it thusly) for all conditions in which the black was the harm-doer, to a greater extent when the victim is white, but also when the victim was another black."); H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCH. 590, 596 (1980) ("Duncan's experiment and the present study, with their complementary methodological strengths, together provide clear evidence that even relatively innocuous acts by black males are likely to be considered more threatening than the same behaviors by white males.").

232. *See, e.g.*, Duncan, *supra* note 231, at 592–93 (discussing a study with behavior scripted and portrayed by Black and White actors); Sagar & Schofield, *supra* note 231, at 594 (discussing a study of responses to behavior portrayed in different pictures with race manipulated); *see also* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1580–81 (2013) (discussing the "Black-as-Criminal" stereotype).

233. Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 190, 207 (2010).

234. Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839 (2019).

the death penalty. The study found that implicit racial bias positively correlated with desire for retribution, including preference for capital punishment.[235]

2. Racial Resentment and Punitiveness

Social scientists have also found strong positive correlation between racial resentment and punitiveness.[236] Recall that racial resentment reflects Whites' beliefs that people of color have equal opportunities to succeed but that they do not comply with cultural norms for social advancement. Accordingly, racial resentment could lead Whites to believe that the racial inequality in criminal justice policies stems from the deviant behavior of people of color, rather than systemic racism.

Researchers have found that racial resentment correlates with Whites' support for a range of punitive practices, including aggressive policing;[237] harsher and lethal sentencing;[238] and allocating more resources to fund punitive, rather than rehabilitative, policies.[239] With respect to police practices, racial resentment predicts Whites' support for use of force by officers.[240] J. Scott Carter and Mamadi Corra conducted a study in which participants responded to several questions to measure racial resentment and support for police use of force. After controlling for other variables that correlate with punitiveness, Carter and Corra found that "racial resentment" "continues . . . to play a strong role in affecting whites' attitudes toward the use of force toward citizens by the police."[241]

Based on this research, racial resentment could impede recent demands for broad changes in criminal justice policies made by Black Lives Matter and other progressive movements. For years, racial justice advocates have organized around the goal of defunding police.[242] This movement has grown and become

235. *Id.* at 879.

236. *See, e.g.*, Justin T. Pickett, Daniel Tope & Rose Bellandi, "*Taking Back Our Country": Tea Party Membership and Support for Punitive Crime Control Policies*, 84 SOCIO. INQUIRY 167, 181 (2014) (finding a strong relationship between racial resentment and punitiveness); James D. Unnever & Francis T. Cullen, *Social Sources of Americans' Punitiveness: A Test of Three Competing Models*, 48 CRIMINOLOGY 99, 115 (2010) (finding that "racial resentment . . . significantly predicts greater support for a punitive approach to crime and the death penalty").

237. J. Scott Carter & Mamadi Corra, *Racial Resentment and Attitudes Toward the Use of Force by Police: An Over-Time Trend Analysis*, 86 SOCIO. INQUIRY 492, 507 (2016).

238. Elizabeth K. Brown & Kelly M. Socia, *Twenty-First Century Punitiveness: Social Sources of Punitive American Views Reconsidered*, 33 J. QUANTITATIVE CRIMINOLOGY 935, 948, 957 (2017) (finding a significant correlation between racial resentment and severity of sentences).

239. R.C. Morris & Ryan Jerome LeCount, *The Value of Social Control: Racial Resentment, Punitiveness, and White Support for Spending on Law Enforcement*, 63 SOCIO. PERSPS. 697, 711 (2020) (finding "racial resentment" significantly correlated with "white self-reported support for spending on police/law enforcement").

240. Carter & Corra, *supra* note 237, at 507.

241. *Id.*

242. Steven W. Thrasher, Opinion, *New York's Newest Protesters Are Right: It's Time to Defund Police*, GUARDIAN (Aug. 3, 2016), https://www.theguardian.com/commentisfree/2016/aug/03/new-york-millions-march-nyc-black-lives-matter-defund-police [https://perma.cc/L29Y-APWH].

more visible since the death of George Floyd.[243] The concept of defunding the police has several different meanings. Some proponents take the phrase literally: they want a complete dismantling of police departments and reallocation of money that funds them to social welfare programs.[244] Others take a more moderate position, calling for retention of police departments along with a reduction in funding to allow more spending on social welfare programs.[245] Regardless of which view prevails, the movement to reduce or cancel police spending could face challenges due to racial resentment. Indeed, as sociologists R. C. Morris and Ryan Jerome LeCount found in their research, White racial resentment, independent of other variables, strongly correlates with preferences for *increased* funding of police.[246]

3. Social Dominance Orientation and Punitiveness

Social dominance theorists contend that societies "structured as group-based social hierarchies" will more likely impose "harsh criminal sanctions" on "members of subordinate social groups" rather than on "members of dominant social groups."[247] From the perspective of social dominance theorists, the "use of harsh criminal sanctions," like "the death penalty and severe torture," helps to preserve "social order" and "the *hierarchical* nature of this social order."[248] Because social dominance theorists have found a strong and consistent correlation between SDO and support for harsh punishment, they have argued "that one can easily identify which social groups are subordinate within a social system by simply noting which groups are overrepresented in that society's prisons, dungeons, or execution chambers."[249]

Jim Sidanius, along with other researchers, examined the interaction of SDO and support for the death penalty.[250] These researchers measured participants' SDO; criminal justice beliefs—specifically general beliefs and specific deterrence and retribution; support for the death penalty; general punitiveness; and belief in the use of lethal torture.[251] The team of researchers

243. Jon Schuppe, *What Would It Mean To 'Defund the Police'? These Cities Offer Ideas*, NBC NEWS (June 10, 2020), https://www.nbcnews.com/news/us-news/what-would-it-mean-defund-police-these-cities-offer-ideas-n1229266 [https://perma.cc/A3VV-MLCF].

244. Henry Goldman, *Why 'Defund the Police' Is a Chant with Many Meanings*, BLOOMBERG (June 9, 2020), https://www.bloomberg.com/news/articles/2020-06-09/why-defund-the-police-is-a-chant-with-many-meanings-quicktake [https://perma.cc/X7FH-APDT].

245. *Id.*

246. Morris & LeCount, *supra* note 239, at 711.

247. Jim Sidanius, Michael Mitchell, Hillary Haley & Carlos David Navarrete, *Support for Harsh Criminal Sanctions and Criminal Justice Beliefs: A Social Dominance Perspective*, 19 SOC. JUST. RSCH. 433, 435 (2006).

248. *Id.* at 436.

249. *Id.* at 435.

250. *Id.* at 437, 439.

251. General deterrence means disincentivizing criminal activity among the public at large, while specific deterrence refers to the prevention of additional crimes by the guilty party through incapacitation. Retributive punishment means use of legal sanctions to exact revenge. *See id.* at 437–40.

hypothesized that SDO would positively correlate with support for capital punishment and criminal justice beliefs.[252] They also expected that criminal justice beliefs "significantly mediate[]" any correlations between SDO and punitiveness.[253] The study found that SDO positively and significantly correlated with all dependent variables, including criminal justice beliefs, and support for the death penalty, punitiveness, and lethal torture.[254] The study also found that criminal justice beliefs "made independent and statistically significant contributions" to support of the death penalty, but retribution had the most robust correlation to SDO.[255] The dependent variables did not mediate SDO's correlation to punitiveness[256] or lethal torture.[257]

Another study on SDO and punitive sentiment found that people with high SDO generally favor retribution more strongly than people with low SDO, but their support for retribution is even higher toward low-status individuals.[258] In this study, participants answered a series of questions designed to measure their support for retributive justice. The study modeled social status using a ladder with ten steps, with one being the lowest status and ten being the highest. High-status individuals occupied the top rungs of the ladder, and they possessed "the most money, . . . education, and . . . respected jobs."[259] Folks occupying the bottom steps of the ladder were low-status and had "the least money, . . . education, and . . . respected jobs" or were unemployed.[260] Participants then answered questions designed to measure their support for retributive justice. Finally, participants disclosed the social position of the criminal they imagined while answering the retributive justice questions. The results of the study confirmed a correlation between SDO and punitive sentiment. Persons with high SDO were generally more retributive, but their retribution scores were higher toward low-status individuals.[261] This correlation provided additional support for

252. *Id.* at 436.

253. *Id.* at 437. A mediating variable is intermediate in the relationship between the independent and dependent variables (like SDO and support for the death penalty). They help explain why the independent and dependent variables are correlated. *See* DAVID P. MACKINNON, INTRODUCTION TO STATISTICAL MEDIATION ANALYSIS 1 (2008).

254. Sidanius et al., *supra* note 247, at 440. For additional research on this subject, see Michael Mitchell & Jim Sidanius, *Social Hierarchy and the Death Penalty: A Social Dominance Perspective*, 16 POL. PSYCH. 591, 608 (1995) (finding that the level of inequality in a society is positively correlated with use of the death penalty).

255. Sidanius et al., *supra* note 247, at 441.

256. *Id.* at 443 (stating that punitiveness "was . . . found to be a result of the direct effect of SDO").

257. *Id.* at 444 (finding that SDO had a strong and independent correlation with support for lethal torture and that specific deterrence provided "partial" mediation).

