

# CARCERAL APARTHEID: CENTERING STATE RESPONSIBILITY FOR THE RACIAL ORDER

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*Racial harms are often attributed to private ordering. But the power of White communities to subordinate communities of color is not a constellation of private acts independent of state violence. When scrutinized, acts of racial exclusion, segregation, and violence persist to the extent they are aligned with the political order and backed by the state's violent guarantee. The knowledge that any resistance to these acts will be met with state retribution bristles in the background.*

*There are different ways in which state violence produces and reproduces the racial order: (1) direct violence; (2) a violent guarantee backing communal acts of racial harm; (3) a violent guarantee backing the distribution of government benefits to White beneficiaries; and (4) extralegal violence. In contrast to legal doctrine that erects a false wall between state action and private ordering, this typology helps reveal how state violence is a precondition to acts of racial harm.*

*To illustrate how these four categories of state violence function, this Article turns to the criminal system. A historical examination surfaces an unbroken record of carceral violence essential to the perpetration of "private" acts of racial harm. This understanding—that state violence is a precondition to acts in furtherance of the racial order—introduces a view of state action that would authorize proactive federal interventions to dismantle the racial order.*

*Erasing state responsibility for the racial order has been an uninterrupted project of White supremacy since slavery. This Article's proposed typologies assist*

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*in efforts to demonstrate state culpability and provide a path forward for acknowledgment of racial harm, accountability, repair, and reparation.*

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## INTRODUCTION

Erasing state responsibility for the racial order has been an uninterrupted project of White supremacy since slavery. The “law of nature,” wrote Professor Claudio Saunt, “justified every act of dispossession, and every act of dispossession furnished yet more proof of nature’s inevitable course.”<sup>1</sup> Within this natural order, the state and its White beneficiaries bore no blame for the violent redistribution of land, wealth, and freedom. When Northern Jim Crow regimes were constructed in response to manumission movements at the turn of the nineteenth century,<sup>2</sup> resulting racial disparities were attributed to “an ordination of Providence, and no more to be changed than the laws of nature.”<sup>3</sup> This self-serving justification attributed racial oppression to biological difference, not the overwhelming assurance of state retribution for violations of the racial order.

The Reconstruction Amendments would do little to disrupt these commitments.<sup>4</sup> The Supreme Court interpreted the Fourteenth Amendment to command equal treatment under the law as it also legitimized a conception of the natural order rooted in biological racism.<sup>5</sup> To achieve this balancing act, the Amendment’s authorization of federal intervention would only be triggered by “state action,” which the Court narrowly defined as an official state act of racial discrimination.<sup>6</sup> This definition attributed most racial terror to private ordering, which would fall outside of “state action” and remain immune from any threat of federal meddling.<sup>7</sup> The Court’s demarcation of this violent and racist natural order was broadly conceived. It included practices within White communities that perpetrated racial violence and exclusion from land, jobs, public accommodations, activities essential to security, social networks, and wealth-building.<sup>8</sup> This conception that racial hierarchy

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<sup>1</sup> CLAUDIO SAUNT, *UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY* 10 (2020).

<sup>2</sup> See Brian Purnell & Jeanne Theoharis, *Histories of Racism and Resistance, Seen and Unseen: How and Why to Think About the Jim Crow North*, in *THE STRANGE CAREERS OF THE JIM CROW NORTH: SEGREGATION AND STRUGGLE OUTSIDE OF THE SOUTH* 1, 13 (Brian Purnell, Jeanne Theoharis & Komozi Woodard eds., 2019).

<sup>3</sup> LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860*, at 21–22 (1961).

<sup>4</sup> U.S. CONST. amends. XIII–XV.

<sup>5</sup> *The Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>6</sup> *Id.* at 11.

<sup>7</sup> *Id.*; Erwin Chemerinsky, *Rethinking State Action*, 80 N.W.U.L. REV. 503, 507–08 (1985).

<sup>8</sup> *Id.* at 25 (“There were thousands of free [Black] people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as [W]hite citizens;

reflected the natural order, versus the political order, still anchors constitutional law.<sup>9</sup>

Erasing state accountability for the racial order obscures what should arguably be plain: that a precondition of any racial order is state violence. If the power of White communities to subordinate residents of color was a constellation of private choices independent of state power, what explains compliance? If not state violence, is there another explanation for this compliance that is not anchored in biological racism?<sup>10</sup> If we reject socioeconomic or cultural justifications that cloak biological determinism, we are left with confronting a racial order that is backed by the guarantee of state violence. But current doctrine assumes that racial disparities reflect a natural order, and thus persons of color tolerate these conditions because race biologically confers advantages and disadvantages that determines educational attainment, wealth accumulation, and social standing.<sup>11</sup> Current doctrine also accepts that

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yet no one, at that time, thought that it was any invasion of their personal status as a freeman because they were not admitted to all the privileges enjoyed by [W]hite citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement.”).

<sup>9</sup> *The Civil Rights Cases* remain controlling law, and have informed subsequent watershed cases, from *Washington v. Davis*, 426 U.S. 239 (1976) to *McCleskey v. Kemp*, 481 U.S. 279 (1987) to *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023). Law students across the country are implicitly taught in Constitutional Law classes that most of the racial order can be explained by the natural order, not the political order.

<sup>10</sup> Cultural or socioeconomic explanations for racial disparity are grounded in biological racism. Socioeconomic justifications ultimately rely on the indefensible assumption that White persons are predisposed to economic success—a popular argument among commentators at the twentieth century’s turn. See, e.g., ALFRED STONE, *STUDIES IN THE AMERICAN RACE PROBLEM* 454-55 (1908) (contending that due to their higher faculties and inherent efficiencies, White workers would outcompete Black workers). Cultural explanations for racial disparities had replaced narratives of biological difference within the sociological field by the 1920s. KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 7-10 (2010). Cultural explanations for racial disparity persist. For example, in diagnosing uprisings in Black communities in the 1960s (which resulted from the economic deprivation caused by federal housing polices and the brutality of policing), David Hackett, head of President Kennedy’s Committee on Juvenile Delinquency and Youth Crime wrote: “It is the slum areas of our metropolitan centers which harbor the highest concentration of delinquency, unemployment, school dropouts, family inadequacies and *cultural deficiencies* . . .” ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 38 (2d prtg. 2017) [hereinafter HINTON, *WAR ON POVERTY*]; see also RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 201 (2017).

<sup>11</sup> As a general matter, scholars have recognized how the Court has imposed a legal construct to construct reality. See, e.g., Julie A. Nice, *Equal Protection’s Antinomies and the Promise of a Co-Constitutive Approach*, 85 CORNELL L. REV. 1392, 1416 (2000) (“The distinction [between private and public] power is grounded in its use in legal doctrine, its internalization throughout society, and law and society’s mutually reinforcing understandings of the distinction.”); Frederick Mark

mass incarceration—carceral apartheid—reflects the inability of persons of color to address cultural deficiencies or to check inherent criminal impulses. Whether justifications for these doctrines spring from narratives of inherent White merit, personal choice, cultural pathology, or socioeconomic failure, they ultimately traffic in biological racism.<sup>12</sup>

In contrast to the doctrinal absolution of state responsibility, this Article offers a multidimensional account of how the state has deployed violence to produce the racial order. At the heart of this account is the administration of criminal law. The carceral system engages in direct racial violence as it also broadcasts a guarantee of retributive violence for any failure to comply with White private acts of racial harm. In theorizing that state violence is a precondition to private ordering's racial commitments, this Article does not address how state violence may be necessary to maintain defensible political arrangements. This Article instead proceeds with the understanding that racial oppression is so cruel and dehumanizing that it can only be sustained by the overwhelming violence of the state.

In centering the state violence that is necessary to sustain the racial order, this Article provides a broader understanding of state action that would authorize Congress under the Fourteenth Amendment to legislatively address prior and ongoing racial harms.<sup>13</sup> For example, a Fair Policing Act that requires jurisdictions to maintain any racial disparities in stops, arrests, charging, and sentencing within a tolerable level (say, not to exceed five percent). Or a Fair Admissions Act that requires admissions at national universities to reflect the demographic representation of marginalized racial groups. Or a Housing Accountability Act that would subsidize loans and new home

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Gedicks, *The "Fixation Thesis" and Other Falsehoods*, 72 FLA. L. REV. 219, 270 (2020) (observing that the Court, in interpreting the Equal Protection Clause, attributed White supremacy to the natural law versus the political order).

<sup>12</sup> Asserting, for example, that enrollment disparities do not reflect racial discrimination, but rather merit, requires a belief that White students have biological or cultural traits that favor academic achievement. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 361 (1978) (Brennan, J., concurring in part and dissenting in part) (stating a concern that any affirmative action program will disrupt the "deeply rooted" principle that college admission should be based on merit). To attribute racial disparities to socioeconomic differences requires a belief that White persons have biological traits that favor the accumulation of wealth and social capital. *Students for Fair Admissions, Inc.*, 600 U.S. at 280 (Thomas, J., concurring) (stating that racial disparities in health outcomes and wealth accumulation can be explained by "socioeconomic status").

<sup>13</sup> To accept state violence as precondition to acts of White communal discrimination would fall under the established meaning of "state action." See, e.g., *Ex parte Virginia*, 100 U.S. 339, 347 (1879) ("A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way."); *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930) ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government."); see also U.S. CONST. amend. XIV, §§ 2, 5 (granting authority to Congress to remediate violations of equal protection).

construction for members of racial groups excluded from the federally-intervened housing market between 1935 and 1968, with job quotas for members of racial groups excluded from trade unions during the same period. Understanding state violence as a precondition of racial oppression would also grant more discretion to state and federal institutions to consider race-conscious interventions to address racial disparities within their institutions or regulatory remit.

In taking up this challenge to examine state action through its violence, this Article attempts to show how state violence makes possible private acts of racial subjugation. Part I offers a typology to understand ways in which the state constructs the racial order, proposing four categories of state violence: (1) direct violence; (2) a violent guarantee to acts of communal racial harm; (3) a violent guarantee backing the distribution of government benefits to White beneficiaries; and (4) extralegal violence. Part II examines the criminal system to show how state violence is expressed in these four ways. In examining who is subject to this violence, how this violence is deployed, and who benefits from this violence, the carceral system's role in constructing and maintaining the racial order comes into focus.<sup>14</sup> This historical examination is framed around moments of existential threats to the racial order, as well as moments of significant transformation in policing designed to respond to those threats. Part III identifies common narratives that are deployed to absolve the state of responsibility for racial harms. The typologies proposed—to identify the state's role in the racial order and to identify efforts to erase the state's role—are intended to assist in taking the accountability necessary to begin to meaningfully address racial harms and disparities.

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<sup>14</sup> This Article joins emerging scholarship that recognizes the importance of using a historical frame to interrogate the criminal system's role in constructing the racial order. See generally Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America's Peculiar Carceral State and Its Prospects for Democratic Transformation Today*, 111 NW. U. L. REV. 1625 (2017) (revealing tension between the legal due process model and the work by the carceral administrative state to racially discriminate); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019) (surfacing the institutional racism that anchors the abolition movement); Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIM. 261 (2021) (showing how policymakers implemented racially oppressive criminal law interventions, culminating in militarized policing); Anthony Gregory, *Policing Jim Crow America: Enforcers' Agency and Structural Transformations*, 40 L. & HIST. REV. 91 (2021) (revealing the role of low-level law enforcement officers in serving and shaping the racial order); SIMON BALTO & MAX FELKER-KANTOR, *POLICE AND CRIME IN THE AMERICAN CITY, 1800–2020* (2022) (showing how policing trends are explained not by crime trends but the need to maintain race, ethnic, and economic hierarchies); I. India Thusi, *The Racialized History of Vice Policing*, 69 UCLA L. REV. 1576 (2023) (examining how vice crimes are deployed to maintain the racial order, not public safety).

## I. CENTERING STATE RESPONSIBILITY FOR THE RACIAL ORDER

The Court has largely exonerated the state from any responsibility for the racial order. After the death of Reconstruction, the Court limited further federal incursion by constraining what the Fourteenth Amendment authorized Congress to do: to only address official state acts of racial discrimination.<sup>15</sup> In doing so, the Court recognized a natural order where racial exclusion, segregation, and violence flourished free from the threat of federal intervention.<sup>16</sup>

Relieved of any responsibility to disrupt acts of racial harm, local and state officials sought to proactively contribute to the racial order without violating the Fourteenth Amendment. The Court accommodated these goals, permitting states to mandate racial apartheid under the separate but equal conceit.<sup>17</sup> When these local practices undermined the country's objectives in an emerging Cold War, the Court in *Brown v. Board of Education* mostly prohibited racial distinctions in pronouncements of law and policy.<sup>18</sup> Within this frame of formal equality, however, the Court still allowed government to proactively contribute to the racial order by permitting state actors to implement facially race-neutral policies even if they knew these policies deepened racial disparities.<sup>19</sup> Biological racism anchored the approach: if a policy was race-neutral, the racially disparate distribution of benefits was a function of the natural order.

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<sup>15</sup> The Civil Rights Cases, 109 U.S. 3, 13–14 (1883).

<sup>16</sup> *Id.*

<sup>17</sup> *Plessy v. Ferguson*, 163 U.S. 537, 548–51 (1896); see e.g., PRESIDENT'S COMM. ON CIV. RTS., TO SECURE THESE RIGHTS 62–65 (1947) (describing higher distribution of public funds to White public schools).

<sup>18</sup> C. VANN WOODWARD, *The Man on the Cliff, in THE STRANGE CAREER OF JIM CROW*, 111, 123–24, 146–47 (commemorative ed., Oxford Univ. Press 2002); see also *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Under *Brown*, any governmental attempt to address the appalling racial harm caused by *Plessy* would be deemed unconstitutional discrimination against White innocents. *Id.* at 495; *Plessy*, 163 U.S. at 541–44.

<sup>19</sup> *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that policies resulting in solely racially disparate outcomes are constitutional); *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (holding the same in the criminal law context); see also *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (determining that the internment of citizens of Japanese descent could be justified if the purpose of the policy was not because they were Japanese but because of a purported national security interest that would be expected to fall most heavily on persons of Japanese descent); *Ashcroft v. Iqbal*, 556 U.S. 662, 669, 682–83 (2009) (enabling the government to knowingly target a national or religious group where a national security interest would be expected to fall most heavily on that group); *Trump v. Hawaii*, 585 U.S. 667, 702–05, 710 (2018) (same and purporting to overrule *Korematsu* by misrepresenting the case's holding; rather than undermine *Korematsu*, the Court in fact provided the government more discretion to racially target a group than did *Korematsu*).

Though the Court has given much leeway to policymaking that deepens racial disparities, the Court has tightly constrained attempts to mitigate them. There must be evidence of purposeful state-based racial discrimination before Congress can exert legislative power granted by the Fourteenth Amendment.<sup>20</sup> Adherents to limited federal intervention seek to hold the line established by a racist Court in 1883; those partial to federalized civil rights seek more expansive conceptions of state action.<sup>21</sup> The most common argument to expand state action is to equate state inaction with action.<sup>22</sup> Under this view, if storeowners on Main Street refuse patrons of color, the state's abdication of its obligation to ensure equal treatment of its constituents constitutes state action.

This Article proposes another interpretive shift that would expand federal protection of civil rights under the Fourteenth Amendment. If we accept that the racial order is not a function of the natural order but the political order—that a precondition to acts of exclusion, segregation, and violence is the state's guarantee of retribution for any resistance—the state's responsibility for the racial order is centered. Centering the state's role in shaping and facilitating private action is not new—Justice Harlan articulated such a theory in his dissent in *The Civil Rights Cases*.<sup>23</sup> Professor Sidney Buchanan calls this the “state authorization” concept, where state law may “permit[] or compel a particular form of private action.”<sup>24</sup> This Article's excavation of the state's role in perpetuating private acts of racial harm resonates but also differs—here, the focus is not on state law, but on state violence.

This Article proposes four categories to understand how state violence is deployed in furtherance of the racial order. First, the state deploys direct racial violence through detention, arrest, conviction, incarceration, and supervision.<sup>25</sup> Second, the state provides a violent

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<sup>20</sup> “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article” including the provision that “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, §§ 1, 5.

<sup>21</sup> Christian Turner, *State Action Problems*, 65 FLA. L. REV. 281, 307 (2013); G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 336–39 (1997).

<sup>22</sup> See, e.g., Chemerinsky, *supra* note 7, at 523.

<sup>23</sup> *The Civil Rights Cases*, 109 U.S. 3, 58–59 (Harlan, J., dissenting) (contending that owners of places of public accommodation are “agents [or] . . . instrumentalities of the State”).

<sup>24</sup> Buchanan, *supra* note 21, at 351.

<sup>25</sup> Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 276 (2006); Samuel Sinyangwe, *The Police Departments with the Biggest Racial Disparities in Arrests and Killings*, FIVETHIRTYEIGHT (Feb. 4, 2021, 1:09 PM), <https://fivethirtyeight.com/features/the-biden-administration-wants-to-address-racial-bias-in-policing-what-cities-should-it-investigate> [<https://perma.cc/NWJ4-QH7X>].



guarantee that backs private acts of racial harm. Third, the state provides a violent guarantee to the distribution of government benefits to White beneficiaries (White welfare). Fourth, the state engages in extralegal violence to achieve racial control. The source of state violence within this typology is almost always the state's carceral power.

### A. *Direct Racial Violence*

The state's carceral power is the locus of the state's physical violence against civilians. State actors racially surveil, detain, arrest, and incarcerate, while scholars surface how these practices determine who belongs and who is entitled to privacy, freedom, status, and safety.<sup>26</sup> Police deploy racialized violence with virtual immunity from liability.<sup>27</sup> In White communities, police are largely absent unless called, its residents excepted from surveillance and control.<sup>28</sup> But in communities of color, "[p]olice are everywhere" and "have become permanent fixtures in the bureaucratic organizations of daily life, from public schools, emergency departments, and colleges to mass transit, public housing,

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"Stop and frisk" is itself a whitewashed term that belies the racially-targeted violence that is committed. See, e.g., The Nation, *The Hunted and the Hated: An Inside Look at the NYPD's Stop-and-Frisk Policy*, YOUTUBE (Oct. 9, 2012), <https://www.youtube.com/watch?v=7rWtDMPaRD8&rc=1> [<https://perma.cc/XM26-9NTG>] (interviewing persons of color subject to constant police harassment and assaults during street encounters).

