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LETTER FROM THE EDITOR-IN-CHIEF

To the Reader:

With much enthusiasm, we are pleased to present Volume IV of the *Howard Human and Civil Rights Law Review* (HCR). HCR's Volume IV comes at an unprecedented time. Published in 2020, members of Volume IV waltzed into the new decade with bright eyes set on ambitious goals. That same year, the world encountered the COVID-19 global pandemic. Traditional law school classrooms metamorphosed into computer screen interactions; entire families endured irreplaceable loss; and uncertainty loomed over the novel disease. Particularly relevant to HCR, COVID-19 served as yet another example of the medical, socio-economic, and political disadvantages of being Black in America. Black Americans make up just over thirteen percent (13.4%) of the overall American population.¹ As of this Letter From the Editor, the twenty-two percent (22%) of U.S. counties that are disproportionately Black account for nearly sixty (60%) percent of deaths from the virus.²

All the while, we at the *Howard Human and Civil Rights Law Review* continued to highlight the long-lasting pandemic of racism and racial injustice through academic discourse. The unjustifiable murders of Breonna Taylor, Ahmaud Arbery, George Floyd, and countless more Black and Brown lives sparked a new Era of activism. We mourned the loss of Civil Rights heroes John Lewis and CT Vivian on the same day. We promised to uphold their legacy of fighting for equal voting rights in the midst of a historic election year, which includes Howard University alumna and Vice-Presidential nominee, Kamala Harris.

None of us could have predicted the uncertainty 2020 would bring us. Yet Still, We Rise. We Rise as students emblazoning Howard University School of Law's imprimatur of "truth and service" and "Social Engineering." Standing on the shoulders of our predecessors, Still We Rise in a time unlike anything we have seen in our existence—and likely for you, the Reader, in your existence as well. In the 2019-20 academic year, the *Howard Human & Civil Rights Law Review* solidified and doubled down on our mission to "publish timely, scholarly articles on issues related to human

1. United States Census Bureau, *Quickfacts: United States*, (last accessed Aug. 27, 2020), <https://www.census.gov/quickfacts/fact/table/US/PST045219>

2. Williams, Vanessa, *Disproportionately Black Counties Account for Over Half of Coronavirus Cases in the U.S. and Nearly 60% of Deaths, Study Finds*, Washington Post (May 6, 2020), <https://www.washingtonpost.com/nation/2020/05/06/study-finds-that-disproportionately-black-counties-account-more-than-half-covid-19-cases-us-nearly-60-percent-deaths/>

rights, civil rights, and international law.” In the Fall semester, we discussed the upcoming election and its predicted impact on the Black and Brown community. In the Spring, HCR’s Executive Solicitations & Submissions Editor Cynthia Emesibe and Howard Law student body President Demetrius McCloud coordinated the annual “Ferguson Symposium,” where a distinguished panel of student activists, professors, and legal experts discussed the fight for reparations. I would like to extend my thanks to the Volume IV Editorial Board and staff members for a remarkable year. Although it was my pleasure serving as your Editor-in-Chief, this Volume would be non-existent if not for each of you.

We hope our readers find the scholarship in this Volume engaging, and a reminder to move the conversation forward. Yet Still, *We Rise*.

Best,

Eric N. St. Bernard
Editor-in-Chief,
Human and Civil Rights Law Review Vol. IV

The Codification of White Privilege

ROBERT L. FREAD*

ABSTRACT

Although racism against non-white citizens is embedded in the very fabric of the United States of America, a powerful contingent within contemporary society argues that white privilege is a fallacy. Ironically, those who would deny white privilege have assumed the role of victim and allege that the white race is under attack. In recent years this argument has gone mainstream, resulting in a substantial increase in race-based violence initiated by both private and state actors. The current racial tension in America is arguably at a breaking point, with ideologies on both the left and right ends the political spectrum losing faith in governmental solutions and thus openly calling for violence.

While a vast network of scholars and academics have approached the topic of white privilege, this paper will focus on the intersection of law and society. Specifically, this paper explores the codification of white privilege through an analysis of common law and statutes that leave no question as to the benefits conferred to white people and the explicit systemic bias shown to persons of color. Accordingly, this article illustrates the intellectual dishonesty of any argument that supposes white people are not bestowed privileges in American society at the expense of others. The fundamental issue is that white privilege does exist, and to deny its presence in both a historical and contemporary context is an untenable argument that will only result in a further escalation of the cultural divide.

I. The Deniers of Privilege

Slavery is unique and it has harmed black Americans to a degree that is still being felt today, but in order to succeed in our competitive

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*society, every American has to overcome the obstacles they face. And here is where the African-American leadership in America is failing. Instead of preaching a cultural revolution, the leadership provides excuses for failure. The race hustlers blame white privilege, an unfair society, a terrible country. So the message is, it's not your fault if you abandon your children, if you become a substance abuser, if you are a criminal. No, it's not your fault; it's society's fault. . . The federal government cannot fix this problem. Only a powerful message of responsibility can turn things around.*¹

This introductory section focuses on contemporary voices in American society who claim that white privilege does not exist—and in some instances—that white people are the actual victims of racial stereotyping. Although a later section in this essay provides an in-depth analysis of what white privilege is, it is sufficient in this introduction to define white privilege as systemic social and legal benefits automatically conferred to white Americans upon their birth. The forthcoming arguments denying white privilege, while in and of themselves are not codified into a *de jure* system of law, nonetheless facilitate the white racial power structure that is “secured by a process of domination, or those acts, decisions, and policies that white subjects perpetrate on people of color.”² In other words, the domination of white privilege is not a random occurrence in the law, but is instead “forged in the historical process[es] . . . out of a patterned and enduring treatment of social groups.”³ Thus, the codification of white privilege cannot occur without those contemporary voices whose “acts” perpetuate stereotypical racist attitudes in an attempt to justify the underlying necessity of legal domination of persons of color.⁴

On August 26, 2014, former Fox News host Bill O'Reilly provided the penultimate example of the dishonesty and misunderstanding that prevents meaningful and productive discourse on race.⁵ While O'Reilly's argument was qualified by an acknowledgment of the persistent generational effects of slavery, he quickly descended into an outright attack on African-Americans that reinforced the stereotype

1. The O'Reilly Factor: The Truth About White Privilege (Fox News television broadcast Aug. 26, 2014) <https://www.foxnews.com/transcript/bill-oreilly-the-truth-about-white-privilege>.

2. Zeus Leonardo, *The Color of Supremacy: Beyond the Discourse of 'White Privilege'*, 36 EDUC. PHIL. & THEORY 137 (2004).

3. *Id.* at 139.

4. *Id.*

5. O'Reilly Factor, *supra* note 1.

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of black men as irresponsible criminals.⁶ O'Reilly also cast blame on children, suggesting that until black youth learn “civil behavior, right from wrong . . . how to speak properly and how to act respectfully in public,” they will “fail as adults” and end up poor, angry, and “looking to blame someone else.”⁷

However, blaming African-Americans for their position in contemporary society was only one facet of O'Reilly's argument—he supported his disbelief in white privilege with the assertion that “Asian privilege” is the only qualified privileged racial class.⁸ Using data from the U.S. Census Bureau and Department of Education showing higher annual incomes, higher graduation rates, and lower percentages of children in single-family homes for Asian households, the implication is that white people should be free of blame and guilt for the systemic hardships persons of color face based on the statistical success of Asian communities.⁹ To solidify his denouncement of the existence of white privilege, O'Reilly identifies a “caveat” to the statistical success of Asian-Americans in that their historical experience “has not been nearly as tough as the African-American experience.”¹⁰

Several months later, O'Reilly again “exempted” himself from white privilege because of his proclivity towards being sunburnt and being raised by parents who “didn't have a lot of money.”¹¹ His broadcast was a planned “privilege-checking” lecture during orientation for incoming students at the Kennedy School of Business at Harvard.¹² Stuart Varney, a fellow Fox News contributor who took part in this discussion, acknowledged that white privilege once existed but opined that historical wrongs cannot be righted by “guilting the present.”¹³ Both O'Reilly and Varney equate “checking” of privilege with an “condescending” and “divisive” “attack” because it does not account for the individual experiences of white people.¹⁴ On the other side of the debate was Reverend Jacques Degraff, who defined white privilege as “the benefits that some enjoy based on their race in this

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Fox News, *Liberals and White Privilege*, YOUTUBE (Dec. 29, 2014), <https://www.youtube.com/watch?v=BQStEplXNiQ>.

12. *Id.*

13. *Id.*

14. *Id.*

society.”¹⁵ Although Degraff defended Harvard’s orientation program as an important message for students who will one day be determining public policy, both O’Reilly and Varney insisted that it was a misguided plot by activist liberals.¹⁶

The importance of these denials is two-fold. First, prior to O’Reilly’s show being canceled in 2017, it reached approximately 4 million viewers weekly.¹⁷ O’Reilly’s viewership suggests wide popularity and support in the United States for an ideology that basks in denial of privilege. Second, the timing of these broadcasts came within a year of the formation of Black Lives Matter, a group formed in response to “violence inflicted on Black communities by the state and vigilantes.”¹⁸ Given this timing, there is no humor in the irony that an argument that denies privilege is a patent manifestation of privilege. However, O’Reilly is only one voice in an ocean of others who have since taken up the tiki torch of privilege denial and white victimhood.¹⁹ During a portion of their 2017 speaking tour, conservative radio talk show host Dennis Prager and television/radio personality Adam Carolla also argued against the merits of white privilege.²⁰ Carolla would not take a position as to whether white privilege “exists or doesn’t exist,” but rather, that it “never existed for [him]” in part due to delays in previous job opportunities caused by affirmative action.²¹

Prior to the speaking tour, Prager authored a column dedicated to disproving white privilege through a “rational inquiry.”²² First, Prager asserts that “too many variables other than race” are determinative of an individual’s ability to succeed.²³ He then points to statistical data that shows white males commit suicide at twice the rate of

15. *Id.*

16. *Id.*

17. Gary Levin, *Bill O’Reilly Ratings Up Amid Sexual-Harassment Controversy*, USA TODAY (Apr. 6, 2017, 10:51 AM), <https://www.usatoday.com/story/life/tv/2017/04/06/bill-oreilly-ratings-up-amid-sexual-harassment-controversy/100114564>.

18. *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/herstory> (last visited Apr. 23, 2019).

19. Paul P. Murphy, *White Nationalists Use Tiki Torches to Light Up Charlottesville March*, CNN (Aug. 14, 2017, 11:37 AM), <https://www.cnn.com/2017/08/12/us/white-nationalists-tiki-torch-march-trnd/index.html>.

20. No Safe Spaces Movie, *Adam Carolla’s White Privilege*, YOUTUBE (Mar. 2, 2017), <https://www.youtube.com/watch?v=O9lsGNUEd1U>.

21. *Id.*

22. Dennis Prager, ‘White Privilege’: Part II in a Series of Widely Held Beliefs That Are Either Untrue or Meaningless, DENNIS PRAGER (Feb. 16, 2016), <https://www.dennisprager.com/white-privilege-part-ii-in-a-series-of-widely-held-beliefs-that-are-either-untrue-or-meaningless>.

23. *Id.*

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black males, and on par with First Nation peoples.²⁴ Second, in similar fashion to O'Reilly,²⁵ Prager asserts that the true privilege in America is for Asian families or children in two-parent households.²⁶ Prager closes his column by claiming that there is a political and philosophical goal of acknowledging white privilege.²⁷ The “political goal” equates to a conspiracy by the Democratic Party to “retain political power” by convincing African-Americans that they are the only political party on their side.²⁸ The “philosophical goal” is a denial of the “primacy and cultural values” that should guide individual choices.²⁹ In other words, Prager likens blackness with crime, ignorance, and poverty as if it is a personal choice.³⁰

Along these same lines, Tucker Carlson, a conservative pundit who took over the primetime television slot left vacant by O'Reilly's departure,³¹ asserts that acknowledgment of white privilege is akin to living under a Maoist regime that employs “woke fascism.”³² Carlson's implicit denial of white privilege is the preface for a broader argument against a federal reparations bill, which has garnered support among Democratic presidential candidates.³³ Staying on par with the preceding deniers of privilege, Carlson likens any notion of white privilege as misguided, divisive, and totalitarian.³⁴

The aforementioned offensive claims are not entirely devoid of value. The rhetoric illustrates a belief system that there exists a level playing field for both personal and professional growth in modern American society and that racism is, in most cases, extinguished.³⁵ Deniers of white privilege espouse a false belief that if a person simply works hard enough they can actualize the American dream. These individuals simultaneously dismiss any contrary notion as a secular left-

24. *Id.*

25. O'Reilly, *supra* note 1.

26. Prager, *supra* note 22.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Mark Joyella, *Why Fox News Didn't Hesitate To Replace Bill O'Reilly With Tucker Carlson*, FORBES (Apr. 20, 2017, 1:18 PM), <https://www.forbes.com/sites/markjoyella/2017/04/20/why-fox-news-didnt-hesitate-to-replace-bill-oreilly-with-tucker-carlson/#1e2abb556b00>.

32. Fox News, *Tucker: Are You Living In A Free Society?*, YOUTUBE (Apr. 5, 2019), <https://www.youtube.com/watch?v=9FtQS8n2PhU>.

33. *Id.*

34. *Id.*

35. Levin, *supra* note 17.

ist or anarchist form of anti-state propaganda.³⁶ Thus, the question turns to a more precise definition of white privilege and a consideration of the legal implications for a denial of said privilege, glossing over a substantially documented history of dehumanization and violence often predicated on race alone.

II. Defining White Privilege

Pre-Reconstruction Privilege

Prior to the emancipation of enslaved Africans in the late 1800s, merely being white in the United States often afforded white people a societal advantage at the expense of persons of color.³⁷ This inherently racist colonial mechanism allowed most white people an adequate opportunity to successfully fulfill the promise of life, liberty, and the pursuit of happiness while simultaneously prohibiting or limiting persons of color's political bodies.³⁸ This reality sets the benchmark from which all white privilege emanates. However, this privilege was not without its limitations for all settlers, including the Scottish, Irish, and German indentured servants in early colonies whose plight was a clear exception to the rule of privilege.³⁹ In her work covering the history of servant labor in colonial America, Salinger examined both the circumstances that led Europeans to flee their homeland in search of a better life and the reality of what they experienced in their transition to servitude.⁴⁰ For many, the willingness to sacrifice their relatively limited freedom in Europe in exchange for years of indentured servitude was made under the pretext that "emigration meant removing the shackles that burdened them in the Old World and replacing them with opportunity in the New."⁴¹ However, most individuals who sought this chance were unaware of the actual conditions that awaited them, as numerous interests who profited from the labor trade often went to great lengths to censor accounts of life in the New World that were unfavorable.⁴²

The conditions that awaited Scottish, Irish, and German indentured servants in both the journey and destination often drew many

36. See O'Reilly Factor, *supra* note 1; see also Fox News, *supra* note 11; see also Fox News, *supra* note 32.

37. U.S. CONST. art. 1, § 2, cl. 3, *superseded* by U.S. CONST. amend. XIV.

38. *Id.*

39. SHARON V. SALINGER, "TO SERVE WELL AND FAITHFULLY" 35-40 (1987).

40. *Id.*

41. *Id.* at 84.

42. *Id.*

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parallels with the precarious life endured by Africans in the Transatlantic Slave Trade.⁴³ Prior to the eighteenth century, most European indentured servants bound for the New World were able to travel on traditional passenger ships.⁴⁴ However, the transportation of European servants soon became a profitable venture in and of itself, resulting in a profit maximizing shift in practices which treated indentured servants less like people, and more like cargo:

“Once they had made the decision to go to America, prospective servants arranged for the indenture. . .soon found themselves in the midst of a nightmare. The journey to the ‘promised land’ became a ‘middle passage’ with horrors that sometimes rivaled those of the slave trade. Illness and death from overcrowding, crude sanitary conditions, and meager diets plagued the passengers. . .when the ship’s progress was delayed, usually owing to inclement weather or unfavorable winds, provisions dipped dangerously low, especially since quantities were calculated to accommodate ‘freights’ rather than the number of people. . .Children between the age of four and fourteen counted as half-freights. On voyages where there were a high proportion of children. . .provisions were less adequate and delays at sea often disastrous.”⁴⁵

These conditions European servants bound for America faced soon led to an excessive rate of death throughout the eighteenth century that surpassed the mortality rate of enslaved Africans in that same time period. Salinger contends that the excessive death rate resulted from the fact that, “although profit motivated both trades, slaves were more valuable than servants. Each slave represented a substantial investment well before reaching the slave market.”⁴⁶ In contrast, servants essentially paid their own way, either through savings or the accumulation of debt placed on the contract they originally signed.⁴⁷ This peculiar economy of European servant transportation gave little incentive for ship captains to ensure the health and safety of servants bound for America. It resulted in egregious attempts at profit maximization wherein shippers would frequently load “as many souls as possible into their vessels, confident that even with the most callous

43. *Id.*

44. *Id.* at 85.

45. *Id.* at 86-87.

46. *Id.* at 92.

47. *Id.*

disregard for human life, the monetary return would still make it worth the effort.”⁴⁸

Notwithstanding these horrific conditions, a subtle yet important element of white privilege would soon emerge. In 1750, the Pennsylvania Assembly passed an act limiting the number of servants transported per voyage to sixteen (16).⁴⁹ Subsequently, noting that this law “had little effect,” Salinger detailed that because of “intense pressure from the Pennsylvania German Society,” a supplemental law was passed in 1765 which “not only clarified matters of health, but addressed a whole range of abuses.”⁵⁰ The resulting legislation took several steps to address the inhumane conditions: mandating the presence of a doctor on each ship; limiting the profit made on goods sold to servants, and requiring bills of lading preventing masters from seeking recompense from the families of servants who died in transit.⁵¹ The most significant of these measures legislating white privilege were enacted so that German servants were not ignorant of the law by requiring that “an interpreter was to board the ship before landing and explain their rights.”⁵²

As a consequence, a clear separation of status based on race emerged even at the lowest rungs of the social ladder, and nearly a full century prior to the emancipation of enslaved Africans.⁵³ In other words, even within an otherwise inhumane economy of human trafficking, whiteness at least offered a claim to the concept of a legal right, which, although minimal, was simply unattainable by black people.⁵⁴ It is in this context where the concept of white privilege becomes easier to identify. Much of the contract work in U.S. cities was a far cry from the harsh and seemingly infinite hours of labor required of both enslaved Africans and servants in rural areas. However, in these rural areas a type of comradery manifested as a result of “servants who worked for artisans in a tremendous array of craft establishments.”⁵⁵ For Germans in particular, once the initial labor contract had expired, the emerging political body which eased their transition

48. *Id.* at 93.

49. *Id.* at 94.

50. *Id.* at 96.

51. *Id.*

52. *Id.*

53. Abraham Lincoln, *Preliminary Emancipation Proclamation* (Sept. 22, 1862), <https://www.loc.gov/item/scsm000950>.

54. *Id.*

55. *See* Salinger, *supra* note 39, at 99.

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into the colonies through transport, provided additional support for a meaningful assimilation into mainstream society.⁵⁶

On the other hand, Irish immigrants did not fare as well as Germans. Irish immigrants were not only confronted with oppression in the New World; they had come from an established history of subjugation resulting from British conquest in their homeland.⁵⁷ Even with the backdrop of white-on-white oppression, there was a key distinction between the plight of the Irish and that of African-Americans—both the scope of the duties performed and the underlying labor economy wherein indentured servants maintained a supplemental relationship to the masters' families contrasted sharply from a master-slave relationship based on pure dominance.⁵⁸ Most relevant here, the particular brand of racial superiority held by Irish-Americans was focused against the authoritative and aggressive characteristics of Anglo-Saxons rather than Afro-Americans.⁵⁹ Even so, Wilson suggests that “militant Young Ireland nationalists were quite prepared to acquiesce in slavery to win white American support for Irish independence . . . the Irish in America were not generally viewed as black, and there is no evidence that they ever saw themselves as being anything other than white.”⁶⁰ Acknowledging the importance of precarious entry into the New World for the European underclass and enslaved Africans recognizes a fundamental expression of state power reliant upon force and manipulation.

However, it is equally important to recognize that one-hundred years prior to the emancipation of enslaved Africans, whiteness was a privilege that offered a release from bondage and the potential to elevate oneself from chattel to a political body.⁶¹ This privilege was manifest even before legislation protecting indentured servants by allowing some early white settlers to use their political voice in protest of slav-

56. See DAVID ROEDIGER, *THE WAGES OF WHITENESS* 32-33 (Verso Press 2d ed. 2007) (noting the change in status of Germans who were initially described as “swarthy” and lacking sufficient “whiteness” to a group of people capable of earning freedom and autonomy through independent skilled labor contracts).

57. David A. Wilson, *Comment: Whiteness and Irish Experience in North America*, 44 J. BRIT. STUD. 153, 160 (2005).

58. See Salinger, *supra* note 39, at 99-100.

59. Wilson, *supra* note 57, at 159.

60. *Id.* at 158.

61. See *id.* at 160-161. (Noting that Irish found whiteness through adoption of the “Celtic” identity which distinguished them from persons of color, at the same time granting them a moral purity associated with ancient Irish traditions and religious morals).

ery nearly two hundred years before Reconstruction.⁶² In 1688, a group of German Mennonite settlers in Pennsylvania drafted *The Germantown Protest Against Slavery*, bringing forth the first public objection to racist subjugation in the colonies because they “conceived of blacks as the social and spiritual equals of whites.”⁶³ While noting that “[i]n Europe there are many oppressed for conscience sake: and here there are those oppressed which are of a black colour [sic],” the protesters buttressed their religious claim asking what worse could be done “than if men should rob or steal us away, and sell us for slaves to strange countries; separating husbands from their wives and children.”⁶⁴ Unfortunately, it took nearly two centuries and a violent civil war for any credence to be given to these calls for racial equality.⁶⁵

Post Reconstruction Privilege

Even after the eventual passage of the Reconstruction Amendments in the wake of the Civil War, a shift in American policy that aimed to establish a legal standard of racial equality continued to leave African-Americans at a constant disadvantage.⁶⁶ For W.E.B. DuBois, a self-described Afro-American writer who lived during this turbulent period, it was clear that although the physical chains were removed from black people, bondage remained ever present in a figurative sense.⁶⁷ Du Bois provided insight into the persistent remnants of racist ideologies that existed even for black people fortunate enough to have attained an education:

[T]he young colored man still finds his life path strictly hedged in. He marries most generally only one of his own race; he has difficulty hiring or buying a house except in certain quarters of the city; in the south he is generally debarred from public libraries, theatres. . . lecture courses, white churches, etc., and from hotels, cafes, restaurants, and the like. . . His wife and daughters are especially liable to insult and outrage, both by law and custom, while if the slightest suspicion arise the he has in any way insulted a white wo-

62. See generally Katharine Gerbner, *Antislavery in Print: The Germantown Protest, the “Exhortation,” and the Seventeenth-Century Quaker Debate on Slavery*, 9 EARLY AM. STUD. 552 (2011).

63. *Id.* at 562.

64. KERMIT HALL, ET AL., *AMERICAN LEGAL HISTORY: CASES AND MATERIALS 57-58* (Oxford Univ. Press 2011).

65. U.S. CONST. amends. XII, XIV, XV.

66. See generally W.E.B. Du Bois, *The Afro-American (1894)*, in 2 J. TRANSNAT’L AM. STUD. 1, 4 (2010).

67. *Id.* at 3.

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man, he is liable to be hanged or burned without judge, jury, or the vestige of a trial. At law, he is not tried by his peers but always by a jury wholly or nine-tenths white, and by a white judge. His right to vote is, to a large extent, throughout the south rendered null and void.⁶⁸

From his chilling first-hand account, it is evident that changing the laws of the land was an insufficient means of adjusting social attitudes that were formed based on centuries of oppression and hatred fueled by racist ignorance.⁶⁹ Even for a man who grew up in the “free North,” Du Bois noted the difference from the Southern states was “indeed great, but rather one of degree than of kind, and in Boston as well as New Orleans, the Afro-American must in his own country, feel himself the unwelcome guest at the national meal.”⁷⁰ For Du Bois and his peers, disadvantages based solely on their skin pigmentation were so pervasive that it reached into every possible facet of daily life.⁷¹ These disadvantages not only affected Black political actions, but impeded the most mundane aspects of everyday life to the point that viewing oneself as an outsider was an inescapable reality.⁷²

Although it took several decades for post-colonial theory to identify this concept of a marginalized group as the ‘Other,’ which emerges from a Eurocentric paradigm of power, its pervasiveness remained a constant both domestically and throughout the colonized world.⁷³ Just one generation after Du Bois, Frantz Fanon offered his perspective of living under French colonial rule in the Caribbean. Fanon he described a self-imposed division of identity as “a direct result of colonialist subjugation.”⁷⁴ Presented through an interesting mix of poetry and scholasticism, which itself could be viewed as both an aesthetic and political statement of identity, Fanon gave numerous personal illustrations of everyday occurrences wherein a white persona was necessary to be considered distinct from the savagery still associated with blackness.⁷⁵ Some of Fanon’s peers wore this mask by choice, anxious to separate themselves from their ancestry by re-

68. Du Bois, *supra* note 66, at 4.

69. *Id.*

70. *Id.* at 3-4.

71. *Id.*

72. *Id.* at 4.

73. See FRANTZ FANON, *BLACK SKIN WHITE MASKS* 55 (Charles Lam Markmann trans., Pluto Press 2008) (1952).

74. *Id.* at 8.