258. Liz Redford & Kate A. Ratliff, *Retribution as Hierarchy Regulation: Hierarchy Preferences Moderate the Effect of Offender Socioeconomic Status on Support for Retribution*, 57 BRIT. J. SOC. PSYCH. 75, 81 (2018).

259. *Id.* at 79.

260. *Id.*

261. *Id.* at 81.

the possibility that criminal justice policies continue to play a primary role in the subjugation of people of color and the preservation of White supremacy.[262]

What do the results of this research mean? Recall that social dominance theory posits that in societies with group-based hierarchies, dominant classes create legitimizing myths to justify marginalization of subordinate classes. They use these myths to justify the use of state violence and other legal sanctions to control subordinates and the existence of group-based hierarchy. Deterrence and retribution could operate as legitimizing myths that mask SDO and validate inequality and social control of subordinates. Furthermore, because this research finds strong correlation between SDO and punitiveness, it suggests that Whites might support or impose harsher sanctions upon persons of color to perpetuate social dominance over racial subordinates.

This research does not demonstrate causation. Nevertheless, most of the studies discussed above find that racism is a substantial predictor of punitive sentiment among Whites. Punitive sentiment affects criminal justice policies because politicians respond to public opinion by supporting tough anticrime measures.[263] Racism from individual policymakers and the public,[264] and politicians stoking racist attitudes or fear of crime, can influence attitudes regarding crime.[265] Although several factors shape criminal justice policies, public opinion is part of the equation.[266] Despite the influence of punitive sentiment in perpetuating racially disparate anticrime policies, Court doctrine dismisses the relevance of both historical and contemporary racism to racial equality claims challenging institutional racism in the context of criminal law and enforcement.

262. *Id.* at 90 ("When disparately directed at low-status social groups, punitive policies can further those groups' disadvantage. . . . Such status-based punitive disparities can even bolster support among high-status groups: White participants who read about highly disproportionate Black inmate representation are more supportive of such policies." (internal citations omitted)).

263. Kevin H. Wozniak, *Public Opinion and the Politics of Criminal Justice Policy Making: Reasons for Optimism, Pessimism, and Uncertainty*, 15 CRIMINOLOGY & PUB. POL'Y 179, 179 (2016) (discussing scholarship finding that "America's political system of democracy and direct electoral accountability formed a context in which punitive public sentiment supported the sentencing policies that undergird mass incarceration").

264. Kevin M. Drakulich & Eileen M. Kirk, *Public Opinion and Criminal Justice Reform: Framing Matters*, 15 CRIMINOLOGY & PUB. POL'Y 171, 172 (2016) ("Punitive attitudes are also driven by racial animus and concerns about racial integration.").

265. *Id.* at 172–73 ("[P]ublic support for punitive policies may be driven by political actors rather than vice versa."). *But see id*. at 173 ("These critiques should not be read as implying that public opinion is either meaningless or irrelevant to policy making. Opinion polls, in fact, can be used to help justify or legitimize policy proposals.").

266. Wozniak, *supra* note 263, at 179 (discussing scholarship linking political factors and public punitive sentiment to anticrime policies).

III.
THE INADEQUACY OF FORMALISTIC EQUALITY DOCTRINES TO REDRESS SYSTEMIC RACIAL INEQUALITY WITHIN CRIMINAL LAW AND ENFORCEMENT

The Fourteenth Amendment's Equal Protection Clause is a natural textual provision for contesting anticrime policies that disparately harm persons of color.[267] Nonetheless, Court doctrine has made equal protection litigation an inadequate tool for combatting pervasive racial inequality generally and within criminal law and enforcement. The resulting equality doctrine is inadequate because the Court discounts the history of racial subjugation through criminal law, employs an archaic understanding of racism, and fails to address the correlation of racism or racial bias and White punitive sentiment.

The Supreme Court has construed the Equal Protection Clause as guaranteeing formal equality. This doctrinal approach shows up primarily in the colorblindness doctrine, which presumes that any state action that classifies by race is unconstitutional, unless the policy can survive the rigors of strict scrutiny.[268] The discriminatory intent rule also represents a formalist approach. Unless state action facially discriminates on the basis of race or other suspect classifications, the Court assumes the policy is constitutional, regardless of statistical effects.[269] The Court has not deemed statistical evidence completely unrelated to a claim of unlawful discrimination.[270] In the absence of stark discriminatory patterns, however, the Court generally declines to rule in favor of plaintiffs.[271] In some cases, the Court has upheld policies with pronounced race and gender disparities.[272]

The discriminatory intent rule has received substantial academic criticism due to the high burden it places on equal protection plaintiffs.[273] The Court

267. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

268. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 222 (1995) ("With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments."). Strict scrutiny requires that a state action be narrowly tailored to achieve a compelling government interest. *See id.* at 227.

269. *See* Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 47–64 (2016) (discussing discriminatory intent rule precedent).

270. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266, (1977) (holding that "circumstantial and direct evidence of intent . . . may be available," and that this evidence could include "[t]he impact of the official action whether it 'bears more heavily on one race than another'" and "a clear pattern, unexplainable on grounds other than race"); Washington v. Davis, 426 U.S 229, 241 (1976) (holding that the intent rule does not require an explicit racial purpose, nor does it deem "disproportionate impact" "irrelevant," and that facially neutral statutes "must not be applied so as invidiously to discriminate on the basis of race").

271. *See Vill. of Arlington Heights*, 429 U.S. at 266.

272. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 269–71, 281 (1979) (upholding Massachusetts's absolute preference policy for veterans, which had an adverse, disparate impact for women applying for civil service positions).

273. *See, e.g.*, Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1144–61 (1998) (criticizing the Court's dismissal of discriminatory impact statistics in equal protection litigation); Damon J. Keith, *What Happens to a Dream Deferred: An Assessment of Civil Rights Law Twenty Years*

justifies the rule as a means of avoiding institutional overreach. Because many facially neutral laws negatively affect persons of color, strict scrutiny of such laws would leave a wide range of executive and legislative decisions susceptible to judicial invalidation.[274] The intent rule, however, discounts the legacy of racial injustice in the United States and assumes a post-racial status quo. It also ignores the subtle nature of discrimination explained by newer social psychology theories of racism and the correlation between racism and punitive sentiment.

A. Early Equal Protection Cases Suggesting Substantive Theory of Equality

Early Supreme Court decisions suggest a broad vision of substantive equality that prohibits racial oppression and subordination, rather than formal racial classifications alone. The Court first interpreted the Reconstruction Amendments in the *Slaughter-House Cases*[275] and held that their purpose was to secure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[276] *Slaughter-House*, however, also narrowly construed the authority of Congress and federal courts to enforce the Reconstruction Amendments.[277] This approach would greatly frustrate racial justice for persons of color. Nevertheless, *Slaughter-House* provided some support for a more emancipatory view of the Equal Protection Clause.

With respect to criminal law, the Court arguably applied a substantive conception of equality in the nineteenth century case of *Yick Wo v. Hopkins*.[278] *Yick Wo* involved a challenge to a San Francisco ordinance that prohibited the operation of laundries in wooden facilities.[279] Owners could obtain a waiver by petitioning the City Council.[280] The City Council granted waivers to all but one

After the 1963 March on Washington, 19 HARV. C.R.-C.L. L. REV. 469, 476 (1984) ("[T]he Court has imposed on the aggrieved party an almost insurmountable burden of proving discriminatory intent."); Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1405 (1988) (arguing that the discriminatory intent rule requires plaintiffs in racial discrimination cases to prove "that officials were 'out to get' a person or group on account of race").

274. *Davis*, 426 U.S. at 248 (arguing that a disparate impact standard would have "far-reaching" effects and could invalidate many laws that burden "the poor" and the "average black" more heavily than "the more affluent white"); McCleskey v. Kemp, 481 U.S. 279, 296–99 (1987) (defending proof of intentional discrimination on grounds that the Court should not interfere with juries, prosecutors, or state legislatures).

275. 83 U.S. (16 Wall.) 36 (1872).

276. *Id.* at 71.

277. *See* Lawrence, *supra* note 102, at 2149 ("In articulating his position, Justice Miller rejected the more far-reaching view of national rights proposed by the dissenting justices.").

278. 118 U.S. 356, 368 (1886).

279. The Supreme Court ruling in *Yick Wo* did not delve into the facts of the case, but the California Supreme Court ruling that petitioner appealed provided substantial details. *See id.* at 356–63.

280. *Id.* at 357–58.

White applicant and denied all of the waivers sought by Chinese Americans.[281] Yick Wo challenged his subsequent arrest on equal protection grounds, and the Court ruled in his favor, holding that the facially neutral law was "applied and administered by public authority with an evil eye and an unequal hand,"[282] rendering its administration a "denial of equal justice."[283] Although *Yick Wo* could support arguments for a more substantive equal protection analysis, the case only partially validated this view. Prior to *Yick Wo*, the Court upheld the San Francisco ordinance, denying a claim that it stemmed from animus against Chinese Americans.[284] Despite the history of racialized economic competition and anti-Asian violence in western states, the Court declined to inquire into the motivation of the legislature and invalidate a facially neutral statute.[285] Like many judicial opinions, *Yick Wo* can support multiple reasonable interpretations, but the Court has settled upon the most constrained interpretation of equality, despite having a reasonable doctrinal alternative.