<sup>26</sup> See, e.g., Sean A. Hill, *The Right to Violence*, 2024 U. UTAH L. REV. 611, 610–17 (2024) (providing a historical examination of the state's failure to protect Black persons from White violence); Jamelia N. Morgan, *Policing Marginality in Public Space*, 81 OHIO ST. L.J. 1045, 1048, 1055–56 (2020); Chan Tov McNamara, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 337–42 (2019); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 73–74 (2009); Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1119 (2017); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1494 (2016).

<sup>27</sup> JOANNA SCHWARTZ, *SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE* (2023). No charges result in almost 99% of police killings, with Black persons victimized at three times the rate of White persons. PHILIP STINSON, CHLOE A. WENTZL & MEGAN L. SWINEHART, *BOWLING GREEN STATE UNIV., ON-DUTY POLICE SHOOTINGS: OFFICERS CHARGED WITH MURDER OR MANSLAUGHTER 2005–2018*, at xii (2019), [https://scholarworks.bgsu.edu/crim\\_just\\_pub/98](https://scholarworks.bgsu.edu/crim_just_pub/98) [<https://perma.cc/W6X8-6PKS>]; GABRIEL L. SCHWARTZ & JACQUELYN L. JAHN, *MAPPING FATAL POLICE VIOLENCE ACROSS U.S. METROPOLITAN AREAS: OVERALL RATES AND RACIAL/ETHNIC INEQUITIES, 2013–2017* (2020).

<sup>28</sup> Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 728 (2020).

social service offices, and private apartment buildings.”<sup>29</sup> Post-conviction surveillance is similarly pervasive in these communities.<sup>30</sup>

*B. A Violent Guarantee That Backs Private Acts of Racial Violence*

Persons do not have the power to bend others to their will based on skin color. It would assume biological difference to believe that inherent qualities of being White results in an acceptance of the racial order. To reject biological explanations for exclusion, segregation, disparity, and violence is to accept that any attempt to racially oppress would face violent resistance. This was the fear of enslavers—armed rebellion—that resulted in carceral laws obligating White men to question and punish Black persons.

The past and present are marked by racially unjust outcomes in every aspect of life—work, education, wealth, freedom, safety, and health. To hold this all together, state violence bristles in the background that warns resistance will be met by overwhelming retribution. As White persons killed, enslaved, raped, tortured, bombed, burned, trafficked, and stole land with ferocity between the 1600s and 1940s, rather than protect victims of color or prosecute White perpetrators, when not coordinating or facilitating these actions, the state threatened retribution for any resistance.<sup>31</sup> This promise of overwhelming state violence is a precondition to the constellation of private acts of racial harm.

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<sup>29</sup> Sunita Patel, *Transinstitutional Policing*, 137 HARV. L. REV. 808, 810 (2024).

<sup>30</sup> COUNCIL ON CRIM. JUST., HOW LONG IS LONG ENOUGH? TASK FORCE ON LONG SENTENCES FINAL REPORT (2023); WENDY SAWYER & PETER WAGNER, PRISON POLY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2024 (2024) (on any given day, 2.9 million persons are serving probation); COUNCIL STATE GOVT’S JUST. CTR., CONFINED AND COSTLY: HOW SUPERVISION VIOLATIONS ARE FILLING PRISONS AND BURDENING BUDGETS (2019) (stating that 45% of prison admissions stem from supervision violations); PAMELA E. OLIVER, DANE COUNTY RATES OF INCARCERATION AND COMMUNITY SUPERVISION—2006 (2008) (stating that, in 2006, in Dane County, Wisconsin, 47% of Black men between ages twenty-five and twenty-nine were supervised by the Department of Corrections); Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 644–46 (2019). There are 85,870 probation and correctional treatment officers in the United States. U.S. BUREAU OF LAB. STAT., OCCUPATIONAL EMPLOYMENT AND WAGE STATISTICS: 21-1092 PROBATION OFFICERS AND CORRECTIONAL TREATMENT SPECIALISTS (2023).

<sup>31</sup> See *infra* Section II.

C. *A Violent Guarantee to Protect the Distribution and Value of White Welfare*

Because White persons have so often needed government assistance, White welfare programs dominate the political timeline. As White persons struggled to build commercial and labor-intensive enterprises, the state enforced the enslavement of Black bodies to clear wilderness, construct infrastructure, and plant and harvest. As struggling White persons on the East Coast sought land, the Army slaughtered and banished Native persons from their improved land as administrators carved the stolen land into grids and distributed parcels to White settlers.<sup>32</sup> To provide more land to White settlers and corporations, the United States declared war on Mexico (forcing Mexico to cede what is now California, Nevada, Utah, New Mexico, Arizona, and parts of Colorado, Oklahoma, Kansas, and Wyoming) to strip Mexican residents and Native persons of their land and subject them to violence and exploitation.<sup>33</sup> During Jim Crow, localities and states redistributed Black tax dollars to White infrastructure: schools, community centers, hospitals, pools, and parks.<sup>34</sup> During the Depression and through the 1960s, White tradesmen built subsidized suburbs and subsidized infrastructure for White families that received subsidized loans from subsidized White-owned banks.<sup>35</sup> The GI Bill paid for tuition and room and board, and the downpayment and part of the monthly payment for new homeowners; virtually all veterans of color were excluded from these

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<sup>32</sup> SAUNT, *supra* note 1, at xiii–xvii; ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES 95 (2014).

<sup>33</sup> LAURA E. GÓMEZ, INVENTING LATINOS: A NEW STORY OF AMERICAN RACISM 25–27 (2020).

<sup>34</sup> See e.g., PRESIDENT’S COMM. ON CIV. RTS., *supra* note 17.

<sup>35</sup> Amy E. Hillier, *Redlining and the Home Owners’ Loan Corporation*, 29 J. URB. HIST. 394, 395 (2003); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985); Patricia Williams, *From the Du Bois Institute’s ‘A Conversation on Race,’* PBS (Aug. 1997), <https://www.pbs.org/wgbh/pages/frontline/shows/race/audio/pwilliams.html> [<https://perma.cc/SHL7-2XFW>] (stating that as the state mandated that Blackness presented unacceptable financial risk, it constructed the racial order; even now, White homeowners are offered lower interest rates and their homes appreciate more quickly than Black-owned homes); KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 9 (2019); *Family Claims Racial Bias Affected Housing Appraisal Because of Wife’s Race: Part 1*, ABC NEWS (Oct. 15, 2020), <https://abcnews.go.com/Nightline/video/family-claims-racial-bias-affected-housing-appraisal-wifes-73624445> [<https://perma.cc/ZC59-PZGG>]; Herbert Hill, *Labor Unions and the Negro: The Record of Discrimination*, COMMENTARY (Dec. 1959), <https://www.commentary.org/articles/herbert-hill-labor-unions-and-the-negro-the-record-of-discrimination> [<https://perma.cc/GS3J-YVPA>].

benefits.<sup>36</sup> Currently, White families receive federal subsidies through the tax code and tuition support that far exceed similar subsidies received by Black families.<sup>37</sup>

These White welfare programs require, and required, the dispossession, segregation, or exclusion of people of color—conditions that necessitate state violence as well as the threat of state violence to constrain resistance to these illegitimate and intolerable conditions.<sup>38</sup>

#### D. *Illegally Extracting Resources from Communities of Color*

The state will also resort to extralegal means to control or extract resources from communities of color.<sup>39</sup> Professor Bernadette Atuahene calls this form of state action “stategraft.”<sup>40</sup> For example, between 1880 and 1915, many Black persons sent to forced labor were not “duly convicted,” but were victims of state-sponsored White crimes such as kidnapping, perjury, false imprisonment, peonage, reckless endangerment, and reckless homicide.<sup>41</sup>

These four categories help surface a precondition to the racial order: the overwhelming violence that only the state can provide. Such violence reveals the state’s essential role in racial oppression that is typically attributed to private ordering. The four ways in which state violence is deployed can be surfaced through a historical interrogation of the carceral system, the primary source of violence against civilians.

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<sup>36</sup> MATTHEW CHAMBERS, CARLOS GARRIGA & DON E. SCHLAGENHAUF, *THE NEW DEAL, THE GI BILL, AND THE POST-WAR HOUSING* (2012); Quil Lawrence, *Black Vets Were Excluded from GI Bill Benefits — A Bill in Congress Aims to Fix That*, NPR (Oct. 18, 2022, 4:25 PM), <https://www.npr.org/2022/10/18/1129735948/black-vets-were-excluded-from-gi-bill-benefits-a-bill-in-congress-aims-to-fix-th> [<https://perma.cc/E6BN-J8ZH>]; Erin Blakemore, *How the GI Bill’s Promise Was Denied to a Million Black WWII Veterans*, HISTORY (June 21, 2023), <https://www.history.com/news/gi-bill-black-wwii-veterans-benefits> [<https://perma.cc/56SR-4ZQJ>].

<sup>37</sup> Phillip Levine & Dubravka Ritter, *The Racial Wealth Gap, Financial Aid, and College Access*, BROOKINGS INST. (Sept. 27, 2022), [www.brookings.edu/articles/the-racial-wealth-gap-financial-aid-and-college-access](http://www.brookings.edu/articles/the-racial-wealth-gap-financial-aid-and-college-access) [<https://perma.cc/243S-G6LM>]; DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* 66 (2021).

<sup>38</sup> NAT’L ASS’N OF REAL EST. BDS., *CODE OF ETHICS*, art. 34, at 7 (rev. ed. 1928) (“Realtor[s] should never be instrumental in introducing into a neighborhood...members of any race... whose presence [would] clearly be detrimental to property values...”).

<sup>39</sup> Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107, 174 (2020).

<sup>40</sup> *Id.* at 170.

<sup>41</sup> Ion Meyn, *White-on-Black Crime: Revisiting the Convict Leasing Narrative*, 2024 WIS. L. REV. 533, 534 (2024).

## II. THE CRIMINAL SYSTEM AS GUARANTOR OF THE RACIAL ORDER

The criminal system is the locus of state violence. What follows is a history of policing and criminal adjudication that reveals how and for what reasons the criminal system has been deployed in furtherance of the racial order. As one examines who is subject to this violence, how this violence is deployed, and who benefits, the carceral system's critical role in constructing and maintaining racial order comes into focus.<sup>42</sup>

### A. *Constructing and Maintaining the System of Chattel Slavery*

Chattel slavery was co-constructed through state and communal violence. Current Fourteenth Amendment doctrine would view private ordering's role in perpetrating chattel slavery to reflect the natural order.<sup>43</sup> Yet it is inconceivable that a system of such unmitigated communal violence could persist absent state alignment—it took the overwhelming threat of state violence to sustain it and the violence of war to end it.

Affecting every aspect of life everywhere, chattel slavery shaped White identity.<sup>44</sup> Northern cities provided ports for the slave trade, Northern financial markets reaped profits, and Northern industries depended on products of exploited labor.<sup>45</sup> In the eighteenth century, enslaved persons constituted one-fifth of New York City's population,<sup>46</sup> and on the eve of Civil War, enslaved persons in union-aligned states numbered 430,000.<sup>47</sup> North and South, chattel slavery required total control over enslaved persons but also community control over free Black

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<sup>42</sup> This analysis does not assess how the criminal system has been used to subjugate the working class, immigrants, or the unhoused; doing so requires separate treatment. See, e.g., Simon, *supra* note 14, at 1636 (“[T]he scale of carceral state was determined not by legal but by economic and social factors created by the emergence of capitalism.”).

<sup>43</sup> See, e.g., *Washington v. Davis*, 426 U.S. 239 (1976); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

<sup>44</sup> Khiara Bridges, *The Dangerous Law of Biological Race*, 82 *FORDHAM L. REV.* 21, 29 (2013).

<sup>45</sup> See EQUAL JUST. INITIATIVE, *THE TRANSATLANTIC SLAVE TRADE* 30–54 (2020), <https://eji.org/report/wp-content/uploads/2023/02/transatlantic-report-PDF-web.pdf> [<https://perma.cc/F575-6K28>]; Zoe Thomas, *The Hidden Links Between Slavery and Wall Street*, BBC (Aug. 28, 2019), <https://www.bbc.com/news/business-49476247> [<https://perma.cc/ZEK9-K96W>].

<sup>46</sup> *Id.* at 49.

<sup>47</sup> 1860 CENSUS: POPULATION OF THE UNITED STATES (indicating the enslaved populations of states in 1850: Kentucky, 225,483 (approximately 20% of total population); Maryland, 87,169 (approximately 13% of total population); Missouri, 114,931 (approximately 10% of total population); Delaware, 1,798 (approximately 2% of total population); Washington, D.C., 3,185 (approximately 4% of total population)).

persons, whose equal treatment would erode slavery's legitimacy. North and South, White men were empowered or required to subject Black persons to immersive surveillance and violence.<sup>48</sup>

In the North, there was much to police in White-on-Black encounters, as restrictions on residency, voting, education, work, and social equality were pervasive.<sup>49</sup> In the antebellum North, Black persons "made up a startling percentage of convicted offenders."<sup>50</sup> In 1826, in post-manumission Massachusetts, one in seventy-four residents were Black, but one in six were inmates; in post-manumission Pennsylvania, one in thirty-four residents were Black, but one in three were inmates.<sup>51</sup>

In the South, any wall between communal and state action was illusory, as laws obligated White adults to detain any Black person and assess for ever-increasing prohibitions.<sup>52</sup> A perceived violation authorized whipping (a punishment reserved for Black persons—as a newspaper opined, "[A] White man's nature revolts at such degrading punishment")<sup>53</sup> and enslavement.<sup>54</sup> Enslaved persons needed a plantation pass; free Black persons needed local registration papers.<sup>55</sup> Jurisdictions imposed curfews, restricted social interaction, and barred free Black persons from reading, writing, vocations, and voting.<sup>56</sup> White assertions of guilt were summary, with punishment meted out regardless of

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<sup>48</sup> LITWACK, *supra* note 3, at 97; IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 316–40 (1st ed. 1974); SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* (2001); MARC HOWARD ROSS, *SLAVERY IN THE NORTH: FORGETTING HISTORY AND RECOVERING MEMORY* 68–69 (2018); BALTO & FELKER-KANTOR, *supra* note 14, at 9; Isaiah Strong, *Surveillance of Black Lives as Injury-in-Fact*, 122 COLUM. L. REV. 1019, 1036–40 (2022); SIMONE BROWNE, "Everybody's Got a Little Light Under the Sun": *The Making of the Book of Negroes*, in *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* 63 (2015); ADAM MALKA, *THE MEN OF MOBTOWN: POLICING BALTIMORE IN THE AGE OF SLAVERY AND EMANCIPATION* 227 (2018) ("For decades [W]hite [men in antebellum Baltimore] vigilantly monitored, chased, arrested, protected, and whipped [B]lack people on the city's streets. . . . The weaker and more vulnerable the law made [B]lack Baltimoreans, the more it empowered [W]hite male Baltimoreans to police them.").

<sup>49</sup> LITWACK, *supra* note 3, at 75 ("By 1840, some 93[%] of the northern free [Black] population lived in states which completely or practically excluded them from the right to vote.").

<sup>50</sup> *Id.* at 95.

<sup>51</sup> *Id.*

<sup>52</sup> WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550–1812*, at 348 (2d ed. 2012). As slavery faced an existential threat after Congress prohibited slave importation, states passed more restrictions on manumission and on free Black persons.

<sup>53</sup> BERLIN, *supra* note 48, at 334 (quoting LOUISVILLE DAILY COURIER, May 3, 1855).

<sup>54</sup> HADDEN, *supra* note 48; BERLIN, *supra* note 48, at 334 ("By the 1850s, it was so rare for [W]hites to be whipped that a Kentucky jury awarded six hundred dollars to a [W]hite thief who had been so punished.").

<sup>55</sup> BERLIN, *supra* note 48, at 94, 319.

<sup>56</sup> *Id.* at 69, 317; WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* 336 (1853) (describing a law sanctioning White persons who taught free Black persons to read).

culpability.<sup>57</sup> It is within this commitment to racial surveillance and violence that the country's first professional police force was formed in the South.<sup>58</sup>

To suggest conformance with the rule of law, plantation violence was technically constrained. Law authorized extraction of labor through violent correction, but an enslaved person, like a “domestic animal, [could] not lawfully be hacked and hewed to pieces, as a block of wood may be.”<sup>59</sup> Notwithstanding the conceit of legal protection, enslaved persons were unprotected from whipping, disfigurement, hot boxes, spiked neck irons, stocks, suspension, branding, rape, and murder.<sup>60</sup>

In the antebellum regime, communal and plantation violence was inseparable from state violence; both in the North and South, “[W]hitenedness and policing were inseparable.”<sup>61</sup> Within these social and political arrangements, White men were privileged to trespass Black bodies—they were expected to “guard the city, enforce its criminal laws, and govern in its name.”<sup>62</sup> As will be discussed, White discretion to surveil, detain, beat, question, and arrest Black persons has informed policing since.<sup>63</sup>

White persons internalized this racial order as they received its dividends of wealth, status, and power. White identity had become inseparable from the racial order. As abolition movements gained traction, White investment in the racial hierarchy was unyielding.

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<sup>57</sup> Roberts, *supra* note 14, at 20–21.

<sup>58</sup> The force was established in 1783 in Charleston. BALTO & FELKER-KANTOR, *supra* note 14, at 9.

<sup>59</sup> GOODELL, *supra* note 56, at 63; see also GEORGE M. STROUD, SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 24 (1827).