75. Fanon, *supra* note 73, at 10.

jecting the burdens of slavery; for Fanon, this fragile mask was often forced upon him.⁷⁶

Though much had changed in the decades following the life of Du Bois, certain constants pervaded societal norms via racial constructs in the U.S. and its global colonial neighborhood.⁷⁷ Fanon noted, “[w]e [Blacks] had physicians, professors, statesmen. Yes, but something out of the ordinary still clung to such cases. . . It was always the Negro teacher, the Negro doctor. . . I knew, for instance, that if the physician made a mistake it would be the end of him and all of those who came after him. . . No exception was made for my refined manners, or my knowledge of literature, or my understanding of the quantum theory.”⁷⁸ Thus, living without white privilege means there was no sanctuary, internal or external, physical or metaphysical, in which a Black man could find lasting comfort in his accomplishments and successes.⁷⁹ If one was not willing to wear the mask of whiteness in colonial society, then it was thrust upon them with an ever-present threat of its removal at the slightest fault or misstep.⁸⁰

Evidence of this precarious existence was equally prevalent in the United States during Fanon’s lifetime, perhaps best exemplified by *Brown v. Board of Education*—the catalyst for a push towards desegregation in the U.S., which occurred just two years after his book was first published.⁸¹ This was an incredibly tense time in American history, leading to the first significant challenge to the era of the “separate but equal” Jim Crow laws; an effort which would require significant coordination from all levels of government, including a second court order to enforce nondiscriminatory admittance to public schools with “all deliberate speed.”⁸² The underlying animosity that remained constant in the Southern United States during this period resonated from the fallout of the civil war wherein “equality was a meaningless principle for white Southerners; the operative norm was to rule or be ruled. The heart of the issue for them in 1954, as in 1864, was not avoiding association with blacks; they wanted association, but only on the basis of domination.”⁸³ Even with the court mandated de-

76. *Id.* at 14-17, 22.

77. *Id.* at 66-68.

78. *Id.* at 88-89.

79. *Id.*

80. *Id.* at 149.

81. See *Brown v. Board. of Education*, 347 U.S. 483 (1954).

82. *Brown v. Board of Education*, 349 U.S. 294, 301 (1955).

83. ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 18 (1992).

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segregation, another decade would pass before the Civil Rights Act of 1964, and the Voting Rights Act of 1965 would come to fruition and begin to create the semblance of a relatively adequate political body for African-Americans.⁸⁴

The importance of this continuum of normalized racist attitudes that persisted in the face of changes in the law is that African-Americans had a limited value in the eyes of the state.

Post-Mortem Privilege

In spite of these landmark legal victories in the Civil Rights era, white supremacy and privilege remained so entrenched that Southern white people felt safe to murder not only African-Americans but other white people who dared to stand in solidarity against racism.⁸⁵ Two white men, Andrew Goodman and Michael Schwerner, along with their black companion James Chaney, were ambushed and murdered by members of the Ku Klux Klan on June 21, 1964, as part of the “Freedom Summer” resistance.⁸⁶ After a nearly two-month search that ended on August 4, 1964, “their bodies were found buried on the secluded property of a Klansman. All three men had been shot at point blank range and Chaney had been badly beaten.”⁸⁷ In this case, race was a predominant factor in these killings—their very presence in Mississippi was in opposition to the suppression of black voting rights.⁸⁸ It could be argued that the mere association of Goodman and Schwerner with black people, both physically and in the context of establishing a political body, had the effect of removing any privilege they would have otherwise been afforded.

Nevertheless, even after being murdered, there was not a total loss of white privilege. Countless man hours were dedicated to a federally organized legal effort that, even though it was thought to be fruitless given the acknowledged racist attitudes of both the local government and jury where the trial was held, and which persisted at a great logistical expense.⁸⁹ In spite of the federal government’s efforts

84. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); see also Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

85. Stephen Smith, *Mississippi Burning Murders Resonate 50 Years Later*, CBS NEWS (June 20, 2014, 5:30 AM), <https://www.cbsnews.com/news/mississippi-burning-murders-resonate-50-years-later/>.

86. *Id.*

87. Smith, *supra* note 85.

88. *Id.*

89. *Id.*

spearheaded by then-Attorney General Robert Kennedy, the result was a mere seven convictions on civil rights violations, while no one was convicted of murder.⁹⁰ It would take more than forty years until a relative sense of justice came with the conviction of Edgar Ray Killen, a former Klansmen and one of the key participants in the crime.⁹¹ Under these circumstances, the fact that any investigation took place at all is evidence of a legal privilege that black people had yet to benefit from.⁹²

The reality of this privilege was not lost on the wife of Mr. Schwerner, who stated during the height of the search that “we all know that the search with hundreds of sailors is because my husband and Andrew Goodman [were] white.”⁹³ In essence, the white privilege bestowed post-mortem on Schwerner and Goodman was found in a “national media frenzy” which highlighted “a great chasm between the attention[s] paid to previous murders and those of June 21, 1964[,] . . . opened, due to the race . . . of the victims: Northern Whites, sons of the American establishment.”⁹⁴

Given this context, one could argue that the response to the subsequent tragedy at Kent State was inevitable. On May 4th, 1970, national tensions and protests in response to the Nixon administration’s expansion of war into Cambodia came to a head at a relatively small university in Kent, Ohio.⁹⁵ According to the University, protesters began to dissipate when the violence unfolded—the students assumed the confrontation was over and started walking to their next classes.⁹⁶ A task force created five years after the event detailed how the events unfolded:

As the [National] [G]uard reached the crest of the Blanket Hill, near the Pagoda of Taylor Hall, about a dozen members of Troop G simultaneously turned around 180 degrees, aimed, and fired their weapons into the crowd in the Prentice Hall parking lot. The 1975 civil trials proved that there was a verbal command to fire. A total of 67 shots were fired in 13 seconds. Four students: Allison Krause, Jeffrey Miller, Sandra Scheuer, and William Schroeder, were killed.

90. *Id.*

91. *Id.*

92. *Id.*

93. John R. Rachal, *We’ll Never Turn Back: Adult Education and the Struggle for Citizenship in Mississippi’s Freedom Summer*, 35 AM. EDUC. RES. J. 167, 169 (1998).

94. *Id.*

95. *May 4 Chronology*, KENT STATE UNIV., <https://www.library.kent.edu/special-collections-and-archives/may-4-chronology> (last visited Apr. 4, 2019).

96. *Id.*

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Nine students were wounded. . . . Of the wounded, one was permanently paralyzed, and several were seriously maimed. All were full-time students.⁹⁷

Although these protests were based on challenges to the Nixon administration's military policies being carried out in Southeast Asia, the victims, in this case, were young white students of relatively good social status that enabled them to pursue a secondary education. Moreover, this violence occurred in a Northern state where slavery was never legal, situated both physically and legally, far away from the historic racial tension in the south. What makes this instance so compelling is that in spite of all of the victims being white and the national outrage demanding justice, none of the Ohio National Guard members who fired the shots were ever convicted.⁹⁸ Although a civil trial later awarded compensation to the victims' families, the fact remains that none of the assailants spent a single day in jail.⁹⁹ In this defining moment, the state had determined that not only was dissent and participation in a political protest sufficient grounds for a lethal response but also merely being present at the campus justified the victims' death.¹⁰⁰

Thus, an extension of earlier justifications for lethal violence against white people based on their association with black people was applied to white bodies who associated with political dissidents standing in solidarity with other persons of color, even though that association only consisted of a spatiotemporal relationship.¹⁰¹ Just three days prior to the shootings, President Nixon was caught on tape during a Pentagon visit labeling college protesters as, "these bums, you know, blowing up the campuses."¹⁰² Joe Rhodes, a student member of Nixon's Presidential Commission on Campus Unrest that formed in the wake of the tragedy, took up the task of discerning "who gave what orders to send police on campus, and were they thinking about

97. *Kent State, May 1-4, 1970*, STUDENT DIRECT ACTION COALITION ABOUT KENT STATE, <https://www.cs.earlham.edu/~paulsjo/KentState.html> (last visited Feb. 13, 2020).

98. Margaret Ann Garmon, *Legal Chronology May 5, 1970 – January 4, 1979*, KENT STATE UNIV., <https://www.library.kent.edu/legal-chronology-may-5-1970-january-4-1979> (last visited Apr. 4, 2019).

99. *Id.*

100. *Id.*

101. *Id.*

102. Gerhard Peters and John T. Woolley, *The President's News Conference May 8, 1970*, THE AMERICAN PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-144> (last visited Apr. 10, 2019).

‘campus bums’ when they pulled the trigger.”¹⁰³ Though Nixon later attempted to clarify that his “bums” moniker should have only applied to violent students, the damage had been done.¹⁰⁴

The consequences of this expansion of otherness onto white people were substantial and created a perpetual subtext, which remains visible in contemporary political commentary, which dehumanizes dissent across the board as anti-American.¹⁰⁵ Writing on the sociological constructs of memory related to tragic events, Christian Steidl detailed the combined efforts in the late 1980s of the Ohio American Legion, Fraternal Order of Police, and the Reserve Officers Association who protested any allocation of government funds for an “anarchist” memorial.¹⁰⁶ In addition to opposition from police and military agencies, she added that “many private citizens and elected public officials from across the United States wrote directly to Kent State trustees and administrators indignantly opposing any 28 commemoration of May 4.”¹⁰⁷ This resistance continued to appear as late as 1998 when it was reported that then University President Cartwright had refused to speak with both current students and the victims’ parents who accompanied them.¹⁰⁸ Ignoring their request to preserve the parking spots where the original victims had died, “she instead turned her back on them and the families whose children were murdered.”¹⁰⁹

Although small memorials have since been installed at the location of their deaths,¹¹⁰ it is important to recognize this systemic resistance persisted for nearly three decades—refusing to acknowledge the humanity of the victims and the denial of the brutality of the state’s response. The question thus arises as to how white privilege can be asserted as being present in this situation, both in the context of the initial violence in 1970s and the decades’ long resistance to acknowledging it. The answer to that question is that privilege exists for the

103. Charles Thomas, *Mission Betrayed: Richard Nixon and the Scranton Commission Inquiry into Kent State*, KENT STATE UNIV., <https://www.library.kent.edu/special-collections-and-archives/mission-betrayed-richard-nixon-and-scranton-commission-inquiry-kent> (last visited Mar. 8, 2019).

104. *Id.*

105. Fox News, *supra* note 32.

106. Christina R. Steidl, *Remembering May 4, 1970: Integrating the Commemorative Field at Kent State*, 78 AM. SOC. REV. 749, 758 (2013).

107. *Id.*

108. *Id.* at 763.

109. *Id.*

110. *Id.* at 766.

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mere fact that the event is recorded and relevant in the contemporary world, while a similar incident of college students being murdered received almost no media attention.¹¹¹ On May 14, 1970, a mere ten days after the Kent State incident, two African-American students were shot and killed by police responding to a protest on the campus of Jackson State University in Mississippi.¹¹² In contrast to Kent State, the victims at Jackson State received little to no media coverage, and no national protests resulted from that incident.¹¹³ Thus, post-mortem privilege remains a constant for the white victims at Kent State because they were (and remain) a focal point of both cultural and academic interest, proving that, even in death, they retained a privilege not afforded to their black peers.¹¹⁴ Accordingly, a consistent thread of privilege is weaved into a 200-year history of the United States. So what does white privilege look like in the twenty-first century?

White Privilege in the Modern World

Peggy McIntosh penned what is now a frequently referenced list of forty-six conditions that encapsulate the paradigm of white privilege.¹¹⁵ Though not merely restricted to the condition of whiteness, but also including male privilege, she creates her criteria from what she suggests are “. . . special circumstances and conditions [she] experience which [she] did not earn but which [she had] been made to feel are [hers] by birth, by citizenship, and by virtue of being a conscientious law abiding ‘normal’ person of good will.”¹¹⁶ The list itself comprises a wide assortment of daily occurrences ranging from seemingly mundane events, such as shopping and general social interactions, to more critical manifestations of identity that relate directly to political life.¹¹⁷ The summation of her view on white privilege defines it as a perpetual set of inherent advantages that, for the most part, her “Afro-American co-workers, friends, and acquaintances with whom [she comes] into daily or frequent contact in this particular time,

111. Melanie McGee and R. Eric Platt, *The Forgotten Slayings: Memory, History, and Institutional Response to the Jackson State University Shootings of 1970*, 42 AM. EDUC. HIST. J. 15 (2015).

112. *Id.* at 15-20.

113. *Id.* at 15-16.

114. Steidl, *supra* note 106.

115. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, in BENDER AND BRAVEMAN'S POWER, PRIVILEGE, AND LAW: A CIVIL RIGHTS READER 22 (1995).

116. *Id.* at 25.

117. *Id.* at 28-33.

place, and line of work cannot count on.”¹¹⁸ Although McIntosh wrote from her own experiences, this definition finds credence in the experiences of others during the Civil Rights era, not just domestically in the U.S., but as part of the global colonialist experience.¹¹⁹

Contemporary white privilege is also defined as inherent because the “characteristics of the privileged group define the societal norms.”¹²⁰ More importantly, holders of white privilege in contemporary society “can rely on this privilege to avoid objecting to oppression or subordination . . . [and] can afford to look away from mistreatment that does not affect them personally.”¹²¹ Further societal conditions that support and maintain white privilege, while often invisible, permeate modern American life and include national housing policies, the targeted development of interstate highway system that “decimated” black neighborhoods, and education funding restrictions continue to reinforce white privilege.¹²² However, the most relevant form of white privilege as it relates to this essay is “taking back the center” in a manner that trivializes or rejects racism in the legal system that results in reinforcing a “white comfort zone.”¹²³ Thus, the act of denying privilege, as discussed earlier in this essay, not only fits within this mold but raises serious concerns as to an entrenchment of white privilege in modern law.

III. Denial is the Foundation of Codified Privilege

Having identified voices whose intent is to deny white privilege, and having established a broad definition of white privilege, the focus of this essay turns to the role this denial plays in the broader codification of a racist legal system. First, it is important to understand that the methods of denying privilege identified in the previous section tend to share a commonality in factors:

Societal practices and thinking patterns, including language itself, operate in conjunction with material forces to reinforce white privilege, enabling whites to self-perpetuate as a dominant racial-

118. *Id.* at 33.

119. Fanon, *supra* note 73 at 68. (Noting that racial paradigms in both Europe and South Africa bestowed white people, regardless of socio-economic status, a de facto privilege based solely on skin color).

120. Stephanie Wildman, *The Persistence of White Privilege*, 18 WASH. U. J. L. & POL’Y 247 (2005).

121. *Id.*

122. *Id.* at 250.

123. *Id.* at 257.

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ized identity, albeit a transparent one. . . .these socio-cultural factors [are]: (1) the contemporary push to colorblindness; (2) the sleight of mind that typifies the relation between an individual and groups in American culture; (3) a comfort zone in whiteness, which includes whiteness as the fabric of daily life for whites and white participation in the construction of race from a white-privileged viewpoint; and (4) the tendency for holders of white privilege to ‘take back the center’ in discourse, turning attention away from potentially uncomfortable conversations about race toward an emphasis on white concerns and issues.¹²⁴

Using the U.S. Constitution as a starting point to understand how these factors contribute to the codification of white privilege, this section will start with the Thirteenth Amendment, which in and of itself can never be separated from the racist ideology held by the founders of the United States.¹²⁵ Perhaps more than any other piece of binding law, this amendment exists in a paradox—on the one hand ending the formal institution of slavery, yet expanding it to extend beyond racial boundaries, shifting the justification for slavery from race to that of legal status as defined by contemporary measures of criminality.¹²⁶ Thus, a racist lens that denies white privilege by, in part, associating crime with blackness, creates a subtext which links the pre-Reconstruction era with contemporary America.¹²⁷ Not only does such an argument fall in line with Wildman’s “sleight of mind” factor of privilege denial, but empirical data also suggests that the “*criminal-blackman*” stereotype is “both ahistorical and counterintuitive,” and provides an excuse for prejudice and racial discrimination to persist.¹²⁸

124. Wildman, *supra* note 120, at 250-251.

125. See *Slavery at Monticello: The Plantation*, THOMAS JEFFERSON MONTICELLO, <https://www.monticello.org/slavery> (last visited April 20, 2019) (“Monticello was a 5,000-acre working plantation where over 400 enslaved individuals lived and worked during Jefferson’s lifetime”); see also Pamela Newkirk, *Slavery and the Contradictions of James Madison*, WASH. POST (January 5, 2018), https://www.washingtonpost.com/outlook/slavery-and-the-contradictions-of-james-madison/2018/01/03/3368716e-db88-11e7-b1a8-62589434a581_story.html?utm_term=.58a1a76a5076.

126. U.S. CONST. amend. XIII, § 1.

127. See O’Reilly, *supra* note 5; see also Bill O’Reilly, *Thugs and Thuggery*, BILL O’REILLY (Apr. 30, 2015), <https://www.billoreilly.com/newslettercolumn?pid=45166> (Noting that O’Reilly stands his ground on his use of the word “thug” in describing looters in Baltimore, in spite of a councilman’s request that he stop because it is thinly veiled racist terminology.); see also Erin Durkin, *Ex-Fox News host says its reputation for racism is ‘for very good reason’*, THE GUARDIAN (Apr. 19, 2019), <https://www.theguardian.com/media/2019/apr/19/fox-news-racism-whites-host-eboni-williams> (claiming that the Fox News network was founded with an intent to frighten white people and to “demonize the other.”)

128. Wildman, *supra* note 120; K. Russel, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L. J. 593, 606 (1996).

In other words, the argument creates a self-fulfilling prophecy that justifies disproportionate punitive sanctions for black people in the criminal justice system.¹²⁹ Thus, the “act” of privilege denial, specifically through the transference of blame from the oppressor to the oppressed, serves as a basis for public acceptance of state power, which can be used to justify otherwise baseless claims of authority and violence over the lives of criminals and black people.¹³⁰

O’Reilly’s argument that the “federal government” is unable to cure racism is not only an example of contemporary white privilege, but it serves as a continuum of legal thought that has persisted for centuries.¹³¹ This ideology is not only lacking in merit but also serves as a disturbing reminder of the nineteenth century brand of American jurisprudence that led to the era of racist Jim Crow laws. In *Plessy v. Ferguson*, the Supreme Court upheld the Separate Car Act of 1890, a Louisiana law that called for “equal but separate accommodations for the white, and colored races,” and led to the prosecution of Homer Plessy.¹³² Mr. Plessy was charged and convicted for sitting in a train coach designated for white people only.¹³³ Writing for the 7-1 majority, Justice Henry Brown upheld the conviction on the grounds that neither the Thirteenth nor Fourteenth Amendments to the US Constitution were violated:

A statute which implies merely a legal distinction between the white and colored races. . .has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude. . . . The object of the [Fourteenth] amendment. . .could not have been intended to abolish distinctions based upon color. . .or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other. . .The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition.¹³⁴

129. *Id.* (Comparing the harsh federal sentencing guidelines for crack cocaine, typically associated with black citizens, with the relatively minor sentencing guidelines associated with powder cocaine, typically associated with white citizens.)

130. Leonardo, *supra* note 2.

131. O’Reilly, *supra* note 1.

132. *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896).

133. *Id.* at 541-42.

134. *Id.* at 543-44.

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This mindset was so entrenched in domestic jurisprudence that this holding remained precedent for nearly six decades.¹³⁵ This is an idea that had mass appeal not just domestically, but also in Germany prior to World War II. Writing from the perspective of life under the burgeoning Nazi regime, Hannah Arendt found that when used as a political weapon, ideologies which ignored state-sanctioned racism and instead interpreted history as either a struggle of class based on economics or a “natural fight of the races” are at the root of imperialism.¹³⁶ Arendt suggests that, “[t]he appeal of both [arguments] to large masses was so strong that they were able to enlist state support and establish themselves as official national doctrines . . . free public opinion has adopted them to such an extent that not only intellectuals but great masses of people will no longer accept a presentation of past or present facts that is not in agreement with either of these views.”¹³⁷

The issue is that the persuasive nature of these complementary ideologies, and the denial of privilege as unfixable, economic, or “natural,” penetrates every facet of political life until they became both a *de jure* and *de facto* reality.¹³⁸ In other words, deniers of white privilege are subscribing to a worldview that was adopted and practiced during the most oppressive times in recent history both domestically and abroad. The argument that white privilege is not real and that government cannot mandate an equitable solution is inaccurate and irresponsible and lays the foundation for state-sanctioned violence to increase.

Codification of Privilege is the Foundation of Violence

Racist legal mechanisms that provide ample opportunity for police and other state institutions to abuse their authority exists not only because the law allows it, but also because the extent of the violence is well hidden from the public gaze. First, it is important to acknowledge that the roots of state-sanctioned violence began in ancient time and remains relevant in contemporary discourse on race for violence to be accepted as a societal norm. Under the ancient Roman Empire, the designation of *homo sacer*, or “sacred man,” created the legal framework which justified killing persons deemed less valuable than others

135. *See* Brown, 347 U.S. at 692. *See* Brown v. Board of Education, 347 U.S. 483, 495 (1954).

136. HANNAH ARENDT, IMPERIALISM PART TWO OF THE ORIGINS OF TOTALITARIANISM 39 (1968).

137. *Id.*

138. *Id.*

based on status.¹³⁹ This law dictated that “the sacred man is the one whom the people have judged on account of a crime. It is not permitted to sacrifice this man, yet he who kills him will not be condemned for homicide; in the first tribunitian[sic] law, in fact, it is noted that “if someone kills the one who is sacred according to the plebiscite, it will not be considered homicide.”¹⁴⁰

Thus, when denial of white privilege includes the proposition that equates blackness with crime, this ancient precept remains a *de facto* standard that devalues the life of African-Americans who are victimized by state violence.¹⁴¹ The death of Eric Garner is one contemporary example of this *de facto* standard. In July of 2014, police officers arrested Mr. Garner for “selling untaxed cigarettes” and subsequently resulted in a New York City Police Officer placing him in a chokehold.¹⁴² The court ruled that his murder was “justified,” and the officer not only never faced charges, but it took five years for his disciplinary trial to begin.¹⁴³ Just two months after Mr. Garner’s death, Michael Brown was shot and killed by a Ferguson, Missouri police officer in August of 2014. The Ferguson police officer justified his lethal response by alleging Mr. Brown acted violently after being approached about his possible connection to a robbery.¹⁴⁴ As was the case with Mr. Garner, Mr. Brown’s death was not considered a murder due to his alleged criminal activity.¹⁴⁵ Although these deaths gained national and international attention,¹⁴⁶ the extent of state-sanctioned lethal force is often unattainable.

It wasn’t until March 2015, when the Department of Justice released statistics by the Arrest-Related Deaths (“ARD”) program that the veil had been lifted.¹⁴⁷ Covering a study period from 2003 through 2011, ARD’s report found that, “at best, [only] 49% of all Police in-

139. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 47 (1998).

140. *Id.*

141. O’Reilly, *supra* note 1; Prager, *supra* note 30.

142. Ali Winston, *Eric Garner Death Was ‘Not a Big Deal,’ Police Commander Said*, *NY TIMES* (May 16, 2019), <https://www.nytimes.com/2019/05/16/nyregion/eric-garner-pantaleo-trial.html>

143. *Id.*

144. *Ferguson Police: Michael Brown was a Robbery Suspect*, *BBC NEWS* (Aug. 15, 2014), <https://www.bbc.com/news/world-us-canada-28806313>

145. *Ferguson Jury: No Charges for Officer in Michael Brown’s Death*, *NPR* (Nov. 24, 2014), <https://www.npr.org/sections/thetwo-way/2014/11/24/366370100/grand-jury-reaches-decision-in-michael-brown-case>.

146. *Id.*

147. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, *Arrest-Related Deaths Program Assessment*, (2015).

duced homicides in the U.S.” were even reported, with the lower bound and more realistic number of reports estimated to be at 36%.¹⁴⁸ The program assessment concluded that “the current ARD methodology does not allow a census of all Law Enforcement homicides in the U.S.”¹⁴⁹ The problem arising from this assessment is the voluntary origin of police department reports; most departments across the nation are not providing any relevant data regarding homicides stemming from police interaction.¹⁵⁰ The subsequent result, at least concerning state sanctioned murder, is that a lack of oversight has allowed a type of secret police to evolve.

Arendt suggests that the act of state-sanctioned murder, in contrast to prisons, where people safely disappear, presents a unique problem for totalitarian regimes because the act leaves behind a body.¹⁵¹ Bodies left behind via state-sanctioned murder poses a problem for the murdering agent because “he has no power to erase the identity of the victim from the memory of the surviving world. The operation of the secret police, on the contrary, miraculously sees to it that the victim never existed at all.”¹⁵² Her suggestion rather accurately predicts the lack of transparency related to the domestic use of lethal force.¹⁵³ Thus, from the position of the state, the homo sacer, due to its dehumanized status, is not worthy of being tallied. Later in 2015, a coalition of private entities released data from 2015, which tracked police killings across the United States.¹⁵⁴ This data revealed that “Young black men were nine times more likely than other Americans to be killed by police officers in 2015,” which was entirely disproportionate to the racial makeup of the total United States population.¹⁵⁵

Another parallel between the ancient world and modern society can be extrapolated from these numbers. Although written nearly 500 years ago, *The Prince* is arguably a how-to manual for modern political powers that details numerous methods and strategies that outline

148. *Id.*

149. *Id.*

150. *Id.*

151. *See* ARENDT at 434-435.

152. *Id.*

153. BUREAU OF JUSTICE STATISTICS, *supra* note 147.

154. Jon Swaine, et al., *Young black men killed by US police at highest rate in year of 1,134 deaths*, THE GUARDIAN (Dec. 31, 2015), <http://www.theguardian.com/us-news/series/counted-us-police-killings>.