Similarly, in *Strauder v. West Virginia,* the Court invalidated a law that prohibited Blacks from serving on juries.[286] The Court held that the Fourteenth Amendment bars "legal discriminations, implying inferiority," and that forms of state action inconsistent with this principle are "steps toward reducing [Blacks] to the condition of a subject race."[287] The Court's interpretation of the Equal Protection Clause could support a substantive view of equality. State action that does not classify on the basis of race can still subjugate people of color, as demonstrated by facially neutral provisions in the Black Codes and the racist application of the death penalty as lynching declined.[288] This conclusion was somewhat undermined by the Court's suggestion that exclusions limiting jury service "to males, . . . freeholders, . . . citizens, . . . persons within certain ages, or . . . persons having educational qualifications" would not violate the Equal Protection Clause.[289] These requirements, particularly those related to education and land ownership, would inevitably have excluded more people of color in the nineteenth century than today. Furthermore, the opinion expressed a then-prevailing view that gender discrimination was not unconstitutional.[290] As with *Yick Wo*, *Strauder* could reasonably support various interpretations of the Equal

281. *Id.* at 358–60.

282. *Id.* at 373–74.

283. *Id.* at 374.

284. Soon Hing v. Crowley, 113 U.S. 703, 706 (1885) (detailing the argument that the ordinance was rooted in animus, as seen in the history of subjugation of Chinese immigrants in the West).

285. *Id.* at 710 ("The motives of the legislators, considered as to the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments.").

286. 100 U.S. 303 (1880).

287. *Id.* at 308.

288. *See supra* Part I.C.1.

289. *Strauder*, 100 U.S. at 310.

290. *See* Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1551 (1991) (noting that the first case to find gender discrimination unconstitutional was Reed v. Reed, 404 U.S. 71 (1971), which invalidated a state law preferring men as administrators of estates).

Protection Clause, but the Court has chosen the narrowest view of equality—one that immunizes systemic racism from judicial invalidation.

B. Equal Protection and Criminal Justice Policies

Historically, criminal justice policies facilitated White dominance over persons of color. The Fourteenth Amendment and civil rights advocacy have eradicated formal racial discrimination from U.S. law and policy. Nonetheless, systemic racial inequality persists within criminal law and enforcement. Despite the racially disparate effect of anticrime policies, courts routinely sustain these policies in equal protection litigation.

The Court's formal equality doctrine is flawed for at least three substantial reasons, which are discussed in turn below. First, the Court treats as irrelevant the long history of criminal justice policies as mechanisms for preserving White supremacy. Second, the Court's rejection of historical racism is inconsistent. The Court invokes this history to justify application of strict scrutiny when Whites challenge remedial uses of race by state actors, but it discounts this history when persons of color contest state action that disparately harms them. Third, Court doctrine conflicts with academic research on contemporary modalities of racism and the linkage between racism and punitive sentiment. The Court employs an archaic and limited conception of racism that does not comport with contemporary theories that account for subtler manifestations of prejudice.

1. The Remoteness of Discriminatory History from Present-Day Policies

In litigation contesting racial disparities caused by criminal justice policies, courts are generally reluctant to assign significance to historical racism. This holds true even in cases involving policies with statistically significant racial correlation, long histories of racist enforcement, widespread present-day racial disparities, and detrimental consequences, including death. Consider *McCleskey v. Kemp*,[291] a case that has received substantial academic treatment.[292] McCleskey, a Black man convicted of murdering a White police officer, challenged his capital sentence by relying upon statistical data showing strong correlation between race and the administration of the death penalty in

291. 481 U.S. 279 (1987).

292. *See, e.g.*, Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in* McCleskey v. Kemp*—and Some Pathways for Change*, 112 NW. U. L. REV. 1269, 1280–89 (2018) (offering a historical reading of the Court's reasons for restricting inferences from statistical evidence in *McCleskey*); Barnes & Chemerinsky, *supra* note 158, at 1313–26 (observing how the Court's use of social science data in *McCleskey* differed from uses of such data in other cases); Jeffrey L. Kirchmeier, *The Supreme Court's Legacy on Race and Capital Punishment in* McCleskey v. Kemp, HUM. RTS. MAG., July 2015, at 14, 25 (discussing how the *McCleskey* decision continues to resonate); John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, *Post*-McCleskey *Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1780–98 (1998) (reviewing courts' published, post-*McCleskey* decisions).

Georgia.[293] Racial disparities existed with respect to both juries imposing the death penalty[294] and prosecutors deciding to seek execution as punishment.[295] McCleskey's data indicated that the victim's racial status correlated most strongly with prosecutor and juror decisions regarding capital punishment. Specifically, prosecutors and jurors preferred capital punishment most frequently in cases involving White victims.[296] The subset of cases involving White victims and Black defendants, however, was most likely to result in prosecutors and juries favoring capital punishment.[297]

These statistics are not unique to Georgia; indeed, most studies of capital punishment find similar patterns.[298] Furthermore, the death penalty became an instrument of racism during the early-twentieth century, replacing lynching as a method of enforcing racial hierarchy.[299] Patterns in the administration of Georgia's death penalty mirror a historical legacy of racism in criminal law and enforcement in Georgia and the United States.[300] McCleskey's attorneys connected contemporary racial disparities with historical racism.[301] Having rejected the relevance of historical racism, the Court described McCleskey's statistical data as "[a]t most" revealing "a discrepancy that appears to correlate with race."[302] Dissenting justices, by contrast, found the data alarming and constitutionally suspicious based on historical racism in the administration of criminal law,[303] the death penalty's racist enforcement,[304] and the pervasiveness of "unconscious racism."[305] Even accepting the debatable position that capital

293. *McCleskey*, 481 U.S. at 279.

294. *Id.* at 286 ("[The] death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims.").

295. *Id.* at 287 ("[P]rosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.").

296. *See id.*

297. *Id.* at 327 (Brennan, J., dissenting).

298. *See, e.g.*, Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2106–23 (2004) (analyzing numerous studies that indicate Black defendants are more often sentenced to capital punishment); Blume et. al., *supra* note 292, at 1781–83 (analyzing a study showing a strong disparity in the pursuit of capital punishment in cases involving Black defendants and White victims).

299. *See supra* Part I.C.1.

300. *See McCleskey*, 481 U.S. at 328–34 (Brennan, J., dissenting) (comparing the facts of the case with historical racism in criminal law and its enforcement).

301. Brief for Petitioner at 23, 35–40, *McCleskey*, 481 U.S. 279 (No. 84-6811), 1986 WL 727359 (discussing historical racial disparities in sentencing).

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

303. *See id.* at 328–29 (Brennan, J., dissenting) (arguing that historical racism provides context for viewing contemporary practices as racially discriminatory).

304. *Id.* at 330–32 (discussing precedent involving the Georgia death penalty).

305. *Id.* at 332–33 (discussing unconscious and ongoing racial bias).

punishment comports with due process, racially discriminatory application of the death penalty is unjustifiable. The Court, however, rejected this logic, finding that McCleskey's sentence was valid for an additional reason (besides a lack of intentional discrimination): murdering a police officer was an aggravating factor justifying imposition of the death penalty in Georgia's statutory scheme.[306] The Court's reasoning parallels the excuses law enforcement and governmental officials once used to justify their inaction toward lynching: the alleged crimes justified mob violence.[307] The Court can defend this conclusion only by treating McCleskey's statistics as unconnected to the historical legacy of racism and criminal law enforcement. The Court's decontextualized analysis legitimizes racism in a setting with grave and irreversible consequences.[308]

For example, *Hernandez v. New York*[309] involves the Court discounting historical racism and reaching a result that validates discrimination against Latinx persons. In *Hernandez*, a defendant challenged the prosecutor's use of peremptory strikes to exclude Latinx persons from the jury.[310] Historically, laws prohibited people of color from serving on juries,[311] but the Court held that racial exclusions from jury service violated the Constitution.[312] Additionally, the Court has held that equal protection applies to the use of peremptory challenges and has established a burden-shifting formula to determine whether exclusion of jurors violates the Constitution.[313] Nevertheless, this test fails to remove racism from the process of selecting jurors.[314]

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306. *Id.* at 297 (majority opinion) (holding that "a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty").

307. *See supra* Part I.B.3.a.

308. *See* United States v. Johnson, 40 F.3d 436, 440 (D.C. Cir. 1994) (rejecting historical evidence of racism related to congressional passage of drug laws because the Voting Rights Act's passage demonstrated that racism is mostly a figment of the past); United States v. Walls, 841 F. Supp. 24, 31 (D.D.C. 1994) (finding racial implications "too sparse, too tangential, or too remote in time to support a finding that a majority of Congress in 1986 intended the crack penalties to discriminate against blacks"), *aff'd in part*, 70 F.3d 1323 (D.C. Cir. 1995).

309. 500 U.S. 352 (1991).

310. *Id.* at 355–56.

311. Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 621 (1983) ("In most antebellum states free persons 'of color' were by law treated like whites for some purposes, and like slaves for other purposes: like whites, they were generally entitled to marry, contract, own personal property, sue and be sued; like slaves, they were generally prohibited from voting, from serving as jurors, and from holding public office.").

312. *See* Batson v. Kentucky, 476 U.S. 79 (1986); Hernandez v. Texas, 347 U.S. 475 (1954); Strauder v. West Virginia, 100 U.S. 303 (1879); Swain v. Alabama, 380 U.S. 202 (1965); *see also* Juan F. Perea, Hernandez v. New York: *Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1, 8 (1992) ("Both private litigants and the parties to a criminal action are prohibited from exercising peremptory challenges based on race.").

313. *See Batson*, 476 U.S. at 97 (developing the burden-shifting test).

314. *See* Jonathan Abel, Batson*'s Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 716–23 (2018) (discussing how *Batson* hinders fair juries by allowing prosecutors to make up justifications for striking jurors, requiring defendants to prove intentional discrimination in juror strikes, and providing too much deference to trial courts in making juror determinations).

Consider the prosecutor's explanation for striking all Latinx persons from the jury in *Hernandez*. The prosecutor claimed he wanted to avoid the possibility of bilingual Spanish and English jurors refusing to accept the interpreter's translation of Spanish testimony and replacing it with their own interpretation.[315] Justice Kennedy's plurality opinion validated the prosecutor's explanation as a race-neutral basis for excluding jurors, despite the drastic racially disparate impact.[316] Justice Kennedy's reasoning ignored the history of barring Latinx and other persons of color from juries[317] and the historical and contemporary use of language discrimination to marginalize Latinx communities. In past rulings, the Court invalidated facially neutral jury selection practices that excluded Latinx persons.[318] In those cases, the Court recognized historical subordination of Latinx people and held that exclusions based on language can implicate racial or national origin discrimination.[319] Justice Kennedy did suggest that under some unspecified circumstances, language might operate as a proxy for race.[320] Nevertheless, he analyzed Hernandez's racial discrimination claim outside of the context of contemporary and historical racism in criminal law and enforcement, and he argued that the exclusion of Latinx jurors does not violate the Equal Protection Clause.[321] Justice O'Connor (joined by Justice Scalia) wrote separately to state her opposition to any analysis that treats language as a proxy for race. Justice O'Connor's concurrence advocated for an extraordinarily rigid application of the discriminatory intent rule, irrespective of how severely state action impacts persons of color.[322]

Many state courts also require a finding of intent in cases alleging racial discrimination in criminal justice settings. In *Flores v. Texas*,[323] the Texas Court of Criminal Appeals affirmed a one-year sentence of incarceration in a county jail and a $100 fine for a Latinx defendant convicted of driving while

315. Hernandez v. New York, 500 U.S. 352, 356 (1991) ("I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses.").

316. *Id.* at 360 ("Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral.").

317. *See* Andrew McGuire, Comment, *Peremptory Exclusion of Spanish-Speaking Jurors: Could* Hernandez v. New York *Happen Here?*, 23 N.M. L. REV. 467, 468 (1993).

318. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 481 (1954) (finding racial discrimination in light of the state stipulating that "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County").

319. *See, e.g.*, *id.* at 479, 479 n.10 (discussing historical separation of Mexican-American and White children purportedly due to language, not race, and observing how these practices created racial injuries); *cf.* Lau v. Nichols, 414 U.S. 563, 566 (1974) (finding racial and national origin discrimination on statutory grounds in a school's English-only policy).

320. Hernandez v. New York, 500 U.S. 352, 371 (1991) ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.").

321. *Id.* at 359–72.

322. *See id.* at 375 (O'Connor, J., concurring).

323. 904 S.W.2d 129 (Tex. Crim. App. 1995) (en banc).

intoxicated.[324] The trial court had imposed a period of incarceration rather than probation due to the defendant's inability to speak English.[325] The judge explained that the lack of a county-sponsored Spanish-language alcohol education program meant that the defendant could not be rehabilitated absent incarceration.[326] While the judge acknowledged that the state conducted a program in Spanish, he stated without explanation that it "is worthless."[327] Finally, the judge found that probation would be futile and, accordingly, meted out punishment of "a one hundred dollar fine and one year in the county jail plus court cost."[328] The judge appeared to have chosen a harsher punishment due to the defendant's lack of English proficiency and the unavailability of alcohol education programs conducted in Spanish.

The defendant appealed his sentence on the grounds that consideration of English proficiency constituted racial or national origin discrimination, depriving him of due process and equal protection under the United States and Texas Constitutions. In his brief, the defendant argued that Spanish-language discrimination has historically been used to discriminate against Latinx communities and that the court should treat Spanish as a proxy for race or national origin.[329] He also argued that if language discrimination targets "persons of a recognized minority group," then this targeting supplies evidence or creates a presumption of unlawful discrimination.[330] However, the Texas court adhered to federal equal protection precedent, even though the plaintiff alleged equality claims under state law.[331] Relying on *McCleskey* and *Hernandez*, the court did not engage the long history of language discrimination against Latinx populations in the United States and in Texas, specifically.[332] Divorcing race-

324. *Id.* at 129–31.
325. *Id.* at 130.
326. *Id.*
327. *Id.* at 132 (Clinton, J., dissenting).
328. *Id.* at 133 (Overstreet, J., dissenting).
329. *Id.* at 134.
330. *Id.*
331. *Id.* at 131 (majority opinion) (deciding that the court "should not extend [the] use [of disparate impact analysis] into the criminal law absent direction from the U.S. Supreme Court or the Legislature," noting that the Supreme Court "requir[es] instead that discriminatory *intent* on the part of the State be proven in order to establish a violation of the Equal Protection Clause" (citing Hernandez v. New York, 500 U.S. 352 (1991); McCleskey v. Kemp, 481 U.S. 279 (1987)).
332. *Id.* On language discrimination and Latinx persons, see Jasmine B. Gonzales Rose, *Language Disenfranchisement in Juries: A Call for Constitutional Remediation*, 65 HASTINGS L.J. 811, 834 (2014) ("The Spanish language is central to Latin[x] identity, and discrimination on the basis of language has been a primary method of discriminating against and subordinating Latin[x persons] in the United States."); Juan F. Perea, Buscando América*: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1438 (2004) ("[Spanish] language discrimination has deep historical roots in attempts to extinguish Spanish and to replace it with English during eras of overt American conquest and colonialism."); Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules As the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CALIF. L. REV. 1347, 1365 (1997) ("Spanish-speaking ability is the historic basis upon which Anglo society discriminates against Latin[x persons]."). For a discussion of language discrimination against Latinx people in Texas,

equality claims from the historical and contemporary contexts of racial subjugation results in decisions like *Flores*, which erased nationality and racial markers from language discrimination.

2. The Court's Selective Uses of History

Although the Supreme Court has deemed historical racism irrelevant in discriminatory intent cases, the Court frequently conducts historical analyses to decide questions of constitutional law in other contexts. For example, originalist and nonoriginalist theories of constitutional interpretation rest on understandings of history.[333] The Court also uses history to resolve matters such as the meaning of text,[334] traditions governing a substantive due process ruling,[335] and whether history should control a decision.[336]

As relevant here, the Court has analyzed history from two additional perspectives that have substantially impacted equality litigation. First, the Court has invoked a history of racial discrimination against persons of color and precedent addressing those harms to justify applying strict scrutiny to any present-day racial classification, including those that serve remedial ends, like affirmative action.[337] The Court, however, has discounted this same history of discrimination when it has examined policies that, though facially neutral, replicate and strengthen racial inequality.[338] Second, historical discrimination influences the level of scrutiny courts apply in equal protection cases outside of race and gender classifications. A history of discrimination is one of several factors courts often consider when applying the suspect class doctrine.[339] If a

see, for example, United States v. Texas, 506 F. Supp. 405, 411–12 (E.D. Tex. 1981) (discussing language discrimination in Texas public schools), *rev'd on other grounds*, 680 F.2d 356 (5th Cir. 1982); José Roberto Juárez, Jr., *The American Tradition of Language Rights: The Forgotten Right to Government in a "Known Tongue,"* 13 LAW & INEQ. 443, 586–97 (1995) (discussing language discrimination in Texas history).

333. *See* Bertrall L. Ross II, *Paths of Resistance to Our Imperial First Amendment*, 113 MICH. L. REV. 917, 925 (2015).

334. *See* Robert Cooter, *Constitutional Consequentialism: Bargain Democracy Versus Median Democracy*, 3 THEORETICAL INQUIRIES. L. 1, 4 (2002).

335. *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 90–91 (2006).

336. *See* Brown v. Bd. of Educ., 347 U.S. 483, 489, 493 (1954).

337. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 218 (1995) (discussing race-equality precedent and conceding that "[m]ost of the cases discussed above involved classifications burdening groups that have suffered discrimination in our society"); Johnson v. California, 543 U.S. 499, 505 (2005) (citing to "special fears" caused by racial classifications to justify strict scrutiny).

338. *See* discussion on *Hernandez v. New York supra* Part III.B.1.