<sup>60</sup> See, e.g., SAMUEL WOOD, INJURED HUMANITY; BEING A REPRESENTATION OF WHAT THE UNHAPPY CHILDREN OF AFRICA ENDURE FOR THOSE WHO CALL THEMSELVES CHRISTIANS (1805); MOSES ROBERT, A NARRATIVE OF THE ADVENTURES AND ESCAPE OF MOSES ROPER, FROM AMERICAN SLAVERY (1st Am. ed. 1838).

<sup>61</sup> BALTO & FELKER-KANTOR, *supra* note 14, at 10.

<sup>62</sup> MALKA, *supra* note 48, at 4; STROUD, *supra* note 59, at 36 (stating any criminal consequence for White on Black crime “cannot be enforced” under prevailing social conditions); GOODELL, *supra* note 56, at 71 (stating that under slave codes, “[r]ape committed on a female slave is an offense not recognized by law”), 209–16 (documenting White-on-Black murders that failed to result in criminal consequences).

<sup>63</sup> See, e.g., SIMON BALTO, OCCUPIED TERRITORY: POLICING BLACK CHICAGO FROM RED SUMMER TO BLACK POWER 45–47 (2019) (describing unchecked beatings and arrests of Black persons by police during the Progressive period); ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960s, at 202–03 (1st ed. 2021) [hereinafter HINTON, AMERICA ON FIRE] (“In . . . the late 1960s and early 1970s, rebellions usually began after an encounter with a police officer or in direct response to police brutality or other violent acts committed by [W]hites against Black people.”).

## B. *Preserving White Privilege in the Transition to Emancipation*

The anti-slavery movement in the North was not anti-racist.<sup>64</sup> The commitments to racial hierarchy resisted disruption by manumission. As Northern states in the late 1700s and early 1800s implemented deferred manumission laws, localities relied on criminal adjudication to substitute for chattel slavery's system of racial control.<sup>65</sup> There was much to enforce as jurisdictions imposed restrictions to further curtail Black freedom in anticipation of more free Black persons. Ohio, Indiana, Illinois, Michigan, and Wisconsin "restricted [B]lack settlement and enshrined official discrimination against [B]lack people."<sup>66</sup> By the 1830s, the North was characterized by state-mandated segregation and privately-imposed exclusion, innovating the pillars of Jim Crow that would define the country by the late 1890s. White men and police enforced "racial etiquette," as well as segregation in or exclusion from transportation, lodging, entertainment, services, and schools.<sup>67</sup> Green Books, associated with navigating the South, were first published to guide Black travelers through the Jim Crow North.<sup>68</sup> White men were empowered to secure arrest warrants from magistrates, conferring powers of policing to private ordering that supplemented a growing reliance on professional forces.<sup>69</sup>

As Northern manumission triggered White fear over labor competition,<sup>70</sup> White mobs in Cincinnati ejected over fifty percent of the city's Black residents in 1829, and in Philadelphia, beat Black residents and destroyed homes and churches in 1834.<sup>71</sup> Philadelphia assigned

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<sup>64</sup> Purnell & Theoharis, *supra* note 2; LITWACK, *supra* note 3, at viii.

<sup>65</sup> Incarceration rates in the later 1820s is indicative of this reliance. See LITWACK, *supra* note 3, at 95 (discussing shockingly high incarceration rates of Black persons in the North during this time). The professionalization of police departments in Northern urban areas is marked after the late 1830s. BALTO & FELKNER-KANTOR, *supra* note 13, at 8. Adam Malka concludes it was Maryland's manumission movement that within a decade resulted in skyrocketing incarceration rates for Black residents, as well as more reliance on police. MALKA, *supra* note 48, at 9 (stating "[B]lack autonomy . . . invited [W]hite policing").

<sup>66</sup> Purnell & Theoharis, *supra* note 2, at 12–13.

<sup>67</sup> LITWACK, *supra* note 3, at 97 (stating that Black persons in the antebellum North were "excluded from railway cars," "could not enter most hotels, restaurants, and resorts," and were "educated in segregated schools, punished in segregated prisons, nursed in segregated hospitals, and buried in segregated cemeteries").

<sup>68</sup> See Richard A. Kennedy, *Automobility, Hospitality, African American Tourism, and Mapping Victor H. Green's Negro Motorist Green Book* (June 2013) (M.A. thesis, East Carolina University) (on file with East Carolina University).

<sup>69</sup> BALTO & FELKER-KANTOR, *supra* note 14, at 7–8 (citing KALIN. GROSS, *COLORED AMAZONS: CRIME, VIOLENCE, AND BLACK WOMEN IN THE CITY OF BROTHERLY LOVE, 1880–1910*, at 69–70 (2006)).

<sup>70</sup> LITWACK, *supra* note 3, at 101, 113.

<sup>71</sup> *Id.* at 100, 102.



blame to the “problematic” hiring of Black persons.<sup>72</sup> Mobs also formed over resistance to the racial order, however symbolic the resistance. A Philadelphia mob in 1842 attacked a Black procession commemorating abolition in the West Indies.<sup>73</sup> The official inquiry blamed Black victims for the procession’s “provocative nature.”<sup>74</sup>

Communal violence in response to White alarm over an increasing free Black population would only intensify after national emancipation.<sup>75</sup> Northerners feared an inundation of Black refugees who were believed to be “degraded and . . . acted upon by no motive to honourable exertions.”<sup>76</sup> Sundown towns that barred Black residents (at any time or by sunset) proliferated across the Midwest and West.<sup>77</sup> In Illinois, there were over 500 towns in which segregation was insufficient and only exclusion would do.<sup>78</sup> Though these conditions were not established by law, these communal acts of exclusion were backed by state violence, as White residents could rely on police to enforce these conditions.<sup>79</sup> What else but the fear of violent state retribution would result in Black persons being forced to leave a sundown town on the orders of White children, some as young as eight?<sup>80</sup>

In the post-Emancipation North, jurisdictions established or fortified police forces.<sup>81</sup> As Reconstruction Amendments “deracialized the statute books,” the “policeman and prison were updated versions of the antebellum [W]hite vigilante.”<sup>82</sup> Historian Adam Malka reveals that after Maryland’s emancipation decree in 1864, pro-abolition Baltimore responded by “arresting and incarcerating large numbers of freed people,”<sup>83</sup> a reaction indicative of a “liberal order that assumed criminality as the essence of [B]lack freedom.”<sup>84</sup> The increasing footprint of police departments attended to White fears over inevitable decay of

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<sup>72</sup> *Id.* at 100–01.

<sup>73</sup> *Id.* at 102.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 21.

<sup>77</sup> JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 150 (2006).

<sup>78</sup> Purnell & Theoharis, *supra* note 2, at 15; see also LOEWEN, *supra* note 77, at 4.

<sup>79</sup> LOEWEN, *supra* note 77, at 4, 65; Purnell & Theoharis, *supra* note 2, at 15.

<sup>80</sup> LOEWEN, *supra* note 77, at 228, 276.

<sup>81</sup> MALKA, *supra* note 48, at 6 (“[A] liberal ideology of freedom cultivated during the age of slavery legitimated the formal policing of [B]lack people during the age of emancipation.”).

<sup>82</sup> *Id.* at 4.

<sup>83</sup> *Id.* at 1.

<sup>84</sup> *Id.* at 3.

“good order and tranquility” upon the arrival of this “injurious population.”<sup>85</sup>

These emerging police forces reinforced communal violence. From the perspective of free Black persons, “[W]hite men were the state.”<sup>86</sup> Where White men might issue summary punishments for any perceived violation, police used formal channels: vagrancy arrests of Black residents in Baltimore, for example, increased by over 1,800% in the ten years following national emancipation.<sup>87</sup> In Maryland, in 1863, Black men represented 23% of the prison population; by 1872, 62%.<sup>88</sup>

The antebellum power of White men to police and enslave Black persons would not be constitutionally relinquished with Reconstruction. The Thirteenth Amendment marked the first explicit constitutional authorization of enslavement, with criminal adjudication providing for slavery’s legitimation and continuance. Within the country’s racial order, this authorization was reserved for Black persons: from available statistics, one conservatively estimates that 95% of those sent into forced labor were Black.<sup>89</sup> The Fourteenth Amendment would be interpreted to prevent neither racially disparate enforcement by the state<sup>90</sup> nor White-on-Black acts of communal violence.<sup>91</sup>

In the South, immersive post-Emancipation surveillance and re-enslavement persisted after criminal codes explicit about such designs were deemed unconstitutional.<sup>92</sup> Well after Emancipation, White-on-Black crimes—murder, rape, or theft—were not treated as crimes.<sup>93</sup> An

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<sup>85</sup> LITWACK, *supra* note 3, at 68.

<sup>86</sup> MALKA, *supra* note 48, at 5.

<sup>87</sup> *Id.* at 231.

<sup>88</sup> *Id.* at 237.

<sup>89</sup> U.S. CONST. amend. XIII, § 1. Of Alabama’s county-processed convicted persons sent to forced labor, 97% were Black. “In ‘Arkansas, Texas and Virginia, Florida and Georgia, North and South Carolina, Louisiana and Mississippi, the convict populations were overwhelmingly [B]lack. Of South Carolina’s 431 state prisoners in 1880, only 25 were [W]hite [94% Black]; of Georgia’s 1,200 state prisoners in that year, almost 1,100 were [Black]’ [92% Black]. Many of these convictions were for vagrancy.” Meyn, *supra* note 41, at 536 (quoting DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 63 (1996)).

<sup>90</sup> See *The Civil Rights Cases*, 109 U.S. 3, 13 (1883) (limiting federal enforcement of the Equal Protection Clause to affirmative acts of the state); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (limiting constitutional violations to state actors who intervene “because of” a person’s race).

<sup>91</sup> See *Civil Rights Cases*, 109 U.S. at 17; see also *United States v. Cruikshank*, 92 U.S. 542, 555–56 (1875) (making clear that the federal government cannot intervene under the Fifteenth Amendment when a private person disenfranchises another based on race through the act of murder).

<sup>92</sup> LITWACK, *supra* note 3, at 279.

<sup>93</sup> LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 278–79, 289 (1979); *EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876*, at 42–52 (2020), <https://eji.org/wp-content/uploads/2020/07/reconstruction-in-america-report.pdf> [<https://perma.cc/ANS8-AN4R>]; Hill, *supra* note 26, *passim*.

1865 report to President Johnson stated that in the South, Black persons were placed:

under a sort of permanent martial law, while the provision investing every white man with the power and authority of a police officer as against every [B]lack man subjects them to the control even of those individuals who in other communities are thought hardly fit to control themselves.<sup>94</sup>

After the end of Reconstruction, as many as 200,000 Black persons would be enslaved or re-enslaved,<sup>95</sup> accomplished through the Thirteenth Amendment, but also illegally.<sup>96</sup> White-owned mining operations, smelting factories, mills, brick manufacturers, railroads, and plantations paid fines owed by convicted Black persons in exchange for their labor.<sup>97</sup> This arrangement was often fulfilled through the selective enforcement of vagrancy laws.<sup>98</sup> But state actors also routinely kidnapped and falsely convicted Black victims through perjured testimony.<sup>99</sup> These White-on-Black crimes included reckless homicide,<sup>100</sup> as state co-conspirators were aware that death rates of forced laborers could reach 45% per year—victims were starved, tortured, and killed by disease, exhaustion, whipping, and gunshots.<sup>101</sup> Such conduct violated the Thirteenth Amendment—these Black men were not *duly* convicted (through any accepted due process norm), but were instead crime victims. These conditions reflected a through line of state immunity for White-on-Black crimes that would survive Reconstruction. This pattern of disguising White crime as Black crime constituted the use of the criminal system to achieve the fourth category of state violence: stategraft.

During and after Reconstruction, “White men dominated the ‘machinery of the police and courts’” as Black persons “‘found themselves singled out for arrest, indictment, conviction, hanging, and long sentences’ while White [persons] received punishments ‘as lenient as

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<sup>94</sup> CARL SHURZ, REPORT ON THE CONDITION OF THE SOUTH (1865), <https://constitutioncenter.org/the-constitution/historic-document-library/detail/carl-schurz-report-on-the-condition-of-the-south-december-181865> [<https://perma.cc/MGP2-6VRT>].

<sup>95</sup> DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 7 (1st ed. 2008).

<sup>96</sup> *Id.*; Meyn, *supra* note 41, at 534.

<sup>97</sup> See Lynn Weinstein, *The Convict Leasing System: Slavery in Its Worst Aspects*, Libr. Cong. Blogs: Inside Adams: Sci. Tech. & Bus. (June 17, 2021), [https://blogs.loc.gov/inside\\_adams/2021/06/convict-leasing-system](https://blogs.loc.gov/inside_adams/2021/06/convict-leasing-system) [<https://perma.cc/E2W4-FEHG>].

<sup>98</sup> BLACKMON, *supra* note 96, at 52–53, 79.

<sup>99</sup> BLACKMON, *supra* note 96, at 69–70, 79.

<sup>100</sup> Meyn, *supra* note 41, at 534.

<sup>101</sup> *Id.* at 545.

ever.”<sup>102</sup> Persons of color during the antebellum period could not testify against a White person,<sup>103</sup> and though the Civil Rights Act of 1866 granted the right to testify regardless of skin color, states continued to enforce prior practices.<sup>104</sup> When explicit bans on Black jury service were prohibited in *Strauder v. West Virginia*,<sup>105</sup> counties installed a White gatekeeper to deem eligible Black jurors unfit to serve.<sup>106</sup> States also passed laws permitting nonunanimous guilty verdicts, a White-supremacy insurance policy to mute the voice of any Black juror who slipped into the jury pool.<sup>107</sup>

That White-on-Black crime was not acknowledged by the state emboldened White violence and rendered life unbearably dangerous for Black persons.<sup>108</sup> White mob massacres—across the rural South (Camilla, Georgia, in 1868,<sup>109</sup> Colfax, Louisiana, in 1873,<sup>110</sup> Thibodaux, Louisiana, in 1887,<sup>111</sup> Slocum, Texas, in 1910,<sup>112</sup> and Rosewood, Florida, in 1923);<sup>113</sup> the rural North (Linton, Indiana, in 1896,<sup>114</sup> and in Missouri in Pierce

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<sup>102</sup> Gregory, *supra* note 14, at 97–98 (quoting EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE NINETEENTH-CENTURY AMERICAN SOUTH*, 173, 223–24, 227 (1985)).

<sup>103</sup> Texas Black Codes, Ch. LIX, Sec. 1 (1866).

<sup>104</sup> See, e.g., *Blyew v. United States*, 80 U.S. 581, 590–93 (1871) (finding that a Black witness to a murder did not have standing under the Civil Rights Act of 1866 to challenge state law that prohibited a person of color to testify against a White defendant); KY. REV. STAT. ANN. § 107.001, (1860).

<sup>105</sup> 100 U.S. 303 (1879).

<sup>106</sup> See GILBERT THOMAS STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW*, 253–68 (1910) (surveying jurisdictions across the South and finding that virtually all excluded Black jurors). For example, in a South Carolina county of 18,000 White persons and 41,000 Black persons, the commissioner explained: “[W]e never allow a [Black person] to serve for the reason of general moral unfitness, and general depravity.” *Id.* at 268.

<sup>107</sup> Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1619 (2018); Ramos v. Louisiana, 590 U.S. 83, 87–88 (2020).

<sup>108</sup> See Hill, *supra* note 26, at 645–47.

<sup>109</sup> See Lee W. Formwalt, *The Camilla Massacre of 1868: Racial Violence as Political Propaganda*, 71 GA. HIST. Q. 399 (1987).

<sup>110</sup> See LEEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION* xiii (2008).

<sup>111</sup> See WILLIAM IVY HAIR, *BOURBONISM AND AGRARIAN PROTEST: LOUISIANA POLITICS 1877–1900*, at 181–82 (1969).

<sup>112</sup> See MARGARITA ARAGON, *This Land of Barbarians*, in *A SAVAGE SONG: RACIST VIOLENCE AND ARMED RESISTANCE IN THE EARLY TWENTIETH-CENTURY U.S.-MEXICO BORDERLANDS* 56 (John Solomos, Satnam Virdee & Aaron Winter eds., 2021).

<sup>113</sup> See *White Mob Destroys Black Community of Rosewood, Florida*, EQUAL JUST. INITIATIVE, <https://calendar.eji.org/racial-injustice/jan/05> [https://perma.cc/QV8G-LDAX].

<sup>114</sup> See *One Place on Earth too Hot for a Negro*, RICHMOND CLIMAX (Aug. 5, 1903).

City in 1901,<sup>115</sup> Joplin in 1903,<sup>116</sup> and Springfield in 1906);<sup>117</sup> the urban South (Memphis, Tennessee, in 1866,<sup>118</sup> Wilmington, North Carolina, in 1898,<sup>119</sup> Forsyth County, Georgia, in 1912,<sup>120</sup> Atlanta, Georgia, in 1906,<sup>121</sup> and Tulsa, Oklahoma, in 1921)<sup>122</sup>; and the urban North (Cincinnati, Ohio, in 1829, New York, New York, in 1842 and 1900,<sup>123</sup> Springfield, Illinois, in 1908,<sup>124</sup> Chester, Pennsylvania, in 1917,<sup>125</sup> East St. Louis, Illinois, in 1917, and Chicago, Illinois, in 1919<sup>126</sup>)—were not possible absent state violence or its guarantee of retributive violence.<sup>127</sup> In an imagined counterfactual, if Black mobs had killed White families and burned White homes and churches in West St. Louis, Missouri, in 1917, the state would have suppressed the mob and terrorized the Black community in retribution.

A significant trigger for this White-on-Black violence continued to be Black competition and success. There are countless examples of police aiding and abetting White mobs triggered by Black economic competition.<sup>128</sup> The lynchings, beatings, arson, and false convictions were committed and facilitated by police, prosecutors, and judges. This

<sup>115</sup> See KIMBERLY HARPER, *WHITE MAN'S HEAVEN: THE LYNCHING AND EXPULSION OF BLACKS IN THE SOUTHERN OZARKS 1894–1909*, at 36 (2010).