155. *Id.*

how ancient rulers maintained control over their subjects.¹⁵⁶ In this respect, Machiavelli, the author of *The Prince*, suggested that maintaining control was dependent on how the cruelties were used, “well used are those cruelties (if it is permitted to speak well of evil) that are carried out in a single stroke, done out of necessity to protect oneself, and are not continued but are instead converted into the greatest possible benefits for the subject. . .injuries, therefore, should be inflicted all at the same time, for the less they are tasted, the less they offend.”¹⁵⁷

Evidence of this strategy can be seen not only in a historical context but also in contemporary society. First, the student deaths at both Kent State and Jackson State served as potent warnings to would-be political dissidents that the state would not hesitate to use unaccountable means of lethal force.¹⁵⁸ The other evidence of a “single stroke,” while more implicit than explicit, can be found in both the decades’ long lack of accounting for police-related deaths, as well as the state’s apparent refusal to consider the deaths of “criminals” as a punishable offense.¹⁵⁹ It is important to note that denial of white privilege is twofold: (1) blaming African-Americans for their plight in the legal system, and (2) deferring ownership of privilege onto Asian communities.¹⁶⁰ As much of this essay has focused on the first step in privilege denial, the last section will illustrate contemporary methods of concealing the past related to the plight of Asian-Americans.

While both O’Reilly and Prager employed a tactic of denying their own privilege by assigning contemporary privilege to Asian-Americans, O’Reilly’s specific claim that the historical plight of Asians bears no relation to that of African-Americans falls directly in line with Arendt’s identification of totalitarian regimes that hide the past in order to justify racist attitudes that support oppressive manifestations of state power.¹⁶¹ Despite claims to the contrary made by privilege deniers, many scholars have noted that the end of slavery did not end racism:

[A]s Reconstruction came to an end, southern whites began to develop a sophisticated system of race control that ultimately led to an

156. NICCOLO MACHIAVELLI, *The Prince* (1532), reprinted in CLASSICS OF POLITICAL AND MORAL PHILOSOPHY 333 (Steven M. Cahn, ed. Oxford Univ. Press 2012).

157. *Id.*

158. McGee and Platt, *supra* note 111.

159. BUREAU OF JUSTICE STATISTICS, *supra* note 147

160. O’Reilly, *supra* note 1; Prager, *supra* note 26.

161. See O’Reilly, *supra* note 10; see also Arendt, *supra* note 136.

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entirely segregated society. This shift from slavery to segregation underscores the dynamic and pliable character of the relationship between race and law. This same ideology would also affect the treatment of Native Americans and Chinese. In each instance, the social and cultural assumptions of inferiority that whites attached to these groups found expressions in legal culture.¹⁶²

Given this context of white privilege extending into legal constructs beyond those which controlled black bodies, I will briefly examine a singular yet striking method of racist policing used against both Chinese immigrants and citizens of the United States that occurred during the Jim Crow era. In her article which focused on the conditions faced by Chinese women under a race-based exclusionary law, Shauna Lo noted that the Chinese Exclusion Act (1882-1943) was “the first U.S. law to control the immigration of a group based on race.”¹⁶³ The passage of this law came at the behest of “white organized labor, which feared competition for jobs, [and] soon developed a hostility for the Chinese, which manifested in numerous local ordinances discriminating against Chinese as well as violent riots protesting their presence.”¹⁶⁴ One could assume that the Act was meant to appease the group of working-class white people whose welfare, be it social or financial, was otherwise secondary to the profit margins of their employers.¹⁶⁵

John Roemer’s account of the Marxian theory of discriminatory wages suggests that this manufactured tension among the working classes comes as a result of “capitalists [using] a divide-and-conquer strategy,” which forces the wages of all workers down and thus maintains a lowered threshold and expectation of compensation across the board.¹⁶⁶ Capitalists then take advantage of the persistence of racism in society, which allows them to implement strategies wherein “capitalists gain and all workers lose from discrimination.”¹⁶⁷ This argument provides an interesting context that supports DuBois’ observance of the persistence of slight advantages afforded to white

162. KERMIT HALL, ET. AL., *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* 278 (2011).

163. Shauna Lo, *Chinese Women Entering New England: Chinese Exclusion Act Case Files, Boston, 1911-1925*, 81 *THE NEW ENG. Q.* 383-84 (2008).

164. *Id.* at 384.

165. *Id.*

166. John E. Roemer, *Divide and Conquer: Microfoundations of a Marxian Theory of Wage Discrimination*, 10 *BELL J. ECON.* 695 (1979).

167. *Id.*

workers over their black counterparts, even in the least desirable fields of employment.¹⁶⁸

Conclusion

White privilege is both a global and domestic phenomenon that has persisted for centuries. One of the key arguments in denying the existence of this privilege is that there can be no statutory solution for racism. While both legislation and common law have disproved this notion in recent decades, there may be some merit to that argument being that white privilege persists. Thus, the answer must be that laws alone cannot bring an end to white privilege and racism, but instead, jurists must work in conjunction with an overall societal, if not global, paradigm shift, which disavows racism as an unnecessary evil which has no place in the future of civilized society.

168. Du Bois, *supra* note 66.

“Make My Day!” The Relevance of Pre-Seizure Conduct in Excessive Force Cases

LEONARD J. FELDMAN¹

I. INTRODUCTION

Excessive force cases involving police officers are governed by a complex, deeply troubling, and conflicting line of court decisions. In many situations in which police are called upon to use lethal force, the victim himself was at fault, creating the need for force by either shooting at officers or refusing to put down a firearm. However, there have been repeated instances in which the police, not the victim, created the need—or more often, merely the apparent need—for force, resulting in the death of, or grave injury to, an entirely blameless law-abiding civilian. In some instances, police create the need for force by committing a constitutional violation that foreseeably led to the apparent need for the use of force. In other instances, police actions foreseeably create the need or apparent need for force through conduct that serves no substantial government interest yet leads to death or injury.

The apparent need for use of force arises most often when police officers fail to identify themselves as law enforcement officers. Usually, that involves plainclothes officers who brandish weapons but do not display their badges or announce their identities. Occasionally, as in *County of Los Angeles, California v. Mendez*² and *White v. Pauly*³,

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2. 137 S. Ct. 1539 (2017).

3. 137 S. Ct. 548 (2017).

the officers are in uniform but know, or reasonably should know, that the people with whom they are dealing with cannot see the uniforms and fail to identify themselves in any other way. In some of these cases, the unidentified officers entered private homes or were just outside those houses. Armed plainclothes officers have also accosted people in their cars or on the street, setting terrified responses in motion which at times result in tragic consequences.

Sadly, these events continue to occur on a weekly, if not daily, basis. The *Washington Post* recently reported a June 2019 incident in which a police officer, responding to a panic alarm that someone in a house triggered shortly before midnight, went to the house, rang the doorbell, and fired his weapon through a window when an armed homeowner inside the house purportedly aimed a gun at him without knowing he was a police officer.⁴ According to the article, the injured homeowner asked the unidentified intruder to “call the cops, please!”⁵ When the officer responded, “I am the cops,” and explained, “you pointed a gun at me, man,” the homeowner replied, “you came to my house 12 o’clock at night, I’m sleeping . . . I’ve got to protect my house . . . I can’t believe you did this to me.”⁶

Police have also created the need for force in more complicated circumstances. In repeated instances, officers have escalated the level of threat posed by mentally ill or suicidal civilians, resulting in the death of the very people whom the police were summoned to protect. In some cases, officers have fired at, fought with, or otherwise threatened a civilian without justification, using even more force when the victim tried to defend themselves. In *City and County of San Francisco, California v. Sheehan*,⁷ for example, police were asked by a social worker to help escort a mentally ill civilian to a facility for temporary evaluation and treatment. Instead, the police forced their way into her apartment, and a shooting ensued.

In recent years, the Department of Justice (DOJ) has commendably attempted to deal with this type of problem. The DOJ has entered into a series of consent decrees that require municipal police depart-

4. Michael Brice-Saddler, *Police Said an Officer Shot a Man who Opened a Door while Aiming a Gun. Then the Body-cam Video Came out*, WASH. POST (July 30, 2019, 10:30 PM), https://www.washingtonpost.com/nation/2019/07/31/police-said-they-shot-man-when-he-opened-his-door-aiming-gun-then-bodycam-video-came-out/?noredirect=on&utm_term=.350aaa460271.

5. *Id.*

6. *Id.*

7. 135 S. Ct. 1765 (2015).

ments to take steps to reduce police-created need for force and deescalate (rather than escalate) when dealing with mentally-ill individuals. In its January 2017 report on the Chicago Police Department, the Justice Department objected to practices which, by needlessly creating a need for force, had resulted in a number of civilian deaths.⁸ Those Department of Justice consent decrees and the Department's related reports would rest on a solid legal foundation if the Supreme Court were to hold, as urged below, that the reasonableness standard in *Graham v. Connor*⁹ applies to police action which foreseeably leads to the need for force. This question was framed, but not resolved, in *Mendez* and is addressed in a disparate array of deeply troubling lower court cases. The Supreme Court should provide additional clarity on whether pre-seizure conduct is relevant in excessive force cases. This article addresses the need for that clarity and offers a proposed framework.

II. LOWER COURT DECISIONS APPLYING THE *GRAHAM* V. *CONNOR* REASONABLENESS TEST

The Supreme Court's opinion in *Graham* is the leading and controlling decision regarding use of force claims against police officers. The Court in *Graham* held that a "reasonableness" test under the Fourth Amendment governs such claims and emphasized that "proper application" of the reasonableness test "requires careful attention to the facts and circumstances of each particular case."¹⁰ Quoting *Tennessee v. Garner*,¹¹ the Court reiterated that the question is "whether the totality of the circumstances justify[es] a particular sort of . . . seizure."¹² The Court thus required lower courts to carefully consider all of the relevant facts and circumstances and did not hold that any facts or circumstances should be ignored in deciding Fourth Amendment claims.

In the wake of *Graham*, lower courts have applied a variety of standards in evaluating the constitutionality of officials' actions that foreseeably create a need for force. Several circuits have sustained excessive force claims based on official action creating a need for

8. U.S. Dep't of Justice Civil Rights Division and U.S. Attorney's Office Northern District of Illinois, *Investigation of the Chicago Police Department*, 5, 28, 37, 151 (2017).

9. 490 U.S. 386 (1989).

10. *Id.* at 396.

11. 471 U.S. 1, 8-9 (1985).

12. *Graham*, 490 U.S. at 396 (emphasis added; brackets and ellipsis in original).

force. The Sixth, Seventh, and Ninth Circuits, for example, apply the *Graham* reasonableness standard to official action creating a need for force, balancing the public interest in that action against the likelihood that it will lead to the use of force. In *Sledd v. Lindsay*,¹³ the Seventh Circuit found liability in part because “the officer had unreasonably created the encounter that led to the use of force.” In *Estate of Starks v. Enyart*,¹⁴ the Seventh Circuit likewise held that “[p]olice officers who unreasonably create a physically threatening situation in the midst of a Fourth Amendment seizure cannot be immunized for the use of deadly force.” In *Yates v. City of Cleveland*,¹⁵ the Sixth Circuit concluded that “[i]t was not ‘objectively reasonable’ for [the officer] to enter the dark hallway at 2:45 a.m. without identifying himself as a police officer, without shining a flashlight, and without wearing his [police] hat.” In *Kirby v. Duva*,¹⁶ the Sixth Circuit confirmed that “[w]here a police officer unreasonably places himself in harm’s way, his use of deadly force may be deemed excessive.” Finally, in *Vos v. City of Newport Beach*,¹⁷ the Ninth Circuit similarly held: “While a Fourth Amendment violation cannot be established based merely on bad tactics that result in a deadly confrontation that could have been avoided, the events leading up to the shooting, including the officers’ tactics, are encompassed in the facts and circumstances for the reasonableness analysis.”

The Tenth Circuit also applies a *Graham* reasonableness standard. However, the Tenth Circuit considers only those actions creating a need for force that are “immediately connected” to the use of force and “actions in the moments leading up to” the use of force.¹⁸ The standard in the Eleventh Circuit is less clear. In *Gilmere v. City of Atlanta, Georgia*,¹⁹ the officers unlawfully beat a suspect who then attempted to escape the officers’ physical abuse. The Eleventh Circuit found liability under *Graham* because “Patillo did little to provoke the police officers to beat him. That unwarranted intrusion, as well as the unwarranted shooting, which directly resulted from his efforts to escape the officers’ further physical abuse, give grounds for relief

13. 102 F.3d 282, 288 (7th Cir. 1996).

14. 5 F.3d 230, 234 (7th Cir. 1993).

15. 941 F.2d 444, 447 (6th Cir. 1991).

16. 530 F.3d 475, 482 (6th Cir. 2008).

17. *Vos v. City of Newport Beach*, 892 F.3d 1024, 1034 (9th Cir. 2018), *cert. denied sub nom. City of Newport Beach v. Vos*, 139 S. Ct. 2613 (2019).

18. *Allen v. Muskogee, Okla.*, 119 F.3d 837, 840 (10th Cir. 1997).

19. *Gilmere v. City of Atlanta, Ga.*, 774 F.2d 1495, 1495 (11th Cir. 1985) (en banc).

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under the fourth amendment.”²⁰ In affirming the district court’s finding that the officer was liable on substantive due process grounds, the court explained that “a moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of official power.”²¹

Conversely, some other circuits hold that “[t]he proper approach . . . is to view excessive force claims in segments” and “disregard” events in earlier segments when determining whether an officer used excessive force in a later segment.²² Notably, the Sixth Circuit reached that holding in *Livermore* despite its contrary decisions in *Kirby* and *Yates*.²³ In *Salim v. Proulx*,²⁴ the Second Circuit also applied a segmenting approach to excessive force claims, holding that “a defendant’s actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force.” And in *Waterman v. Batton*,²⁵ the Fourth Circuit likewise held that “the reasonableness of the officer’s actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis.” These and other decisions generally reason that pre-seizure conduct is not relevant in analyzing the reasonableness of force used by a police officer because, under their interpretation of *Graham*, such force must be examined “at the moment”²⁶ it occurs. As discussed below, this reasoning is deeply flawed and leads to absurd results.

III. TOTALITY MEANS TOTALITY

A segmenting approach cannot properly be justified by the “at the moment” language in *Graham*. Although *Graham* refers to the reasonableness of an officer’s actions “at the moment,” the rest of the passage in question makes clear that the “at the moment” phrase was not intended to preclude consideration of what preceded the use of force, but only to focus the analysis on “the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hind-

20. *Id.* at 1502.

21. *Id.* at 1501.

22. *Livermore v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007).

23. *See Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991); *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008).

24. *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996).

25. *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005).

26. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

sight.”²⁷ The Court explained that “[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers . . . violates the Fourth Amendment.”²⁸ The “at the moment” requirement is properly read to preclude courts from second-guessing the actions of police officers after the fact; it does not require courts to pretend that critically important events leading to the use of force did not occur.

A segmenting approach is also contrary to any reasonable interpretation of the phrase “totality of the circumstances.”²⁹ As the Third Circuit noted in *Abraham v. Raso*,³⁰ it is not possible to reconcile the Supreme Court’s rule “requiring examination of the ‘totality of the circumstances’ with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished. ‘Totality’ is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer’s use of force.”³¹ Moreover, if the seizure is a bullet striking a suspect, then the circumstances before that moment—which the segmenting approach disregards—would include “what [the officer] saw when she squeezed the trigger.”³² As the court in *Abraham* noted, courts that disregard pre-seizure circumstances “are left without any principled way of explaining when ‘pre-seizure’ events start and, consequently, will not have any defensible justification for why conduct prior to that chosen moment should be excluded.”³³

In *Mendez*, the United States, writing as *amicus curiae*, appears to have recognized the problem that the court identified in *Abraham*. Addressing the relevance of prior events, the government stated in its amicus brief:

This is not to say that courts and officers should be blind to the events that lead to a use of force. The objective reasonableness test accounts for “the facts and circumstances of each particular case,” *Graham*, 490 U.S. at 396, including “what the officer knew at the time” he decided to use force, *Kingsley [v. Hendrickson]*, 135 S. Ct. 2466, 2473 (2015); see *Plumhoff [v. Rickard]*, 134 S. Ct. 2012, 2023

27. *Id.* (emphasis added).

28. *Id.* (citation omitted).

29. *Id.*

30. *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999).

31. *Id.*

32. *Id.*

33. *Id.* at 291-92.

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(2014)] (The “crucial question” is “whether the official acted reasonably in the particular circumstances that he or she faced.”).³⁴

But the government never explained what it meant by, and the legal significance of “what the officer knew at the time.” For example, would it include a police officer’s knowledge—or presumed knowledge—that his unreasonable or unlawful pre-seizure conduct is what created the apparent need for force? If so, would that knowledge be enough to impose liability even if the use of force was otherwise justified?

Indeed, in many cases, the pre-seizure conduct by the officer and victim is as a practical matter the only action to which *Graham* could meaningfully be applied. The Court in *Graham* stressed that “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”³⁵ But in many cases involving the use of deadly force, the person who “forced” the police officer to make that decision was the police officer himself, by entering a residence without first alerting the occupants or otherwise creating a dangerous situation. Although there may be a need for a split-second decision once an officer is in an apparently life-threatening situation, the decision that got the officer into that situation is often far less hurried.

A strict application of a segmenting approach also bars redress in a troubling range of situations. In *Sudden Impact*, Harry Callahan—played by Clint Eastwood—points his .44 Magnum revolver at a man’s face and dares him to shoot, saying with classic Clint Eastwood style, “Go ahead, make my day!” If a plainclothes police officer, without identifying himself, was to imitate Clint Eastwood’s famous conduct and the civilian were to reach for a weapon or point an already-drawn weapon at the officer, the officer’s subsequent fatal shooting of the civilian would constitute a reasonable use of force in any circuit that has adopted a segmenting approach because, in those circuits, pre-seizure conduct is legally irrelevant. The dispositive inquiry is whether a reasonable officer on the scene, *at the moment of the shooting*, would believe that the civilian was threatening his safety.

The segmenting approach also bars redress in other equally troubling yet more realistic situations where courts have found liability or otherwise condemned the officer’s conduct. If a plainclothes

34. Brief for the U.S. at Amicus Curiae Supporting Petitioners at 25, *Cty of L.A., Cal. v. Mendez*, 137 S. Ct. 1359 (2017) (No. 16-369).

35. *Graham*, 490 U.S. at 397.

police officer who had a warrant and was within one of the “knock and announce” exceptions climbed through a bedroom window in the middle of the night without identifying himself and then killed a resident who pointed a weapon in fear, the officer’s fatal shooting of the resident would constitute a reasonable use of force under a segmenting approach. That is essentially what the officer did in *McDonald v. United States*.³⁶ In his concurring opinion, Justice Jackson soundly condemned such conduct:

I am the less reluctant to reach this conclusion because the method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave troubles if continued. That it did not do so on this occasion was due to luck more than to foresight. Many home-owners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves.³⁷

Similarly, if a police officer jumped in front of a moving car and then shot the driver to stop the car, the killing of the motorist would constitute a reasonable use of force. The Seventh Circuit appropriately rejected such a result in *Starks*.³⁸ And if a police officer were called to the house of a deranged man who was home alone shouting incoherently and swinging a golf club, the officer was warned that if he entered the house, the man would attack him with the club. The officer nonetheless entered the house and was attacked as predicted, the officer’s killing of the mentally ill man would constitute a reasonable use of force. The district court logically rejected that result in *Estate of Crawley v. McRae*.³⁹

36. 335 U.S. 451 (1948).

37. *Id.* at 460-61 (Jackson, J., concurring).

38. *Enyart*, 5 F.3d at 234.

39. *Estate of Crawley v. McRae*, No. 1:13-CV-02042-LJO-SAB, 2015 WL 5432787, at *28-33 (E.D. Cal. Sept. 15, 2015).

IV. A PROPOSED FRAMEWORK

Unfortunately, the Supreme Court has not squarely decided whether pre-seizure conduct can properly be considered in deciding an excessive force claim under *Graham*. The issue was briefed and argued in *Mendez*; however, the Court held: “We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here.”⁴⁰ Following *Mendez*, several courts have continued to hold that pre-seizure conduct is relevant and must be considered as part of the “totality of the circumstances.”⁴¹ Nevertheless, the issue remains unresolved in the Supreme Court.

In the absence of controlling Supreme Court authority, this article suggests the following framework:

- In resolving excessive force claims, courts may entertain a claim that police action foreseeably created the need for the use of force against a claimant and should apply to the police action the general standard of reasonableness established by *Graham* and *Scott*.
- Under *Graham*, whether that prior police action was reasonable “requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.”⁴²
- Consideration would also be given to the “relative culpability” of involved individuals,⁴³ and all such issues would be assessed from the perspective of “a reasonable officer on the scene.”⁴⁴

Since the test draws from both *Graham* and *Scott*, it can appropriately be characterized as “*Graham/Scott* balancing.”

Applying such a balancing test is simple and straightforward. Action involving a high likelihood of creating a need for force would be justified in the circumstances involving culpable conduct, such as po-

40. 137 S. Ct. at 1547 n.* (internal citations omitted).

41. See, e.g., *K.J.P. v. City of San Diego*, No. 3:15-CV-2692-H-MDD, 2017 WL 3537740, at *3 (S.D. Cal. Aug. 17, 2017) (“The Supreme Court recently reversed the Ninth Circuit’s provocation rule. In doing so, however, the Court did not say that provocation was irrelevant, only that it should be considered as part of the ‘totality of the circumstances.’”) (citing *Mendez*, 137 S. Ct. at 1546-47); *Maddox v. City of Sandpoint*, No. 2:16-CV-00162-BLW, 2017 WL 4343031, at *3 (D. Idaho Sept. 29, 2017) (reading *Mendez* as allowing courts to continue to consider “whether the officers engaged in ‘unreasonable conduct prior to the use of force that foreseeably created the need to use it’”) (quoting *Mendez*, 137 S. Ct. at 1547 n.*); *Felts v. Valencia County*, No. 13-CV-1094 MCA/SCY, 2017 WL 4480118, at *2 (D.N.M. Oct. 6, 2017) (reading *Mendez* to allow courts to continue to consider “whether Defendants’ own reckless or deliberate conduct during the seizure unreasonably created the need to use such force”).

42. *Graham*, 490 U.S. at 396 (internal quotation marks and citation omitted).

43. *Scott*, 550 U.S. at 384.

44. *Graham*, 490 U.S. at 396.

lice entering a room in which armed robbers are holding a hostage. Conversely, a relatively modest likelihood of creating a need for force would *not* be justified if the action in question served no apparent governmental interest, such as the failure of plainclothes officers to identify themselves as police when they accost civilians.⁴⁵ Under the *Graham/Scott* balancing test, it would be irrelevant whether the officer intended that his or her action would create a need for force. The reasonableness inquiry under the Fourth Amendment is and would remain an objective one; it does not depend on the officer's "underlying intent and motivation."⁴⁶ The crucial question is whether the official acted reasonably given the "totality of the circumstances"⁴⁷ that he or she faced.

Some may claim that adopting a framework that considers events that precede the use of force would undermine officer safety. The opposite is true: a rule that imposes liability for objectively unreasonable conduct protects both police and the public. If an officer engages in unreasonable conduct that creates the need for force, both the officer and the suspect are at risk of harm. Conversely, when officers use crisis intervention and de-escalation techniques, the likelihood of a violent confrontation is reduced. When these techniques were employed by the Seattle Police Department as required by a Court-ordered agreement with the Department of Justice, the compliance monitor found that "[f]orce has gone down without officer injuries going up."⁴⁸ Clearly, the best approach for both officer and civilian safety is to promote safe practices *before* a violent confrontation becomes necessary. The above framework accomplishes that goal.

V. CONCLUSION

A police officer who dares a suspect to "make (his or her) day" should be liable if his or her unreasonable conduct leads to a violent confrontation. Unfortunately, the Supreme Court in *Mendez* missed a

45. See United States Department of Justice, Investigation of Chicago Police Department at 31 (Jan. 13, 2017) (criticizing "jump out" tactic, in which a group of gun wielding officers suddenly accost a group of pedestrians to see who will flee, noting that it "can be particularly problematic when deployed by [the Chicago Police Department] using unmarked vehicle[s] and plainclothes officers").

46. *Graham*, 490 U.S. at 397.

47. *Id.* at 396.

48. Press Release, U.S. Dep't of Justice, Federal Monitor finds Seattle Police Department in Initial Compliance with Use of Force Requirements of Consent Decree (Apr. 6, 2017), <https://www.justice.gov/usao-wdwa/pr/federal-monitor-finds-seattle-police-department-initial-compliance-use-force>.

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crucial opportunity to provide needed guidance regarding whether pre-seizure conduct is relevant in excessive force cases involving police officers. As urged herein, the Court should adopt a test that appropriately considers pre-seizure conduct as part of the “totality of the circumstances.” Considering such conduct will promote safe practices *before* a violent confrontation becomes necessary, thereby protecting both police officers and the public.

Book Review: Chokehold by Paul Butler

JUSTIN HANSFORD

When Mike Brown was killed on August 9th, 2014, few of the people who took to the streets in protest could explain in depth the structural details of the system that we knew would, in all likelihood, allow the killer to escape without punishment. We just knew the whole system was guilty as hell.¹ Any instincts to take a systemic perspective were made more challenging in a place like Ferguson, Missouri, where villainizing the individual “bad apples” was easy. Officer Darren Wilson, Police Chief Jackson, and Prosecutor Bob McCullough seemed like characters pulled straight from an episode of “Eyes on the Prize;” segregation era Alabama sheriffs would be proud of the Ferguson officials’ thinly veiled sense of racial superiority and arrogance. The national discourse fixated on these cartoonish characters, localized Ferguson and framed it as an exception. Without the language and analysis of systematic legal, structural injustice, crafting a response that could move racial reform nationally proved problematic. In the gap during that first year of turmoil, the Federal government intervened, supplying its own narratives about “restoring trust between police and communities,”² and implementing moderate reforms, body cameras, and police training.