339. *See, e.g.*, Rishita Apsani, *Are Women's Spaces Transgender Spaces? Single-Sex Domestic Violence Shelters, Transgender Inclusion, and the Equal Protection Clause*, 106 CALIF. L. REV. 1689, 1715 (2018) ("The Court typically uses four factors to determine whether a group constitutes a discrete and insular minority that renders them a suspect class: (1) the group faced a history of discrimination; (2) the group lacks political power; (3) the classification is based on an immutable characteristic; and (4) the characteristic has no bearing on the group's ability to contribute to society."); Ronald C. Den Otter, *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 EMORY L.J. 1977, 2022 (2015) ("In deciding whether a particular group constitutes a suspect or quasi-suspect

group seeking redress from courts has experienced a history of discrimination, this weighs in favor of suspect class status and against a presumption that contemporary discrimination against the group is legitimate.[340] In both of these doctrinal settings, historical discrimination warrants judicial suspicion regarding contemporary practices. In other words, the legacy of racism and other forms of marginalization in the United States should inform judicial skepticism of present-day discrimination.

The Supreme Court treats historical racism as doctrinally insignificant when people of color contest facially neutral state action that disparately harms them. For example, in *McCleskey*, the Court held that historical racism in the administration of Georgia criminal law could not serve as "evidence of current intent."[341] Historical racism in the administration of criminal law, however, could have informed and contextualized the Court's analysis in several ways. History could have bolstered McCleskey's evidence of racial disparities in the administration of capital punishment. Specifically, due to the history of racial subjugation through criminal justice practices, McCleskey's statistics could have indicated that racism remains systemic, despite the achievement of formal equality.[342] The racist past also could have caused judicial skepticism regarding racial disparities, justifying application of a higher level of scrutiny, consistent with affirmative action cases.[343] Finally, just as historical discrimination indicates possible invidiousness under the suspect class doctrine, the legacy of racism could also have suggested impropriety in *McCleskey*.[344] The Court's inconsistent treatment of historical racism in equal protection cases, which rests on the thin reed of explicitness or overtness, legalizes racially injurious state action that imposes severe burdens, including death, upon persons of color.

3. Ignoring Contemporary Racism and Its Link to Punitive Sentiment

Academic research finds that racism is a substantial predictor of punitive sentiment among Whites,[345] which raises questions about the Court's presumption that racism normally does not influence criminal justice policies. The Court does not provide any empirical basis for this conclusion. Social science studies, however, link racism and harsh criminal justice policies, after controlling for numerous factors known to influence punitiveness.[346] This

class, the three criteria are: an immutable or fixed characteristic, political powerlessness, and history of discrimination.").

340. Apsani, *supra* note 339, at 1715 (discussing suspect-class doctrine); Otter, *supra* note 339, at 2022 (same).

341. McCleskey v. Kemp, 481 U.S. 279, 298 n.20 (1987) ("Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent.").

342. *See supra* Part I.C.1.

343. *See* cases cited *supra* note 337.

344. *See supra* note 339 and accompanying text.

345. *See supra* Part II.

346. *See supra* Part II.

research provides a more rigorous frame for evaluating claims of racial discrimination in the context of criminal law and enforcement. The Court simply concludes that racial discrimination only occurs as a matter of law when it is accompanied by some indication of intent.[347] The Court, however, does not consider the significance of the history of discrimination, new and evolving forms of racism, or the correlation between racism and punitiveness. The Court's doctrinal stance makes equal protection doctrine structurally inadequate to address systemic racism associated with criminal justice practices.

IV.
FASHIONING AN EQUALITY DOCTRINE TO COMBAT RACISM

Currently, activists, think tanks, and public officials continue to push for (and against) institutional changes to eradicate racial injustice associated with criminal justice practices and policies in other contexts. Legal scholars and lawyers should reinvigorate their work by infusing it with the same purpose of equal justice. Much of the recent criminal justice activism focuses on abusive practices in executive agencies like police departments, prosecutors' offices, and prisons.[348] Comparatively, courts have not received significant scrutiny as sources of systemic racism, despite the historical and contemporary judicial role in legalizing racial inequality. The judicial legitimization of racism occurs when courts, applying formal equality doctrines, validate discrimination against people of color, while erecting exacting—often insurmountable—barriers to policies designed to attenuate racial hierarchy.[349]

When contemporary courts uphold policies that impose severe and irreversible harms on communities of color, they participate in racial subordination, just like Jim Crow judges who presided over summary prosecution of Black defendants destined for conviction and harsh sanctions.[350] Jim Crow courts formalistically applied the law and deferred to legislatures, just as the Court does today. Where constitutional interpretation presents options, as it does in the context of equal protection,[351] courts should choose a substantive approach that responds more effectively to the violence of racial domination.

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347. *See supra* Part III.

348. *See, e.g.*, *BLM Demands*, BLACK LIVES MATTER, https://blacklivesmatter.com/blm-demands/ [https://perma.cc/F5KE-H6HL] (listing seven "demands" that focus almost exclusively on executives, including police, former President Trump, and President Biden).

349. *See supra* Part III.B.1.

350. *See supra* Part I.C.1.

351. *See, e.g.*, 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, 619–27 (describing potential interpretations of the meaning of equality and equal protection, as suggested by themes contained in judicial precedent and American history); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 939–45 (1989) (discussing five possible ways of interpreting the Equal Protection Clause: lack of impartiality, subordination, stigma, second-class citizenship, and encouragement of prejudice); Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's* Social Statics,

A. Content of Doctrinal Reform

The discriminatory intent rule is archaic. It remains unchanged after more than thirty years of academic criticism.[352] The Court's equality doctrine does not remedy racism that exists in the shadows of decision-making. Court doctrine fails because it unnecessarily employs a simplistic and limited conception of equality to analyze an issue as complex and resilient as racism.

A meaningful racial equality doctrine would instead give substantial weight to the historical and contemporary use of criminal law as an instrument of racial subordination. This history of violent oppression separates criminal law from many other areas of law. In other words, the intersection of race and criminal law is substantially different from other policy settings. A meaningful racial equality doctrine would also give substantial weight to historical analysis of specific policies, embrace social science research on the modalities of contemporary racism, discard the judicial presumption of constitutionality and deferential analysis for criminal justice policies with racially disparate effects, and engage social science literature finding a strong correlation between racism and punitive sentiment.[353]

1. The Intersection of Criminal Law and Race "Is Different"

Historical racism is not as lifeless and irrelevant as courts represent in equal protection cases. Instead, the ongoing legacy of racial subordination lives in the nation's institutional practices, the behavior and attitudes of its citizenry, and cultural norms and attitudes. The long historical use of criminal law to structure and preserve White supremacy makes anticrime policy a setting that warrants a skeptical judicial stance toward racial disparities that negatively affect persons of color. This more rigorous scrutiny would respond to the reality that criminal law continues to subjugate persons of color. It would also mean that the Court's equality doctrines would not routinely validate systemic racism.

In *McCleskey*, Justices Blackmun and Brennan made dissenting arguments that, though not fully theorized, provide some rudimentary elements of a stronger and more impactful equal protection doctrine.[354] Justice Blackmun argued that by denying the petitioner's claims, the Court had deviated from a tradition of

88 MICH. L. REV. 1366, 1367 (1990) (criticizing the "urge to identify a single animating philosophy or an overarching theory of equal protection").

352. Charles Lawrence published his influential article on the discriminatory intent rule in 1987. *See* Lawrence, *supra* note 203.

353. The focus on criminal law does not mean that this is the only legal context that warrants judicial skepticism due to its association with White supremacy. Indeed, one could make arguments regarding public and private education, employment, and housing. Furthermore, the concern with the Equal Protection Clause does not preclude application of the themes in this Article to other legal settings that implicate racism, such as criminal procedure doctrines, particularly those derived from the Fourth and Fifth Amendments.

354. *See* McCleskey v. Kemp, 481 U.S. 279, 345–67 (1987) (Blackmun, J., dissenting); *id.* at 320–45 (Brennan, J., dissenting).

closely scrutinizing constitutional challenges to capital sentences.[355] He criticized the majority's failure to recognize that "death is different."[356]

Justice Brennan responded to the Court's speculation that a victory for McCleskey would have led to expansive litigation challenging racial discrimination in other parts of the criminal justice system beyond racist application of the death penalty, such as equality claims filed by persons of color other than Blacks and challenges to gender discrimination.[357] Justice Brennan criticized the Court's Pandora's Box reasoning, arguing that it "seems to suggest a fear of too much justice."[358] Justice Brennan asserted that denying McCleskey's claim in order to prevent broader litigation regarding possible constitutional violations constitutes an abdication of judicial responsibility.[359] Brennan's dissent imagined more substantive equality and due process doctrines that closely scrutinize systemic racism throughout criminal law and enforcement.

Justice Blackmun's "death is different" passage recognized that some types of claims—such as those challenging state action with irreversible consequences—warrant more pressing judicial scrutiny. This is sound logic, but death is not the only type of state action or criminal justice policy with irreversible consequences or harmful effects that are extremely difficult to repair. Anticrime policies, including the death penalty, have helped structure racial hierarchy, contribute to intergenerational inequality, and deprive persons of liberty.[360] They impose stigmatic harm that impedes employment, causes poor physical and mental health, and deprives individuals of important political freedoms, like the right to vote.[361] The effects of criminal law and enforcement are deep and long-lasting—harming the individuals directly subjected to arrest, prosecution, and punishment, as well as their families and communities.[362] The intersection of race and crime is different. It justifies a departure from formal equality doctrines and concern for measurable racial inequities.