<sup>116</sup> See *id.* at 81–83.

<sup>117</sup> See *id.* at 161.

<sup>118</sup> See Mackenzie Lanum, *Memphis Riot 1866*, BLACK PAST (Nov. 20, 2011), <https://www.blackpast.org/african-american-history/memphis-riot-1866> [https://perma.cc/6DJ5-S49M].

<sup>119</sup> See 1898 WILMINGTON RACE RIOT COMM'N., 1898 WILMINGTON RACE RIOT REP. (2006), <https://digital.ncdcr.gov/Documents/Detail/1898-wilmington-race-riot-report/2257408?item=2277536> [https://perma.cc/S7WM-WF6Z].

<sup>120</sup> See PATRICK PHILLIPS, *BLOOD AT THE ROOT: A RACIAL CLEANSING IN AMERICA* xi–xiii (2016).

<sup>121</sup> See JAY WINSTON DRISKELL, JR., *SCHOOLING JIM CROW: THE FIGHT FOR ATLANTA'S BOOKER T. WASHINGTON HIGH SCHOOL AND THE ROOTS OF BLACK PROTEST POLITICS* 84 (Deborah E. McDowell ed., 2014).

<sup>122</sup> OKLA. COMM'N. TO STUDY THE TULSA RACE RIOT OF 1921, TULSA RACE RIOT MAP 1 (2001), <https://www.okhistory.org/research/forms/freport.pdf> [https://perma.cc/67WF-7MXR].

<sup>123</sup> See DOUGLAS J. FLOWE, UNCONTROLLABLE BLACKNESS: AFRICAN AMERICAN MEN AND CRIMINALITY IN JIM CROW NEW YORK 50 (Heather Ann Thompson & Rhonda Y. Williams eds., 2020); ROBERTA SENECHAL DE LA ROCHE, IN LINCOLN'S SHADOW: THE 1908 RACE RIOT IN SPRINGFIELD, ILLINOIS 2 (1990).

<sup>124</sup> See *id.* at 1.

<sup>125</sup> See Eric Ledell Smith, *The 1917 Race Riot in Chester, Pennsylvania*, 75 PA. HIST. 171 (2008).

<sup>126</sup> See Gregory, *supra* note 14, at 114.

<sup>127</sup> Gregory, *supra* note 14, at 114. See generally Toby Moore, *Race and the County Sheriff in the American South*, INT'L SOC. SCI. REV., Jan. 1, 1997, at 50, 53.

<sup>128</sup> “In the face of Black political and economic competition created by emancipation and progressive Reconstruction, [W]hite backlash worked to re-impose [W]hite dominance through violent repression.” *Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUST. INITIATIVE (2017), <https://lynchinginamerica.eji.org/report> [https://perma.cc/674B-4RQY].

violence effectively reserved economic opportunity and wealth to White persons. In 1892, Memphian journalist Ida B. Wells watched in horror as vigilantes and police lynched owners of a successful Black grocery, disarmed Black Memphians, and falsely convicted dozens of Black men to years of forced labor (likely to their death).<sup>129</sup> She understood then that Black success was not a path to acceptance, but rather a severe violation of the color line.<sup>130</sup> The East St. Louis, Illinois, massacre in 1917 that occurred over the threat of competition resulted in a White mob “backed by the state police and local law enforcement”<sup>131</sup> that killed hundreds of Black residents—with accounts of children thrown into burning homes<sup>132</sup>—sparking an exodus of 6,000.<sup>133</sup> The 1921 Tulsa massacre was ignited by rumors of a Black youth breaking social protocol but White resentment over Black success was the fuel.<sup>134</sup> The police abetted and aided the mob as hundreds were murdered and 10,000 Black persons lost businesses and possessions.<sup>135</sup> White mobs could not accomplish such reprisals absent aligned state violence. Had there been attempted Black-on-White communal violence, state retribution would be immediate and overwhelming.

### C. *Creating a Template of Racial Control During the Great Migration*

Black persons sought to escape an increasingly hostile South to seek refuge in a hostile North. The reliance on professionalized police forces was reinforced by a department’s effectiveness in responding to White hysteria over Black migration.<sup>136</sup> As Black persons arrived in the early

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<sup>129</sup> Ida B. Wells, *Address at Tremont Temple: Lynch Law in All Its Phases* (Feb. 13, 1893).

<sup>130</sup> *Id.* (“Until this past year I was one among those who believed the condition of masses gave large excuse for the humiliations and proscriptions under which we labored; that when wealth, education and character became more feral among us, the cause being removed the effect would cease, and justice being accorded to all alike.”)

<sup>131</sup> HINTON, *AMERICA ON FIRE*, *supra* note 63, at 71.

<sup>132</sup> *The East St. Louis Riot*, PBS: AM. EXPERIENCE, <https://pbs.org/wgbh/americanexperience/features/garvey-riot> [<http://perma.cc/9D7V-9TRD>].

<sup>133</sup> Wells, *supra* note 129.

<sup>134</sup> Yuliya Parshina-Kottas et al., *What the Tulsa Race Massacre Destroyed*, N.Y. TIMES (May 24, 2021), <https://www.nytimes.com/interactive/2021/05/24/us/tulsa-race-massacre.html> [<https://perma.cc/9SGG-CPAN>]; OKLA. COMM’N. TO STUDY THE TULSA RACE RIOT OF 1921, TULSA RACE RIOT Map 1 (2001), <https://www.okhistory.org/research/forms/freport.pdf> [<https://perma.cc/67WF-7MXR>].

<sup>135</sup> Parshina-Kottas et al., *supra* note 134.

<sup>136</sup> By the early twentieth century, inflated and fabricated crime rates were attributed to Black persons. Meyn, *supra* note 41, at 550–51. Criminologists used this flawed data to assert a link between Blackness and criminality. KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 4–7 (2010).

1900s, departments earned legitimacy by enforcing neighborhood borders and deploying counterinsurgency tactics in burgeoning communities of color. These counterinsurgency tactics would form the template for modern policing.<sup>137</sup>

Counterinsurgency tactics had been developed in colonial campaigns against Native nations. By 1794, the War Department was relying on mobile units to penetrate territory, kill civilians, and destroy food supplies.<sup>138</sup> By the late nineteenth century, “[c]ounterinsurgent warfare . . . targeting Indigenous civilians” defined “US war making.”<sup>139</sup> At the turn of the twentieth century in the Philippines during the Spanish-American War, the Army faced protracted local resistance, spurring improvements in collecting intelligence, unit discipline, and tactics.<sup>140</sup>

Returning veterans and police reformers imported these strategies.<sup>141</sup> They imposed a military hierarchy (chief, captain, lieutenant, sergeant, and patrol). They established academies that modeled training based on military manuals. They deployed mobile units to surveil and conduct preemptive sweeps in communities of color.<sup>142</sup> August Vollmer—Berkeley’s police chief by 1909, head of the International Association of Police Chiefs, and in-demand consultant to urban departments—stated: “since Spanish-American War days, I’ve studied military tactics and used them to good effect . . . we’re conducting a war, a war against the enemies of society.”<sup>143</sup> Vollmer developed a criminology program at Berkeley that taught criminal traits were race based.<sup>144</sup> He also imported crime-mapping, a precursor to modern systems like Compstat<sup>145</sup> that reinforce racist policing: surge into communities of color, preemptively suppress criminal activity, report it, and establish a feedback loop. White communities were spared.

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<sup>137</sup> See Julian Go, *The Imperial Origins of American Policing: Militarization and Imperial Feedback in the Early 20th Century*, 125 AM. J. SOCIO. 1193 (2020); Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), <https://newyorker.com/magazine/2020/07/20/the-invention-of-the-police> [https://perma.cc/SS76-BL5M]; HINTON, AMERICA ON FIRE, *supra* note 63, at 10, 206.

<sup>138</sup> DUNBAR-ORTIZ, *supra* note 32 at 82–83.

<sup>139</sup> *Id.* at 93.

<sup>140</sup> Go, *supra* note 137, at 1202, 1204, 1207–09 (2020).

<sup>141</sup> See *id.* at 1204–05.

<sup>142</sup> *Id.* at 1212–15.

<sup>143</sup> ALFRED PARKER, CRIME FIGHTER, AUGUST VOLLMER 144 (1961).

<sup>144</sup> Tony Hicks, *Berkeley’s First Police Chief Supported Eugenics, Prompting Calls to Rename Vollmer Peak*, BERKELEYSIDE (Sept. 15, 2020, 8:39 AM), <https://www.berkeleyside.org/2020/09/15/berkeleys-first-police-chief-supported-eugenics-prompting-calls-to-rename-vollmer-peak> [https://perma.cc/UWA3-8H2C].

<sup>145</sup> Andrew Guthrie Ferguson, *Policing Predictive Policing* 94 WASH. U. L. REV. 1109, 1124 (2017).

The consequences of such tactics are reflected in historian Jeffrey Adler's study of policing in New Orleans during the early twentieth century.<sup>146</sup> The majority of fatal, officer-involved shootings of Black victims occurred in Black neighborhoods (where officers engaged in preemptive tactics), whereas shootings of White victims occurred in commercial districts (where officers responded to crimes in progress).<sup>147</sup> During this period, Black residents comprised 29% of the city's population but 61% of its officer-involved homicides, even as Black victims were much less likely to be armed or involved in crime.<sup>148</sup>

#### D. *Maintaining Segregation and Exclusion During Jim Crow and Redlining*

In the 1920s, the Congressional Eugenics Committee reduced immigration quotas for disfavored groups as states passed sterilization laws that by 1935 would exist in the majority of states and target women of color.<sup>149</sup> In 1923, an estimated 200,000 Ku Klux Klan members celebrated July 4th in Kokomo, Indiana, population 30,000.<sup>150</sup> Strongest in the North, the Klan was resurgent—as many as one in seven Americans eligible to join did so.<sup>151</sup> Within this *Plessy* regime,<sup>152</sup> the “statutory structure and language” mandating apartheid is acknowledged by

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<sup>146</sup> Jeffrey Adler, “*The Killer Behind the Badge*”: *Race and Police Homicide in New Orleans, 1925–1945*, 30 L. & HIST. REV. 495, 511 (2012).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 508.

<sup>149</sup> See generally Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS: REPRODUCTIVE RIGHTS (Jan. 29, 2016), <https://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states> [https://perma.cc/H69B-H8BY]. California's eugenics law resulted in 20,000 forced sterilizations, with highly disproportionate consequences for Latine women. Nicole L. Novak et al., *Disproportionate Sterilization of Latinos Under California's Eugenic Sterilization Program, 1920–1945*, 108 AM. J. PUB. HEALTH 611, 611–13 (2018); Alexandra Stern, *Sterilized in the Name of Public Health: Reproductive Control in Modern California*, 95 AM. J. PUB. HEALTH 1128, 1128 (2005); Alexandra Minna Stern et al., *California's Sterilization Survivors: An Estimate and Call for Redress*, 107 AM. J. PUB. HEALTH 50 (2017); *The Immigration Act of 1924 (The Johnson-Reed Act)*, OFF. HISTORIAN, <https://history.state.gov/milestones/1921-1936/immigration-act> [https://perma.cc/86SH-WZ2K].

<sup>150</sup> RORY McVEIGH, *THE RISE OF THE KU KLUX KLAN: RIGHT-WING MOVEMENTS AND NATIONAL POLITICS I* (2009); *Indiana City/Town Census Counts, 1900 to 2020*, STATSINDIANA, [https://www.stats.indiana.edu/population/PopTotals/historic\\_counts\\_cities.asp](https://www.stats.indiana.edu/population/PopTotals/historic_counts_cities.asp) [https://perma.cc/NH9P-SCGT].

<sup>151</sup> Purnell & Theoharis, *supra* note 2, at 15; LINDA GORDON, *THE SECOND COMING OF THE KKK: THE KU KLUX KLAN OF THE 1920S AND THE AMERICAN POLITICAL TRADITION I* (2017); Roland G. Fryer Jr. & Steven D. Levitt, *Hatred and Profits: Under the Hood of the Ku Klux Klan*, 127 Q.J. ECON. 1883, 1888 (2012) (estimating that during peak membership in 1924, 5–14% of the country's eligible population participated).

<sup>152</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).



courts,<sup>153</sup> but the violence committed and backed by thousands of officers escapes mention in doctrinal summaries of the period.<sup>154</sup>

In the South, but also in the North, police provided essential support to White communal violence over White status violations. In 1900, when a White undercover cop who assaulted a Black woman was killed in the incident by her husband, White rioters poured into Black neighborhoods to mete out violence as officers conducted mass arrests of Black victims.<sup>155</sup> Black teenage swimmers who crossed an invisible line extending out over Lake Michigan set off a week of White-on-Black violence in Chicago in 1919 as police assisted in beatings and arrested Black victims.<sup>156</sup> Professors Simon Balto and Max Felker-Kantor write:

Police from New Orleans to New York to Chicago often did little to stop white violence, and often actively participated in it. Knowing this, whites enlisted the police to “preserve exclusion” through both daily acts of violence and organized assaults.<sup>157</sup>

In the 1920s, arrangements between city officials and White crime syndicates pushed vice into Black neighborhoods.<sup>158</sup> White-owned establishments were patronized by White persons visiting from White neighborhoods spared of this activity.<sup>159</sup> When police needed to show they were cracking down on vice, they arrested Black persons. Burdening Black neighborhoods with White crime reinforced sociological claims of Black criminality and would later provide White neighborhood associations with ammunition to agitate for neighborhood segregation.<sup>160</sup>

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<sup>153</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 203 (2023) (“For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy v. Ferguson* the separate but equal regime that would come to deface much of America.”); see also *Hopwood v. Texas* 84 F.3d 720, 724–25 (1996) (“[T]he United States Supreme Court scripted one of this nation’s most evil conceits in *Plessy v. Ferguson*, declaring ‘separate but equal’ treatment of [B]lack Americans constitutional. *Plessy* was no more than a license for continued racial discrimination.” (citation omitted) (citing *Plessy*, 163 U.S. 537)).

<sup>154</sup> See, e.g., *Students for Fair Admissions, Inc.*, 600 U.S. at 230. For a description of law enforcement’s role, see Gregory, *supra* note 14, at 106, 121.

<sup>155</sup> DOUGLAS J. FLOWE, UNCONTROLLABLE BLACKNESS: AFRICAN AMERICAN MEN AND CRIMINALITY IN JIM CROW NEW YORK 50 (Heather Ann Thompson & Rhonda Y. Williams eds., 2020).

<sup>156</sup> BALTO, *supra* note 63, at 30–37.

<sup>157</sup> BALTO & FELKER-KANTOR, *supra* note 14, at 17 (footnote omitted).

<sup>158</sup> See, e.g., BALTO, *supra* note 47, at 39–40; Stephen Robertson, Shane White, Stephen Garton & Graham White, *Disorderly Houses: Residences, Privacy, and the Surveillance of Sexuality in 1920s Harlem*, 21 J. HIST. SEXUALITY 443, 448–49 (2012); Thusi, *supra* note 14, at 1601–03, 1605.

<sup>159</sup> See *infra* note 158.

<sup>160</sup> Thomas J. Sugrue, *Crabgrass-Roots Politics: Race, Rights, and the Reaction against Liberalism in the Urban North, 1940-1965*, 82 J. AM. HIST. 561 (1995). <https://tristero.typepad.com/sounds/files/sugrue.pdf>

Where there were allegations of a serious Black-on-White crime, “officers launched indiscriminate roundups, such as the arrest and detention of nearly 1,000 African-American New Orleanians following the robbery and shooting of a [W]hite shipyard worker.”<sup>161</sup> Police subjected Black “suspects” to sleep deprivation, beatings, “placing a box over an individual’s head and filling it with tear gas, applying acid to genitals, hanging prisoners upside down by their ankles, or beating them with poles to the point of eyeball dislocation and blindness.”<sup>162</sup>

In 1921, in Chicago, “one in ten [B]lack men between seventeen and forty-four . . . spent time in . . . jail.”<sup>163</sup> These disparities did not reflect rates of criminal conduct, as a Chicago Commission reported:

[T]estimony [within Chicago’s law enforcement community] is practically unanimous that [Black residents] are much more liable to arrest than [W]hites since police officers share in the general opinion of the public that [Black persons] “are more criminal than [W]hites” and also feel that there is little risk in arresting [Black persons].<sup>164</sup>

In moving White crime to Black neighborhoods and enforcing neighborhood segregation, police played an essential role in New Deal and post-war efforts to build White wealth through a federally-intervened housing market.<sup>165</sup> Federal financing of new housing was dependent on building all-White developments.<sup>166</sup> Between 1934 and 1968, 98% of subsidized homeowners were White.<sup>167</sup> Supplementing this White

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<sup>161</sup> See, e.g., Adler, *supra* note 146, at 520 (“Dragnets of African-American [‘suspects’] were commonplace.”).

<sup>162</sup> BALTO, *supra* note 63, at 46. ZECHARIAH CHAFFEE, JR., WALTER H. POLLAK & CARL S. STERN, THE THIRD DEGREE: REPORT TO THE NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT 158 (1931) (“[T]hird-degree practices were particularly harsh in the case of [Black persons].”).

<sup>163</sup> BALTO, *supra* note 63, at 43.

<sup>164</sup> *Id.* at 44–45.

<sup>165</sup> See generally JAMES R. HAGERTY, THE FATEFUL HISTORY OF FANNIE MAE: NEW DEAL BIRTH TO MORTGAGE CRISIS FALL 19–21 (2012). Offering insurance on defaults (minimizing lender risk), mandating low down payments (easing borrower entry), instituting twenty-year repayment periods (lowering borrower’s monthly payment), and requiring amortization (borrower owes nothing at term’s end) made homeownership possible for many. But no bank would participate on those terms—why risk holding a depreciating investment for so long? The government thus created an agency to allow banks to quickly off-load loans. Banks could reap profits on origination fees and then sell the loan for a premium to the government, thus recouping their capital to restart the churn in this artificial, federally intervened market. *Id.*

<sup>166</sup> See ROTHSTEIN, *supra* note 10, at 5–9. These federally financed developments were built by all-White construction workers, two-thirds of which in 1934 were unemployed. COMM. ON ECON. SEC., SOCIAL SECURITY IN AMERICA 57 (U.S. Dep’t of Labor 1937). Black workers were excluded from trade unions, and thus did not benefit from these federally funded programs. Hill, *supra* note 35.