I begin with this history because, at its best, “Chokehold” is the book we needed most in 2014 and 2015. It’s free use of popular culture and hip hop street slang³ indicates that the book is meant to be accessible to an “ordinary person” who just needs to “know the

1. Justin Hansford, *The Whole System is Guilty as Hell: Interrupting a Legacy of Racist Police Culture Through a Human Rights Lens*, HARV. J. AFR. AM. PUB POL’Y (forthcoming); St. Louis U. Legal Stud. Res. Paper No. 2015 -4, (Feb.20, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2596910.

2. President’s Task Force on 21st Century Policing, *Final Report* (May 2015), https://static1.squarespace.com/static/55b673c0e4b0cf84699bdffb/t/5a188ea553450a9c540ad94b/1511558829397/taskforce_finalreport.compressed.pdf.

3. See e.g., PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 8 (2017).

facts.”⁴ It even includes a chapter on what do if you catch a case—particularly helpful as the author was a former federal prosecutor—indicating that it aspires to be an on the spot useful tool for someone recently arrested who is hoping to stay out of jail. From a movement perspective, I can imagine youth activists in Ferguson reading this book, discussing this book, and responding to mainstream media interviewers with citations to supreme court cases and scholarly studies proving that, far from an isolated incident, the killings of Mike Brown, Freddie Gray, and others were examples of the system “working exactly the way that it was designed to.”

The dual pragmatic and analytic nature of this text is not surprising, as the author Paul Butler is a leading figure in the field of “critical race theory”—a lens that seeks to expose the central way that race informs American law, and importantly, often seeks to actively engage in advocating for progressive racial reform. That merging of theory and practice, called “praxis,” is a hallmark of critical race theory work. And that is key to this book’s resonance. Another important factor is its framing. It is not just the fact that Butler amassed this information about the legal system that strikes a chord. It’s his *reading* of this information—using the data to argue that the system was *designed* to kill Mike Brown and Freddie Gray, Sandra Bland and Rekia Boyd—that is so jarring.

This reading harmonizes with the Black Lives Matter movement. Outside of its inheritance of Black Power era critiques of liberalism (which is also shared by Critical Race Theorist), Black Lives Matter’s two most substantive contributions to the discourse on race have been its popularization and manifestation of intersectionality and its critique of respectability politics. Butler uses both to excellent effect. He implicitly attacks respectability norms through his use of hip hop and street slang in a book which engages in a deep critique of supreme court jurisprudence and philosophy. Perhaps the book’s most interesting contribution to the scholarly discourse is its application of intersectionality and gender analysis to the unique way that gender works to harm black men in the criminal process.⁵ This is particularly bracing as in the Black Lives Matter world; the concept of intersectionality is often flattened to signify nothing more than the drive to incorporate the experiences of Black women, or queer black women, into the dis-

4. *Id.* at introduction.

5. Also, scholars like Frank Rudy Cooper have been engaged in this type of work.

cussion. This is fundamental to do of course. However, as the progenitor of the term, Kimberly Crenshaw, has argued in other platforms,⁶ intersectionality is often misunderstood. Intersectionality is not simply a more complex way of saying Black feminism—it is a separate concept. Butler demonstrates that here by using an intersectional lens to discuss police violence against Black men, demonstrating the idea’s usefulness in this context by explaining how police stops become “masculinity contests” that a Black man with an intersectional lens would be more likely to survive.

Surveying the field, it is clear that *Chokehold* is perhaps the most on topic book project to emerge from the deluge of literature which hit the bookshelves after the sparking of the Black Lives Matter movement. Most of the primary Black Lives Matter activists themselves have written memoirs⁷ that focused primarily on their own personal histories, as did the Ferguson police chief.⁸ Observers and commentators who were not lawyers or law professors tended to (appropriately) write in their own fields, using Ferguson like as a launch point. Washington Post Reporter Wesley Lowery⁹ and Jennifer E. Cobbina’s¹⁰ documented the voices of the participants of the protests but did not offer any answers to the questions that brought people to the streets. Many of the most widely celebrated scholarly texts, from Keeanga-Yamahtta Taylor¹¹, or Tahnesi Coates¹², Eddie Glaude¹³ or Jeff Chang¹⁴ are wide surveys of racial issues that each scholar had studied previously, briefly touching on the issues at stake in Ferguson to add relevance.

6. Jane Coaston, *The intersectionality wars*, Vox (May 28, 2019, 9:09AM), <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination>.

7. PATRISSE KHAN-CULLORS ET AL., *WHEN THEY CALL YOU A TERRORIST: A BLACK LIVES MATTER MEMOIR* (2018); DERAY MCKESSON, *ON THE OTHER SIDE OF FREEDOM: THE CASE FOR HOPE* (2018).

8. THOMAS JACKSON, *POLICING FERGUSON, POLICING AMERICA: WHAT REALLY HAPPENED AND WHAT THE COUNTRY CAN LEARN FROM IT* (2017).

9. WESLEY LOWERY, *THEY CAN’T KILL US ALL: THE STORY OF BLACK LIVES MATTER* (2017).

10. JENNIFER E. COBBINA, *HANDS UP, DON’T SHOOT: WHY THE PROTESTS IN FERGUSON AND BALTIMORE MATTER, AND HOW THEY CHANGED AMERICA* (2019).

11. KEEANGA-YAMAHTTA TAYLOR, *FROM #BLACK LIVES MATTER TO BLACK LIBERATION* (2016).

12. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015).

13. EDDIE S. GLAUDE JR., *DEMOCRACY IN BLACK: HOW RACE STILL ENSLAVES THE AMERICAN SOUL* (2017).

14. JEFF CHANG, *WE GON’ BE ALRIGHT: NOTES ON RACE AND RESEGREGATION* (2016).

Perhaps the most significant scholarly contributions thus far were Marc Lamont Hill's *Nobody* and *Making All Black Lives Matter* by Barbara Ransby. While Hill takes an anthropological view and provides substantive context of the broader issues involved in a wide array of the most prominent Black Lives Matter related campaigns, Ransby does the most significant deep dive into the roots of the movement, exploring the pragmatics of the organizations involved, and adding the intellectual history of the movement's core contributions to Black politics. Yet, neither are scholars of law and policing. Yes, there have been compilations of law and policing scholars that have sought to: 1) focus on policing, and 2) adhere to the movement's values.¹⁵ In hindsight however, none of these other texts posits an argument nearly as effectively as Butler on the legitimacy of the Black Lives Matter argument for systemic transformation. This is primarily because, as a monograph, Butler can more effectively maintain his theoretical framework throughout all of his chapters than any compilation could.

Sadly, no scholar has undergone to directly engage the arguments made over the policing issues brought about in the debates other than the pro police screed "War on Police" by McDonald. Reading these two books alongside each other is interesting, however, as it further demonstrates the usefulness of this book for activists engaged in debates over the criminal justice system. Butler's response to the urge to focus on Black-on-Black crime (all races commit crime intra race), more black are criminals, so they belong in jail, stop and frisk works, and training and other reforms are enough (the system is designed through the law and court cases to have racially biased outcomes, so well trained officers can't stop it) are well researched and indeed more persuasive than McDonald's.

This leads me to conclude that the greatest weakness of the book is perhaps not in its substance, but in its inability to reach its most urgent goals. From the nature of the work, I ascribe to Butler, the goal of providing ammunition for activists to bolster their arguments in the theater of activism. But why aren't more young activists reading this book, or using it to add scholarly legitimacy and data to their arguments for radical policing transformation? Why have they in-

15. See JORDAN T. CAMP & CHRISTINA HEATHERTON, *POLICING THE PLANT: WHY THE POLICING CRISIS LED TO BLACK LIVES MATTER* (2016); ANGELA J. DAVIS ET AL., *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* (2018); KIMBERLY JADE NORWOOD, *FERGUSON'S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION* (2016).

stead read many of the books listed above, even if they are less useful to them in their work and less on topic?

Even more urgently, Butler says in the introduction that his other goals is to “spark revolution,” in the same way if the chokehold were happening to white people, he imagines they would react. Taking him at his word, it is not an impossible feat. *Uncle Tom’s Cabin* by Harriet Beecher Stowe played a role in abolition; Karl Marx’s *Das Kapital* helped to remake many societies. Books like *Silent Spring*¹⁶ or *The Second Sex*¹⁷ helped spring the environmental and the feminist movements. Why hasn’t this book had similar popular impact?

It is not an easy answer. It does appear that, with the exception of *The New Jim Crow* by Michelle Alexander, the most popular books on racial reform by African-American lawyers have been narratives. The founder of Critical Race Theory, Derrick Bell, wrote afro-futurism allegories¹⁸ and even made films to spread his message;¹⁹ Bryan Stevenson used a novel²⁰ and feature film to make his impact. Perhaps Butler’s next foray into advocacy should rely more on narrative and read less like a “brief;” even a highly accessible legal argument with hip-hop lyrics may not be what moves the people. I say this as someone who sincerely hopes his dream comes true and his ideas become widely embraced, sparking a revolution.

16. RACHEL CARSON, *SILENT SPRING* (1962).

17. SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley ed. & trans., Bantam Books 1961) (1949).

18. DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (Basic Books 1987); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (Basic Books 1992).

19. Derrick Bell, *Space Traders*, YouTube (Mar. 8, 2012), <https://www.youtube.com/watch?v=K0BtFWwH0mQ>.

20. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (Spiegel & Grau, 2014).

Removing the Chokehold on School Discipline

DARIN E.W. JOHNSON¹

In his influential book, *Chokehold – Policing Black Men*, Paul Butler argues that the chokehold – a widely-banned and lethal “maneuver in which a person’s neck is tightly gripped in a way that restrains breathing”² is an apt metaphor for how the U.S. criminal justice system treats African-American men:

A chokehold is a process of coercing submission that is self-reinforcing. A chokehold justifies additional pressure on the body because the body does not come into compliance, but the body cannot come into compliance because of the vise grip that is on it. This is the black experience of the United States. This is how the process of law and order pushes African American men into the criminal system.³

Butler articulates the *Chokehold* as a metaphor for understanding how racial inequality infuses the modern criminal justice system, which through the war on drugs, mass incarceration, discriminatory law enforcement practices, and police violence has become a system of social control and for the African-American community, and in particular black men.⁴ Butler argues that the *Chokehold* is the means to the end of maintaining a racialized economic and social hierarchy.⁵ He supports his theory with myriad statistics about how U.S. law and criminal justice practices exact a harsh toll on black men. While Butler primarily focuses on the construction and impact of the *Chokehold* rather than the motivations behind it, his analysis presumes what the

1. Associate Professor of Law, Howard University School of Law. The author would like to thank Yannick Gill, Howard University School of Law, Class of 2019, for his research assistance with this article.

2. PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 3 (2017).

3. *Id.* at 5.

4. *Id.* at 6.

5. *Id.*

reader is left to intuit – that bias is just as much a driver of the *Chokehold* as economic benefit.

This article explores that issue - why the *Chokehold* exists and why it is so pervasive. The article proceeds from the hypothesis that a combination of bias and economic incentives are the chief drivers of the *Chokehold*. I explore this hypothesis in the context of public-school discipline. I apply Butler’s *Chokehold* framework to public school discipline in order to assess whether the economic motivations that Butler asserts have primacy in the criminal justice context, also shape the racially disproportionate implementation of public-school discipline. First, I discuss Butler’s *Chokehold* thesis in the context in which it is presented – criminal justice and the policing of black men. Next, I examine the racially disproportionate implementation of public-school discipline, and I conclude that racial bias is the primary driver of racially disproportionate outcomes. I further observe that, consistent with the *Chokehold* thesis, the economic motivations of the modern school to prison pipeline exacerbate these outcomes. Finally, I conclude that while the economic drivers of the school to prison pipeline must be confronted through policy, ultimately the radical transformation of public-school discipline may be the only means of preventing its racially disproportionate impact on minority youth. I offer suggestions on what a radical transformation in public school discipline might look like and why radical transformation, rather than simply reformation, is required.

I. THE *CHOKEHOLD* THESIS

Butler describes the *Chokehold* as a mutable system of racial oppression in the United States that has evolved over time – beginning with slavery, morphing into the old Jim Crow and finding modern form in the new Jim Crow of mass incarceration.⁶ Butler states that the *Chokehold* is the legal and social response to the reality that “many people – cops, politicians and ordinary people – see African-American men as a threat.”⁷ All of these institutions have sought to control the black population of the United States through various forms of oppression. Accordingly, Butler states that “police violence and selective enforcement are not so much flaws in American criminal

6. *Id.* at 7.

7. *Id.* at 9.

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justice as they are integral features of it.”⁸ Butler asserts that the “Chokehold does not stem from hatred of African Americans. Its anti-blackness is instrumental rather than emotional.”⁹ In other words, the *Chokehold* is not rooted in hatred of African Americans but rather economic exploitation.¹⁰ Just as slavery supported the political economy of the United States, Butler argues that the *Chokehold* builds the wealth of elites, through the subjugation of black bodies.¹¹

Butler is correct that the *Chokehold* reaps financial rewards for many – private companies in the prison industrial complex profit from mass incarceration,¹² rural areas long abandoned by de-industrialization rely upon the building and staffing of prisons for local jobs;¹³ and municipalities, like Ferguson, have built a business model out of exploiting poor and minority communities for revenue through over-policing and exorbitant fines.¹⁴ Though incentivized by economics, the *Chokehold* is defined by race, as it comprises practices targeted at minority communities that would be unacceptable if directed at white communities.¹⁵ Because the Civil Rights movement of the 1960’s stigmatized overt racism, Butler argues that the *Chokehold* in criminal justice evolved as an ostensibly color-blind mechanism to control African Americans and to blame them for their own subjugation.¹⁶ While criminal justice institutions purport to be race neutral, throughout his book, Butler describes in exacting detail, how criminal justice prac-

8. *Id.* at 6.

9. *Id.*

10. In addition to economic benefits, Butler also notes that the Chokehold has psychic benefits to its purveyors. “Because the Chokehold imposes racial order, who wins and who loses is based on race. . . White people are the winners. What they win is not only material, like the cash money that arresting African Americans brings to cities all over the country in fines and court costs. The criminalizing of blackness also brings psychic rewards. American criminal justice enhances the property value of whiteness.” *Id.* at 12.

11. *Id.* at 6.

12. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 230-32 (The New Press) (2010).

13. BUTLER, *supra* note 1, at 77-78.

14. U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIVISION, *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 54-62 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

15. For example, Judge Scheindlin’s opinion in the litigation challenging New York’s *Stop and Frisk* practices reveal that the stop and frisk practices were directed almost exclusively at black and brown men in minority communities, despite the racial diversity of New York City. A retort that these were high crime areas elides the fact that the *Stop and Frisk* techniques were used throughout New York City, almost exclusively against minority males. *See generally, Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

16. BUTLER, *supra* note 1, at 6; *see also*, German Lopez, *Nixon official: real reason for the drug war was to criminalize black people and hippies*, *VOX* (Mar. 23, 2016, 6:05 PM), <https://www.vox.com/2016/3/22/11278760/war-on-drugs-racism-nixon>.

tices and policing have a racially disproportionate impact on black men.

Despite the modern-day stigmatization of overt racism, it is my contention that racial bias and stereotype drive the *Chokehold*'s continued existence. Racial stereotypes rooted in white supremacy and proffered to justify earlier forms of the *Chokehold* such as slavery and Jim Crow have created entrenched racial biases in America that enable the *Chokehold* to thrive today. Stereotypes of African-American men as violent beings that need to be pacified were invoked to justify the brutality of slavery and lynching, just as they are invoked today to justify mass incarceration and police brutality.¹⁷ Butler states that racial stereotypes of African-American men as “thugs” are the justification for the harsh measures that the *Chokehold* exacts against African-American men.¹⁸ Butler asserts that *Chokehold* is formed from a two part process – first demonizing black men and second, passing laws to control them based on that demonization.

Racial bias rooted in white supremacy¹⁹ drives the *Chokehold*, and enables elites in the prison industrial complex to exploit this bias for their financial gain.²⁰ In this piece, I explore how racial bias is the chief driver of the *Chokehold* through a case study of the *Chokehold* in school discipline at U.S. public elementary and secondary schools.²¹ I have chosen school discipline in the public education system as my case study, because public school discipline today is inextricably linked to the criminal justice system, forming what is commonly

17. See, e.g., Emily Badger, Claire Cain Miller, Adam Pearce & Kevin Quealy, *Extensive Data Shows Punishing Reach of Racism for Black Boys*, N.Y. TIMES (Mar. 19, 2018) (“It’s not just being black but being male that has been hyper-stereotyped in this negative way, in which we’ve made black men scary, intimidating, with a propensity toward violence,” said Noelle Hurd, a psychology professor at the University of Virginia”), <https://www.nytimes.com/interactive/2018/03/19/upshot/race-class-white-and-black-men.html>.

18. BUTLER, *supra* note 1, at 17.

19. In his response piece in this same volume, Butler asks why my essay uses the term racial bias, rather than white supremacy. I refer to racial bias to focus on the bias, conscious and unconscious, that drives racially disparate outcomes for students. Blaming the racially disparate outcomes in schools only on white supremacy might seem esoteric or conceptual to the casual reader. I specifically note here, however, that the racial bias to which my essay refers is rooted in structural legacies of white supremacy – ideologies, stereotypes, practices and so forth. My hope is that the reader understands that psychological racial bias is firmly rooted in structural white supremacy.

20. ALEXANDER, *supra* note 11, at 230-31.

21. Butler asserts that the *Chokehold* metaphor translates to numerous contexts of oppression in the United States. See BUTLER, *supra* note 1, at 7. Therefore, I apply the theory to a different but related social construct that also disproportionately penalizes black youth, and black males in particular – school discipline.

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known as the school to prison pipeline.²² Just as with the enforcement of criminal justice, public school discipline is carried out in a racially disproportionate manner towards minorities, particularly black males. This discriminatory treatment in public school discipline is rooted in the same racial bias and stereotypes that support the criminal justice *Chokehold*.²³ Consequently, black males at younger and younger ages are being channeled into the criminal justice system based on racially biased school disciplinary approaches, forming the *Education Chokehold*.

II. RACIAL DISCRIMINATION IN PUBLIC SCHOOL DISCIPLINE

In 2014, the Obama Administration issued joint guidance through the Education and Justice Departments aimed at assisting public elementary and secondary schools around the country in carrying out school discipline without discriminating on the basis of race.²⁴ The guidance revealed that African-American students were more than three times as likely as their white peers to be expelled or suspended.²⁵ This racial disparity in public school discipline exists despite the fact that students of color are not engaged in more frequent or more serious misbehavior than non-minority students.²⁶ Department of Education investigations revealed that racial discrimination was a significant cause of the disparity. Federal investigators personally observed situations where African-American students were disciplined more harshly and more frequently than similarly situated white students.²⁷ The guidance revealed that over fifty percent of students who were involved in school related arrests and referrals to law en-

22. See, e.g., Libby Nelson & Dara Lind, *The school to prison pipeline, explained*, JUSTICE POLICY INSTITUTE (Feb. 24, 2015), <http://www.justicepolicy.org/news/8775>.

23. See Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 THE URBAN REV. 317, 336 (2002) (“Teachers who are prone to accepting stereotypes of adolescent African-American males as threatening or dangerous may overreact to relatively minor threats to authority, especially if their anxiety is paired with a misunderstanding of cultural norms of social interaction.”).

24. DEP’T OF JUSTICE & DEP’T OF EDUC., DEAR COLLEAGUE LETTER: NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 1 (Jan. 8, 2014) [hereinafter “Obama Guidance”].

25. These statistics are taken from the Department of Education Office of Civil Rights’ Civil Rights Data Collection (CRDC) from 2014, based on the 2011-12 academic year. See *id.* at 3.

26. *Id.* at 4.

27. *Id.*

forcement were African-American or Hispanic.²⁸ As part of its commitment to combatting racial discrimination in school discipline, the Obama Administration announced nationwide compliance reviews on school discipline.²⁹

Significant research supports the Obama Administration findings that racial bias, not racially disproportionate misbehavior, drives the racially skewed administration of public-school discipline. Young black boys are particularly vulnerable to being victimized by racial bias. A report by the American Psychological Association concluded that black boys as young as ten are unlikely to be viewed in the same light of innocence as their white peers, are more likely to be mistaken as older, more likely to be perceived as guilty, and more likely to face police violence if accused of a crime.³⁰ Even as early as preschool, black boys are more likely to be disciplined in school.³¹ Yale Child Study Center research revealed that black preschool students were disciplined at a much higher rate than other preschoolers because of implicit bias exhibited by preschool teachers and staff, and that the race of the teacher played a significant role in the outcome.³² The Yale study revealed that black preschoolers are 3.6 times as likely to receive suspensions as white preschoolers, and that although black children only make up nineteen percent of preschool enrollment, they comprise forty-seven percent of suspensions.³³ The denial of the presumption of childhood innocence to black children is exacerbated by a racial empathy gap which makes it less likely that a teacher of a different race will respond with empathy if a student exhibits challenging behaviors or has challenging home experiences.³⁴ The racially disproportionate disciplinary treatment that begins in preschool extends into elementary, middle and high school. Mirroring the results of the Obama Administration findings, a study from the UCLA Civil Rights Project revealed that in 2012, among K-12 students, one out of six

28. *Id.* at 3-4.

29. *Id.*

30. Phillip Atiba et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, J. PERS. & SOC. PSYCHOL., Feb. 24, 2014, at 529, 539-40, <https://www.apa.org/pubs/journals/releases/psp-a0035663.pdf> [hereinafter "APA report"].

31. Walter Gilliam et al., *Do Early Educators' Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspensions?*, YALE CHILD STUDY CENTER, Sept. 28, 2016, https://medicine.yale.edu/childstudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_final_9_26_276766_5379_v1.pdf [hereinafter "Yale Study"].

32. *Id.*

33. *Id.* at 2.

34. *Id.* at 3.

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black students (seventeen percent) had been suspended in a year, more than three times the proportion of suspended white students which was one out of twenty (five percent).³⁵

III. SCHOOL TO PRISON PIPELINE

The consequences of disproportionate public-school discipline for black males are particularly significant in the modern era because of the school to prison pipeline. The school to prison pipeline refers to educational policies that track students out of educational institutions and directly or indirectly into the juvenile and adult criminal justice systems.³⁶ The school to prison pipeline has several sources, including the proliferation of zero tolerance policies in public schools. During the Clinton Administration, public schools around the country passed zero tolerance policies for a student's possession of a firearm, in order not to risk the loss of federal funds from the 1994 Gun Free School Zones Act.³⁷ Zero tolerance meant that any infraction would automatically lead to the most extreme disciplinary infraction – suspension or expulsion.³⁸ Following the 1999 Columbine school shootings, a number of schools increased their zero tolerance policies to include even minor infractions that would normally result in nominal school discipline. Students who have been suspended or expelled under discretionary zero tolerance policies are three times more likely to enter the juvenile justice system within the next year.³⁹ Because of implicit bias, black students are disproportionately disciplined under zero tolerance policies. A study of zero tolerance policies in Texas, one of the largest and most diverse public school systems, found that black students in ninth grade faced a thirty-one percent higher risk of suspension or expulsion for discretionary offenses than white students, despite the fact that they were no more likely to behave in a way that required such discipline.⁴⁰ A Harvard Civil Rights Project study de-

35. Daniel Losen & Jonathan Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion From School*, UCLA: THE CIVIL RIGHTS PROJECT, Aug. 7, 2012, at 6, <https://escholarship.org/uc/item/3g36n0c3> [hereinafter “UCLA Study”].

36. NANCY A. HEITZEG, *EDUCATION OR INCARCERATION: ZERO TOLERANCE POLICIES AND THE SCHOOL TO PRISON PIPELINE*, 1 (2009).

37. Lauren A. Maddox, *His Wrists Were Too Small: School Resource Officers and the Over-Criminalization of America's Students*, 6 U. MIAMI RACE & SOC. JUST. L. REV. 193 (2016).

38. *Id.*

39. *Id.* at 201-202.

40. *Id.* at 199 (citing TONEY FABELO ET AL., *BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT* 42 (2011)).

terminated that students suspended under zero tolerance policies, had a greater likelihood of dropping out of school, not attending college, committing a crime and ending up incarcerated as adults.⁴¹ Zero tolerance policies have led to the increased likelihood that students, and black males in particular, will touch the juvenile and adult criminal justice systems.

At the same time that zero tolerance policies were expanding, many schools also hired armed police, or school resource officers, to enforce the harsh new disciplinary policies. The enforcement of these zero tolerance policies by police officers, subjected students who would normally receive a minor in-school disciplinary penalty to arrest and criminal charges for even minor disciplinary infractions. Modern public-school discipline has effectively criminalized student misbehavior through the transfer of responsibility for school discipline from faculty and administrators to the police. Criminalization in school discipline has become normalized. In 2013-14, 70,000 students were arrested or referred to law enforcement; seventy percent of those students were black or Hispanic.⁴² Black boys were the most at risk of arrest, with a three times greater likelihood of being arrested than white boys; black girls had a 1.5 times greater likelihood of being arrested than white boys.⁴³

The school to prison pipeline feeds the prison industrial complex. Within the prison industrial complex, “companies that service the criminal justice system need sufficient quantities of raw materials to guarantee [their] long term growth. . . the raw material is prisoners. . . The industry will do what it must to guarantee a steady supply. For the supply of prisoners to grow, criminal justice policies must insure a sufficient number of incarcerated Americans whether crime is rising or the incarceration is necessary.”⁴⁴ Private companies have colluded with politicians, to increase criminal penalties to ensure that prisons continue to be constructed and staffed by these same companies. The American Legislative Exchange Council (ALEC), a lobby-

41. *Id.* at 202, (citing THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 17 (2000), <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf>).

42. Mary Ellen Flannery, *The School to (Privatized)-Prison Pipeline*, NEA TODAY (Nov. 14, 2017 10:41 AM), <http://neatoday.org/2017/11/14/school-to-privatized-prison-pipeline/>.