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355. *See id.* at 347–48 (Blackmun, J., dissenting) ("The Court today seems to give a new meaning to our recognition that death is different. Rather than requiring 'a correspondingly greater degree of scrutiny of the capital sentencing determination,' the Court relies on the very fact that this is a case involving capital punishment to apply a *lesser* standard of scrutiny under the Equal Protection Clause." (internal citation omitted)).

356. *Id.* at 347. Blackmun also argues that the Court should not deny relief to McCleskey because it could lead to greater scrutiny of criminal justice policies. *See id.* at 346.

357. The Court held that granting McCleskey relief would lead to judicial scrutiny of an expansive list of grievances, including claims asserting injuries to "other minority groups"; alleging anomalies related to "gender"; challenging conduct of other criminal justice actors, "such as defense attorneys" and "judges"; or contesting any other "arbitrary variable," like defendant's "facial characteristics, or the physical attractiveness of the defendant or the victim." The Court held that "there is no limiting principle to the type of challenge brought by McCleskey." *Id.* at 316–18 (majority opinion).

358. *Id.* at 339 (Brennan, J., dissenting). Like Justice Blackmun, however, Brennan also discussed the "uniqueness of the punishment of death." *Id.* at 340.

359. *Id.* at 339.

360. *See supra* notes 187–194, 198 and accompanying text.

361. *See supra* notes 196–202 and accompanying text.

362. *See supra* notes 196–202 and accompanying text.

2. Fundamental Doctrinal Change

A robust equality doctrine could contribute to the difficult work of achieving racial justice. This would require several important changes to the current doctrinal approach: (1) extending substantial weight to historical racism as a contextual lens for evaluating claims of discrimination, (2) utilizing academic research on complex modes of racism to inform adjudication of equal protection claims, (3) discarding the default presumption of constitutionality for facially neutral criminal justice policies that produce statistically significant racial disparities, (4) engaging social science data on the correlation of racism and punitive sentiment, and (5) assigning greater probative value to statistical patterns of discrimination. These moves would bring equal protection doctrine closer to antisubordination approaches advocated by legal theorists. Antisubordination theory recognizes the institutional and subtle nature of racism and supports judicial invalidation of facially neutral practices that sustain racial inequality, regardless of the intent.[363]

Some of these recommendations have been tested in precedent by dissenting judges,[364] judges whose rulings were overruled on appeal,[365] and judges deciding claims under state equality provisions.[366] Justice Brennan's dissenting opinion in *McCleskey*, for example, analyzed historical racism related to anticrime policies in Georgia[367] and acknowledged the existence of "unconscious racism,"[368] a precursor to more developed theories of contemporary racism. Also, state courts have conducted more rigorous scrutiny of disparate effects in criminal justice equal protection litigation, without the need for intent.[369] Moreover, courts have begun to consider evidence of implicit bias in discrimination cases.[370] State courts' acceptance of implicit bias research

363. *See* Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1, 65–66 (2015) (discussing antisubordination theory).

364. *See McCleskey*, 328–35 (Brennan, J., dissenting) (analyzing historical racism in Georgia's criminal justice policies).

365. *See* United States v. Clary, 846 F. Supp. 768, 774–76, 796 (E.D. Mo. 1994) (analyzing racial history of anticrime policies and finding crack and powder cocaine sentencing disparity unconstitutional), *rev'd*, 34 F.3d 709 (8th Cir. 1994).

366. *See* State v. Russell, 477 N.W.2d 886, 888 (Minn. 1991) (invalidating a sentencing disparity in Minnesota's crack and powder cocaine law using a stronger rational basis analysis under the state Constitution); State v. Gregory, 427 P.3d 621, 633–36 (Wash. 2018) (applying due process analysis, invalidating state death penalty based on statistical study showing racial application, and taking judicial notice of explicit and implicit bias).

367. *McCleskey*, 481 U.S. at 332 (Brennan, J. dissenting) ("[I]t would be unrealistic to ignore the influence of history in assessing the plausible implications of McCleskey's evidence.").

368. *Id.* at 332–33.

369. *See Russell*, 477 N.W.2d at 888 (invalidating crack and powder cocaine law without showing of intent for sentencing disparity).

370. *See, e.g.*, State v. Saintcalle, 309 P.3d 326, 335–37 (Wash. 2013) (en banc) (discussing implicit bias); Anthony Kakoyannis, *Assessing the Viability of Implicit Bias Evidence in Discrimination Cases: An Analysis of the Most Significant Federal Cases*, 69 FLA. L. REV. 1181, 1192 (2017) (observing that some courts are beginning to permit implicit bias evidence, while others still refuse).

could lead to usage of other social science data related to contemporary racism and punitive sentiment.

Elevating the significance of historical racism in equal protection claims related to criminal justice practices would represent a fundamental shift in equal protection jurisprudence. This change, however, would not require the Court to engage in completely unfamiliar analysis. On the contrary, the Supreme Court has frequently invoked historical racism in equal protection litigation, holding that a history of racial discrimination makes present-day racial affirmative action policies more suspicious.[371] Also, when applying the suspect class doctrine, the Court has held that a history of discrimination beyond race and gender could lead to application of more rigorous scrutiny for other types of equality claims.[372]

3. Alternatives to Federal Equality Litigation

The conservative ideological makeup of the federal courts means that a substantial progressive shift in equal protection doctrine will not likely occur soon. Litigants and social movements, however, have other options. An overwhelming majority of criminal law and enforcement activity happens at the state, rather than federal, level.[373] While many states follow Supreme Court precedent when they interpret analogous state constitutional provisions, some state courts depart from federal doctrines and apply more expansive notions of equal protection.[374] Consistent with the recommendations made herein, some state courts have given more weight to statistical patterns of discrimination, historical racial subordination, contemporary theories of racism, and the racist dimensions of punishment.[375] These rulings provide a blueprint for building a substantive equality doctrine needed to ameliorate systemic racism. Additionally, state and federal tort law could provide relief to race-equality litigants when redress is foreclosed or limited by restrictive constitutional doctrines.[376]

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371. *See* cases cited *supra* note 337.

372. *See supra* note 339 and accompanying text.

373. The National Center for State Courts found that in 2015, 18.1 million criminal law filings were made in state trial courts. RICHARD Y. SCHAUFFLER, ROBERT C. LAFOUNTAIN, SHAUNA M. STRICKLAND, KATHRYN A. HOLT & KATHRYN J. GENTHON, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT CASELOADS 3 (2016), https://www.courtstatistics.org/__data/assets/pdf_file/0028/29818/2015-EWSC.pdf [https://perma.cc/ZG3A-GE9N]. The most recent federal data show 93,213 criminal case filings in district courts for the twelve-month period ending March 31, 2020. *See Federal Judicial Caseload Statistics 2020*, U.S. CTS. https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020 [https://perma.cc/LK8D-GX5G].

374. *See supra* notes 369, 370 and accompanying text.

375. *See supra* notes 369, 370 and accompanying text.

376. *See* Paul David Stern, *Tort Justice Reform*, 52 U. MICH. J. L. REFORM 649, 650–97 (2019) (discussing tort claims for misconduct by federal officials); Paul Stern, *Hold Police Accountable by Changing Public Tort Law, Not Just Qualified Immunity*, LAWFARE (June 24, 2020), https://www.lawfareblog.com/hold-police-accountable-changing-public-tort-law-not-just-qualified-immunity# [https://perma.cc/NTF8-GYYR] ("The historical distinction between the Supreme Court's

Other avenues for relief outside of courts include legislative and executive reform in state and federal criminal justice institutions. Activism on matters related to mass incarceration and other aspects of criminal law have already led to reforms in sentencing, bail, police practices, juvenile justice, and antidrug policies.[377] Furthermore, voters in many jurisdictions have elected reform-oriented prosecutors[378] who have implemented or promised to adopt policies discontinuing cash bail,[379] reducing prosecutions and incarceration,[380] creating integrity units to review past and prospective cases to determine whether innocent people are being criminalized,[381] and seeking more lenient treatment of certain offenders.[382]

In other legislative developments, state legislatures and Congress have considered qualified immunity's possible role in limiting the deterrent effect of civil rights litigation alleging police misconduct.[383] As some scholars have

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Fourth Amendment excessive force jurisprudence and traditional common-law torts, such as assault, battery and negligence, makes clear that generic tort cases can examine a broader array of conduct than can constitutional litigation.").