<sup>167</sup> SAM FULWOOD III, CTR. FOR AM. PROGRESS, THE UNITED STATES’ HISTORY OF SEGREGATED HOUSING CONTINUES TO LIMIT AFFORDABLE HOUSING 3 (2016).

welfare was the G.I. Bill, which helped create a White professional class by providing free college tuition and living stipends: By 1947, 49% of college admits were veterans, virtually all of them White, as universities North and South barred Black applicants.<sup>168</sup> By 1955, the G.I. Bill would further subsidize down payments and interest on 4.3 million loans (about a quarter of the nation's home loans),<sup>169</sup> virtually all to White veterans,<sup>170</sup> as Black veterans were ineligible to secure home loans due to redlining.<sup>171</sup>

This equity-building White welfare generated durable economic security and opportunity for White families.<sup>172</sup> And yet, a single Black neighbor would remove a White home from the mortgage market (no interested buyer could obtain a loan to purchase the home), significantly undermining the value of what was often a family's sole investment.<sup>173</sup> Government had weaponized the Black body; where persons of color had been a perceived threat, they were now an actual threat to White financial security. Along racial borders, White communities engaged in beatings, shootings, and arson to hold the line.<sup>174</sup> Under current doctrine, such violence reflected the natural order, but police aided and abetted this communal White violence.<sup>175</sup> This alignment was explicit: in Chicago, the police commissioner deemed racial integration a threat to public safety.<sup>176</sup>

Within this bristling atmosphere of state-aligned White lawlessness and violence, Los Angeles Police Chief William Parker in 1952 proclaimed police the "thin blue line" holding back chaos, which, to him

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<sup>168</sup> Milton Greenberg, *How the GI Bill Changed Higher Education*, CHRON. HIGHER EDUC. (June 18, 2004), <https://www.commentary.org/articles/herbert-hill/labor-unions-and-the-negro-the-record-of-discrimination> [<https://perma.cc/8NNGE-VTUJ>]; Lawrence, *supra* note 36; Blakemore, *supra* note 36.

<sup>169</sup> Matthew Chambers, Carlos Garriga & Don E. Schlagenhauf, *Did Housing Policies Cause the Postwar Boom in Home Ownership?*, in HOUSING AND MORTGAGE MARKETS IN HISTORICAL PERSPECTIVE 351, 353, 356–57 (Eugene N. White, Kenneth Snowden & Price Fishback eds., 2014); SERVICEMEN'S READJUSTMENT ACT, Pub. L. No. 78-346, 58 Stat. 284 (1944) (codified at 38 C.F.R. (1949)) (guaranteeing loans and setting interest at 4% (between 1940 and 1950, prevailing rates varied between 5–6%)).

<sup>170</sup> SAUL B. KLAMAN, *Mortgage Market Techniques and Characteristics*, in THE POSTWAR RESIDENTIAL MORTGAGE MARKET (1961); see *supra* note 36.

<sup>171</sup> See ROTHSTEIN., *supra* note 10, at 6–7.

<sup>172</sup> Emily Moss, Kriston McIntosh, Wendy Edelberg & Kristin Broady, *The Black-White Wealth Gap Left Black Households More Vulnerable*, BROOKINGS INST. (Dec. 8, 2020), <https://www.brookings.edu/articles/the-black-white-wealth-gap-left-black-households-more-vulnerable> [<https://perma.cc/G73U-6SLC>]; RAKESH KOCHHAR & MOHAMAD MOSLIMANI, PEW RSCH. CTR., WEALTH SURGED IN THE PANDEMIC, BUT DEBT ENDURES FOR POORER BLACK AND HISPANIC FAMILIES 14–17 (2023), <https://www.pewresearch.org/2023/12/04/wealth-gaps-across-racial-and-ethnic-groups> [<https://perma.cc/GGZ8-HLEL>].

<sup>173</sup> ROTHSTEIN, *supra* note 10, at 13.

<sup>174</sup> BALTO, *supra* note 63, at 97–106.

<sup>175</sup> See *id.* at 29, 37.

<sup>176</sup> *Id.* at 103.

and his constituents, included persons of color seeking financial security.<sup>177</sup> As post-*Brown* desegregation efforts were fiercely resisted in the North and South, White constituents—as they did when the racial order was threatened—called for more police.<sup>178</sup> The Chicago Police Department between 1945 and 1965 doubled in size, which resulted in skyrocketing drug arrests of Black residents as arrests for equally involved White residents declined.<sup>179</sup> Elizabeth Hinton writes that Black residents in Broward County, Florida, in 1969, “didn’t have sidewalks, fire hydrants, or a sewer system. They did, however, have police patrolling their streets.”<sup>180</sup>

Post-*Brown* resistance demonstrates how state alignment with the racial order permitted communities to maintain segregation in violation of federal law. The Citizens’ Council, which grew to 300,000 members in eighteen months, used economic reprisals and violence to suppress communities of color from “agitating” for desegregation.<sup>181</sup> This communal flouting of a constitutional mandate was backed by the state’s violent guarantee. Photos of federal marshals escorting Ruby Bridges dominate history books, but lost in that picture are a thousand points of darkness—acts of community members, officials, and officers committed to violently keep students of color out of White schools. As Professor Jonathan Simon observes, police departments “viewed themselves as the frontline against the desegregation of jobs, schools, and housing demanded by civil rights protesters in this period.”<sup>182</sup> The image of a (visiting) federal marshal is an aberration that feeds perennial and premature White exultation of due process and racial equality.

Surviving the civil rights era was the tradition of state authorization of White communal violence. In 1967, in Cairo, Illinois, White persons:

Point[ed] their rifles at passersby, and when Black children were on their way to school, they threatened them with German shepherds . . . Sheriff Chesley Willis . . . deputized any [W]hite person who wanted to assume police functions . . . [S]ix hundred members patrolled the streets of Cairo in groups, armed with

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<sup>177</sup> Maurice Chammah & Cary Aspinwall, *The Short, Fraught History of the ‘Thin Blue Line’ American Flag*, MARSHALL PROJECT (June 8, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/06/08/the-short-fraught-history-of-the-thin-blue-line-american-flag> [<https://perma.cc/56T3-JWE4>]; BALTO & FELKER-KANTOR, *supra* note 13, at 5.

<sup>178</sup> See generally TIMOTHY B. TYSON, *THE BLOOD OF EMMETT TILL* (2017); Nikole Hannah-Jones, *It Was Never About Busing*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/opinion/sunday/it-was-never-about-busing.html> [<https://perma.cc/3H7C-XCYC>]; Hinton & Cook, *supra* note 14, at 263–65, 271–72.

<sup>179</sup> BALTO, *supra* note 63, at 134.

<sup>180</sup> HINTON, *AMERICA ON FIRE*, *supra* note 63, at 19.

<sup>181</sup> TYSON, *supra* note 178, at 96, 100, 105.

<sup>182</sup> Simon, *supra* note 14, at 1641–42.

shotguns, rifles, pistols, two-way radios, and police dogs, conducting paramilitary drills to practice for the impending battles with Black residents.<sup>183</sup>

In Salisbury, Maryland in 1968, the forty-officer department deputized an “all-[W]hite, 216-member volunteer force” to intervene in the case of a Black uprising.<sup>184</sup> Hinton observed:

Many laws permitted mayors and police chiefs to deputize [W]hite persons, in this way, legitimating vigilantism. In contrast, any exertion by a [B]lack person to take up arms was deemed criminal, feeding racist narratives of Black dangerousness.<sup>185</sup>

Police continued to support constitutionally prohibited practices. Although the Civil Rights Act of 1964 prohibited civilians from barring access to public accommodations, communities continued to prohibit Black persons’ entry into towns across the Midwest, well into the 1970s.<sup>186</sup> When a federal judge ordered bussing of 40,000 students in Memphis, White families of 20,000 students moved outside district lines to create the largest private and segregated school system in the country.<sup>187</sup> This movement was not met with communal efforts in outlying townships to resist White migration. Rather, these communities and their police departments shared allegiance with and gave refuge to White families who fled from the law.

White families across the country defied desegregation orders, taking capital to White enclaves.<sup>188</sup> As Richard Rothstein observed, redlining and White flight created a “white noose” around communities of color, resulting in crushing unemployment, housing disinvestment, a diminished tax base, and struggling schools.<sup>189</sup> Also left behind: a growing White police force that enforced racial geography. Professor Aya Gruber writes of “bluelining,” the continued use of police to maintain borders

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<sup>183</sup> HINTON, *AMERICA ON FIRE*, *supra* note 63, at 51, 74.

<sup>184</sup> *Id.* at 92.

<sup>185</sup> *Id.* at 97.

<sup>186</sup> LOEWEN, *supra* note 77, at 3, 23, 53, 65.

<sup>187</sup> John Branston, *Battering Ram: The Tragedy of Busing Revisited*, *MEMPHIS MAG.* (Mar. 4, 2011, 3:53 PM), <https://memphismagazine.com/features/the-tragedy-of-busing-revisited> [<https://perma.cc/7ZRE-N5TX>].

<sup>188</sup> ROTHSTEIN, *supra* note 10, at 201; STEVEN M. GILLON, *SEPARATE AND UNEQUAL: THE KERNER COMMISSION AND THE UNRAVELLING OF AMERICAN LIBERALISM*, 117–18 (2018) (stating that as White families fled to the suburbs, cities faced a “diminishing tax base and less revenue for education, even as school enrollments grew and student populations became predominately [B]lack,” and that in Detroit in the 1960s, in a survey of a Detroit high school, “two years after graduation, 72 percent of [B]lack graduates were still unemployed”).

<sup>189</sup> See ROTHSTEIN, *supra* note 10, at 184.

between White communities and communities of color.<sup>190</sup> This protects White monopolies in the employment sector, as well as White investments, as interest rates, appraisal values, and home values still depend on whether a neighborhood remains White—the racial order itself determining what the market will bear.

### E. *The Nationalization of Policing*

By the 1960s, Black persons were trapped in economic exclusion zones and subject to increasing police control. James Baldwin wrote:

[In] every Northern city with a large [Black] population . . . the police are simply the hired enemies . . . They are present to keep the [Black person] in his place and to protect [W]hite business interests, and they have no other function . . . [A]nd since they know that they are hated, they are always afraid. One cannot possibly arrive at a more surefire formula for cruelty.<sup>191</sup>

After generations of federal interventions that facilitated economic growth and secured White housing wealth, skilled labor, and a professional corps, and after communities of color, in the absence of government assistance, had to recover from slavery, Jim Crow, and the Depression while subjected to racial violence and exclusion,<sup>192</sup> White policing of communities of color only became more violent and immersive.<sup>193</sup> As the federal government funded the deployment of more police to communities of color, between 1968 and 1972, Black communities experienced 1,949 uprisings, most all sparked by police brutality.<sup>194</sup>

The White chattering elite used these uprisings to reinforce narratives grounded in biological racism. President Eisenhower diagnosed the “savage riots” as “neglect of certain fundamental moral

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<sup>190</sup> Aya Gruber, *Policing and “Bluelining,”* 58 HOUS. L. REV. 867, 868 (2021).

<sup>191</sup> James Baldwin, *A Report from Occupied Territory*, NATION (July 11, 1966), <https://www.thenation.com/article/culture/report-occupied-territory> [https://perma.cc/G4Q8-BZUB].

<sup>192</sup> See generally Paul Moreno, *An Ambivalent Legacy: Black Americans and the Political Economy of the New Deal*, 6 INDEP. REV. 513 (2002).

<sup>193</sup> See BALTO AND FELKER-KANTOR, *supra* note 14, at 21–22; GILLON, *supra* note 145, at 88, 120 (stating that nationally, Black guardsmen represented 1.5% of the force, and that “[n]early all police forces in major cities were overwhelmingly [W]hite.”).

<sup>194</sup> HINTON, *WAR ON POVERTY*, *supra* note 10, at 2.10; Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) (allocating \$400 million (\$3.6 billion in 2024 dollars) authorizing the newly created Law Enforcement Assistance Administration to provide 75% of funding of additional officers deployed to “high crime areas”).

principles.”<sup>195</sup> Kerner Commissioner Katherine Peden attributed uprisings to Black persons who “did not take enough pride in their homes and in their communities” (and failed to acknowledge that many of these homes were owned by absent White landlords and that no rational owner would invest in upkeep or improvement on a depreciating asset that could not be sold in the housing market).<sup>196</sup> A *Wall Street Journal* headline read: “Behind the Riots: Family Life Breakdown in Negro Slums Sows Seeds of Race Violence; Husbandless Homes Spawn Young Hoodlums, Impede Reforms, Sociologists Say.”<sup>197</sup> President Johnson announced he would not let “any part of America [] become a jungle.”<sup>198</sup> The Federal Crime Commission Report of 1967 blamed uprisings on Black attitudes toward police.<sup>199</sup>

In response, the federal government financed the hiring of *more* White police. Between 1965 and 1970, federal funding for urban policing increased 2,900%.<sup>200</sup> When all this was happening, the country’s homicide rate had remained stable for 20 years at a historical low.<sup>201</sup> The murder rate was 90% higher in 1933,<sup>202</sup> when the government, instead of demonizing and policing White persons, saved existing White-owned homes from default, gave White persons jobs, and subsidized loans so that new White borrowers could afford new, subsidized suburban housing at the expense of Black and Brown taxpayers.

Hinton’s archival work reveals how in the 1960s the federal government laid the foundation for mass carceral apartheid by pathologizing Black communities, funding urban departments and prison construction, and financing a racially punitive sentencing regime.<sup>203</sup> The Court facilitated federal policy by diluting the Fourth Amendment in *Terry v. Ohio*, an opinion that came just after the 1967 President’s Crime Commission Report calling for preemptive policing and just days after the passage of the Safe Streets Act, which earmarked \$3.6 billion (in today’s value) to fund additional officers to be deployed to “high crime areas” (communities of color).<sup>204</sup> Though departments had

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<sup>195</sup> HINTON, AMERICA ON FIRE, *supra* note 63, at 73.

<sup>196</sup> GILLON, *supra* note 193, at 141.

<sup>197</sup> HINTON, WAR ON POVERTY, *supra* note 10, at 56.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 100–02.

<sup>200</sup> HINTON, AMERICA ON FIRE, *supra* note 63, at 22.

<sup>201</sup> *Deaths by Homicide per 100,000 Resident Population in the U.S. from 1950 to 2019*, STATISTA (July 5, 2024), <https://www.statista.com/statistics/187592/death-rate-from-homicide-in-the-us-since-1950> [<https://perma.cc/TFV6-A6JH>].

<sup>202</sup> HEATHER ANN THOMPSON, BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY 19 (2016).

<sup>203</sup> See HINTON, WAR ON POVERTY, *supra* note 10.

<sup>204</sup> See *supra* note 202.

been preemptively policing residents of color in violation of the Fourth Amendment for a century, *Terry* permitted localities to now include these tactics in official policy. *Terry* implicitly reserved the Fourth Amendment to White communities as it less implicitly granted officers discretion to preemptively detain, question, and search persons of color.<sup>205</sup> Cities received funding for specialized units to conduct counterinsurgency operations.<sup>206</sup> In Detroit, the federally funded “Stop the Robberies, Enjoy Safe Streets” program targeted “young, 17 to 29, *non-White*” men.<sup>207</sup> The program’s architect, Inspector James Bannon, designed the program to “effectively police the Black community” by way of “zero visibility patrol.”<sup>208</sup> The first 1,747 arrests by undercover officers were marked by a *fifteen percent fatality rate*.<sup>209</sup>

Jails and prisons began to exceed capacity in racially disparate ways. In 1970, Philadelphia’s jail population was 50% White and 50% Black.<sup>210</sup> By 1974, it was five percent White and 95% Black.<sup>211</sup> Between 1970 and 1977:

[T]he Bureau of Prisons opened fifteen new prisons for 4,871 inmates [as] federal prisons took in 4,904 new [B]lack and Latino Americans. Observing this development at the annual meeting of the National Council on Crime and Delinquency in 1974, corrections expert William Nagel said, “We must conclude, therefore, that the new prisons are for [B]lack [persons].”<sup>212</sup>

Unable to keep up with demand for beds as police flooded communities of color and prosecutors processed rising arrests, prison conditions deteriorated. Historian Heather Ann Thompson examined conditions in Attica during this advanced phase of carceral apartheid, detailing overcrowding of an overwhelmingly Black and Brown population, undernourishment, disfigurement and death from medical

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<sup>205</sup> *Terry v. Ohio*, 392 U.S. 1, 27 (1968). For rich discussions on the work the Fourth Amendment does to facilitate the racial order, see, for example, Devon Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011); I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653 (2018).

<sup>206</sup> HINTON, *WAR ON POVERTY*, *supra* note 10, at 129.

<sup>207</sup> Matthew D. Lassiter & Policing and Social Justice HistoryLab, *Detroit Under Fire: Police Violence, Crime Politics, and the Struggle for Racial Justice in the Civil Rights Era*, U. MICH. DEP’T HIST. CARCERAL STATE PROJECT (Mar. 2021), <https://policing.umhistorylabs.lsa.umich.edu/s/detroitunderfire/page/home> [<https://perma.cc/U3MT-ZN22>].

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*; BALTO & FELKER-KANTOR, *supra* note 14, at 25.