43. *Id.*

44. STEPHEN R. DOZINGER, *THE REAL WAR ON CRIME: REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION* 87 (Harper Perennial 1996).

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ing group funded by corporations such as the nation's largest for profit prison operator - the Corrections Corporation of America (CCA), has drafted and advocated for three strikes laws, mandatory minimum laws, and truth-in-sentencing laws throughout the country, which have increased the number of inmates and the length of, benefiting its benefactor CCA.⁴⁵ ALEC's legislation contributed to the increase in the prison population from 1.1 million in 1990 to 2.3 million in 2010.⁴⁶

Punitive laws, like those advocated by ALEC, have contributed to the school to prison pipeline and benefited the bottom line of private corporations. In Florida, one of the first states to embrace zero tolerance policies, over fifty percent of the schools have school resource officers.⁴⁷ In 2012, 12,000 students were arrested nearly 14,000 times but not for serious criminal acts, but rather for minor offenses such as disrupting class.⁴⁸ All of Florida's juvenile prisons are operated by private corporations and funded by the state.⁴⁹ Across the United States, almost fifty percent of juvenile prisons are operated by private corporations; a higher percentage than adult prisons.⁵⁰ Florida's support for these zero tolerance polices is a result of the private prison industry's investment of millions of dollars in campaign contributions to politicians who support zero tolerance laws and mandatory sentencing laws.⁵¹ In Florida, one private prison company contributed over \$400,000 to political candidates over a fifteen year period, more than the combined contributions of the state's two largest Fortune 500 corporations.⁵² The disturbing lengths to which private prison companies will go to ensure that their juvenile beds are filled was revealed in the "Cash for Kids" scandal where two juvenile court judges in Lazzar, Pennsylvania accepted over \$2million in bribes from a pri-

45. Mike Elb & Bob Sloan, *The Hidden History of ALEC and Prison Labor*, THE NATION (Aug. 1, 2011), <https://www.thenation.com/article/hidden-history-alec-and-prison-labor/>.

46. Beau Hodai, *Corrections Corporation of America Used in Drug Sweeps of Public School Students*, THE CENTER FOR MEDIA & DEMOCRACY'S PR WATCH (Nov. 27, 2012 7:00 AM), <https://www.prwatch.org/news/2012/11/11876/corrections-corporation-america-used-drug-sweeps-public-school-students>.

47. Flannery, *supra* note 40.

48. *Id.*

49. *Id.*

50. *Id.*

51. Tracie Porter, *The School-to-Prison Pipeline: The Business Side of Incarcerating, Not Educating, Students in Public Schools*, 68 ARK. L. REV. 55, 67-68 (2015).

52. Chris Kirkham, *Prisoners of Profit: Private Prison Empire Rises Despite Startling Record of Juvenile Abuse*, HUFFINGTON POST (Oct. 22, 2013), <http://projects.huffingtonpost.com/prisoners-of-profit>.

vate prison company to ensure that thousands of juveniles were sent to the facility despite minor offenses.⁵³

IV. DESPITE ECONOMIC INCENTIVES, THE EDUCATION CHOKEHOLD IS ROOTED IN RACIAL BIAS

While the school to prison pipeline has drastically expanded because of the financial incentives of the private prison industry, the pipeline itself is justified by racial stereotypes and narratives rooted in white supremacy. Politicians exploit racialized tropes of blacks and Latinos as criminal and dangerous to invoke the need for zero tolerance laws and harsh juvenile sentencing laws. School officials then apply those laws most harshly ask minority students, black male students in particular, based on their own racial biases. Butler's Chokehold thesis that profit motives undergird the violent and disproportionate policing of black men, translates to black youth in the school discipline context. However, the profit incentives of private prison companies are only realized because actors within our system – politicians who create zero tolerance laws and school officials who apply them – have been willing to sanction black and Latino children in a racially disproportionate and harsh manner. Just as Butler observes that constructing the “thug” is essential to the modern system of policing, similar invocations of racist tropes about black and brown youth is not merely functional within the Education Chokehold, it is the essence of the Education Chokehold. I would posit that even absent the economic incentives of private prison companies, school discipline would continue to be more severe for black and Latino students than similarly situated white students because of these ingrained racial biases. The interests of the private prison industry have, however, made the consequences much more severe – racially disproportionate disciplinary consequences such as school detention have morphed into racially disproportionate criminal consequences for students such as arrest and imprisonment. Racial bias drives the racially disproportionate outcomes, even as economic incentives motivate parties to exploit these biases for their gain. Without the willingness of parties to accept and exploit racially-biased outcomes for black and Latino stu-

53. Jon Hurdle & Sabrina Tavernise, *Former Judge is on Trial in 'Cash For Kids' Scheme*, N.Y. TIMES (Feb. 8, 2011), <https://www.nytimes.com/2011/02/09/us/09judge.html#:~:text=former%20Judge%20is%20on%20Trial%20in%20'Cash%20for%20Kids'%20Scheme,-By%20Jon%20Hurdle&text=SCRANTON%2C%20Pa.,delinquents%20to%20privately%20run%20prisons>.

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dents, private prisons would have greater difficulty accomplishing their economic goals.

V. ABOLISHING THE EDUCATION CHOKEHOLD

Butler calls for a dismantling of the criminal justice system as it exists today as the only solution to prevent the racialized impact of mass incarceration. Reform of the system, as he argues, hasn't worked and is stillborn. Instead he proposes a radical re-thinking of the criminal justice system, of which prison abolition might play a significant part. Butler posits that a system designed to oppress cannot be sufficiently reformed. In many ways, the U.S. system for school discipline must be re-thought as well. Significant transformation, not just reform, is necessary to protect minority youth from the entrenched racially biases that studies have identified in disciplinary administration. Such a transformation begins with removal of the retrograde disciplinary practices that have evolved over the past two decades, but it does not end there.

School discipline must remove the criminally punitive measures that have too often been selectively enforced against minority students, particularly black males. To achieve this end, zero tolerance policies should be abolished, as should the use of school resource officers. The data clearly shows that excessive disciplinary options will be applied against minority students in a racially disproportionate way because of racial bias, implicit and otherwise, even when the application of these extreme consequences is discretionary. Therefore, the school to prison pipeline disciplinary system that has been built over the past 25 years must be abolished. Instead, greater investment in school counselors, administrators and social workers should be made for interventions that adjust rather than criminalize student behavior. I support the Civil Rights Project recommendation that states should pursue legislation and implement policies that make suspension a rare measure of only last resort⁵⁴ because of its racially disproportionate usage, the negative impact suspension has on a student's likelihood of graduation, and the increased likelihood suspension has on their entry into the criminal justice system. In schools that require additional safety measures such as preventing students from bringing weapons into schools, trained private guards using technology can provide a first line of defense for school safety but they should have no arrest

54. UCLA Study, *supra* note 33, at 6-7.

authority or role in school discipline. Similarly, offsite local police will remain available to respond to situations of mass shooting or campus violence. Eliminating school resource officers and zero tolerance policies will ensure that minority students do not automatically face criminal arrest for non-violent, non-criminal violations; and that they are not funneled into the criminal justice system. Even if these fundamental aspects of the school to prison pipeline are abolished, minority students still face the risk of disproportionate disciplinary consequences due to racial bias. While the Yale Study Center calls for implicit bias training for all school educators and administrators, such important measures would merely mitigate but not abolish discriminatory outcomes in discipline.⁵⁵

Just as Butler calls for a radical transformation of the criminal justice system and many activists have called for police abolition and defunding in the wake of the recent protests following the killing of George Floyd and many others, the abolition and radical re-imagining of school discipline is in order.⁵⁶ There are many possibilities for supporting preferred student behaviors in schools, beyond punitive models. The creativity of advocates is in order. Restorative justice is one model that reflects the possibility for transformation in this space. Restorative justice refers to measures, often drawn from indigenous and traditional wisdom that focus less on punishment and more on restoration of all parties in the wake of behaviors that harm the broader community.⁵⁷ Rather than simply punishing students for purported inappropriate behavior, restorative justice seeks to restore all of the individuals involved to wholeness. Restorative measures can include restorative conversations, reparative measures, conferencing,

55. Yale Study Center, *supra* Note 29, at 15. Furthermore, detailed tracking and assessment for every education disciplinary decision and how similarly situated students are disciplined based on race would provide necessary data for school administrators and school district officials to assess whether implicit bias training has its impacted effect. The Obama Education Department mandated increased tracking along these lines. Although the Trump Education Department has attempted to undo many of these tracking requirements, they should be reinstated. I also recommend that racially-diverse school, district or community discipline oversight panels be formed to review a school's disciplinary record and to recommend revisions in performance for racially-disproportionate and racially-biased outcomes.

56. In his response essay in this volume, Butler observes that the elimination of school resource officers and zero tolerance policies have been suggested by others. He fairly observed that minority students would still face disparate impacts in the historic school disciplinary system. I agree. I took his comment as an opportunity to add some thoughts on how the school disciplinary system could be further reimagined. Restorative justice is one such approach.

57. Anne Gregory and Katherine Evans, *The Starts and Stumbles of Restorative Justice in Education: Where Do We Go From Here?*, NATIONAL EDUCATION POLICY CENTER 7-8 (Jan. 14, 2020).

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mediation and a strong student-led component.⁵⁸ Restorative justice mechanisms also create the opportunity for minority students, their parents and advocates to identify and to correct racially biased treatment by teachers and administrators and to help correct that behavior. There is evidence that a restorative approach can reduce racial disparities in school discipline. A restorative justice initiative was piloted at an Oakland middle school in 2006; in just 2 years, suspension rates had dropped by 87 percent, violence and teacher attrition were eradicated and academic outcome increased.⁵⁹ By 2010, the Oakland School district adopted restorative justice as official policy, committing significant staff and resources to this new restorative model.⁶⁰ In adopting restorative justice as school-wide policy, the district noted its legal obligation to address the racial disparities in school discipline demonstrated by the disparate rate at which it had suspended, arrested and expelled black students in comparison to white students.⁶¹ The federal Department of Education had opened a civil rights investigation into the school district practices and the Oakland school district entered into a settlement agreement with the DOE that included restorative justice as a new school discipline approach to address the racially disproportionate impact under the earlier system.⁶²

In addition to restorative justice approaches, advocates could also develop broader transformative justice approaches that address the underlying societal issues that can contribute to school discipline problems; as well as rooting out the racial biases that lead to disparate disciplinary outcomes. Ultimately, a transformed school discipline model that focuses on restoration rather than criminalization will help to release the Education Chokehold.

58. Fania Davis, *How Schools Are Using Restorative Justice to Remedy Racial Disparities in Discipline*, SALON (Apr. 21, 2019), <https://www.salon.com/2019/04/21/these-schools-use-restorative-justice-to-remedy-racial-disparities-in-discipline/>.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

“Chokehold:” This Is the Remix

LENESE C. HERBERT¹

*Societies are never able to examine, to overhaul themselves. . . . This ferment, this disturbance, is the responsibility and the necessity, of writers. It is, alas, the truth that to be an American writer today means mounting an unending attack on all that Americans believe themselves to hold sacred. It means fighting an astute and agile guerrilla warfare with that American complacency which so inadequately masks the American panic.*²

In 2009, Paul Butler published “Let’s Get Free: A Hip-Hop Theory of Justice.” Still “a prosecutor at heart,” he urged Americans to engage in “The Beautiful Struggle” of reclaiming American justice³ “Let’s Get Free” lovingly repurposed Dead Prez’s⁴ unvarnished vernacular and irreverent sensibility, providing it with a particularly apt tenor that cautiously anticipated the heralding of a new Black President of the United States and his eponymous Obama Era/Age of Obama.⁵

1. Professor of Law, Howard University School of Law. Former Assistant U.S. Attorney for the District of Columbia.

2. See JAMES BALDWIN, *As Much Truth as One Can Bear*, in *THE CROSS OF REDEMPTION: UNCOLLECTED WRITINGS* 40 (Randall Kenan ed., 2010).

3. See PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 167-182 (2009) [hereinafter *LET’S GET FREE*].

4. Proclaimed by many as a lyrical triumph and primer of resistance against the forces of American hegemony, Dead Prez’s album, “Let’s Get Free,” was met with critical acclaim upon its 2000 release and, nearly two decades later, is still regarded as one of the best hip-hop and rap albums of all time, given its “winning mixture of fierce anger and clear-eyed compassion” that “attack[s] everything from the prison system to public schools to police brutality without coming off as preachy or self-righteous.” Nathan Rabin, *Review: Dead Prez Let’s Get Free*, A.V. CLUB (Mar. 14, 2000, 12:00 AM), <https://music.avclub.com/dead-prez-lets-get-free-1798192320>.

5. *LET’S GET FREE*, *supra* note 3, at 147. Butler “imagine[d] criminal justice in a hip-hop nation . . . that would enhance public safety and treat all people with respect.” *Id.* at 123. Per Butler, a Hip-Hop Theory of Justice “ha[d] the potential to transform the United States into a safer, more just society.” *Id.* at 130. Hip-hop offered America a “remix,” i.e., a “post-postmodern” understanding of punishment contemplated, designed, and built “from the bottom up,” i.e., from the experiences of those most negatively affected by the current regime, in order to combat the ineffective, undignified, disrespectful, and unfair policies of American criminal justice. See *id.* at 123-137.

Ten years later, now “woke,”⁶ Butler has published “Chokehold: Policing Black Men.” Butler, soidisant “illuminator”⁷ and abolitionist (or, at the very least, a decarcerationist⁸), ponders, inter alia, the “moral righteousness” of insurrectionist violence against an American “criminal justice regime that targets black men and sets them up to fail.”⁹

What a difference a decade makes.

It was no ordinary decade. Zeniths included the twice-duly-elected President of the United States, Barack H. Obama, who not only disrupted the unrelenting whiteness that was the American Presidency¹⁰, but did so with his wife, First Lady Michelle LaVaughn Robinson,¹¹ First Daughters, Malia and Natasha “Sasha,”¹² and First

6. PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 251 (2018) [hereinafter CHOKEHOLD].

7. *Id.* at 120.

8. *See id.* at 232-234.

9. *Id.* at 6, 7, 246.

10. In the Age of Technology, the word “disruption” has taken on a slightly different connotative meaning. Specifically used in this way, it means more than the denotative definition that describes an interruption that is abrupt, jarring, or unexpected. Rather, disruption:

describes a process whereby a smaller company with fewer resources is able to successfully challenge established incumbent businesses. Specifically, as incumbents focus on improving their products and services for their most demanding (and usually most profitable) customers, they exceed the needs of some segments and ignore the needs of others. Entrants that prove disruptive begin by successfully targeting those overlooked segments, gaining a foothold by delivering more-suitable functionality—frequently at a lower price. Incumbents, chasing higher profitability in more-demanding segments, tend not to respond vigorously. Entrants then move upmarket, delivering the performance that incumbents’ mainstream customers require, while preserving the advantages that drove their early success. When mainstream customers start adopting the entrants’ offerings in volume, disruption has occurred.

Clayton M. Christensen, Michael E. Raynor, and Rory McDonald, “What is Disruptive Innovation?,” HARV. BUS. REV. (Dec. 2015), available at <https://hbr.org/2015/12/what-is-disruptive-innovation>.

Another writer put it this way:

Barack Obama’s victories in 2008 and 2012 were dismissed by some of his critics as merely symbolic for African Americans. But there is nothing ‘mere’ about symbols. . . Much as the unbroken ranks of forty-three white male presidents communicated that the highest office of government in the country – indeed, the most powerful political office in the world – was off-limits to black individuals, the election of Barack Obama communicated that the prohibition had been lifted. . . Against the specter of black pathology, against the narrow images of welfare moms and deadbeat dads, his time in the White House had been an eight-year showcase of a healthy and successful black family spanning three generations, with two dogs to boot. In short, he became a symbol of black people’s everyday, extraordinary Americanness.

...
We were launched into the Obama era with no notion of what to expect, if only because a black presidency had seemed such a dubious proposition. There was no preparation, because it would have meant preparing for the impossible.

Ta-Nehisi Coates, *My President Was Black*, in WE WERE EIGHT YEARS IN POWER: AN AMERICAN TRAGEDY 295-296, 333 (2018).

11. “While many of the 45 first ladies who preceded her were the daughters of wealthy merchants (Edith Roosevelt), bankers (Ida McKinley), judges (Helen Taft) and slaveholders

Black Grammy¹³, Marian Robinson — at his side, supplanting Ameri-

(Martha Washington and Julia Grant), Michelle Obama was a descendant of the very caste of people that some of the previous first ladies had owned.” Isabel Wilkerson, *Book Review: Becoming*, WASH. POST (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/books/review/michelle-obama-becoming-memoir.html>. The historical significance of a Black First Lady of the United States remains tectonic:

Back in the ancestral homeland of Michelle Obama, the architects of Jim Crow took great pains to set down the boundaries and define the roles of anyone living in the pre-modern South. Signs directed people to where they could sit, stand, get a sip of water. They reinforced the social order of an American hierarchy — how people were seen, what they were called, what they had been before the Republic was founded and what was presumed they could never be.

The signs reminded every inhabitant of the very different place of black women and white women in the hierarchy. There were restrooms for “white ladies” and often, conversely, restrooms for “colored women.” Black women were rarely granted the honorific Miss or Mrs., but were addressed by their first name, or simply as “gal” or “auntie” or worse. This so openly demeaned them that many black women, long after they had left the South, refused to answer if called by their first name.

A mother and father in 1970s Texas named their newborn “Miss” so that white people would have no choice but to address their daughter by that title. To the founding fathers and the enforcers of Jim Crow, and to their silent partners in the North, black women were meant for the field or the kitchen, or for use as they saw fit. They were, by definition, not ladies. The very idea of a black woman as first lady of the land, well, that would have been unthinkable.

It was with the weight of this history in her bones that Michelle Obama walked onto the world stage as the first black woman to become first lady when her husband, Barack Obama, was sworn in as president in January 2009.

Id.; see also Rachel L. Swarns, *Meet Your Cousin, the First Lady: A Family Story, Long Hidden*, N.Y. TIMES (June 16, 2012), <https://www.nytimes.com/2012/06/17/us/dna-gives-new-insights-into-michelle-obamas-roots.html> (detailing the enslaved and enslavers’ genealogical lines of Michelle Obama’s ancestry).

12. One of the most noteworthy historical juxtapositions of the Obama Presidency was evidenced in a social media meme that compared photographs and artist Norman Rockwell’s rendition of federal agents escorting Ruby Bridges to enforce desegregation laws in Alabama/Mississippi and federal agents protecting Sasha Obama as she made her way to her private school. See, e.g., *Ruby Bridges Reflects on Role in History*, ESSENCE MAGAZINE (Dec. 16, 2009), <https://www.essence.com/news/ruby-bridges-reflects-on-role-in-history/>.

13. See Jessica Dixon Weaver, *Grandma In The White House: Legal Support For Intergenerational Caregiving*, 43 Seton Hall L. Rev. 1 (2013) (citing various articles regarding Ms. Robinson’s “classic, modern day,” grandmotherly presence, single role of supporting her granddaughters’ well-being and stability, including, e.g., Will Obama Mum-in-Law Make it a Family Affair in the White House?, ASSOC. FREE PRESS (Nov. 22, 2008) http://www.firstladies.org/documents/art_inlawAFP.pdf; Amie Parnes, ‘First Grandma’ Embraces Life in D.C., POLITICO (Sept. 12, 2011, 7:28 AM), <http://www.politico.com/news/stories/0811/61719.html>; *Times Topics: Marian Robinson*, N.Y. TIMES, <https://www.nytimes.com/topic/person/marian-robinson> (last visited June 14, 2020). ; Philip Sherwell, Michelle Obama Persuades First Granny to Join New White House Team, TELEGRAPH (Nov. 8, 2008) <http://www.telegraph.co.uk/news/3407525/Michelle-Obama-persuades-First-Granny-to-join-new-White-House-team.html>; see also Ana Veciana-Suarez, The First Granny Has Left the White House, Too, and I’ll Miss Her,” MIAMI HERALD (Jan. 20, 2017). Compare these descriptions to the racialized American stereotype of Black women, the “Mammy:”

Mammy was “asexual,” “maternal,” and “deeply religious.” Her principal tasks were caring for the master’s children and running the household. Mammy was said to be so enamored of her white charges that she placed their welfare above that of her own children. Mammy was “the perfect slave—a loyal, faithful, contented, efficient, conscientious member of the family who always knew her place; and she gave the slaves a white-approved standard of black behavior.” She was “the personification of the ideal slave, and the ideal woman, . . . an ideal symbol of the patriarchal tradition. She was not just a product of the ‘cultural uplift’ theory [sic] [which touted slavery as a means of civilizing

can iconography in a most heady (for some) and disturbing (for others) fashion.

Nadirs also marked the decade. Viral video footage documented unprovoked police killings and violence visited upon unarmed,¹⁴ peaceful,¹⁵ and law-abiding¹⁶ Black men, women, and children, numbed some observers while bringing others to their emotional knees.¹⁷ Notwithstanding the Audacity of Hope,¹⁸ the supremacy of whiteness — “the belief that white people are superior to those of all other races, especially the black race, and should therefore dominate society”¹⁹ — newly emboldened by the (s)election by white people²⁰

blacks], but she was also a product of the forces that in the South raised motherhood to sainthood.”

Ronald Turner, *Little Black Sambo, Images, and Perceptions: Professor Cohen's Critique of Professor Lawrence*, 12 HARV. BLACKLETTER L.J. 131, 142 n.69 (1995) (citing Regina Austin, *Sapphire Bound!*, 1989 WISC. L. REV. 539, 539 n.1 (1989)).

14. According to the Washington Post, statistics show that police have shot and killed 3,309 people since 2015, or more than twice as many fatal shootings per year as the average reported by the FBI. Of those killed, 231, or 7% percent, were not armed with guns, knives or other objects that could be used as weapons at the time of the shootings. Blacks, who are approximately 13% percent of the United States, constituted 23% percent of those fatally shot by police since 2015; they were 36 percent of the unarmed people who were killed. John Sullivan et al., *Fatal Police Shootings of Unarmed People Have Significantly Declined, Experts Say*, WASH. POST (May 7, 2018); see also Glenn Kessler, *Beto O'Rourke's Claims on African Americans and Police Shootings*, WASH. POST, (Aug. 20, 2018) (noting that between 2015 and August 2018, 90 unarmed Black adults were shot and killed by police).

15. See *id.*

16. See, e.g., Nina Strochlic, *The 14 Teens Killed by Cops Since Michael Brown*, DAILY BEAST (Nov. 25, 2014) (detailing nonviolent child victims' death at the hands of law enforcement in 2014 alone). The Washington Post's fatal-shootings database for 2015, 2016, 2017 and through Aug. 20, 2018 notes that in addition to 12-year-old Tamir Rice (who played with a toy gun in a public park when he was slain by police), several unarmed black teenagers were fatally shot: Jordan Edwards, 15, David Joseph, 17, and 17-year-old Antwon Rose.

17. When it comes to adaptation, sublimation, and suppression of the degradation of oppression, there are health-destroying reactions and accommodations to African American bodies and mental health. See, e.g., CLOVIS E. SEMMES, *Contemporary Challenges to Health: Destabilization, Maladaptation, and Consumer Manipulation*, in RACISM, HEALTH, AND POST-INDUSTRIALISM 134 (1996) (identifying “the normative tendency of American society to devalue the social worth of African Americans” is one manifestation of “a major African-American public health problem that is related to stress (or distress)"); see also *id.* at 135 (identifying “the misdirected frustration of oppression can surface in self-destructive ways”) and 137 (noting “the conditions created by structured inequality exacerbate chronic and degenerative diseases among African Americans, as they did for infectious diseases” such as “heart disease and stroke, cancer, diabetes, obesity, infant mortality, alcohol consumption, smoking cigarettes, and the like are deeply connected to complex social and historical factors . . . because of continuing relationships of inequality”).

18. “The Audacity of Hope” is the title of President Barack H. Obama's 2006 autobiography. The phrase comes from his 2004 Democratic Convention keynote address, which made him the party's rising young star. The term also served as the theme and a popular slogan of his 2008 campaign for the presidency of the United States.

19. CHOKEHOLD, *supra* note 6, at 143 (citation omitted). The election of 2016 “marked a turning point in white identity. Thanks to the success of ‘Make America Great Again’ as a call for a return to the times when white people ruled, and thanks to the widespread analysis of

of a white nationalist (p)resident²¹ and reemerged as the most enduring American value.²² How dare any sanguine observer insist #BlackLivesMatter when, “by every metric . . . they absolutely do not?”²³

Chokehold, then, autopsies the psychogenic death²⁴ and subsequent disintegration of the vaunted American ideals of liberty and justice for all, undone/overtaken by the more accurate, central, founding, sustaining, and inescapable American value of white supremacy.²⁵

Butler is a proud former criminal prosecutor, seemingly unaffected by any Darden Dilemma or worse.²⁶ This is not because Butler

voters’ preferences in racial terms, white identity became marked as a racial identity. From being individuals expressing individual preferences in life and politics, the Trump era stamps white Americans with race: white race.” Nell Irvin Painter, *What Whiteness Means in the Trump Era*, N.Y. TIMES (Nov. 12, 2016), <https://www.nytimes.com/2016/11/13/opinion/what-whiteness-means-in-the-trump-era.html>

20. See COATES, *supra* note 10, at 346 (noting that Trump won white women, white men, whites with college degrees, and whites without them; he won young whites, adult whites, middle-aged whites, and senior whites; in no state that they polled did Trump’s white support dip below forty percent).

21. “By elevating Steve Bannon of Breitbart News into its leadership and not vigorously forswearing white nationalist support, the Trump campaign enmeshed ‘Make America Great Again’ with white nationalism.” Painter, *supra* note 19.