377. *See, e.g.*, Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2019*, SENTENCING PROJECT (Jan. 17, 2020) https://www.sentencingproject.org/publications/top-trends-in-state-criminal-justice-reform-2019/ [https://perma.cc/L73F-QGD5] (discussing numerous criminal justice reforms made in 2019 by states); *New York's New Bail Reform Model: The Next Wave of Bail Reform Goes Beyond Ending Money Bail*, VERA INST. (2019), https://www.vera.org/state-of-justice-reform/2019/bail-reform [https://perma.cc/HT87-NR5J] (discussing state efforts to pass bail reform); Jesse McKinley, Alan Feuer & Luis Ferré-Sadurní, *Why Abolishing Bail for Some Crimes Has Law Enforcement on Edge*, N.Y. TIMES (Dec. 31, 2019), https://www.nytimes.com/2019/12/31/nyregion/cash-bail-reform-new-york.html [https://perma.cc/C9P2-TPDP]; Saja Hindi, *Here's What Colorado's Police Reform Bill Does*, DENVER POST (June 13, 2020), https://www.denverpost.com/2020/06/13/colorado-police-accountability-reform-bill/ [https://perma.cc/WPY4-5A8S] (reporting Colorado's enactment of sweeping police reform legislation).

378. Emily Bazelon & Miriam Krinsky, *There's a Wave of New Prosecutors. And They Mean Justice*, N.Y. TIMES (Dec. 11, 2018), https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html [https://perma.cc/UP49-KH4X].

379. James Queally, *On First Day as L.A. County D.A., George Gascón Eliminates Bail, Remakes Sentencing Rules*, L.A. TIMES (Dec. 7, 2020), https://www.latimes.com/california/story/2020-12-07/in-first-day-on-job-gascon-remakes-bail-sentencing-rules [https://perma.cc/BA8A-RNWB].

380. *See* Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 7–15 (2019) (discussing progressive prosecutors' policies to curb prosecutions); Chris Palmer, *Larry Krasner's First Year as Philly DA: Staff Turnover, Fewer Cases, Plenty of Controversy*, PHILA. INQUIRER (Jan. 6, 2019), https://www.inquirer.com/news/larry-krasner-philadelphia-district-attorney-staff-reform-cases-first-year-20190106.html [https://perma.cc/HV2T-NJBM] (reporting that during a reform-oriented district attorney's first year in office, Philadelphia "prosecutors . . . opened 6,500 fewer cases than the previous year, and half as many as the 73,000 the office filed in 2013"); Taylor Pendergrass & Somil Trivedi, *Beyond Reform: Four Virtues of a Transformational Prosecutor*, 16 STAN. J. C.R. & C.L. 435, 442–44 (2021) (discussing the implications of prosecutor pledges to reduce prison and jail populations).

381. *See Conviction Integrity Units*, NAT'L REGISTRY EXONERATIONS (Nov. 4, 2021) https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx [https://perma.cc/GS82-HJVR].

382. *See* Davis, *supra* note 380, at 8–9.

383. *See, e.g.*, Josephine Walker, *Police Reform Advocates Frustrated By Bill's Defeat*, ASSOCIATED PRESS (Feb. 9, 2021), https://apnews.com/article/police-virginia-richmond-bills-police-

argued, however, qualified immunity might not significantly impact police behavior because state and municipal governments almost fully indemnify officers.[384] Responding to this concern, when Colorado reformed qualified immunity in 2020, the state required that officers found liable for misconduct must pay a certain portion of damage awards before receiving indemnity.[385] Other states could consider whether this approach would deter police misconduct, which has a detrimental impact on people of color.

Congress could attempt to strengthen antidiscrimination norms using its Section 5 powers[386] to create a right of action to challenge state and federal policies, including criminal law and enforcement, that replicate and preserve racial inequality. Indeed, after *McCleskey*, members of Congress introduced the Racial Justice Act, which would have created a federal right of action for defendants to challenge their death sentences by demonstrating a statistically significant racial disparity in a state's imposition of capital punishment.[387] After proving a statistically significant racial effect, states would then have the burden of proving the operation of a nonracial variable.[388] Congress failed to pass the bill, although it was introduced three times from 1988 to 1994.[389] Kentucky[390] and North Carolina,[391] however, subsequently enacted similar measures. In 2013, North Carolina repealed the statute and applied the repeal retroactively to

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reform-5e219f1f2657690df2ecc3acce1ac58e [https://perma.cc/4QPY-4RMU] (reporting defeat of qualified immunity reform legislation in Virginia); Andrea Januta, Andrew Chung, Jami Dowdell & Lawrence Hurley, *Shielded: Color of Suspicion*, REUTERS (Dec. 23, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-race/ [https://perma.cc/DR3P-A5P9] (reporting that bills to eliminate qualified immunity for police officers "stalled" in Congress).

384. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) ("Between 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor."). Officers typically pay little to nothing out-of-pocket for such settlements and judgments. *See id.* (finding that officers contributed "to just .02% of the over $730 million spent by cities, counties, and states in th[e] cases" examined in the study, and that "[o]fficers did not pay a dime of the over $3.9 million awarded in punitive damages").

385. *See* Hindi, *supra* note 377 ("Officers determined not to have acted in good faith or with a reasonable belief that what they did was legal can be held personally liable for 5% of a judgment or settlement or $25,000, whichever is less.").

386. U.S. CONST. amend. XIV, § V.

387. Olatunde C.A. Johnson, *Legislating Racial Fairness in Criminal Justice*, 39 COLUM. HUM. RTS. L. REV. 233, 239 (2007).

388. *Id.*

389. *Id.* at 239–40.

390. KY. REV. STAT. ANN. § 532.300 (West 2006); *see also* Alex Lesman, Note, *State Responses to the Specter of Racial Discrimination in Capital Proceedings: The Kentucky Racial Justice Act and the New Jersey Supreme Court's Proportionality Review Project*, 13 J.L. & POL'Y 359, 372–87 (2005) (analyzing the Kentucky Racial Justice Act). Prior to the passage of the Kentucky statute, the state's supreme court followed *McCleskey* and rejected statistical evidence of racial discrimination presented by a Black capital defendant. *See id.* at 381–82.

391. *See generally* Barbara O'Brien & Catherine M. Grosso, *Confronting Race: How a Confluence of Social Movements Convinced North Carolina to Go Where the* McCleskey *Court Wouldn't*, 2011 MICH. ST. L. REV. 463 (discussing passage of the North Carolina Racial Justice Act).

capital defendants.[392] The North Carolina Supreme Court, however, held that retroactive application of the repeal, which would have abolished capital defendants' rights to challenge racially disparate sentences, was an impermissible ex post facto law.[393]

Even if Congress enacted the Racial Justice Act or similar legislation, the measure would have to withstand close judicial scrutiny. Starting with the Rehnquist Court, the justices have constrained congressional exercise of authority pursuant to Section 5.[394] Supreme Court precedent provides that when Congress seeks to define equal protection violations using Section 5 authority, it is constrained by the Court's determination of what constitutes such a violation.[395] This doctrinal stance could jeopardize federal substantive equality legislation.[396] Despite the risks and hurdles, state and federal executive and legislative reforms, along with state court litigation, might provide relief for equality claimants contesting racist anticrime policies.

B. Anticipated Critiques

The foregoing analysis could generate several critiques that are worthy of analysis. Critics might argue that more rigorous judicial scrutiny could erode proper boundaries of federalism and separation of powers. Furthermore, critics could challenge the Article's focus on criminal law, rather than a broader, more comprehensive interrogation of systemic racism. Finally, some commentators might find that the analysis does not go far enough to undo systemic racial inequality because it advocates reform rather than transformation. Discussing these concerns is helpful for the development of solutions for systemic racial inequality. Nevertheless, these matters should not derail the reform project this Article recommends.

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392. Matt Smith, *'Racial Justice Act' Repealed in North Carolina*, CNN (June 21, 2013), https://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty/index.html [https://perma.cc/6J5D-TGTN].

393. State v. Ramseur, 843 S.E.2d 106, 110–11 (N.C. 2020); State v. Burke, 843 S.E.2d 246, 248–49 (N.C. 2020).

394. *See* City of Boerne v. Flores, 521 U.S. 507, 518–29 (1997) (finding that Congress can enact prophylactic remedies using Section 5 powers, but that the Supreme Court defines substantive violations of constitutional law).

395. *See id.* at 518–29; *see also* David C. Baldus, George Woodworth & Catherine M. Grosso, *Race and Proportionality Since* McCleskey v. Kemp *(1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 COLUM. HUM. RTS. L. REV. 143, 146 n.12 (2007) ("[B]ecause of Supreme Court precedent, limiting Congress' powers under Section 5 of the Fourteenth Amendment, . . . an issue now exists concerning the power of Congress to overrule *McCleskey* through the exercise of its powers under Section 5.").

396. Congress can, however, pass prophylactic measures designed to remedy—but not define—violations of the Fourteenth Amendment. *See Boerne*, 521 U.S. at 518–29 (finding that Congress can enact prophylactic remedies using its Section 5 powers but that the Supreme Court defines substantive violations of constitutional law).

1. Judicial Supremacy or Racial Equality

Critics might argue that this reformed doctrine would lead to judicial supremacy. Indeed, courts often invoke institutional concerns to justify application of the discriminatory intent rule.[397] This argument, however, does not hold weight. Racism pervasively and severely harms people of color, and these abuses have occurred throughout the history of the United States. The status quo doctrine constrains the Court, but it does not halt racist state action. In fact, knowing that equal protection plaintiffs can only prevail if they meet the high burden of showing intent could disincentivize government officials from avoiding policies that systematically harm persons of color. Also, nothing in the Constitution textually compels the Court to prioritize institutional concerns in such a fashion. Court doctrine, however, treats racial justice as a dilemma, resolved by denying relief to some of society's most marginalized communities.