<sup>210</sup> HINTON, *WAR ON POVERTY*, *supra* note 10, at 174.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*



neglect, and temperatures ranging from freezing cold to blistering hot.<sup>213</sup> New York's Department of Corrections (DOC) warned the governor conditions "would lead to uncontrollable frustrations, and anger."<sup>214</sup> In 1971, they did. Inmates took over Attica, holding the guards hostage and demanding change.<sup>215</sup>

To end the takeover, troopers indiscriminately shot into clouds of tear gas, killing inmates and guards. After securing the prison, troopers continued to execute inmates. A "prisoner who had been shot in the abdomen and in the leg was ordered to get up and walk, which he was unable to do. The trooper then shot him in the head with a handgun."<sup>216</sup> A Latine inmate who had been shot was approached by a trooper, who dumped him from the stretcher and "told the prisoner to go to his cell or he would stab him with a screwdriver, and before the prisoner had a chance to do anything he stabbed him five or six times in the anal area."<sup>217</sup>

Inmate Chris Reed was hit by four bullets:

[As troopers debated] whether to kill him or let him bleed to death . . . [they jammed rifle butts into wounds] until he fell unconscious. When he awoke, he found himself stacked up with the dead bodies.

"I never saw human beings treated like this," another prisoner later recalled. He couldn't understand: "Why all the hatred?" But it wasn't just any hatred—it was racial hatred. As one prisoner was told by a trooper who had a gun trained on him: he would soon be dead because "we haven't killed enough [Black persons]."<sup>218</sup>

Inmates, feet bleeding, were forced to walk and crawl through a fifty-yard gauntlet of guards wielding axe handles, two-by-fours, baseball bats, and rifle butts. Doctors volunteering aid were refused entry. Guards played Russian roulette on inmates and forced inmates to drink urine. The New York DOC described corrections officers as "deeply concerned" working tirelessly to issue "clothing, bedding and the essentials . . . under as comfortable living conditions as possible."<sup>219</sup> President Nixon remarked New York's governor handled it well, stating, "you see it's the [B]lack business . . . he had to do it."<sup>220</sup>

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<sup>213</sup> THOMPSON, *supra* note 202, at 34–35, 39–40.

<sup>214</sup> *Id.* at 20.

<sup>215</sup> *Id.* at 95–110.

<sup>216</sup> *Id.* at 286.

<sup>217</sup> *Id.* at 210.

<sup>218</sup> *Id.* at 287 (footnote omitted).

<sup>219</sup> *Id.* at 217.

<sup>220</sup> *Id.* at 308.

The Attica response is an example of the violent guarantee of the state: if persons of color resist, state retribution will be total.

*F. The Criminal System's Perfection of Direct Violence to Maintain the Racial Order*

In the 1980s, police were deployed to detain, assault, search, and arrest Black and Brown residents under a “broken windows” theory of crime control that provided a fresh theoretical basis to invigorate historical practices of preemptive, race-based sweeps.<sup>221</sup> Public safety narratives targeting crack, gangs, and “superpredators” sounded in biological racism. Incentivized by federal funding for prison construction in exchange for sentencing reform, most states instituted severe sentencing regimes that would exile so many Black and Brown men who were discarded as dangerous offenders and gang members.<sup>222</sup> As Professor Babe Howell writes: “Gang policing allows law enforcement to engage in intensive surveillance and policing of suspect racial groups with no oversight. It also leads to conspiracy cases that are so difficult to defend that there is virtually no check on gang policing and prosecutions in the form of trials.”<sup>223</sup>

The policing of Los Angeles provides an example of how cities terrorized communities of color in the 1980s and 1990s. Historically, like other urban areas in the early 1900s, Los Angeles experienced an influx of migrants of color. The Los Angeles Police Department (LAPD) turned to Berkeley Chief August Vollmer to transform into a counterinsurgency force.<sup>224</sup> LAPD Chief William Parker, who described immigrants coming from “wild tribes of Mexico” and called Black persons in Watts “monkeys in a zoo,” sharpened aggressive tactics in the 1950s and 1960s.<sup>225</sup> Daryl Gates, who led the force between 1978 and 1992, deployed the nation’s

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<sup>221</sup> Harcourt & Ludwig, *supra* note 25, at 276.

<sup>222</sup> Lynn Adelman, *The Adverse Impact of Truth-in-Sentencing on Wisconsin's Efforts to Deal with Low-Level Drug Offenders*, 47 VAL. U. L. REV. 689, 691 (2013) (“In 1994, Congress enacted the Violent Crime Control & Law Enforcement Act, 11 [which] included [the] Violent Offender Incarceration and Truth-in-Sentencing [TIS] Incentive Program . . . [which provided] funding to any state that required offenders who committed violent crimes to serve at least 85% of the sentence . . . . By 2002, forty states had enacted TIS laws.”).

<sup>223</sup> Babe Howell, *Gang Narratives and Race-Based Policing and Prosecution in New York City*, in ROUTLEDGE INT’L HANDBOOK OF CRITICAL GANG STUD. 178 (David Brotherton & Rafael Jose Gude eds., 2021).

<sup>224</sup> Go, *supra* note 140, at 1207.

<sup>225</sup> *Chief Parker's Time Is Past*, L.A. TIMES (Apr. 19, 2009, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2009-apr-19-ed-parker19-story.html> [<https://perma.cc/RL5S-C6FW>].

first “special weapons and tactics” (SWAT) teams.<sup>226</sup> Like Vollmer and Parker, Gates conceived of policing as a theatre of war.<sup>227</sup> Supervising officers compared communities of color to Beirut or Vietnam.<sup>228</sup> Gates believed in biological difference. Responding to reports that 75% of those killed by police chokeholds were Black residents (who represented 10% of the city’s population), Gates explained that “in some [B]lacks, the veins or arteries do not open up as fast as they do on normal people.”<sup>229</sup>

In 1988, the LAPD launched “Community Resources Against Street Hoodlums” (CRASH) to implement a strategy of “total suppression.” Within two years, a CRASH initiative—Operation Hammer—detained and arrested 50,000 young men of color; indicative of the program’s purpose of racial control, only one in ten were charged.<sup>230</sup> To justify these tactics, officials drummed up hysteria over gangs and inflated their numbers.<sup>231</sup> “With more than 50,000 *hard-core* gang members, mostly [B]lack, Hispanic and Asian, in Los Angeles County,” reported the *Washington Post* in 1988, “police are battling what many say is a losing war.”<sup>232</sup> The LAPD classified 47% of Los Angeles’s Black men as gang

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<sup>226</sup> MAX FELKER-KANTOR, POLICING LOS ANGELES: RACE, RESISTANCE, AND THE RISE OF THE LAPD 52–53 (2018); Michael Carson, *Daryl Gates Obituary*, GUARDIAN (Apr. 22, 2010, 1:36 PM), <https://www.theguardian.com/world/2010/apr/22/daryl-gates-obituary> [https://perma.cc/DX8Q-5BZ5].

<sup>227</sup> John L. Mitchell, *The Raid That Still Haunts L.A.*, L.A. TIMES (Mar. 14, 2001), <https://www.latimes.com/archives/la-xpm-2001-mar-14-mn-37553-story.html> [https://perma.cc/66TT-FZCF].

<sup>228</sup> Mike Davis, *A Hard-Edged Look at Life on L.A.’s Mean Streets*, L.A. TIMES (Dec. 9, 1990), <https://www.latimes.com/archives/la-xpm-1990-12-09-op-8752-story.html> [https://perma.cc/LVM7-BN69]. A mayor of one of L.A.’s municipalities proclaimed Black gangs to be “the Viet Cong.” *Id.* Local officials referred to gangs as “murderer militias of Beirut.” *Id.*

<sup>229</sup> David Shaw, *Media Failed to Examine Alleged LAPD Abuses : Press: Eulia Love Case Brought a Tougher Look. But Complaints About Patterns of Use of Force Weren’t Explored*, L.A. TIMES (May 26, 1992), <https://www.latimes.com/archives/la-xpm-1992-05-26-mn-147-story.html> [https://perma.cc/8WCB-E4V9]. See generally *City of L.A. v. Lyons*, 461 U.S. 95 (1983).

<sup>230</sup> Mitchell, *supra* note 227; Alexander Cockburn, *Police Abuse: Fronting for the Haves: War in Iraq, War on Drugs—It’s All the Same Exercise of Power*, L.A. TIMES (Mar. 13, 1991), <https://www.latimes.com/archives/la-xpm-1991-03-13-me-48-story.html> [https://perma.cc/8CTJ-UBUV]; Jose Miguel Cruz, *Central American Gangs like MS-13 Were Born Out of Failed Anti-Crime Policies*, LEGALNEWS (Jan. 2, 2020), <https://legalnews.com/Home/Articles?DataId=1483115> [https://perma.cc/67QB-6FLH] (noting Operation Hammer was a CRASH initiative).

<sup>231</sup> Edward J. Boyer, *Gang Raid Leaves Some Bad Feelings: Police: South-Central Residents Accuse Officers of Going Overboard in Their Search. They Also Resent Chief Williams’ Comparison of Area to Beirut*, L.A. TIMES (Apr. 5, 1995), <https://www.latimes.com/archives/la-xpm-1995-04-05-me-51092-story.html> [https://perma.cc/5WQ4-PPZD].

<sup>232</sup> Matt Lait, *The Battle to Control 50,000 Gang Members on the Streets of Los Angeles*, WASH. POST (Mar. 11, 1988, 7:00 PM) (emphasis added), <https://www.washingtonpost.com/archive/politics/1988/03/12/the-battle-to-control-50000-gang-members-on-the-streets-of-los-angeles/8872cfe7-e09a-4411-aa5d-f7bb17df80e0> [https://perma.cc/5RKG-KXRA].

members—most were in high school.<sup>233</sup> Between 1987 and 1992, “a quarter of Black youth in South Central had been arrested.”<sup>234</sup> The media pushed narratives justifying state violence. The *Los Angeles Times* conducted an internal investigation to determine whether it had at any point in the 1980s investigated potential racial disparities in LAPD practices; it did not turn up a single instance.<sup>235</sup> In 1990, *Time Magazine* finally asked: Was the war on gangs in Los Angeles “being waged indiscriminately on law-abiding [B]lack and Hispanic citizens[?]”<sup>236</sup>

This question was asked a year before LAPD officers pulled Rodney King over for speeding. As twenty officers casually watched, four officers clubbed King fifty-six times.<sup>237</sup> They pulverized facial bones, broke his skull in eleven places, and broke his leg.<sup>238</sup> At the hospital, officers joked, “[w]e played a good game of hardball.”<sup>239</sup> A commission formed to investigate LAPD practices found a significant number of excessive force incidents were motivated by racism, that officers who engaged in extreme force received strong evaluations, and that racially derogatory language was widely used.<sup>240</sup> In 1998, the Rampart Scandal revealed another instance of organized police predation in communities of color, implicating seventy anti-gang officers in planting evidence, due process violations, and racialized violence.

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<sup>233</sup> Elizabeth Hinton, *Los Angeles Had a Chance to Build a Better City After the Rodney King Violence in 1992. Here's Why It Failed*, TIME (May 18, 2021, 9:40 AM), <https://time.com/6049185/los-angeles-rodney-king-misunderstand-what-happened> [<https://perma.cc/3FFT-D6HH>] [hereinafter Hinton, *Build a Better City*]; Boyer, *supra* note 231.

<sup>234</sup> Hinton, *Build a Better City*, *supra* note 233.

<sup>235</sup> Shaw, *supra* note 182.

<sup>236</sup> Sylvester Monroe, *Complaints About a Crackdown*, TIME (July 16, 1990), <https://time.com/archive/6715387/complaints-about-a-crackdown> [<https://perma.cc/YJA2-MLVY>]. The author was one of the few journalists at the magazine who was Black.

<sup>237</sup> Carol A. Watson, *Complaints Meet a Wall of Silence: The Only Unique Thing About King's Beating Is the Fact That It Was Captured on Videotape*, L.A. TIMES (Mar. 10, 1991), <https://www.latimes.com/archives/la-xpm-1991-03-10-op-182-story.html> [<https://perma.cc/Y8MU-UEZK>]; Chelsea Matias & Lily Rothman, *The Beating that Changed America: What Happened to Rodney King 25 Years Ago*, TIME (Mar. 3, 2016), <https://time.com/4245175/rodney-king-la-riots-anniversary> [<https://perma.cc/938B-LPL4>].

<sup>238</sup> *The Rodney King Affair*, L.A. TIMES (Mar. 24, 1991) <https://www.latimes.com/archives/la-xpm-1991-03-24-me-1422-story.html> [<https://perma.cc/AHE6-EPLQ>]; John Mitchell, *Doctor Says He was Surprised King Survived Beating: Trial: Ophthalmologist Testifies That the Victim's Eye Socket Had to be Rebuilt. Damages Owed to King Are at Issue*, L.A. TIMES (Mar. 25, 1994), <https://www.latimes.com/archives/la-xpm-1994-03-25-me-38226-story.html> [<https://perma.cc/WHZ7-RSNW>].

<sup>239</sup> Justin Ray, *I Was Some Damn Human Piñata: How Rodney King Described His Own Beating*, L.A. TIMES (Apr. 28, 2022), <https://www.latimes.com/california/newsletter/2022-04-28/essential-california-rodney-king-beating-book-essential-california> [<https://perma.cc/A4CG-CPZT>].

<sup>240</sup> *Summary of Christopher Commission's Findings*, L.A. SENTINEL, July 11, 1991.

LAPD practices—high-tech, militarized surges into communities of color—are typical in urban areas. And despite the perfection of police control over communities of color through direct violence, the participation of civilians has not been displaced. Reminiscent of the country's historical conception of White duty, White persons still constantly surveil persons of color who trespass White-controlled space:

The summer of 2018 saw a legion of White persons calling the police on Black persons engaged in mundane activities. Black people had the authorities summoned for sitting in Starbucks; playing golf; eating at Waffle House; sleeping in university common rooms; eating in university classrooms; making purchases; returning purchases; smoking cigarettes; moving into apartments; leaving apartments; going for walks; doing their jobs; eating in restaurants; barbecuing; going to the gym; attending funerals; using too many or the wrong coupons; swimming in pools; playing basketball; canvassing for political reelection; doing community service; mowing the lawn; sheltering from the rain; getting into their cars; sitting in their cars; not listening to a neighbor's problems; walking their dogs; wearing costumes; wearing a bandana; and selling bottled water on a hot summer's day. The number of such reports has only grown . . . .<sup>241</sup>

Violent policing by White men still finds expression as well. In 2020, as protests over the shooting of Jacob Blake in Kenosha, Wisconsin, resulted in local authorities compiling lists of Black Lives Matter activists, the imposition of curfews, and mine-resistant ambush protected vehicles rumbling through streets, police distributed provisions to some of the White men who had poured in carrying assault rifles, permitted them to violate the curfew, and thanked them for patrolling.<sup>242</sup>

### G. *Achieving Carceral Apartheid*

Indicative of the investment in carceral practices, since the 1970s the number of *prison guards* in 2010 (490,000) far outstripped the number of *inmates* on the eve of mass carceral apartheid in 1973 (330,000).<sup>243</sup> Indicative of bipartisan investment in racially targeted policing and incarceration, under a Democratic president, the country passed its most aggressive legislation furthering carceral apartheid since the Thirteenth

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<sup>241</sup> McNamara, *supra* note 26, at 335, 337–41.

<sup>242</sup> John Raphling, *Kenosha Police Turned a Blind Eye to US Vigilantes*, HUM. RTS. WATCH (Sept. 14, 2020), <https://www.hrw.org/news/2020/09/14/kenosha-police-turned-blind-eye-us-vigilantes> [<https://perma.cc/BV56-D4BP>].

<sup>243</sup> Brian Mann, *The Drug Laws That Changed How We Punish*, NPR (Feb. 14, 2013), <https://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish> [<https://perma.cc/XK52-FS5N>].

Amendment, the Violent Crime Control and Law Enforcement Act of 1994, which incentivized states to construct prisons, prohibit parole, and lengthen prison sentences.<sup>244</sup> The number of state and federal prisons would increase by 43% in just fifteen years.<sup>245</sup> The consequences of this? The country would now need to release 70% of its prisoners to return to its incarceration rate at the height of Jim Crow.<sup>246</sup> Each year, ten million persons cycle through jail.<sup>247</sup> Now, on any day two million people are behind bars<sup>248</sup> and three million are serving probation.<sup>249</sup> Seventy-eight million have a criminal record.<sup>250</sup> These conditions are reserved largely for Black and Brown persons. There are five times more White than Black people in the United States, yet in our prisons, Black inmates exceed the number of White inmates.<sup>251</sup> Black persons in five states are incarcerated at a 900% higher rate than White persons.<sup>252</sup> In 2010, the incarceration rate for White persons was 450 per 100,000; for Black men 3,074 per 100,000.<sup>253</sup> A third of Black men born in 2001 will be subject to prison.<sup>254</sup>

These racial disparities start at intake. When such disparities should raise alarm at five percent, a survey of 100 cities indicate arrest rates for

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<sup>244</sup> Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, BRENNAN CTR. JUST. (Sept. 9, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice> [<https://perma.cc/MPF9-M4P6>].

<sup>245</sup> *Id.*

<sup>246</sup> Calculations based on incarceration rate in 1940 (on file with the author).

<sup>247</sup> Nazish Dholakia, *The Difference Between Jail and Prison*, VERA (Feb. 21, 2023), <https://www.vera.org/news/u-s-jails-and-prisons-explained> [<https://perma.cc/LVL8-Y7AD>].

<sup>248</sup> SAWYER & WAGNER, *supra* note 30, at 1.

<sup>249</sup> *Id.*; DANIELLE KAEBLE, U.S. DEPT. OF JUST., PROBATION AND PAROLE IN THE UNITED STATES 1 (2024), <https://bjs.ojp.gov/document/ppus22.pdf> [<https://perma.cc/CJ38-JKSZ>].

<sup>250</sup> SAWYER & WAGNER, *supra* note 30; ALL FOR SAFETY AND JUST., TOWARD STABILITY AND SAFETY: EXPERIENCES OF PEOPLE WITH OLD CRIMINAL RECORDS 3 (2021) <https://allianceforsafetyandjustice.org/wp-content/uploads/2021/09/Convictions-Brief.pdf> [<https://perma.cc/X6WT-CKL7>].