22. “[T]he pretence that formal, juridical equality is sufficient to remedy inequities created on a foundation of several hundred years of racial privilege, and that challenging that foundation is a transgression of the terms of the social contract.” CHARLES W. MILLS, *THE RACIAL CONTRACT* 73-74 (1997).

23. CHOKEHOLD, *supra* note 6, at 250.

24. See Paul Ratner, 5 States of Psychogenic Death or Give-up-it is, *BIG THINK* (Oct. 2, 2018), <https://bigthink.com/mind-brain/can-you-die-from-giving-up>; see also Alexa Lardieri, *Yes, People Can Die From Giving Up on Life*, U.S. NEWS (Sept. 27, 2018, 2:57 PM), <https://www.usnews.com/news/health-care-news/articles/2018-09-27/yes-people-can-die-from-giving-up-on-life>.

25. “In recent times, whiteness as an overt political tactic has been restrained by a kind of cordiality that held that is overt invocation would scare off ‘moderate’ whites. This has proven to be only half-true at best. Trump’s legacy will be exposing the patina of decency for what it is and revealing just how much a demagogue can get away with.” COATES, *supra* note 10, at 365.

26. The “Darden Dilemma” is a “pressure,” according to its eponym, Christopher Darden, felt by Black criminal prosecutors “from those in the community who criticize them for standing up and convicting Black criminals.” CHRISTOPHER A. DARDEN & JESS WALTER, IN *CONTEMPT* 383 (1996). Such attorneys, accordingly, are viewed by Black people as “sell-outs” for prosecuting Black criminal defendants. *Id.* at 382. It was spawned by the so-called “trial of the century,” the widely broadcast, highly publicized 1995 criminal prosecution of Orenthal “O.J.” Simpson by the state of California for the double homicide of his ex-wife and her male companion. Charles Darden was one of the government prosecutors. His presence and participation were noteworthy, in part, because of his race and the government’s eleventh-hour decision to add him to its trial team. Darden reported that he suffered immensely during and after the trial because of his profession (versus, e.g., his service as a trial team token). According to Mr. Darden, “[b]y fulfilling his professional obligation to prosecute crimes fairly, impartially, and without regard to race, [he] believes he incurred the wrath of the African-American community.” Kenneth B. Nunn, *The “Darden Dilemma”: Should African Americans Prosecute Crimes?*, 68 *Fordham L. Rev.* 1473, 1472-73 (2000). The Darden Dilemma became a subject of inquiry for those who knew of or worked with Black prosecutors. Ultimately, however, Darden’s experience was regarded as more personal than pervasive. See, e.g., Lenese C. Herbert, *Et in Arcadia Ego: A Perspective on*

is an ideologue along the lines of “race men,”²⁷ social engineers,²⁸ or Black Nationalists.²⁹ Instead, Butler’s convictions were, in fact, his convictions.³⁰ Perhaps this, then, is what makes his unmasking rebuke of the criminal justice system that much more damning. As per a number of (former) African American prosecutors, Butler’s loyalty and fealty remain to justice and not the criminal justice system, espe-

Black Prosecutors’ Loyalty Within the American Criminal Justice System, 49 *Howard L. J.* 495, 509-519 (2006).

27. See generally, Taunya Lovell Banks, *Thurgood Marshall, the Race Man, and Gender Equality in the Courts*, 18 *V.A. J. SOC. POL’Y & L.* 15, 20 (2010) (describing the late Justice Thurgood Marshall’s jurisprudence — shaped by his American Deep South Jim Crow experiences — as unsurprisingly and “particularly devoted to advancing the interests of [black] Americans”); Adrien Katherine Wing, *Henry J. Richardson III: A Critical Race Man*, 31 *TEMP. INT’L & COMP. L.J.* 377, 380 (2017) (paying tribute to the professor’s life work as characteristic of the “high achieving Black men who devote themselves to the betterment of Black people, and live counter to stereotypes about the inferiority of Black people. They believe in the pursuit of race consciousness, race pride, and race solidarity”).

28. Charles Hamilton Houston, venerated Vice Dean of Howard University’s School of Law and touted as “The Man Who Killed Jim Crow,” is famous for one of his characterizations of lawyering: “A lawyer’s either a social engineer or a parasite on society. A social engineer was a highly skilled, perceptive, sensitive lawyer who understood the Constitution of the United States and knew how to explore its uses in the solving of ‘problems of . . . local communities’ and in ‘bettering conditions of the underprivileged citizens.” GENNA RAE McNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 84 (1983).

29. Black Nationalisms is an ideology that supports overthrowing the system of white supremacy, seizure of land control, and the achievement of self-determination for Black people of the African Diaspora. In its purest form, it is opposed to integration, assimilation, and accommodation as a solution to the problems of people of African ancestry in America, as well as appealing to the morality of white people, who are compromised by institutions and societal systems rooted in their white supremacy.

30. Unlike the infamous humiliation of Charles Darden, the African American Assistant D.A. in *People of the State of California v. Orenthal James Simpson* (which pitted the phenotypically Black Football Hall of Fame and popular defendant and his legendary Black defense lawyer, Johnny Cochran, against, mostly, the lone Black member of the prosecutorial team, Darden), Butler never expresses regret for being a Black man who prosecuted other Black men. See, e.g., CHOKEHOLD, *supra* note 6, at 223 (describing his aggressive, skilled cross-examination of Black male criminal defendants) and 222 (noting his use of bluffing “all the time” about the strength of the government’s case when consulting with defense counsel, as well as distinguishing himself from the criminal defendant: “We would make sure that they knew that I was a well-educated lawyer . . . You have to present yourself as the kind of black man who does not belong in jail”); *id.* at 138 (describing enjoyment in “going after someone for a violent crime . . . working myself up in a frothy-mouthed closing statement about what an evil dude he was”). To learn more about the so-called “Darden Dilemma,” see Herbert, *supra* note 26, at 512, 517 (debunking the notion that being a Black prosecutor represents a career and character flaw or carries with it a stigma for either Black prosecutors or members of the Black community); see also JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 203 (2017) (rebuking Black prosecutorial stigma and quoting former prosecutors Herbert — “black prosecutors, along with other black lawyers and judges, were viewed as ‘part of the race’s success,’ its ‘shining Black princes and princesses,” and Butler’s self-described ability to win criminal convictions: “I love to stand in front of the black jurors and point, like I learned in training, at the black defendant. I represent the United States of America, I boast, and I am going to present evidence that proves beyond a reasonable doubt that that guy over there is a big jerk. Then I proceed to kick a little butt myself.”) (citations omitted).

cially as it currently prosecutes and incarcerates.³¹ Chokehold exposes the American criminal justice system’s increasingly, irretrievably spoiled identity³² as congenitally anti-Black. The wholesale failure to hold accountable its actors who are, in fact, deeply implicated in the unending infliction of traumatic badges and incidents of slavery on the free is an American crime.

But, Chokehold is neither funereal nor dirge. Rather, it is a warrior’s — not a victim’s — cry. Like a literary longboat set ablaze with an arrow shot, Chokehold is a defiant accounting that expertly navigates the seas of white supremacy and anti-Black trade winds in order to deliver the disingenuous American experiment not to Valhalla, but condemnation. Chokehold offers neither recipe or a recommendation. It is, instead, a receipt. Cries of “no justice, no peace” are mistakenly directed towards governmental actors as a threat. What Chokehold unmasks is that the American criminal justice is built on, for, and fueled by war.³³ Peace, then, in times of war? It does not exist here.

31. “Black prosecutors cannot afford loyalty, and instead must rely upon clarity. Without such clarity infusing their job performance, Black prosecutors merely color the machinery of race based persecution, both completely oblivious to the racing of crime in this country, and complicit in it. Herbert, *supra* note 26, at 535 (examining the role of Black prosecutors’ loyalty in the performance of their prosecutor’s role within the American criminal justice system and asserting that Black prosecutors “are not loyal to judges, police, juries, the criminal justice system, or race . . . Instead, they are most loyal to their internalized notions of justice”).

32. *See, e.g.*, ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963). America’s “self-betraying stratification” – a characteristic that the stigmatized tend to exhibit – “standards which [it] applies to [it]self in spite of failing to conform to them, it is inevitable that [it] will feel some ambivalence about [its]self.” *Id.* at 106. This spoiled identity – which falsely promised blindness in weighing the scales of justice – coincides with the spoiled identity of whiteness. Both ideals – justice and whiteness – were the unquestionable, presumed, legitimate default. Now:

white has fundamentally changed, from unmarked default to racially marked, a change now widely visible: from of course being president and of course being beauty queen and of course being the cute young people selling things in ads to having to make space for other, nonwhite people. . .

Black and brown and Asian people sell you financial instruments and clothing. The president and first lady are black. Your college literature course includes Toni Morrison and Junot Díaz. But if you haven’t gone to college, where multiculturalism has been making its way for a generation, and if your version of America was formed in school in the 20th century, and that 20th-century image remains in your consciousness, you may have a lot to lose.

In our racially oriented American society, this change marks a demotion for white people. From assumed domination, they now take their place among the multiracial American millions.

Painter, *supra* note 19.

33. *See* CHRIS HAYES, *II*, in *A COLONY IN A NATION* 67-68 (2017) (noting how law enforcement agents are “mobilized as if for war: flak jackets, masks, helmets, camouflage, assault weapons, and armored vehicles” when challenged by unarmed and largely peaceful protestors).

One decade later, Butler still desires that we “get free;” however, this time around, he seeks, but finds lacking, American freedom. Frederick Douglass famously asked “What is freedom to the slave?” Chokehold both sharpens and reframes the inquiry, which forces readers to evaluate the parasitic value of American freedom, as well as the cannibalistic nature of its criminal justice system. Seeking justice from the very system that produces unjust results is useless.³⁴ American freedom can never be until the country, once again, confronts its original sin of chattel slavery. American criminal justice can never be realized unless and until the nation atones for its race-based policing, prosecuting those it has failed, creating yet, again, another, bondage class of hundreds of thousands of Black bodies.³⁵

Chokehold, then, serves as Butler’s “Janus Opus”³⁶ regarding the American criminal justice system. It is an important pivot point in his evolution as a writer on matters of criminal justice, as it obliterates lingering, idealistic American innocence/ignorance and, perhaps, heralds an impending supplanting of the old American criminal justice system with one that is less racially dishonest and more racially just.

Legacy, legacy, legacy, legacy
Black excellency, baby, let ‘em see
Day, someday, someday, we all
*Someday, we’ll all be free, yeah*³⁷

34. See CHRIS HAYES, VI, in *A COLONY IN A NATION* 204-08 (2017) (describing the American criminal justice system as two-tiered, punitive, and unequal based on the confluence of race, class, location). “This instinct to level down . . . rather than level up is a core feature of American justice.” *Id.* at 206-207.

35. See *Like Betsy Ross*, DATABASE NARRATIVE ARCHIVE (Matt Soar & Monika Gagnon, eds. Jan. 1, 2013), <http://dnaanthology.com/anvc/dna/like-betsy-ross—beverly> (quoting Beverly Henry: “America has become a country that imprisons those it fails”).

36. According to Roman mythology, the god, Janus, was the animistic spirit and guardian of doorways, archways, portals, beginnings and endings, as well as transitions. Often portrayed standing in a doorway with his two faces looking forward and backward at the same time, Janus was the embodiment of juxtapose, signaling the beginnings and the ends, the entrance and departure, the gatekeeper that looks both ways and the protector of the start of all activities, the inauguration of all seasons. See *Encyclopaedia Britannica*, available at <https://www.britannica.com/topic/Janus-Roman-god> (last visited Dec. 12, 2018). A writer’s “magnum opus” is defined as their most important work. See, e.g., *Cambridge Dictionary*, available at <https://dictionary.cambridge.org/us/dictionary/english/magnum-opus>.

37. JAY-Z, *Legacy*, on 4:44 (Universal Music Publ’g Group 2017).

Politics Change. Policing Black Men Stays the Same.

PAUL BUTLER

It is a high honor to have three important scholars offer such careful analysis of my book *Chokehold: Policing Black Men*. The reviews, by Howard University Law Professors Justin Hansford, Lenese Herbert and Darin Johnson, are provocative and fair. Here I want not to so much respond point by point as to riff off some of the most challenging themes in these three essays.

Professor Herbert detects an evolution in my thinking on the criminal legal process from my book, *Let's Get Free: A Hip-Hop Theory of Justice*, published in 2008, to *Chokehold*, published in 2017. She is right: the first book is more liberal and the second one is more radical. Herbert attributes the difference to what happened in the time span between the two books, including the election and re-election of the first African American US president, and the rise of the movement for black lives.

I concluded *Let's Get Free* with this observation

*As I finish this book, the United States recently has elected as president Barack Obama, a brilliant man who used marijuana and cocaine during high school and college and got away with it. If his criminality had been handled like that of the 500,000 people now locked up for nonviolent drug offenses, it is doubtful that he would have become the most powerful person in the world. An important question now is: Will President Obama use his power to help other people who made mistakes, especially those who committed drug crimes like his? Dare the 2.3 million prisoners in the United States have the audacity of hope?*¹

1. Paul Butler, *Chokehold* 182 (2017). The author thanks Dean Danielle Holley-Walker and the Howard Human and Civil Rights Law Review for the honor of delivering the C. Clyde

The answer turned out to be “no,” or at least “not much.” Obama was the first sitting US president to visit a prison. He commuted the sentences of more than 1,300 inmates, far more than any president before him.² Obama established the “President’s Task Force on 21st Century Policing” and his Justice Department investigated over twenty local police departments.³ These acts made Obama the most progressive US president in US history on issues of race and criminal justice.

But the bar was quite low. Obama’s commutations were just a fraction of the people who were potentially eligible⁴; his first pardon attorney resigned in protest because the White House did not give her the resources to properly consider all who were eligible.⁵ Outside of the criminal legal process, African Americans maintained their place at or near the bottom of most indicia of socio-economic achievement.

Black families have a median net worth of \$17,061, compared with \$171,000 for white families.⁶ Getting killed by the police is a leading

Ferguson Jr. Lecture. For helpful comments, much respect to Darin Johnson and Rod Wilkins. Excellent research assistance was provided by Joshua Newton and Anuva Ganapathi.

2. Neil Eggleston, *President Obama Has Now Granted More Commutations than Any President in this Nation’s History*, OBAMA WHITE HOUSE: BLOG (Jan. 17, 2017, 4:17 PM), <https://obamawhitehouse.archives.gov/blog/2017/01/17/president-obama-has-now-granted-more-commutations-any-president-nations-history>.

3. *Fact Sheet: Task Force on 21st Century Policing*, OBAMA WHITE HOUSE: STATEMENTS AND RELEASES (Dec. 18, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/12/18/fact-sheet-task-force-21st-century-policing>; *Final Report of the President’s Task Force on 21st Century Policing*, AMERICAN B. FOUND. (last visited May 20, 2020), https://americanbarfoundation.org/uploads/cms/documents/executive_summary_policing_task_force.pdf.

4. Kimberly Lawson, *How Significant Are Obama’s 1,385 Commutations?*, VICE (Jan. 18, 2017, 11:29 AM), https://www.vice.com/en_us/article/d3g8aj/how-significant-are-obamas-1385-commutations; Dara Lind, *President Obama was supposed to shorten 10,000 prison sentences. What happened?*, VOX (Mar. 29, 2016, 12:40 PM), <https://www.vox.com/2016/3/29/11325502/obama-pardon-clemency-leff>.

5. Josh Gerstein, *Obama’s pardon attorney resigns*, POLITICO (Jan. 15, 2016 10:14 PM), <https://www.politico.com/story/2016/01/obama-pardon-attorney-resigns-217874>; Sarah Smith, *Obama Isn’t Following Through on Pardons Promise, Says His Former Pardons Attorney*, PROPUBLICA (Mar. 30, 2016, 11:04 AM), <https://www.propublica.org/article/obama-not-following-through-pardons-promise-says-former-pardons-attorney>.

6. Lisa J. Dettling et al., *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*, FED. RESERVE: FEDS NOTES (Sept. 27, 2017), <https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm>

cause of death for young black men.⁷ In 2020, a large percentage of black, Latino, and white children attend segregated schools.⁸

The Obama era was the best of times and the worst of times for progressives, so in telling the story I would emphasize what did not happen: African Americans did not prosper during the Obama era.⁹ Police and prosecutors remained on our backs. And certainly the administration could have done more. For example, the Obama administration refined, but chose not to end, the 1033 Program, so even when Barack Obama was in the White House the Pentagon offered U.S. cops weaponry intended for enemies of the state, including humvees, drones, manned aircraft, explosives, and battering rams.¹⁰

In *Chokehold*, published a few months after the inauguration of Donald Trump, I noted “cops did not treat African Americans better when Obama was in office, and they will not treat them worse during the era of Trump.”¹¹ Is the Chokehold worse in the post-Obama era? Things could hardly have gotten worse. The cops shoot, beat up, and sexually harass African American people regardless of who is in the White House.

Certainly, the Trump Justice Department’s retreat from its watchdog role over local police departments sent a clear message of disdain for the victims of police violence; but, as explained in chapter 6, those federal takeovers had limited effects.¹² The main problem has never been bad apple cops. The main problem is that the system is working the way it is supposed to, and that does not change regardless of who is the president.

One difference between the eras of Barack Obama and Donald Trump is that now the force of white supremacy can no longer be denied. When neo-Nazis marched in Charlottesville, Virginia, carrying

7. Amina Khan, *Getting killed by police is a leading cause of death for young black men in America*, L.A. TIMES (Aug. 16, 2019), <https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men>.

8. Erica Frankenberg et al., *Harming Our Common Future: American’s Segregated Schools 65 Years after Brown*, CTR. FOR EDUC. AND C.R. (May 10, 2019), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf>.

9. See TA-NEHISI COATES, *WE WERE EIGHT YEARS IN POWER* (2017).

10. BUTLER, *supra* note 1, at xii.

11. BUTLER, *supra* note 1, at 2.

12. BUTLER, *supra* note 1, at 171.

torches and chanting, “Jews will not replace us,” Donald Trump said the marchers included some “very fine people.”¹³ The president called Latinx gang members “animals,” described African nations as “shithole countries,” said that people who support the removal of monuments to the pro-slavery confederacy are “trying to take away our culture,” and, during the campaign, called for “a complete and total shutdown of Muslims entering the United States.”¹⁴

If people don’t get it now, they never will. The “productive apocalypse” described in chapter 8 is ascendant.¹⁵ What remains to be seen is the form the resistance takes, including whether it settles for removing Trump from office or, alternatively, demands more extreme change. As *Chokehold* makes clear, for people of color to be safe and free, the old ways of thinking about “reform” and “civil rights” are not only insufficient, they can get in the way of the transformation that the United States desperately needs. In this moment of extreme crisis, with white supremacy as transparent as it has ever been, here’s to the revolution.

What does the revolution look like in school discipline? Professor Johnson calls for “abolishing the education chokehold” including by eliminating “school resource officers” and “zero tolerance” policies, and investing in “interventions that adjust rather than criminalize inappropriate student behavior.”¹⁶ Johnson believes that racial bias is the best explanation of why African American children are vastly more likely to be subject to school disciplinary procedures than white children.

Johnson makes this point in contrast to my argument that the “Chokehold does not stem from hatred of African Americans. Its anti-blackness is instrumental rather than emotional.”¹⁷ Johnson acknowledges the corrosive profit motive in locking up children. Almost half of detention centers for children are privately operated, unlike adult prisons, which are primarily operated by states. Still, Johnson states, “even absent the economic incentives of private prison compa-

13. BUTLER, *supra* note 1, at xii.

14. *Id.*

15. BUTLER, *supra* note 1, at 249.

16. Darin E.W. Johnson, *Removing the Chokehold on School Discipline*, *How. L.J.* at 7 (2020).

17. BUTLER, *supra* note 1, at 6.

nies, school discipline would continue to be more severe for black and Latino students than similarly situated white students because of . . . ingrained racial biases.”¹⁸

To be clear I do not think the only payoff of the chokehold is financial. I wrote “Because the Chokehold imposes racial order, who wins and who loses is based on race. . . White people are the winners. What they win is not only material, like the cash money that arresting African Americans brings to cities all over the country in fines and court costs. The criminalizing of blackness also brings psychic rewards. American criminal justice enhances the property value of whiteness.”¹⁹

Still, Johnson’s focus on children is instructive because it demonstrates the substantial role that prejudice plays in constructing black people as criminal. In the adult context, racial profiling is sometimes described as rational discrimination, based on the theory that blacks commit more crime. This is not true with regard to drug crimes, and misdemeanor offenses.²⁰ But, as discussed in *Chokehold’s* Chapter 4, “*Black Male Violence: The Chokehold Within*,” African American men are disproportionately at risk for certain kinds of violent crime, as victims and perpetrators. This risk is used to justify oppressive policies like “stop and frisk” and “broken windows” policing. The best evidence is that black children don’t commit disciplinary infractions more than other children, so the racial disparities can’t be excused by blaming African American kids. Johnson’s insight about the persistence and stickiness of anti-black racism is persuasive, and especially tragic when children are the victims.

I was curious about Johnson’s avoidance of the phrase “white supremacy,” which is the term *Chokehold* most frequently invokes to describe the US racial project. Johnson employs “racial bias,” which, again, he makes a persuasive case exists, but I worry that the focus on psychology detracts from *Chokehold’s* structural critique. I think white supremacy more accurately reflects the scale of the problem. A theme in *Chokehold* is the problem is not bad apple cops, but rather

18. Darin E.W. Johnson, *Removing the Chokehold on School Discipline*, How. L.J. at 7 (2020).

19. BUTLER, *supra* note 1, at 12.

20. BUTLER, *supra* note 1, at 122; *Criminal Justice Fact Sheet*, NAACP (last visited May 20, 2020), <https://www.naacp.org/criminal-justice-fact-sheet/>.

the problem is that the system is working the way it's supposed to. Johnson's attention to bias might lead to remedies focused on school administrators, rather than more integral components. My worry is that even if we could somehow achieve bias free school discipline, we would continue to see disproportionate disciplining of children of color – another manifestation of “racism without racists,” in Eduardo Bonilla-Silva's famous phrase.²¹

Johnson calls for “the radical transformation of public school discipline” but his concrete proposals seem more liberal than radical. He is right that police should be removed from schools and that draconian policies, imported from criminal law, like “zero tolerance” have no place in education. But these ideas are commonplace in progressive circles. Here, again, my concern is that even if these proposals are implemented, black kids would still bear the brunt of whatever disciplinary system remained. What would be the equivalent of prison abolition in the context of school discipline?

I hope that, in other work, Johnson develops his important analysis. Considering his attention to young people, I would be interested in his response to *Chokehold's* concerns about black male achievement programs, which are usually designed for boys and teenagers. I wonder too if Johnson is in accord with my book's tentative critique of some performances of masculinity by African American teens. Is there a relationship between stereotype vulnerability and who ends up in the principal's office, or the kiddy jail?²²

Critical race theory has a rich literature in both law and education, but they proceed now as two separate canons.²³ Johnson's essay is won-

21. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS* (2003).

22. CLAUDE STEELE, *WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO* (2010).

23. Matt Barnum, *Race, not just poverty, shapes who graduates in America — and other education lessons from a big new study*, CHALKBEAT (Mar. 23, 2018, 12:25 PM), <https://www.chalkbeat.org/2018/3/23/21104601/race-not-just-poverty-shapes-who-graduates-in-america-and-other-education-lessons-from-a-big-new-stu>; Yolanda Anyon et al., *An exploration of the relationships between student racial background and the school sub-contexts of office discipline referrals: A critical race theory analysis*, RACE ETHNICITY EDUC., May 2017, at 1, https://www.researchgate.net/publication/317098248_An_exploration_of_the_relationships_between_student_racial_background_and_the_school_sub-contexts_of_office_discipline_referrals_A_critical_race_theory_analysis; Rita Kohli et al., *The “New Racism” of K–12 Schools: Centering Critical Research on Racism*, 41 REV. OF RES. IN EDUC. 182 (Mar. 2017), <https://www.sjsu.edu/people/marcos.pizarro/publications/KohliPizarroNevarez2017.pdf>; Payne Hiraldo, *The Role of*

derfully suggestive about the benefits of moving outside of silos to confront the beast in all its ugly manifestations.

Professor Hansford is fully down with the radical program. He states that the most substantive contributions of the movement for black lives have been its critique of liberalism, its “popularization and manifestation of intersectionality,” and its critique of respectability politics. I’m proud to have *Chokehold* associated with all three contributions. As discussed above, progressive politics, alone, has not and will not create the transformation that black people need to live free in the United States.

I wanted to use Kimberle Crenshaw’s powerful intersectional analysis to illuminate the role that gender as well as race plays in the subordination of black men.²⁴ I will confess to approaching the task of writing a book centered on African American men with some trepidation. I did not want to contribute to what I have described as “black male exceptionalism,” the idea that African American men face more severe problems than any other demographic group, including African American women.²⁵ I don’t think this is true. The important #SayHerName campaign has lifted up the experiences of women of color and the police. For example, after excessive force, sexual assault is the most common complaint against the police, and African American women are the most likely victims. In *Chokehold* I wanted to discuss the sexual degradation to black men in “stop and frisk” but even the problem of police sexual abuse of women has not gotten the attention it deserves, which is not uncommon for issues that disproportionately impact black women. The challenge for any project that focuses on African American men – whether a black male achievement program like former president Obama’s My Brother’s Keeper initiative, or a book such as *Chokehold* – is to highlight the particular ways that black men are stereotyped without marginalizing the exper-

Critical Race Theory in Higher Education, 31 *Vt. Connection* 53 (2010), <https://www.uvm.edu/~vtconn/v31/Hirald.pdf>.

24. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. CHI. LEGAL F.* 139 (1989) <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1052&context=uclf>.