2. Other Policy Settings Are "Different" Too

Other critics might argue that the proposed reforms rest on the limited understanding that the intersection of race and crime is different. Many policy areas, such as education, housing, and health care, replicate historical racism and are likely influenced by symbolic racism. Furthermore, the discriminatory intent rule applies to all equal protection litigation, not only to cases contesting criminal justice policies.[398] This criticism has merit. Focusing on criminal justice policies, however, does not foreclose a more expansive application of the themes in this Article. Criminal justice is only one of many policy areas that have involved persistent racial discrimination. Scholars should continue analyzing the appropriateness of substantive equality theories across a variety of policy settings.

3. Reform Versus Transformation

An additional critique could be that the analysis values reform over transformation. Drawing from the Black Lives Matter movement and the works of Critical Race Theorists Derrick Bell, Kimberlé Williams Crenshaw, and Charles Lawrence, Paul Butler proposed a radical antiracist agenda that prioritizes transformation over reform.[399] This vision of antiracism seeks to dismantle systemic inequality by eliminating institutions that have historically caused pervasive and severe harms to Blacks.[400] For example, with respect to police officers, Butler argued that police violence and other acts of oppression against Blacks persist because policing exists for the very purpose of racial

397. *See supra* text accompanying note 274.

398. *See supra* Part III.

399. *See* Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1439–46 (2016).

400. *Id.*

control.[401] Butler argued that reform leads to limited and nondurable change.[402] By contrast, transformation eliminates structures of racism to provide sustainable relief.[403] Butler's arguments are powerful, well-reasoned, and, frankly, difficult to rebut. Racism remains a central feature of criminal justice practices because the United States never transformed legal institutions that historically subjugated persons of color. While racist practices have mutated, the outcome remains the same: racial subordination.

It is possible that reformist approaches do not necessarily conflict with transformation or the recognition of systemic, rather than atomized, racism. While Butler accurately described Critical Race Theory's transformative agenda, his assessment obscured some of the complexity in this literature. Scholars in the field have argued that Critical Race Theory uses a dualist approach to racism.[404] Critical Race Theorists envision radical change and engage deconstructionist critiques of law and society.[405] Nevertheless, Critical Race Theorists also value rights, legal reasoning, and use of democratic institutions to accomplish change.[406]

The dualist approaches in Critical Race Theory results, in part, from the conditions that led to the organized collection of scholars who first identified themselves as Critical Race Theorists. The early race crits simultaneously challenged the lack of racial analysis within the progressive Critical Legal Studies movement and the absence of radicalism in the traditional Civil Rights Movement.[407] Angela Harris contributed to this discourse in her pathbreaking article, *The Jurisprudence of Reconstruction*.[408] Harris recognized the existential conflict caused by efforts to blend radical thought with liberalism. Harris, however, emphatically encouraged Critical Race Theorists to "inhabit that very tension."[409] Racism is multidimensional. It is durable. It mutates and evolves. A flexible approach permits Critical Race Theorists to utilize numerous tools—radical and reformist—to illuminate and contest injustice in its multiple forms.

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401. *Id.* at 1434 (discussing the radical view that "police practices against blacks [are] symptoms of structural racism and white supremacy").

402. *Id.* at 1461 ("Reform does not, however, do the work of transformation. It does not bring about the kind of change that the radical critics are seeking.").

403. *See id.* at 1466 ("Pattern or practice investigations, and other liberal reforms, will not bring about the extreme change in American criminal justice necessary to end overpolicing, mass incarceration, and vast racial disparities.").

404. *See* Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 748–54 (1994) (describing the dual nature of Critical Race Theory as blending modernism and postmodernism).

405. *Id.* at 748–50.

406. *See id.* at 750–54.

407. *Introduction to* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii, xix (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) (explaining how Critical Race Theory represents a "left intervention into race discourse and a race intervention into left discourse").

408. Harris, *supra* note 404.

409. *Id.* at 760; *see also* Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1191–96 (2004) (discussing influences on Critical Race Theory).

It is also possible to articulate a vision for progressive transformation while simultaneously pursuing institutional reform. Derrick Bell, for example, argued that racism is permanent and that improvement in Black lives has to be understood vis-à-vis the potential benefits it provides to Whites.[410] Still, Bell did not argue that Critical Race Theorists cannot strategically utilize liberal legal institutions to combat systemic racism. Instead, in an analysis of *Brown v. Board of Education*, Bell argued that "those who rely on . . . [this ruling] must exhibit the dynamic awareness of all the legal and political considerations that influenced those who wrote it."[411] In other words, lawyers must always recognize that apparent victories occur due to political opportunities resulting when people of color and Whites have shared interests,[412] not from a permanent commitment to justice.

Social movements that accomplish broad change do not achieve their goals rapidly. Instead, transformation is a process that consists of moments of radicalism and engagement with state actors and institutions. Dorothy Roberts addressed these concerns in her recent insightful work on prison abolition and the Constitution.[413] Roberts argued that abolitionists can develop alternative interpretations of the Constitution suitable for more radical agendas, even though the actual document is flawed and restrictive.[414] Roberts contended that prison abolitionists already recognize that their project is a long-term commitment and that it will progress incrementally.[415] Liberal legal reforms that occur along the path toward abolition (like limiting or ending cash bail and eliminating mandatory minimum sentencing) might seem small, but they remain part of a broader strategy to abolish prisons.[416]

With respect to equal protection doctrine, using litigation as an instrument of social change is fraught with difficulty, as Bell argued in his analysis of *Brown*.[417] Any significant changes that occur will likely occur incrementally, and they could be fleeting. But modified doctrines have the potential for addressing

410. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–26 (1980).

411. *Id.* at 533.

412. *See id.* at 524–26; *see also* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 513 (1976) (discussing the difficulty of using civil rights litigation to engender change, but not dismissing the law as irrelevant).

413. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

414. *Id.* at 108 ("We can see the Reconstruction Amendments as a compromised embodiment of the unfinished revolution for which abolitionists today continue to fight. Like antebellum abolitionist theorizing, prison abolitionism can craft an approach to engaging with the Constitution that furthers radical change.").

415. *Id.* at 114 ("Prison abolition is a long-term project that requires strategically working toward the complete elimination of carceral punishment. No abolitionist expects all prison walls to come tumbling down at once.").

416. *See id.* at 115–16.

417. *See* Bell, *supra* note 410, at 530.

some of the inequities related to criminal law and enforcement.[418] As Butler accurately stated, liberal reforms alone will not eradicate racism.[419] Racial justice movements, however, should continue to pursue reforms that attenuate racial domination, while recognizing the often fragile and tenuous nature of change.

CONCLUSION

Criminal law and enforcement functioned as a powerful instrument of racial subordination from the earliest moments of United States history. Modes of racism have shifted over time. Slavery morphed into convict leasing, apprenticeships, and debt peonage. Lynching evolved into the death penalty. Violent ejection of Latinx and Asian Americans by White mobs fueled modern border control policies. Jim Crow criminal law reemerged as mass incarceration, disparate arrests and sentencing, and police surveillance and violence.

Presently, Supreme Court doctrine does not offer much hope for people of color who suffer from the effects of racist criminal justice policies. Equality doctrine fails to redress racial injustice in three important ways. First, courts dismiss the usefulness of historical racism as a frame to contextualize contemporary racial disparities. Second, judges employ archaic theories of racism premised on the flawed belief that discrimination always occurs intentionally and leaves a trail of explicit evidence for victims. Lastly, courts assume, contrary to findings in a large body of social science studies, that facially neutral anticrime policies are presumptively nonracist. These doctrinal choices validate a broad range of criminal justice practices that impose severe harms and burdens on racial subordinates and preserve White supremacy.

The severe impact of anticrime policies on persons of color occupies center stage in present-day public discourse. As racial justice activists and legal scholars criticize institutional practices that replicate racial hierarchy, they should not treat courts as external or irrelevant. By validating anticrime policies responsible for racial subjugation, contemporary courts participate in racial injustice, regardless of intent. With substantial doctrinal reform, however, courts could give substance to the Equal Protection Clause and make it more consistent with the goals of abolitionists who wanted to create federal remedies for southern Blacks experiencing re-enslavement and denial of political freedoms due, in large part, to racist enforcement of criminal law.[420] A reinvigorated equality doctrine could mean, from the standpoint of courts, that Black lives actually matter and that racial subjugation of persons of color is inconsistent with equal protection. Courts can help attenuate racial inequality only by recognizing the powerful influence of historical racism on contemporary practices, the evolving nature of racial bias, and the relationship between racism and punishment. By

418. *See* Roberts, *supra* note 413, at 110–13 (discussing concrete benefits of reformist litigation victories).

419. *See supra* text accompanying notes 399–402.

420. *See supra* note 93 and accompanying text.

omitting these critical concerns from analysis, courts continue to validate and legalize racism, thus preserving White supremacy. Social justice strategies must target all institutions that empower White supremacy. Accordingly, private institutions, legislators, executives, *and* courts should receive scrutiny from antiracist activists and scholars.