<sup>251</sup> Leah Wang, Wendy Sawyer, Tiana Herring & Emily Widra, *Beyond the Count: A Deep Dive into State Prison Populations*, PRISON POL'Y INITIATIVE (Apr. 2022), <https://www.prisonpolicy.org/reports/beyondthecount.html> [<https://perma.cc/V5JH-FT8S>].

<sup>252</sup> ASHLEY NELLIS, SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS (2016), <https://www.sentencingproject.org/app/uploads/2022/10/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons-2016.pdf> [<https://perma.cc/JL8H-MXYB>].

<sup>253</sup> Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census*, PRISON POL'Y INITIATIVE (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html> [<https://perma.cc/Y9RF-GVDM>]; Paola Scommegna, *U.S. Has World's Highest Incarceration Rate*, PRB (Aug. 10, 2012), <https://www.prb.org/resources/u-s-has-worlds-highest-incarceration-rate> [<https://perma.cc/vMN8-CBX3>] (finding that White men have an incarceration rate of 459 per 100,000).

<sup>254</sup> Ellis P. Monk, *The Color of Punishment: African Americans, Skin Tone, and the Criminal Justice System*, ETHNIC & RACIAL STUD., Sept. 10, 2018, at 3.

street encounters are between 100% and 600% higher for Black persons.<sup>255</sup> In an analysis of 100 million traffic stops, Black drivers were arrested on a lesser evidentiary basis than White drivers.<sup>256</sup> In New York City, police found contraband on White persons at five times the rate of Black persons; though this data should result in stepped up enforcement of White persons, they were stopped five times less.<sup>257</sup> In Chicago, Black residents make up 29% of the population, but make up 78% of drug arrests and 90% of arrests for ordinance violations.<sup>258</sup> In New York, 99% of its gang database are people of color.<sup>259</sup>

When departments are subject to outside investigations, allegiance to the racial order is revealed.<sup>260</sup> In 2022, in the City of Antioch—10 minutes from Berkeley where August Vollmer in the early 1900s transformed departments across the country into counterinsurgency operations against communities of color—a federal investigation turned up daily group chats sharing racist tropes, imagery, and slurs. A representative sample: “I’m only stopping them cuz they black. Fuck them. Kill each other.”<sup>261</sup> One officer in charge of deploying a less-than-lethal .40 bragged that he shot a Black suspect point blank in the throat, “muzzle thumped [him] 6 times,” and tried “to kick his head over the fence,”<sup>262</sup> sending photos of the injuries along with a GIF of a referee

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<sup>255</sup> Samuel Sinyangwe, *The Police Departments with the Biggest Racial Disparities in Arrests and Killings*, FIVETHIRTYEIGHT (Feb. 4, 2021), <https://fivethirtyeight.com/features/the-biden-administration-wants-to-address-racial-bias-in-policing-what-cities-should-it-investigate> [<https://perma.cc/66A2-TAK4>].

<sup>256</sup> Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 736 (2020).

<sup>257</sup> Jaeah Lee & Adam Serwer, *Are the NYPD’s Stop-and-Frisks Violating the Constitution?*, MOTHER JONES (Apr. 29, 2013), <https://www.motherjones.com/politics/2013/04/new-york-nypd-stop-frisk-lawsuit-trial-charts> [<https://perma.cc/789P-WERZ>].

<sup>258</sup> BALTO AND FELKER-KANTOR, *supra* note 14, at 3 (citing statistics from 2010).

<sup>259</sup> Daryl Khan, *New York City’s Gang Database Is 99% People of Color, Chief of Detectives Testifies*, JUV. JUST. INFO. EXCH. (June 14, 2018), <https://jjiie.org/2018/06/14/new-york-citys-gang-database-is-99-people-of-color-chief-of-detectives-testifies> [<https://perma.cc/A7YY-3SMH>]; Victor Flores, Note, *Challenging Guilt By Association: Rethinking Youths’ First Amendment Right to Association and Their Protection from Gang Databases*, 107 CORNELL L. REV. ONLINE 847, 851 (2022).

<sup>260</sup> See generally INDEP. COMM’N ON THE L.A. POLICE DEP’T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991); COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, MOLLEN COMMISSION REPORT (1994); C.R. DIV., U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015).

<sup>261</sup> OFF. OF THE DIST. ATT’Y CONTRA COSTA CNTY., INVESTIGATION REPORT (2023).

<sup>262</sup> *Id.* at 11.

indicating a field goal.<sup>263</sup> He later joked, “bro, my foot hurts.”<sup>264</sup> Another officer complained that injuries do not show up on Black persons.<sup>265</sup>

Despite the unbroken record of racialized predation and continued exonerations of mostly Black and Brown persons, prosecutors continue to rely on the word of police.<sup>266</sup> Those prosecutors then subject Black persons to more severe sentences.<sup>267</sup> In California, 45% of those serving life under three-strikes are Black—the state’s Black population is 6.5%.<sup>268</sup> In Louisiana, 91% of those serving life-without-parole are Black.<sup>269</sup> In Oklahoma, Black persons are 1,700% more likely than White persons to serve life-without-parole for nonviolent crimes.<sup>270</sup>

On an institutional level, the criminal system has achieved apartheid—defined as a maintenance of a system of legalized racial segregation in which one racial group is deprived of political civil rights.<sup>271</sup> In a just world, current conditions would be illegal, but because officials maintain they rely on race-neutral policies, these practices are deemed constitutional.

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<sup>263</sup> *Id.* at 14.

<sup>264</sup> *Id.* at 10.

<sup>265</sup> *Id.* at 14.

<sup>266</sup> SAMUEL R. GROSS, MAURICE POSSLEY & KLARA STEPHENS, NAT’L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1 (2017), [https://www.law.umich.edu/special/exoneration/Documents/Race\\_and\\_Wrongful\\_Convictions.pdf](https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf) [<https://perma.cc/V4EK-N9JY>]. Due to Jim Crow procedures that govern criminal litigation, the defense is unable to launch formal investigations into officers involved in the case. See Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1, 40–45 (2021); Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOKLYN L. REV. 1091, 1091–92, 1131–32 (2014).

<sup>267</sup> See Gregoire AnneMarie, *Prosecutorial Discretion and Its Impact on Racial Inequality in the Criminal Justice System*, The Criminal Law Practitioner, American University Washington College of Law (2023); Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1190–91 (2018); Besiki Luka Kutateladze, Nancy R. Andiloro & Brian D. Johnson, *Opening Pandora’s Box: How Does Defendant Race Influence Plea Bargaining?*, 33 JUST. Q. 398, 414 (2016).

<sup>268</sup> SCOTT EHLERS, VINCENT SCHIRALDI & ERIC LOTKE, JUST. POL’Y INST., RACIAL DIVIDE: AN EXAMINATION OF THE IMPACT OF CALIFORNIA’S THREE STRIKES LAW ON AFRICAN-AMERICANS AND LATINOS 2 (2004).

<sup>269</sup> AM CL.UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES IN LOUISIANA 6 (2013).

<sup>270</sup> *Id.* at 30.

<sup>271</sup> *Apartheid*, LEGAL INFO. INST. (Apr. 2022), <https://www.law.cornell.edu/wex/apartheid> [<https://perma.cc/66QK-S83R>].



#### H. *The Criminal System's Role in Constructing and Maintaining the Racial Order*

Benefits to White persons and harms to Black persons are generational, cumulative, and continuing. In the early 2000s, Professor Dorothy Roberts flipped the White critique that Black families suffer from generational pathology that leads to antisocial conduct and incarceration, and instead showed how carceral apartheid erodes networks essential to economic and social well-being, stresses family life (over half of federal inmates had lived with their children and provided emotional and financial support), and disrupts informal social controls that play a greater role in public safety than formal state controls.<sup>272</sup>

Examining the history of policing is to reveal the continuity of state violence against communities of color through direct violence, the aiding and abetting of communal violence, the protection of White welfare, and statecraft. The first law enforcement “officers” were White men authorized by state legislatures to surveil, control, and punish free Black persons. The post-Civil War landscape was one of White communal violence backed by the state’s violent guarantee—if persons of color did not comply, the state’s hammer dropped with fury. Extralegal state violence dominated for a generation after the 1880s, when state actors conspired to criminally traffic Black victims and launder these White crimes through adjudication. Police have protected the value of massive White welfare programs, through direct violence and the aiding and abetting of communal violence. And since the 1900s, militarized police have deployed counterinsurgency operations in communities of color to exert racial control and achieve segregation. Over time, the criminal system has tightened the “White noose” by surging into communities of color and deploying tactics that would never be tolerated by White communities. The state’s role in constructing and maintaining the racial order has been constant; what evolves are the tactics employed.<sup>273</sup> Within this exertion of state violence, White persons reap the dividends of White welfare in the wake of devastating racial harms and disparities. This racial order is not a product of the natural order, but rather a product of state violence. This immersive state violence is a precondition to the racial order’s existence and continuation.

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<sup>272</sup> Dorothy Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281–85 (2004).

<sup>273</sup> Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1114 (1997).

### III. RESISTANCE TO ACKNOWLEDGING RACIAL HARM

The state violence requires narratives justifying its perpetration.<sup>274</sup> To call racism arbitrary is to ignore its structural nature, to call racism irrational is to ignore the dividends of White welfare, and to call racism ignorant is to obfuscate the seductive ingenuity of the justifications that perpetuate it. The following typology categorizes common narratives deployed to justify the racial disparities that persist wherever one looks, in wealth, criminal system outcomes, the workplace, education, health, housing, and political representation.

#### A. *Biological Racism*

Biological racism attributes racial disparities to biological difference between members of different racial groups.<sup>275</sup> Biological racism anchors the racial order, but adherents have found ways to disguise it through scripts celebrating formal equality, attributing disparities to socioeconomic conditions (which would mean that due to biological difference, Black persons were less able to climb the economic ladder and build strong networks), cultural characteristics (which would mean that due to biological difference, Black persons have adopted modes of interaction that are resistant to success), and merit (which would mean that due to biological difference, Black persons are less able to achieve economic success and educational attainment).

Within the context of disparities in the carceral system, proponents of biological racism understand crime rates to reflect criminogenic traits. How sociologists used crime rates as a proxy for biological racism is well documented.<sup>276</sup> In 1896, statistician Frederick Hoffman relied on crime rates to “show without exception that the criminality of the [Black

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<sup>274</sup> See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 31 (1883) (permitting communities to commit racial harm without fear of federal intervention and complaining that Black persons must “cease to be special favorites of the law”); H.R. 7, 124th Leg. Reg. Sess. (Fla. 2022) (amending FLA. STAT. §§ 760.10, 1000.05, 1003.42, 1006.31, 1012.98, 1002.20, 1006.40 (2022)) (prohibiting the teaching of critical race theory in public schools); Bryan Anderson, *State GOP Lawmakers Try to Limit Teaching About Race, Racism*, ASSOCIATED PRESS (May 29, 2021, 10:14 AM), <https://apnews.com/article/race-and-ethnicity-racial-injustice-business-education-government-and-politics-905c354a805cec1785160cf21f04c7ec> [<https://perma.cc/D99E-2G5T>] (identifying sixteen state legislative efforts to ban the teaching of critical race theory in schools).

<sup>275</sup> Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 28 (2013).

<sup>276</sup> See generally MUHAMMAD, *supra* note 136.

person] exceeds that of any other race.”<sup>277</sup> The Black crime rate, however, was inflated (due to racially targeted enforcement) and fabricated (due to the trafficking of Black victims who were falsely convicted and sent to forced labor).<sup>278</sup> In contrast, the White crime rate was severely underrepresented, as pervasive White-on-Black crime was ignored and White persons were rarely arrested for vagrancy.<sup>279</sup> This racially constructed “crime rate” proved to White persons that crime was a race-based trait.

This strain of biological racism is easily identified through time. A generation later in 1933, Professor Andrew Bruce, President of the American Institute of Criminal Law, explained crime rates indicated that, “In the cities the [Black person] is out of his element . . . and has little guidance from the [W]hite man.”<sup>280</sup> A generation later in 1965, Patrick Moynihan’s report to President Johnson concluded the Black family was “the principal source of most of the aberrant, inadequate, or antisocial behavior.”<sup>281</sup> A generation later in 1995, Princeton Professor John DiLulio cited a rise in Black crime to warn of a coming wave of “superpredators”: “We’re talking about [Black] elementary school youngsters who pack guns instead of lunches . . . [T]hey kill or maim on impulse, without any intelligible motive . . . [and commit] homicidal violence in ‘wolf packs.’”<sup>282</sup> A generation later, in 2020, reporter Louis Casiano used crime data to suggest Black criminality.<sup>283</sup> In 2023, Bill Maher (erroneously) told his (White) audience that (White) society had flooded Black communities with welfare, and with a look of helpless exasperation turned to the camera to apparently address all Black youth with a question Maher had already answered (because Black bodies are

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<sup>277</sup> Frederick Hoffman, *The Race Traits and Tendencies of the American Negro*, 11 AM. ECON. ASS’N, 1896, at 1, 228.

<sup>278</sup> Meyn, *supra* note 41, at 550–51, 554–55; BLACKMON, *supra* note 96, at 301, 312–14, 317.

<sup>279</sup> Meyn, *supra* note 41, at 551–52.

<sup>280</sup> Andrew Bruce, *One Hundred Years of Criminological Development in Illinois*, 24 J. CRIM. L. & CRIMINOLOGY 11, 47 (1933).

<sup>281</sup> GILLON, *supra* note 193, at 160; DANIEL PATRICK MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 30 (1965).

<sup>282</sup> John DiLulio, *The Coming of the Super-Predators*, WEEKLY STANDARD (Nov. 27, 1995, 5:00 AM), <https://www.washingtonexaminer.com/magazine/1558817/the-coming-of-the-super-predators> [<https://perma.cc/2XRW-BAHG>]. DiLulio would be appointed by President George W. Bush to serve as director of the White House Office of Faith-Based and Community Initiatives. Sarah Posner, *Bush’s Director of Faith-Based Initiatives Praises Liberal Successor*, SALON (Feb. 5, 2013, 6:11 PM), [https://www.salon.com/2013/02/05/former\\_bush\\_director\\_of\\_faith\\_based\\_initiative\\_extols\\_liberal\\_successor\\_partne](https://www.salon.com/2013/02/05/former_bush_director_of_faith_based_initiative_extols_liberal_successor_partne) [<https://perma.cc/AMV7-95C2>].

<sup>283</sup> Louis Casiano, *Most Chicago Homicide Victims over the Past Decade Are Black, Police Data Show*, FOX NEWS (July 23, 2020, 9:14 PM), <https://www.foxnews.com/us/chicago-homicide-victims-black-police-data-show> [<https://perma.cc/3JJC-PPBG>] (resorting to dog-whistle tactics and blaming Black-on-Black shootings on cultural deficiencies).

predisposed to criminality): “Why are you killing each other?”<sup>284</sup> The (White) audience erupted in applause.

### B. *Us Versus Them*

The stakes of disrupting the racial order are high. If similar government interventions on behalf of White persons are extended to persons of color and White persons are subjected to merit-based competition, White-privileged access to wealth, land, power, and status will be diminished. Still, many White persons fear more than a loss of privilege. They fear subjugation.

Justice Scalia was characteristically transparent about this in a speech at Washington University Law School in 1978.<sup>285</sup> He describes racial groups in terms of bloodlines, a race-as-biology view. Scalia told a story about the Lone Ranger and his Native companion, Tonto (Scalia did not acknowledge the colonial context or that “Tonto” means “dumb” in Spanish).<sup>286</sup> Scalia recounts how the Lone Ranger and Tonto see oncoming Native warriors. “What should we do?” asks the Lone Ranger. “Ugh, ride-um west,” says Tonto. They head west but are intercepted. “What should we do?” “Ugh, ride-um north.” They are intercepted again and after attempting to escape along each cardinal point, surrounded. “What should we do?” “What do you mean, we, White man?” responds Tonto.<sup>287</sup> Scalia assumes the primacy of race loyalty, that race is inherent to the natural order. His view of racial violence is informed by colonial sin, a lurking fear that a loss of power will invite what White persons had wrought, and thus a view that demands continued exploitation and violence.

### C. *Denying the Existence of Racism*

White people continue to be housed in subsidized all-White enclaves, offered subsidized college education, and granted access to a professional work force absent fair competition from persons of color. White persons are not above offering false equivalents to race

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<sup>284</sup> Lindsay Kornick, *Bill Maher Questions Why Chicago's Crime Wave Isn't Addressed: 'Why Are You Killing Each Other?'*, FOX NEWS (Apr. 23, 2023, 6:00 PM), <https://www.foxnews.com/media/bill-maher-questions-chicago-crime-wave-addressed-killing> [<https://perma.cc/64H5-58DW>].

<sup>285</sup> See Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L.Q. 147, 149–50 (1979).

<sup>286</sup> *Id.* at 153 (“I owe no man anything, nor he me, because of the blood that flows in our veins.”).

<sup>287</sup> *Id.*

discrimination, often recounting personal stories of White ancestral struggle and generational tenacity. Meanwhile, law enforcement officers continue to surveil, harass, and terrorize communities of color. Absent is White introspection.