25. Paul Butler, *Black Male Exceptionalism? The Problems and Potential of Black Male-Focused Interventions*, 10 *DU BOIS REV.* 485 (2013), <https://scholarship.law.georgetown.edu/facpub/1314/>.

iences of African American women in the process. It is especially gratifying to know that Hansford thinks that *Chokehold* got that right.

Not everyone agrees with Hansford that *Chokehold* eschews respectability politics. Chapter 8, “*If You Catch a Case*” advises people, particularly black men, how to minimize contacts with police and prosecutors and how to have better outcomes if one does become embroiled in the system. Among the suggestions are that black men should speak respectfully to cops during an encounter, wear a suit to court appearances, and, if they have braids, cut them before appearing before a judge or jury. If a black man does not feel like extra attention from the police he should be careful about wearing pants that sag or hoodies. I state that African American men “should resent having to do these things. They severely curtail your rights as a citizen of the United States, and as a free human being.”²⁶ Despite this disclaimer, a few commentators have seen echoes of victim blaming, or urging conformity with white middle class standards. One could offer this same critique of “the talk,” a conversation many parents have with children of color to warn them that they will be treated differently by the police and they should act accordingly.²⁷ Indeed, I wrote that chapter as a “keeping it real” version of the talk, capitalizing on my experiences as both a former prosecutor and an African American man who has had many unpleasant encounters with the cops, including being falsely arrested. What both “the talk” and *Chokehold* have in common is the imperative of helping folks survive encounters with the cops.

Professor Hansford would like more activists to use *Chokehold* “to bolster their arguments in the theater of activism.” He, and I, believe in the power of books to spark revolutionary transformation. *Chokehold* has, for a book of serious non-fiction, sold well and been widely reviewed. The New York Times described it as the best book

26. BUTLER, *supra* note 1, at 201.

27. Curtis Bunn, *After Arbery shooting, black parents are rethinking ‘the talk’ with sons to explain white vigilantes*, NBC NEWS (May 19, 2020, 9:33 AM), <https://www.nbcnews.com/news/nbcblk/after-arbery-shooting-black-parents-are-rethinking-talk-sons-explain-n1209601>; *A Conversation With My Black Son*, N.Y. TIMES (Mar. 17, 2015), <https://www.nytimes.com/video/opinion/100000003575589/a-conversation-with-my-black-son.html?action=click>ype=vhs&version=vhs-heading&module=vhs®ion=title-area>; *Having ‘The Talk’: Expert Guidance on Preparing Kids for Police Interactions*, NPR: WBEZ CHICAGO (Aug. 27, 2019), <https://www.npr.org/local/309/2019/08/27/754459083/having-the-talk-expert-guidance-on-preparing-kids-for-police-interactions>.

on criminal justice reform since “The New Jim Crow” and the Washington Post named it one of best non-fiction books of 2017.²⁸ It was nominated for a NAACP Image Award. The book was inspired by the movement for black lives, of which Hansford is a prominent leader. I take Hansford’s question – “why aren’t more young activists reading this book?”- as a challenge. I need to work harder to get the word out and my book in their hands. If my legal skills, research, or resources connected to my privilege as a tenured professor can help make the crucial work that activists are doing more effective, they must be so employed. I thank Hansford for this call to action, and all three reviewers for their life affirming work in “the beautiful struggle” for justice.

28. Elizabeth Hinton, *Three New Books to Discuss How to Confront and Reform Racist Policing*, N.Y. TIMES (July 26, 2017), <https://www.nytimes.com/2017/07/26/books/review/called-to-rise-david-brown-policing-the-black-man-paul-butler.html>; *50 notable works of nonfiction in 2017*, WASH. POST (last visited May 20, 2020), https://www.washingtonpost.com/entertainment/books/50-notable-works-of-nonfiction-in-2017/2017/11/14/36063e26-af85-11e7-9e58-e6288544af98_story.html.

NOTE

Debunking the Broken Windows Theory in Policing: An Incident and Badge of Slavery

KATESHA LONG*

INTRODUCTION

“The work of Abolitionists is not finished. . . Slavery has been fruitful in giving itself names. . . All of us had better wait and see what new form this old monster will assume, in what new skin this old snake will come forth.”¹ Frederick Douglass said these very words on May 10, 1865, at the American Anti-Slavery Society Meeting, which was meeting to decide whether or not to disband, now that the slaves were free by way of the Thirteenth Amendment.² Who knew how accurate his prediction would be.

The Thirteenth Amendment was the first of three Reconstruction Amendments adopted following the American Civil War. Together

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1. Fredrick Douglass Speech on the Thirteenth Amendment, ALMOST CHOSEN PEOPLE: WORDPRESS (Jan. 19, 2015, 5:30 AM), <https://almostchosenpeople.wordpress.com/2015/01/19/frederick-douglass-speech-on-the-thirteenth-amendment/>.

2. George M. Eberhart, *Old Snake, New Skin Jelani Cobb Speaks on Diversity*, AMERICAN LIBRARIES (Mar. 20, 2017), <https://americanlibrariesmagazine.org/blogs/the-scoop/old-snake-new-skin>.

with the Fourteenth and Fifteenth Amendments, the Thirteenth Amendment sought to establish equality for the newly freed men, Black Americans. Even with the civil rights amendments, achieving full equality and guaranteed civil rights is still a fallacy for Black Americans today. Since America's inception, control over African Americans has materialized repeatedly through different institutions, "which appear to die, but then are reborn in new form, tailored to the needs and constraints of time."³ First, it was slavery coupled with Slave codes, then Black Codes, and today it is law enforcement policies and procedures for policing Black Americans.

Modern-day policing uses innovative policing techniques that constitute proactive policing.⁴ These policies encourage police to target those whom they believe are more likely to be involved in criminal activities, increasing the risk of officers acting based on racial prejudices.⁵ Racial profiling in policing would seem to be unconstitutional, but it is nearly impossible to prove. Policing is usually contested under the Fourth Amendment, which governs searches and seizures. The Fourth Amendment states, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." In *Whren v. United States*, a unanimous opinion of the Supreme Court held the constitutional basis for objecting to racial discrimination is afforded under the Equal Protection Clause and not the Fourth Amendment unreasonable search and seizure clause,⁶ implying that being seized under racial discrimination is not unreasonable.⁷ Probable cause that a crime is afoot is the test under the Fourth Amendment; it is irrelevant if the officer's seizure was pretextual, except in the context of inventory searches and administrative inspections,⁸ which are not the incidents typically contested for racial profiling. In *Whren*, the petitioners raised the following argument:

3. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 21 (2010).

4. Lawrence Rosenthal, *Policing and Equal Protection*, 21 *YALE L. & POL'Y REV.* 53 (2003).

5. *Id.* at 55.

6. *Whren v. United States*, 517 U.S. 806, 813 (1996).

7. *Id.* ("We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.")

8. *Id.* at 812.

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the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists. . . . [P]olice officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants. To avoid this danger, they say, the Fourth Amendment test for traffic stops should be, not the normal one . . . of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given.⁹

Even though the above argument is sound, the Court rejected it.

Rejecting the petitioners' argument left protection under the Equal Protection Clause, which forbids any use of race as a basis for governmental decision-making.¹⁰ However, proving such discrimination is almost impossible in racial profiling police cases, which leaves the constitutional test of rational basis to review these cases.¹¹ This test gives complete deference to the state by upholding laws as long as they are rationally related to a legitimate government interest. Moreover, it is nearly impossible to have police policies that heighten the risk of racial profiling struck down under the Equal Protection Clause. To strike down specific police policies of a police department, one must show that the entire police department is discriminating based on race, which would hardly be feasible. Current case law has fallen short of concrete protection. Therefore, I will discuss how Congress can eliminate modern-day policing policies that negatively affect Black Americans. I will specifically focus on one type of policing technique that mirrors slave patrols and Black codes, which is Broken Windows policing.

This note will explain why Congress has the power to prohibit Broken Windows policing as an incident and badge of slavery under powers granted to them under the Thirteenth Amendment. I will not discuss how Broken Windows Policing discriminates; however, I will

9. *Id.* at 810.

10. Rosenthal, *supra* note 4, at 56.

11. Michael Tamir, *Public Law as a Whole: The Case of Selective Enforcement and Racial Profiling*, 4 https://www.law.nyu.edu/sites/default/files/upload_documents/tamirarticle.pdf (last visited Feb. 27, 2020).

discuss why Congress has the power to prohibit it. I will also explore better ways to prevent crime.

I begin in Part I by explaining what Broken Windows theory and policing are. This will include how the Broken Windows theory was used to support Broken Windows policing and how it has been implemented. Part II defines “badges and incidents of slavery” and explains how Congress has the power to pass legislation to rid badges and incidents of slavery as they see fit. Part II also includes a roadmap of how incidents and badges of slavery have shown themselves throughout history. Part III explains why Broken Windows policing is an incident and badge of slavery. Finally, Part IV challenges the validity in Broken Windows policing and offers better methods to address crime.

I. BROKEN WINDOWS THEORY AND POLICING

A. The History of the Broken Windows Theory

George L. Kelling and James Q. Wilson used a 1969 experiment conducted by Stanford psychologist Philip Zimbardo to support their own theory, called “The Broken Windows theory.”¹² Zimbardo’s 1969 experiment involved leaving an automobile without license plates parked with its hood up on a street in the Bronx and a comparable automobile on a street in Palo Alto, California.¹³ The car in the Bronx was attacked within ten minutes of its abandonment while the car in Palo Alto was untouched for more than a week; however, once Zimbardo started to deface the car in Palo Alto, passersby joined in with destructing the car.¹⁴

Zimbardo ignored a significant distinction between the two groups; the people in the Bronx took things of value, while people in Palo Alto defaced the car just for the sake of it. In the Bronx, the first to take was a family, probably in need, which is a rational explanation as to why others in the Bronx took as well. Zimbardo overlooked the rational explanation and instead focused on the aspect of unattended property. He concluded that untended property becomes fair game for people out for fun and plunder, even those who usually consider themselves law-abiding citizens.¹⁵ Zimbardo drew a prejudicial con-

12. George L. Kelling & James Q. Wilson, *Broken Windows The Police and Neighborhood Safety*, THE ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

13. *Id.*

14. *Id.*

15. *Id.*

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clusion that people in the Bronx destroyed the car rather quickly “[b]ecause of the nature of community life in the Bronx—its anonymity, the frequency with which cars are abandoned and things are stolen or broken, the past experience of ‘no one caring.’”¹⁶ Amplifying his prejudice, Zimbardo compared the Bronx to Palo Alto by saying the people in staid Palo Alto “have come to believe that private possessions are cared for.”¹⁷

Zimbardo’s premise is based on the idea that ‘vandalism can occur anywhere once communal barriers. . .[like] obligations of civility. . .are lowered by actions that seem to signal that ‘no one cares.’”¹⁸ Zimbardo based his conclusion on an irrational prejudice of a specific group of people. He completely overlooked a more rational reason for the people’s actions in the Bronx, like maybe they stole from the car because they were in need. Zimbardo’s conclusion has furthered the idea that certain groups of people do not care, and therefore, they will be delinquent.

Kelling and Wilson use Zimbardo’s theory to assert that once disorder begins, things will get out of control regardless of where the neighborhood is.¹⁹ Kelling and Wilson’s article suggests that a broken window and other visible signs of disorder send the signal that a neighborhood is uncared for, but if police addressed these signs of disorder (loitering, graffiti, prostitution, and drug use), major crimes might not occur, thus creating Broken Windows policing.²⁰

Broken Windows policing refers to cops having a zero tolerance of criminal behavior, even for quality-of-life crimes, such as strict traffic enforcement, keeping neighborhoods free of loitering, public intoxication, unlicensed selling of goods, and other minor criminal offenses.²¹ The idea behind this method of policing is “if you fix the broken windows and clean up the sidewalks, problems will not escalate.”²² The Broken Windows policing theory suggests that when there

16. *Id.*

17. *Id.*

18. *Id.*

19. *How A Theory of Crime and Policing was Born, and Went Terribly Wrong*, NPR (Nov. 1, 2016, 12:00 AM), <https://www.npr.org/2016/11/01/500104506/broken-windows-policing-and-the-origins-of-stop-and-frisk-and-how-it-went-wrong>.

20. *Id.*

21. Glenn French, *How “Broken Windows” Policing Devolved into A False Narrative of Racism*, POLICEONE (Feb. 4, 2015), <https://www.policeone.com/Officer-Safety/articles/8217729-How-broken-windows-policing-devolved-into-a-false-narrative-of-racism/>.

22. Bill Ong Hing, *From Ferguson to Palestine: Disrupting Race-Based Policing*, 59 *How. L.J.* 559, 574 (Spring 2016).

is less opportunity for minor crimes, it naturally flows that major crimes will decrease because officers' presence in any neighborhood reduces crime.²³

B. Broken Windows Policing Implemented

The Broken Windows theory is based on the irrational conclusion that because people in specific neighborhoods are accustomed to not caring, there will be more disorder and crime. This irrational conclusion, coupled with other preexisting harsh stereotypes that Black people are violent, hostile, aggressive, and dangerous²⁴, impels heavy policing in Black neighborhoods. Even Kelling admitted that Broken Windows theory is based heavily on speculation.²⁵ Nevertheless, those who have personal agendas do not need reliable data to justify implementing them; they only need a semi-sound basis to justify why their way is the right way, even if proven to be futile. For example, in the mid-1970s, New Jersey implemented Broken Windows policing by having police officers on foot patrol to cut crime, however, after five years of this program, the results showed crime rates had not reduced.²⁶ Under this program, policing occurred in predominately Black neighborhoods, and the foot patrolmen were mostly white; their jobs were "order maintenance."²⁷

Broken Windows theory has been a leading force to implement many innovative policing policies, including zero tolerance policing and the use of stop, question, and frisk. The stop and frisk program in New York City, is a practice based on the *Terry v. Ohio*, 392 U.S. 1 (1968) decision, which allowed police officers to stop and question a pedestrian, then frisk them for weapons and other contraband if the police officer had reasonable suspicion that the pedestrian was armed and dangerous. In New York City, about 684,000 people, mostly Afri-

23. French, *supra* note 21.

24. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2039 (Jun. 2011).

25. Christina Sterbenz, *The Creator of "Broken Windows" Describes A Huge Misconception About the Controversial Huge Misconception About the Controversial Policing Theory*, BUSINESS INSIDER (Jan. 26, 2015, 7:36 PM), <https://www.businessinsider.com/creator-of-controversial-policing-theory-broken-windows-calls-it-a-misconception-2015-1>.

26. Kelling & Wilson, *supra* note 12.

27. *Id.* See also Alison & Jenny A. Flemming, *Order Maintenance Definition*, SAGE KNOWLEDGE, <https://sk.sagepub.com/reference/the-sage-dictionary-of-policing/n83.xml> (defining order maintenance as "the aspect of policing concerned with regulating the fair use of public spaces.") (last visited Apr. 18, 2020).

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can Americans and Latinos, were stopped in 2011 under the stop and frisk program.²⁸

The application of the Broken Windows policing has led to many unnecessary arrests for quality-of-life crimes.²⁹ Furthermore, Broken Windows policing leads to the criminalization of communities of color by justifying vaguely written ordinances that give great discretion to the police to determine what is and who engages in disorderly behavior.³⁰ This type of police intervention is simply a guise for racist behavior. More importantly, it can produce a racially skewed outcome in crime statistics.³¹

Crime did decline in New York City when Broken Windows policing was first initiated in poor Black neighborhoods, but the police presence was maintained, and officers self-initiated action to keep statistics up rather than waiting for a 911 call.³² As Paul Butler, author of *Chokehold: Policing Black Men*, stated, “[i]t’s not a question of how many people are committing the crime—it’s a question of where the police are directing their law-enforcement resources. Because wherever they direct the resources, they can find crime.”³³

Black communities have become oversaturated by police using an overwhelming use of force in response to a comparatively small number of bad actors.³⁴ The result is the criminalization of minority communities as a whole.³⁵ Implicit biases that officers have further the criminalization of Black people because an officer might evaluate behaviors engaged in by individuals who appear Black as suspicious even if identical behavior by those who appear white would go unnoticed.³⁶ The oversaturation of police, combined with their implicit biases of Black people, harms Black communities by exacerbating the way others perceive people living in these neighborhoods. The negative perception of Black communities induces the idea that control over Black people is needed, which is what the basis of Broken Win-

28. Hing, *supra* note 22, at 574-75.

29. Sterbenz, *supra* note 25.

30. Hing, *supra* note 22, at 575.

31. *Id.*

32. *Id.*

33. Abdallah Fayyad, *The Criminalization of Gentrifying Neighborhoods*, THE ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/>.

34. *Id.*

35. Hing, *supra* note 22, at 575.

36. Richardson, *supra* note 24, at 2040; *see also* Bustle, *The Impact of “Broken Windows” Policing on Black Communities [INSIGHT]*, YOUTUBE (Feb. 10, 2016 at 1:49), <https://www.youtube.com/watch?v=anoHcUnJ2aU>.

dows policing is “social control.” The institution of slavery used control over Black people to maintain order. But for slavery, would Broken Windows policing be in place? Or is it simply put, a badge and incident of slavery?

II. BADGES AND INCIDENTS OF SLAVERY

Section two of the Thirteenth Amendment establishes the Enabling Clause, which states: “Congress shall have power to enforce this article by appropriate legislation.” This clause empowers Congress to do much more than abolish Slavery; it clothes “Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”³⁷ Also, it has been interpreted to mean Congress has the power under the Thirteenth Amendment to rationally determine what the badges and incidents of slavery are.³⁸ This amendment enfranchised four million enslaved Africans and gave Congress the power not only to legislate for the eradication of slavery but also “the power to give full effect to this bestowment of liberty on these millions of people.”³⁹

In 1968, Congress’ power was made clear in the Supreme Court Decision of *Jones v. Alfred*. In *Jones*, the Court held the Thirteenth Amendment “is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”⁴⁰ Therefore, “the power vested in Congress to enforce the article by appropriate legislation includes the power to enact laws direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.” The focus of this legislative power is to target the badges and incidents of slavery not because they are themselves unconstitutional under section one of the Thirteenth Amendment, but because eradicating them means the end of preventing the de facto reestablishment of slavery.

The words “badge” and “incident” are terms of art that appertain to specific aspects of the slave system and its legacy.⁴¹ The power to eliminate badges and incidents of slavery should not be confused with

37. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

38. *Id.*

39. *Hodges v. United States*, 203 U.S. 1, 29 (1906) (Harlan, J., dissenting opinion).

40. *Alfred H. Mayer Co.*, 392 U.S. at 438.

41. Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 566 (2012).

conferring a broad anti-discrimination power to Congress because their power under section five of the Fourteenth Amendment would be repetitious and futile rather than consequential.⁴² Since the Fourteenth Amendment and the Thirteenth Amendment are not identical, the congressional power to enforce the amendments must be distinct.⁴³

An “incident” of slavery was an aspect of the law that was inherently tied to or flowed directly from the institution of slavery, i.e., “a legal restriction that applied to slaves qua slaves or a legal right that inhered in slaveowners qua slaveowners.”⁴⁴ Even before the Thirteenth Amendment, an incident of slavery included the requirement that a slave obeys the master’s commands or be subject “to beating, imprisonment, and every species of chastisement.”⁴⁵ An incident of slavery also described the civil disabilities imposed on enslaved Africans like the closed set of public laws that applied in antebellum slaveholding states.⁴⁶ One inseparable incident of slavery was the “restraint of [one’s] movements except by the master’s will”.⁴⁷

A badge of slavery is an indicator, physical or otherwise, of slave status. The most common badge of slavery between the Revolutionary and Civil Wars was the skin color of African Americans.⁴⁸ Regularly, dark skin, as opposed to white skin, was presumptively a sign of slave status because “slavery could be predicated only of the negro and mulatto.”⁴⁹ However, once slavery was abolished, skin color alone could no longer be classified as a badge of servitude. Justice Swayne, writing the opinion for *United States v. Rhodes*, stated, “[t]he shadow of evil [of slavery] fell upon the free [B]lacks,” thereby equating “the badges of degradation with the incidents of slavery and recogniz[ing] that those legal constraints applied to free Blacks.”⁵⁰

Badges and incidents of slavery have been defined as “the public or widespread private action, aimed at any racial group . . . that has previously been in slavery or servitude, that mimics the law of slavery and has significant potential to lead to the de facto reenslavement or

42. *Id.*

43. *Id.*

44. *Id.* at 571.

45. *Id.* (citing in footnote 45 *Tom v. State*, 27 Tenn. 86, 88 (1847) (terming as a “necessary incident to the institution of slavery” the duty of a runaway slave to submit to arrest)).

46. McAward, *supra* note 41 at 575.

47. *Hodges*, 203 U.S. at 31 (Harlan, J., dissenting opinion).

48. McAward, *supra* note 41, at 576.

49. *Id.*

50. *Id.* at 578.

legal subjugation of the targeted group,”⁵¹ or in other words a “relic of slavery.”⁵² The badges and incidents of slavery—its burdens and disabilities—included restraints upon “those fundamental rights which are the essence of civil freedom.”⁵³ As a result, once slavery ended, badges and incidents of slavery evolved from Slave codes into Black Codes⁵⁴, and now into Broken Windows policing. The common practices that have been a direct result of slavery’s implementations continue throughout history.

A. The Succession of Oppression

1. Slave Codes

“Slaves were not considered men. They could be punished at will.”⁵⁵

More enslaved people were stolen from Africa than any other continent because they were easier to control and far less likely to form alliances with poor whites since they were not familiar with European language and culture.⁵⁶ The racist idea that Africans were an uncivilized lesser race lacking intelligence and laudable human qualities, combined with notions of white supremacy, erroneously gave grounds for the enslavement of Africans.⁵⁷

However, enslaved Africans did not willingly accept slavery, as evidenced by many uprisings where white settlers were slain or injured.⁵⁸ Plantation owners were afraid that violent rebellion would be brought against them and they also feared for their lives.⁵⁹ Therefore, they came together to create what was called “slave codes,” these laws restricted slaves behaviors to control their actions and reduce the chances of an uprising.⁶⁰

51. *Id.* at 569.

52. *Alfred H. Mayer Co.*, 392 U.S. at 443.

53. *Id.* at 441.

54. *Id.* at 426.

55. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 1860-1880*, 10 (Henry Louis ed. 1962) (introduction by David Levering Lewis 1992).

56. Alexander, *supra* note 3, at 24.

57. *Id.* at 25.

58. Curtis Bunn, *10 Slave Codes That Were Designed to Oppress and Humiliate Black People*, ATLANTA BLACK STAR (Dec. 22, 2014), <https://atlantablackstar.com/2014/12/22/10-slave-codes-that-were-designed-to-oppress-and-humiliate-black-people/>; see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 23 (2010).

59. Bunn, *supra* note 58.

60. *Id.*

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Virginia was the first of the Thirteen colonies to adopt slave codes; they set the stage for others to follow.⁶¹ Between 1689 and 1865, Virginia enacted over 130 slave statutes.⁶² Slave codes gave total control to white masters over the lives of enslaved people, permitting owners to use any punishment they saw fit such as whipping, branding, maiming, and torture.⁶³ Although murder was illegal, many white masters illegally murdered their slaves and were never prosecuted.⁶⁴

One example of a slave code is from the 1705 Virginia General Assembly:

All servants imported and brought into the Country . . . who were not Christians in their native Country. . . shall be accounted and be slaves. All Negro, mulatto . . . shall be held to be real estate. If any slave resist his master. Correcting such slave, and shall be free of all punishment . . . as if such accident never happened.⁶⁵

Black people were not allowed to protect themselves because they were prohibited from possessing weapons or lifting a hand against any white person, even in self-defense.⁶⁶ If an enslaved African resisted the violence of a slaveholder or overseer, the slaveholder or overseer would have the right to kill that enslaved person without fear of prosecution.⁶⁷ Many slave codes required enslaved Africans who conducted sales for their master (“bondsmen”) to carry a ticket designating their destination and their business.⁶⁸ Additionally, enslaved Africans were never allowed to travel without a note from their master.⁶⁹ All white people were required to capture bondsmen and whip them if they had no pass.⁷⁰ Furthermore, laws protected white people by declaring that if an enslaved African resisted, that enslaved

61. Alan K. Lamm, *Slave Codes*, NCPEDIA (2006), <https://www.ncpedia.org/slave-codes>.

62. See, e.g., *Virginia Slave Codes*, PBS, (last visited Apr. 19, 2020) <https://www.pbs.org/wgbh/aia/part1/1p268.html> (Virginia General Assembly: “All servants imported and brought into the Country. . . who were not Christians in their native Country. . . shall be accounted and be slaves. All Negro [and] mulatto. . . shall be held to be real estate. If any slave resist his master . . . correcting such slave, and shall happen to be killed in such correction . . . the master shall be free of all punishment . . . as if such accident never happened.”).

63. Lamm, *supra* note 61.

64. *Id.*

65. *Slave Law in Colonial Virginia: A Timeline*, SAM HOUSTON STATE UNIVERSITY, <https://www.shsu.edu/~jll004/vabeachcoursespring09/baconsrebellion/slavelawincolonialvirginiatimeline.pdf>; see also *Virginia Slave Codes*, PBS, <https://www.pbs.org/wgbh/aia/part1/1p268.html>.

66. Bunn, *supra* note 58.

67. *Id.*

68. SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 15 (2001).

69. *Id.* at 16.

70. *Id.* at 18.

African could be beaten, maimed, assaulted, or even killed if they resisted or took flight.⁷¹

Night watchers and slave patrols enforced slave codes.⁷² Night watchers and slave patrols were composed of white men who were responsible for controlling, returning, and punishing runaway enslaved Africans.⁷³ The interest was to preserve the institution of slavery.⁷⁴ The colony of South Carolina developed the Nation's first official slave patrol in 1704.⁷⁵ Enacting slave codes began the amplification of the racist idea that Black people are not dangerous and should be feared.