This absence of introspection is evident in a sampling of White diagnoses of Black uprisings in communities of color in the late 1960s: in Columbus, Ohio, the police department was “unsure”; in Broward County, Florida, there was just “[n]o explanation”; in Fort Wayne, Indiana, “[w]e don’t know why”; and in York, Pennsylvania, “[Black persons] don’t have anything else to do.”<sup>288</sup>

When confronted with data that White violence and exclusion was the root cause, a common reaction is to take offense. When Kerner Commissioners invited field investigators to present their initial findings:

[F]ield-team members stated that the conditions in the cities were so horrible, and the [W]hite power structure so unresponsive, that taking to the streets was the only rational way for residents to get attention and force officials to address their grievances . . . the commissioners seemed puzzled and angry by the presentation and now questioned whether they could trust the staff to provide an objective analysis of the riots.<sup>289</sup>

Commissioner Tex Thornton was angered by a chapter of the Kerner Report drafted by John Franklin, Chair of History at the University of Chicago. Thornton, not a historian, wanted it to reflect “moderation and judicial temper” and “to see the impact of slavery downplayed, White people positioned in a better light, and greater emphasis placed on the progress that had been made in race relations.”<sup>290</sup> Another draft chapter described rampant police brutality.<sup>291</sup> Commissioners complained this depiction did not acknowledge “the difficult job facing most officers.”<sup>292</sup> Polls taken after the Report’s release found that most White persons disagreed racism had anything to do with the uprisings.<sup>293</sup> Kerner Commission field investigators reported “many [W]hite[] [persons] complained that [Black persons] were in fact getting ‘special treatment.’”<sup>294</sup>

White denial persists. Now, fifty years into the unprecedented incarceration of Black and Brown persons, the term to describe this crisis

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<sup>288</sup> HINTON, *AMERICA ON FIRE*, *supra* note 63, at 24.

<sup>289</sup> GILLON, *supra* note 189, at 129.

<sup>290</sup> *Id.* at 143.

<sup>291</sup> *See id.* at 146.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 278.

<sup>294</sup> *Id.* at 121.

is “mass incarceration.” The term fails to acknowledge the violence necessary to achieve such disparity and instead facilitates racial subordination by obscuring the racial harm being done. A term like “carceral apartheid” would center the state and acknowledge that racial disparities result from racial discrimination, nothing else. It would communicate that conditions do not reflect a natural order but rather a political order. It would in turn offend police, prosecutors, and judges who deny the existence of racism or who feel that being perceived as racist is worse than racism.<sup>295</sup> That the whitewashed term “mass incarceration” erases racial harm is arguably the reason it has gained mainstream acceptance.<sup>296</sup>

Since *Brown*, which peddled a sophomoric view that racism causes individualized stigma that can harm White persons, the colorblind narrative continues to be legitimized by powerful voices. Key to adhering to this view is to exaggerate racial progress, as in *Shelby v. Holder*, where the Supreme Court used data of improved turnout for Black voters to hollow out the Voting Rights Act.<sup>297</sup> As colorblind adherents exaggerate the success of remedial efforts in order to end them, they minimize the persistence of racism to accomplish the same ends. An example: in 1978, Justice Powell concluded that “societal discrimination” is “an amorphous concept of injury” and could not justify efforts by a university to increase the number of Black and Brown admits.<sup>298</sup> Powell had a wealth of resources to consult that indicated otherwise, including the Committee on Civil Rights Report of 1947, contemporaneous writings by James Baldwin, and legislative history to the Civil Rights Acts of 1964, 1965, and 1968.<sup>299</sup> And though a long line of federal opinions detailed how societal

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<sup>295</sup> PEW RSCH. CTR., BEHIND THE BADGE 76 (2016) (surveying White law enforcement officers, of whom 92% contend racism does not exist); see also Simon, *supra* note 14, at 1645 (“[P]olling data shows that racism is now among the most discrediting attributes that can be associated with people and, thus, has become a charge vigorously contested by most people to whom it is applied.”).

<sup>296</sup> Criminal law terminology does much to reinforce justifications for state violence and the marginalization of justice-involved individuals. See Anna Roberts, *Criminal Terms*, 107 MINN. L. REV. 1495, 1507 (2023) (analyzing how carceral terms reinforce perceptions of system accuracy, communicate that justice-involved persons are dangerous, and support perceptions that the system is “well-intentioned”). See generally Alice Ristorph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020) (revealing how the traditional criminal law curriculum legitimizes carceral interventions).

<sup>297</sup> 570 U.S. 529, 535 (2013).

<sup>298</sup> *Shelby County v. Holder*, No. 12-96, slip op. at 18 (June 25, 2013); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–90, 307 (1978).

<sup>299</sup> See generally PRESIDENT’S COMM. ON CIV. RTS., TO SECURE THESE RIGHTS (1947). See, e.g., James Baldwin, *The White Man’s Guilt*, in BALDWIN: COLLECTED ESSAYS 722 (1998); *The Civil Rights Bill: Hearing on H. Res. 789 Before the H. Comm. on Rules*, 88th Cong. 15–17 (1964) (statement of Roy Wilkins, NAACP) (citing to testimony of presenters, including Roy Wilkins of

discrimination visited exclusion, violence, and death of persons of color in conflicts over education, voting, housing, employment, and health, Justice Powell did not deem this judicial manuscript sufficiently credible to have to explain away.<sup>300</sup> Did he not know that first grader Ruby Bridges in 1960 needed federal marshals to attend her new school, and that due to threats of poisoning she could not eat school lunch, and that due to threats of violence she could not attend recess, and that she was the only Black student in her classroom, that she was subjected to constant bullying, and that due to her enrollment her father was fired from his job and her grandparents were kicked off the land they had tilled for a generation as sharecroppers; and that these were just a few of the societal harms visited on a single family in a single year?<sup>301</sup>

And despite historical, sociological, economic, and legal revelations over the next forty-five years detailing specific, continuing racial harms

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the NAACP, who stated societal discrimination causes harm to the “body, but always strike at the root of the human spirit, at the very core of human dignity” and that Black persons are “bruised in nearly every waking hour by differential treatment . . . [f]rom the time they leave their homes in the morning, en route to school or to work, to shopping, or visiting, until they return home at night, humiliation stalks . . . public transportation, eating establishments, hotels, lodging houses, theaters, motels, arenas . . . retail stores, markets . . . that offer them either differentiated service or none at all . . . I invite the members of this committee to imagine themselves [to be Black] and to plan an auto trip from Norfolk . . . to Biloxi . . . Where and under what conditions can you and your family eat? Where can they use a rest room? Can you stop driving after a reasonable day behind the wheel or must you drive until you reach a city where relatives or friends will accommodate you? Will your children be denied a soft drink or an ice cream cone because they are not [W]hite? . . . You just live uncomfortably from day to day.”)

<sup>300</sup> See, e.g., In housing: *Heyward v. Pub. Hous. Admin.*, 238 F.2d 689, 692 (5th Cir.1956) (detailing how Georgia’s housing authority displaced Black families to raze buildings and replace with improved housing for White families); in employment: *Vogler v. McCarty*, 294 F. Supp. 368, 374–75 (E.D.L.A. 1967) (finding in southeastern Louisiana, unions completely excluded Black persons from asbestos industry); *Griggs v. Duke Power Co.*, 401 U.S. 424, 427 (1971) (finding company relegated Black employees to performing menial, low-paid tasks); in education, *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 638 (1950) (describing a Black student excluded from others during instruction); in housing and health, *Citizens Comm. for Faraday Wood v. Lindsay*, 507 F.2d 1065, 1073 (2d Cir. 1974) (Oakes, J., dissenting) (noting populations of color are relegated to neighborhoods “where grocery prices and crime rates are highest, garbage is collected last, soft coal is still burned for fuel, windows are broken, schools are worst, medical care is least and jobs are a subway ride and an education away”). For one to think these spot-checks of judicial intervention ended these conditions would be too stupid to comprehend . . . and yet.

<sup>301</sup> George Judson, *Child of Courage Joins Her Biographer; Pioneer of Integration Is Honored with the Author She Inspired*, N.Y. TIMES (Sept. 1, 1995), <https://www.nytimes.com/1995/09/01/nyregion/child-courage-joins-her-biographer-pioneer-integration-honored-with-author-she.html>; Zach Smith, *Ruby Bridges: The First Black Child to Desegregate an Elementary School in the South Celebrates an Anniversary*, NEW ORLEANS MAG. (Oct. 1, 2010), <https://www.myneworleans.com/ruby-bridges> [<https://perma.cc/L534-YJV3>]; Steve Rose, *Ruby Bridges: The Six-Year-Old Who Defied a Mob and Desegregated Her School*, GUARDIAN (May 6, 2021, 5:00 AM) <https://www.theguardian.com/society/2021/may/06/ruby-bridges-the-six-year-old-who-defied-a-mob-and-desegregated-her-school> [<https://perma.cc/6GVT-UR8B>].

in housing, employment, education, health, and carceral interventions, the Court in 2023 reaffirmed Powell's ignorant statement that societal discrimination is too amorphous to justify race-conscious remedies, dismantling affirmative action programs that Justice Powell had already diluted.<sup>302</sup>

#### D. *Erasing the State*

Doctrine has attempted to erase state responsibility for the racial order. *The Civil Rights Cases* interpreted the Fourteenth Amendment to relieve states of any duty to prevent communities from engaging in pervasive racial discrimination.<sup>303</sup> Before, during, and after state-mandated segregation and exclusion, White communities exercised power over Black persons to segregate, exclude, control, humiliate, steal, injure, and kill. The Court attributed these conditions to the natural order, denying that it is a violent regime only sustainable through state alignment and its violent guarantee.

The court in *Brown* did not explain the racial order as a violent order that deprived only persons of color of the safety, wealth, education, freedom, and power that was distributed to White persons.<sup>304</sup> By ignoring the racial order's one-way street of White violence and ill-gotten gains and instead defining racism as a universalized stigma that could victimize White persons, *Brown* set the stage for the straightjacket of formal equality that would prohibit most any race-conscious action by a state to address racial disparities.<sup>305</sup> Adherents of colorblindness skipped over any accountability phase, locking in White gains under a veil of anti-racism.

With the emergence of the colorblind antidiscrimination statutes in the 1960s, the remedy for centuries of exploitation and violence against Black bodies and mass exclusions from the workforce, the housing market, and educational opportunity was a promise not to discriminate on the basis of race. The absence of race-based interventions ensured the continued receipt of dividends from past and continuing discrimination.<sup>306</sup> The Civil Rights Act of 1964 has been interpreted to mean any attempt to interfere with White networks that monopolize job opportunities would violate the Act. As to education, the average Black

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<sup>302</sup> See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

<sup>303</sup> *The Civil Rights Cases*, 109 U.S. 3, 11–12 (1883).

<sup>304</sup> See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>305</sup> See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (stating that societal discrimination is too amorphous to assess); *Students for Fair Admissions, Inc.*, 600 U.S. 181.

<sup>306</sup> Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1714 (1993).



student enrollment at the fifteen highest ranked public schools was 4% in 2022, far below the demographic representation of 12%.<sup>307</sup> Emerging reports indicate these shocking numbers will worsen significantly post *Students for Fair Admissions*.<sup>308</sup> Thus, Black families paying taxes that subsidize college costs are bankrolling White students sitting in seats that should be occupied by Black students.

In these ways the antidiscrimination framework is deeply invested in biological racism, under the justification that the dramatic underrepresentation of Black workers and students and homeowners and CEOs reflects the natural order, not the political order. Within this frame of formal equality, the Court gave constitutional clearance to policies that its architects know will result in racially disparate outcomes, a move that has facilitated the state's proactive and sweeping policy commitments to White beneficiaries.<sup>309</sup>

## CONCLUSION

Our country was given form by racial violence. Race was constructed to perpetrate and legitimate slavery.<sup>310</sup> Racism was essential to occupying improved Native land east of the Mississippi River,<sup>311</sup> a genocide and dislocation legitimized through the Doctrine of Discovery,<sup>312</sup> required by federal law,<sup>313</sup> funded by Northern investors,<sup>314</sup> and enforced by the Army

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<sup>307</sup> Janie Boschma et al., *Census Release Shows America Is More Diverse and More Multiracial Than Ever*, CNN (Aug. 12, 2021, 8:36 PM), <https://www.cnn.com/2021/08/12/politics/us-census-2020-data/index.html> [<https://perma.cc/PTB3-YEKK>]; Calculations on file with author are based on U.S. News and World Report (2024 rankings) and enrollment data provided by Data USA. <https://datausa.io/search/?dimension=University> [<https://perma.cc/4RBL-WYWV>].

<sup>308</sup> As a post-*Students for Fair Admissions* example of enrollment, Black student enrollment at the University of Wisconsin dropped by 50% the year after the *Students for Fair Admissions* decision. Becky Jacobs, *UW-Madison Sees 'Disappointing' Enrollment Drop for Students of Color*, CAP TIMES (Sept. 27, 2024), [https://captimes.com/news/education/uw-madison-sees-disappointing-enrollment-drop-for-students-of-color/article\\_47f7185c-7c2a-11ef-9348-7b3a94b3d200.html](https://captimes.com/news/education/uw-madison-sees-disappointing-enrollment-drop-for-students-of-color/article_47f7185c-7c2a-11ef-9348-7b3a94b3d200.html) [<https://perma.cc/5GDX-B2GB>].

<sup>309</sup> *Washington v. Davis*, 426 U.S. 229, 232–35 (1976).

<sup>310</sup> Khiara Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 29 (2013).

<sup>311</sup> SAUNT, *supra* note 1, at 189. See generally STEPHEN KANTROWITZ, *CITIZENS OF A STOLEN LAND: A HO-CHUNK HISTORY OF THE NINETEENTH-CENTURY UNITED STATES* (2023).

<sup>312</sup> *Johnson v. McIntosh*, 21 U.S. 543, 567–68 (1823).

<sup>313</sup> Indian Removal Act of 1830, Pub. L. No. 21-148, 4 Stat. 411 (1830). After the 1887 General Allotment Act that further diminished and broke up Native land, 1.5 billion acres of Native land became 156 million; by the late 1800s, a dominant White narrative was that Native persons were “taking a free ride on public domain.” DUNBAR-ORTIZ, *supra* note 138, at 11.

<sup>314</sup> SAUNT, *supra* note 1, at 173–74.

and the “private acts” of White settlers.<sup>315</sup> Racism was necessary to insist on carceral slavery after the abolition of chattel slavery.<sup>316</sup> Racism justified the invasion and occupation of Northern Mexico.<sup>317</sup> Racism was necessary to Jim Crow apartheid. Racism was essential to send persons of Japanese descent to internment camps and distribute their property to White persons.<sup>318</sup> Racism reserved the benefits of a federally intervened housing market to White families. Racism was critical to federal programs of mass sterilization of Black, Brown, and Native women between 1920 and 1975.<sup>319</sup> Racism has driven policies and practices that send Black and Brown persons to jail, prison, and supervision in overwhelming numbers. Racism was critical to detaining, torturing, and deporting persons of Middle Eastern descent domestically and abroad,<sup>320</sup> and then excluding them from U.S. soil.<sup>321</sup>

The increasing work of historians to expose the topography of racial harm is beginning to uncover what most White scholars could not see or did not want to see.<sup>322</sup> It is critical that resources are invested in the

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<sup>315</sup> DUNBAR-ORTIZ, *supra* note 104, at 113 (describing the genocide and quoting a Georgia colonel: “I fought the civil war and have seen men shot to pieces and slaughtered by thousands, but the Cherokee removal was the cruelest work I ever knew”). See generally KANTROWITZ, *supra* note 311.

<sup>316</sup> See generally BLACKMON, *supra* note 96; Meyn, *supra* note 41.

<sup>317</sup> GÓMEZ, *supra* note 33, at 24 (quoting a senator’s call to recognize Texas as “the United States had a duty to support ‘our kindred race’ against the ‘colored mongrel race, and barbarous tyranny, and superstitions of Mexico’”).

<sup>318</sup> See generally U.S. COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1997).

<sup>319</sup> Stern, *supra* note 149, at 1134, 1136 (2005); Relf v. Weinberger, 373 F. Supp. 1196, 1199 (D.C. 1974) (“Over the last few years, an estimated 100,000 to 150,000 low-income persons have been sterilized annually under federally funded programs.”); Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS (Jan. 29, 2016), <https://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states> [<https://perma.cc/3JRU-PXMG>]; Rosalind Early, *The Sweat and Blood of Fannie Lou Hamer*, HUMANS., Winter 2021, <https://www.neh.gov/article/sweat-and-blood-fannie-lou-hamer> [<https://perma.cc/8K46-3WAA>]; BRIANNA THEOBALD, REPRODUCTION ON THE RESERVATION: PREGNANCY, CHILDBIRTH, AND COLONIALISM IN THE LONG TWENTIETH CENTURY 1 (2019).

<sup>320</sup> OFF. OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003); Spencer Ackerman, *Only Three of 116 Guantanamo Detainees Were Captured by US Forces*, GUARDIAN (Aug. 25, 2015, 7:00 AM) <https://www.theguardian.com/us-news/2015/aug/25/guantanamo-detainees-captured-pakistan-afghanistan> [<https://perma.cc/6W4F-ZBFC>] (reporting that detainees were often abducted in Afghanistan by warlords and foreign spies seeking U.S. bounty awards).

<sup>321</sup> Trump v. Hawaii, 585 U.S. 667, 708–09 (2018).

<sup>322</sup> Shaun Ossei-Owusu, *Criminal Legal Education*, 58 AM. CRIM. L. REV. 413, 414–15 (2021) (examining how law school curricula reproduces inequality in criminal law, and situating this analysis within broader discussions of how educational systems reproduce the social order); see also Hinton & Cook, *supra* note 14, at 262 (discussing emerging historical scholarship critical of the criminal legal system).

historical interrogation of racial harm and a forensic accounting of White benefits, even as efforts to account crash against a bulwark of White resistance, including the continued judicial affirmation of doctrines fashioned in the 1880s by racist judges.<sup>323</sup>

The carceral system is at the center of understanding how state violence can be broadly deployed to construct and maintain the racial order. The criminal system uses direct violence, it aligns itself with communal racial violence, it protects the distribution and value of White welfare, and at times uses extralegal violence to exploit Black and Brown persons. This Article attempts to provide an expanded definition of “state action” that centers state violence, rejects biological difference, is focused on accountability for prior and ongoing racial harm, and would provide authority for Congress to address the racial order’s disparate distribution of harms and benefits. Understanding that state violence is essential to the construction and maintenance of the racial order will move us closer to acknowledgement, accountability, reparation, and repair.

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<sup>323</sup> See *generally* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).