The preamble in South Carolina's slave patrol law noted white resident's immediate worries: "on the sight or advice of an enemy it will be necessary for the safety and defense of the inhabitants . . . to draw . . . together to the sea coast," and this external threat could leave them vulnerable internally to "insurrections and mischiefs."⁷⁶ Enslaved Africans were seen as the enemy that inhabitants needed protection from. The colony had one military force to repel foreign enemies, and another military force left behind to patrol as a deterrent against slave revolts.⁷⁷ Patrollers were required to interrogate enslaved Africans to investigate all "suspicious" activities. Patrollers would ride together in groups visiting each plantation at least once a month to search slave quarters without search warrants, they could enter any house where people were suspected of hiding or loitering.⁷⁸ Other slave patrols shared common characteristics such as maintaining an organized society by regulating the behavior of enslaved Africans, thereby authorizing what a slave should and should not do.⁷⁹

In 1861, the Civil War began, which made the enforcement of patrol laws increasingly difficult since many southern men left to fight in the war. Then in 1862, the fear of southern citizens had been realized;

71. *Id.*

72. *Slave Codes*, U.S. HISTORY, <http://www.ushistory.org/us/6f.asp>.

73. *Police: History Early Policing in Colonial America*, LAW LIBRARY- AMERICAN LAW AND LEGAL INFORMATION, <http://law.jrank.org/pages/1640/Police-History-Early-policing-in-colonial-America.html>.

74. Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME, <http://time.com/4779112/police-history-origins/> (last updated May 18, 2017, 9:45 AM).

75. Victor E. Kappeler, *A Brief History of Slavery and the Origins of American Policing*, ECU POLICE STUDIES ONLINE (Jan. 07, 2014), <https://plsonline.eku.edu/insidelook/brief-history-slavery-and-origins-american-policing>.

76. Hadden, *supra* note 68, at 19.

77. *Id.* at 20.

78. *Id.* at 22.

79. *Id.*

Abraham Lincoln issued the preliminary Emancipation Proclamation, declaring that all enslaved people would become free on January 1, 1863.⁸⁰ Freeing enslaved Africans whom white would not be allowed to control was white people's greatest fear. One anxious white writer for the Baltimore Gazette complained that the federal government "armed negroes to the teeth⁸¹" and warned, "[i]f some steps are not taken to check [them], God only knows what will come next."⁸² In 1865, the Thirteenth Amendment was passed abolishing slavery, which also nullified slave patrol laws because slavery was no longer allowed. Former enslaved Africans envisioned that freedom would mean they would be able to operate like white men. They thought this would end the use of racial controls like the past system and slave patrols.⁸³ Sadly, they were wrong.

2. Black Codes

"[T]he slave went free; stood a brief moment in the sun; then moved back again toward slavery."

– W.E.B. Dubois, *Black Reconstruction in America*.⁸⁴

The Thirteenth Amendment states: "[n]either slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States, or any place subject to their jurisdiction."⁸⁵ Congress has the power to enforce this article by appropriate legislation.⁸⁶ By its own unaided force and effect, the Thirteenth Amendment abolished slavery and established universal freedom.⁸⁷ At least many had hoped for that.⁸⁸ This hope would soon be hit with a harsh reality when the first black codes were enacted by Mississippi and South Carolina later that year.⁸⁹

80. *Id.* at 122.

81. Someone who is "armed to teeth" is armed with a lot of weapons or with very effective weapons. Armed to teeth definition and meaning: Collins English Dictionary, COLLINS Dictionary, <https://www.collinsdictionary.com/us/dictionary/english/armed-to-the-teeth> (last visited Apr. 19, 2020).

82. STEPHEN TUCK, *WE AIN'T WHAT WE OUGHT TO BE: THE BLACK FREEDOM STRUGGLE FROM EMANCIPATION TO OBAMA* 36 (2011).

83. Hadden, *supra* note 68, at 203.

84. Alexander, *supra* note 3, at 20.

85. U.S. CONST. amend. XIV, § 1.

86. U.S. CONST. amend. XIV, § 2.

87. *Alfred H. Mayer Co.*, 392 U.S. at 439.

88. Tuck, *supra* note 82, at 37 (quoting from the words of Sally Dixon, a former slave, that "When we got freed we was going to get forty acres and a mule. Stead of that we didn't get nothing.").

89. History.com Editors, *Black Codes*, HISTORY, <https://www.history.com/topics/black-history/black-codes> (last updated Oct. 10, 2019).

President Johnson's Reconstruction policies, which began in May 1865, required that the former Confederate states uphold the abolition of slavery, swear loyalty to the Union and pay off their war debt.⁹⁰ Beyond those requirements, free rein was given to the states to rebuild their own governments.⁹¹ The result was the enactment of black codes.

At this time, Black people were living as second-class citizens.⁹² These black codes were an early attempt to control the lives of Black Americans⁹³ and were rooted in the slave codes.⁹⁴ Southern white people wanted to reassert the social control they had enjoyed during slavery. They assumed freedmen needed to be controlled and forced to work; otherwise, white people believed, lazy, larcenous former enslaved Black people could only survive by leading a life of crime.⁹⁵ For example, "Mississippi's law required [Black people] to have written evidence of employment for the coming year each January; if they left before the end of the contract, they would be forced to forfeit earlier wages and were subject to arrest."⁹⁶

Mississippi's black codes also penalized Black people for being "wanton in conduct or speech, neglect[ing] job or family, handl[ing] money carelessly, and all other idle and disorderly persons."⁹⁷ Many other states adopted similar black codes. Black people who broke these laws were subject to arrest, beatings and forced labor.⁹⁸ The states were able to force labor once the freedmen had broken the laws because it would be "punishment for crime" which was allowed under the Thirteenth Amendment.⁹⁹ Under black codes, all African Americans, convicts or not, were subject to curfews set by their local governments.¹⁰⁰ In *John v. Alfred*, the court recognized that black codes were badges and incidents of slavery because they substituted the slave sys-

90. *Id.*

91. *Id.*

92. Nadra Kareem Nittle, *The Black Codes and Why They Still Matter Today*, THOUGHT CO., <https://www.thoughtco.com/the-black-codes-4125744> (last updated Oct. 20, 2019).

93. Roberto Tijerina, *Black Codes, Jim Crow, and Social Control in the South*, STMU HISTORY MEDIA (Mar. 22, 2017), <https://www.stmuhistorymedia.org/the-south-and-vigilante-justice/>.

94. Editors of Encyclopedia Britannica, *Black Codes*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/black-code> (last visited Mar. 1, 2020).

95. Hadden, *supra* note 67, at 203-04.

96. History.com Editors, *supra* note 89.

97. Nittle, *supra* note 92.

98. Editors of Encyclopedia, *supra* note 94.

99. Nittle, *supra* note 92.

100. *Id.*

tem's focus on restricting the exercise of fundamental rights, which are the essence of civil freedom.¹⁰¹

The following year, Congress passed the Nation's first civil rights bill, the Civil Rights Act of 1866.¹⁰² The bill stated, "all persons born in the United States," except American Indians, were "hereby declared to be citizens of the United States."¹⁰³ Furthermore, it granted all citizens the "full and equal benefit of all laws and proceedings for the security of person and property."¹⁰⁴ Senator Lyman Trumbull, who sponsored the bill, argued that Congress had the power to enact the Civil Rights Act of 1866 in order to eliminate a discriminatory "badge of servitude" prohibited by the Thirteenth Amendment, which the Supreme Court later accepted in *John v. Alfred*.¹⁰⁵ More specifically, in *United States v. Rhodes*, the Court evaluated the Civil Rights Act of 1866 under Congress's enforcement power and upheld the act.¹⁰⁶ Black Codes and their relationship to the Thirteenth Amendment provides a historical context for racial profiling and police brutality.¹⁰⁷ This historical context leads us to how Broken Windows policing is a badge and incident of slavery.

III. BROKEN WINDOWS POLICING THE MODERN INCIDENT AND BADGE OF SLAVERY

Broken Windows policing has implemented the very same techniques as the enforcement of slave codes and black codes used in the past. "Policing's origins were rooted in the slave economy and the radically racialized social order that invented "whiteness" as the ultimate boundary."¹⁰⁸ Two of the more disturbing historical characteristics of America's policing is the institution of slavery and the control of mi-

101. *Alfred H. Mayer Co.*, 392 U.S. at 441- 43.

102. History.com Editors, *13th Amendment*, HISTORY (Original: Nov. 9, 2009; Updated: May. 16, 2019), <https://www.history.com/topics/black-history/thirteenth-amendment>.

103. *The Civil Rights Bill of 1866*, HISTORY, ART & ARCHIVES UNITED STATES HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Bill-of-1866/> (last visited Mar. 1, 2020).

104. *Id.*

105. *Alfred H. Mayer Co.*, 392 U.S. at 440.

106. McAward, *supra* note 41, at 578 (citing *United States v. Rhodes* 27 F. Cas. 785 (C.C.D. Ky. 1866)).

107. Nittle, *supra* note 92.

108. Ben Fountain, *Slavery and the Origins of the American Police State*, MEDIUM (Sep. 17, 2018), <https://medium.com/s/story/slavery-and-the-origins-of-the-american-police-state-ec318f5ff05b>.

norities.¹⁰⁹ Slave patrols, which later became modern-day police departments, were “designed to control the behaviors of minorities.”¹¹⁰ Slave codes and black codes implemented control over enslaved Africans and freed slaves—likewise, Broken Windows policing implements control in today’s society over the descendants of enslaved Africans, Black people.

The very same tactics used during the time of slave patrols, are not merely being implemented in policing but are specifically being used in Broken Windows policing. Broken Windows policing, mirroring slave patrols and the enforcement of black codes, is maintained by a series of surveillance, intimidation, and brute force with the purpose to control Black people. The practices implemented under Broken Windows policing lead to the stopping, frisking, and arresting of more people in high-crime areas based on mere suspicion i.e., being Black. The result is a spike in police unfairly targeting minorities, specifically Black people.¹¹¹ The death of Michael Brown was a result of Broken Windows policing, where the minor infraction of walking in the street, for which he was stopped and harassed, led him to be slain at the hands of police.¹¹²

Cornell William Brooks, National President of the NAACP, says, “[w]e have a number of incidents where we have young people who are at worst suspected of underwhelming, minor offenses who meet an overwhelming, major. . .use of force that leads to tragedy.”¹¹³ The tragedies that result mirror what was authorized under the slave codes. Broken Windows policing, like slave codes and black codes, allows the patroller to harass Black people for minute conduct. Similar to slave codes, Broken Windows policing allows Black people to be killed at the hands of the ones asserting control over them, while the persons asserting control face no consequences for their actions. During slavery, the one asserting control and enforcing the slave codes could beat and even kill an enslaved person if they resisted because it was illegal for Black people to defend themselves. Similarly, under

109. Victor E. Kappeler, *A Brief History of Slavery and the Origins of American Policing*, ECU POLICE STUDIES ONLINE (Jan. 7, 2017), <https://plsonline.eku.edu/insidelook/brief-history-slavery-and-origins-american-policing>.

110. *Id.*

111. Eric Klinenberg, *The Other Side of “Broken Windows,”* THE NEW YORKER (Aug. 23, 2018), <https://www.newyorker.com/books/page-turner/the-other-side-of-broken-windows>.

112. Tierney Sneed, *From Ferguson to Staten Island Questions About Broken Window Policing*, U.S. NEWS (Aug. 14, 2014, 6:30 PM), <https://www.usnews.com/news/articles/2014/08/14/michael-brown-eric-garner-deaths-add-scrutiny-to-broken-windows-policing>.

113. *Id.*

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Broken Windows policing, which is primarily implemented in Black neighborhoods, some laws make it illegal to resist arrest, even if the arrest is unlawful.¹¹⁴ Generally, police officers are allowed to use as much force as they feel is necessary, rather than using absolutely necessary force. Moreover, mirroring the times of slavery, the basis of the surveillance in Broken Windows policing is focused on a specific group of people who are then criminalized for minute conduct. These systems all display not only a social reality but also a psychological reality that is maintained by terror, surveillance, and the letter of the law.

The basis of the control during slavery was to create order, which is the basis of Broken Windows policing. During slavery, white people thought Black people were savages and once they were free, they would create havoc. Fredrick Douglas narrated this point perfectly by saying, “He is the trammled victim of a prejudice, well calculated to repress his manly ambition, paralyze his energies, and make him a dejected and spiritless man, if not a sullen enemy to society, fit to prey upon life and property and to make trouble generally.”¹¹⁵

This psychological reality is evidenced in the Black community itself as well as those outside the community. An example of outsiders being affected is when Trayvon Martin, a teenager, was walking down the street, minding his own business, and was killed by a “self-anointed night-riding, so-called neighborhood watchman.”¹¹⁶ Under Florida’s “stand your ground” law, Trayvon’s terrorizer was allowed to be set free without consequences, similar to the slave codes and black codes that allowed night watchers to terrorize Black people without consequences. Policies like Broken Windows policing implements this negative view on the Black community and give fallacious justifications that allow the terrorizers to attack and kill Black people, like in the tragedy of Trayvon Martin.

Broken Windows policing has the effect of criminalizing being Black and attempting to make the Black race inferior, which mirrors the perception of Black people during slavery. The science of implicit social cognition reveals that people of all races have implicit biases in

114. *Use of Force in Resisting Arrest*, JUSTIA, <https://www.justia.com/criminal/procedure/arrests-and-arrest-warrants/use-of-force-in-resisting-arrest/> (last visited Apr. 19, 2020).

115. *Alfred H. Mayer Co.*, 392 U.S. at 447 (Douglas, J., concurring opinion) (quoting Frederick Douglass, *The Color Line*, in *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: RECONSTRUCTION AND AFTER* 343 - 44 (International Publisher 1955)).

116. Fountain, *supra* note 108.

the form of stereotypes and prejudices that can negatively and unconsciously affect behavior towards Black people.¹¹⁷ These negative implicit biases consist of cultural stereotypes that Black people are violent, hostile, aggressive, and dangerous.¹¹⁸ Implicit biases can lead to a lower threshold for finding identical behavior suspicious when engaged in by Black people rather than by white people. Conscious racial profiling (a basis of Broken Windows policing) likely multiplies the effects.¹¹⁹

As was done with black codes, even the most innocent conduct by Black people are seen as criminal. People call the police on Black people for performing basic activities like barbecuing, moving into their apartment, cashing their paychecks, and other innocent conduct.¹²⁰ These actions seem irrational, but this is the exact conduct that Broken Windows policing has worked to justify. Implicit biases make normal conduct done by Black people appear suspicious, leading to the fallacious justification for Black people needing to be controlled. Just as black codes were badges and incidents of slavery because they restricted the exercise of fundamental rights, Broken Windows policing creates similar effects. As a result, Broken Windows Policing should be deemed by Congress as a badge and incident of slavery.

Black people, being a victim of this prejudice, are affected not only physically but mentally as well. The Supreme Court has already recognized that inferiority as to social status in communities has a permanent negative effect on the hearts and minds of Black children.¹²¹ Broken Windows policing, like slavery, instills fear in Black people through the assertion of control. This type of policing causes individuals to experience fear, anxiety, humiliation, anger, resentment, and cynicism because they are unjustifiably being treated as criminal suspects.¹²²

In *Racializing Justice, Disenfranchising Lives: The Racism Criminal Justice and Law Reader*, different youth were interviewed in neighborhoods with a prevalent police presence. The youth in these

117. Richardson, *supra* note 24, at 2039.

118. *Id.*

119. *Id.*

120. Brett Molina, *Cashing Checks, Napping, More Activities leading to Police Calls on Black People in 2018*, USA TODAY (Dec. 20, 2018, 2:29 PM), <https://www.usatoday.com/story/news/nation/2018/12/20/black-people-doing-normal-things-who-had-police-called-them-2018/2374750002/>.

121. *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

122. William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 23 (2004).

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communities felt that on an everyday basis, their lives were being defined and controlled through discourses and practices of crime and policies related to crime even when they were not committing crimes.¹²³ Even if they had not committed crimes, they were seen as delinquent, or thugs by many in the community who already saw them as suspects. As a result, many of these youth developed identities that they often wished they could renounce. They began to resist the community, and as they resisted, they began to embrace their own criminalization.¹²⁴

It is undeniable that over policing in Black communities and criminalizing being Black is a relic of slavery. The underlying justification for Broken Windows policing is the same justification for slave codes and black codes. Broken Windows policing mimics the laws of slavery and has significant potential to lead to the de facto enslavement and legal subjugation of Black people. Broken Windows policing gives officers an ample amount of control, permitting occupants of specific neighborhoods, mainly Black neighborhoods, to be treated as second class citizens.

The Supreme Court has struck down ordinances that were implemented under Broken Windows policing.¹²⁵ For example, at issue in *City of Chicago v. Morales* was an anti-loitering ordinance under which a police officer who observed a person whom he reasonably believed to be a gang member loitering in a public place with one or more persons, could order them to disperse and if they didn't promptly disperse they are deemed to have violated the ordinance and could be arrested.¹²⁶ Under this ordinance, Chicago police issued over 89,000 dispersal orders and arrested more than 42,000 people violating the ordinance.¹²⁷ The Supreme Court struck down the ordinance for its' vagueness and not giving sufficient notice as to what the criminal conduct is.¹²⁸ The Court also noted that although there is no criminal conduct unless a person disobeys the dispersal order, if the loitering is in fact harmless and innocent, the dispersal order itself is

123. RACIALIZING JUSTICE, DISENFRANCHISING LIVES: THE RACISM, CRIMINAL JUSTICE, AND LAW READER 21 (Manning Marable et al eds., 2007).

124. *Id.*

125. *See, e.g.,* *Shuttlesworth v. Birmingham*, 382 U.S. 87, 86 S. Ct. 211 (1965) and *City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849 (1999).

126. Sneed, *supra* note 112; *see generally Morales*, 527 U.S. 41(1999).

127. *Morales*, 527 U.S. at 49.

128. *Id.* at 56.

an unjustified impairment of liberty.¹²⁹ *City of Chicago* shows that even in the realization that crime is prevalent in a neighborhood¹³⁰ there must be restrictions on such state implementation.

Supporters of Broken Windows policing argue that this policy reduces disorderly behavior, which lessens the daily opportunity for crime.¹³¹ Some say that this policing technique gives a deterrent effect.¹³² Supporters assert that the deterrent effect is necessary to drive out bullies and shooters off the street and lower the risk of being killed or terrorized while allowing for a law-abiding community to reemerge into a prosperous neighborhood. However, Eric Gardner was no bully nor killer.¹³³ If the real issue is how to lower crime and improve the quality of specific neighborhoods, there are better ways than doing so through tactics that are relics of slavery. “It is impermissible to subject all members of a racially defined group to heightened police enforcement because some members of that group are criminals.”¹³⁴ The solution should be done in a way that does not promote the stereotype that Black Americans are dangerous criminals. The answer should encourage community and unity in a way that strengthens these neighborhoods.

IV. SOLUTION

A. Prohibit Broken Windows Policing

What I ask for the Negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us. Gen. Banks was distressed with solicitude as to what he should do with the Negro. Everybody has asked the question, and they learned to ask it early of the abolitionists, “What shall we do with the Negro?” I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are wormeaten at the core, if they are early ripe and disposed to fall, let them fall! I am not for tying or fastening them on the tree in any way, except by nature’s plan, and if they will not stay there, let them fall. And if the Negro cannot stand on his own legs, let him fall also.

129. *Id.* at 58.

130. *Id.* at 46.

131. Kelling & Wilson, *supra* note 12.

132. *Id.*

133. Sneed, *supra* note 112.

134. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 561 (S.D.N.Y. 2013).

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All I ask is, give him a chance to stand on his own legs! Let him alone! If you see him on his way to school, let him alone, don't disturb him! If you see him going to the dinner-table at a hotel, let him go! If you see him going to the ballot-box, let him alone, don't disturb him! If you see him going into a work-shop, just let him alone,—your interference is doing him a positive injury. Gen. Banks' "preparation" is of a piece with this attempt to prop up the Negro. Let him fall if he cannot stand alone! If the Negro cannot live by the line of eternal justice, so beautifully pictured to you in the illustration used by Mr. Phillips, the fault will not be yours, it will be his who made the Negro, and established that line for his government. Let him live or die by that. If you will only untie his hands, and give him a chance, I think he will live. He will work as readily for himself as the white man. A great many delusions have been swept away by this war. One was, that the Negro would not work; he has proved his ability to work. Another was, that the Negro would not fight; that he possessed only the most sheepish attributes of humanity; was a perfect lamb, or an "Uncle Tom;" disposed to take off his coat whenever required, fold his hands, and be whipped by anybody who wanted to whip him. But the war has proved that there is a great deal of human nature in the Negro, and that "he will fight," as Mr. Quincy, our President, said, in earlier days than these, "when there is a reasonable probability of his whipping anybody."¹³⁵

Fredrick Douglass's speech "*What the Black Man Wants 1865*" has a powerful meaning even in today's society. If Black people had been left alone, they would have thrived. They do not need to be controlled in order to succeed or in order to be made humane. As aforementioned, assumptions from the beginning of slavery have been that Black people are savages. Yet these assumptions have no sound foundation. It is a natural fight or flight response that anyone who is forcibly controlled would try to rebel. Therefore, Black people trying to rebel against slavery does not make them deviant; it is just human nature to be free from control. However, it is sad to say that Fredrick Douglass's request to untie the Black man's hands and give him a chance has never come to pass, as evidenced by the succession of oppression still existing for many Black people. The only real way to overcome this is to break the chain. Although this country has grown

135. Fredrick Douglass, *What the Black Man Wants*, TEACHING AMERICAN HISTORY, <https://teachingamericanhistory.org/library/document/what-the-black-man-wants/> (last visited Mar. 1, 2020).

in some ways, it has much more growing to do. The fact that some African Americans have experienced great success in recent years does not mean this system of oppression no longer exists. This system of oppression has never really governed all Black people. There have always been “free Blacks” and Black success stories, even during slavery.¹³⁶

The approach of policing is to control the residents in the broken windows neighborhoods; however, as a former police officer concedes, “[i]n neighborhoods, you’re not supposed to be controlling people. You’re supposed to be working with them. You’re supposed to be serving them. And that attitude is what’s missing.”¹³⁷ People should not feel fear when they see police coming their way. In a time when crime control seems to calm the anxiety of the public, a punitive carceral system of managing the poor has developed.¹³⁸ This system is inexpensive and easy to implement, and at first glance, it is successful. It is a system of all-encompassing criminalization that manages youth as criminal risks to calm adult anxieties in the community.¹³⁹

Some states have already begun to address Broken Windows policing head-on. In California, there are laws in place that prohibit a police officer from engaging in racial profiling and requires the training to prescribe patterns, practices, and protocols that prevent racial profiling. One specific law requires the Attorney General to establish the Racial and Identity Profiling Advisory Board (RIPA) to eliminate racial and identity profiling and improve diversity and racial and identity sensitivity in law enforcement.¹⁴⁰ Rhode Island has passed the Comprehensive Community Police Relationship Act of 2015, which prohibits being stopped or detained beyond the time needed to address the violation that the officer has reasonable suspicion or probable cause of criminal activity. But, what I argue is that police should never practice zero tolerance policing because currently, this type of policing is only implemented in specific neighborhoods. The solution is not to enforce zero tolerance policing in every neighborhood the

136. Alexander, *supra* note 3.

137. Hing, *supra* note 22, at 577 (citing Matt Taibbi, *Why Baltimore Blew Up*, ROLLING STONE (May 26, 2015, 1:15 PM), <http://www.rollingstone.com/politics/news/why-baltimore-blew-up-20150526>).

138. Manning Marable et al eds., *supra* note 123, at 29.

139. *Id.*

140. Racial and Identity Profiling Act of 2015, Assem. Bill 953, 2015-2016 Reg. Sess. (Cal. 2015).

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argument; instead, it should be eradicated entirely because it has caused more harm than good.

B. Better Ways to Address Crime

Police have killed at least 287 people who were involved in what we have recognized as broken window offenses such as sleeping in parks, drug possession, looking “suspicious,” or having a mental health crisis.¹⁴¹ As “Campaign Zero,” a campaign to end police violence in America, recognizes such incidents result from minor infractions or related issues such as homelessness, drug addiction, and mental health issues.¹⁴² These issues should be handled in substantially different ways rather than by force, control, and oppression.

Campaign Zero gives three main ways to get rid of police violence and ten policy solutions. The three categories are limiting police intervention, improving community interactions, and ensuring accountability. The ten policy solutions are as follows: (1) end broken windows policing; (2) community oversight; (3) limit use of force; (4) independently investigate & prosecute; (5) community representation; (6) body cams/film the police; (7) training; (8) end for profit policing; (9) demilitarization; and (10) fair police union contracts.¹⁴³

Campaign Zero recommends alternative approaches to Broken Windows policing that focus on mental health crises. They recommend sending mental health professionals, social workers and/or crisis counselors with police officers when they receive calls involving mental health issues.¹⁴⁴ Money and resources should be used on addressing homelessness, for example, taking the money spent on over policing and providing more shelters for people who are homeless. Putting more money into the community as a whole would be most beneficial. Another solution is assuring youth programs are in place to put children on a path to success, such as more organizations and mentorships like The Boys and Girls Club.

Reducing crime can be done by improving places rather than by punishing people. In an article by Eric Klinenberg, called *The Other Side of “Broken Windows*, Klinenberg discusses how this can be done.

141. *End Broken Windows Policing*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/brokenwindows> (last visited Mar. 1, 2020).

142. *Id.*

143. CAMPAIGN ZERO, <https://www.joincampaignzero.org/#vision> (last visited Mar. 1, 2020).

144. Racial and Identity Profiling Act of 2015, Assem. Bill 953, 2015-2016 Reg. Sess. (Cal. 2015).

The idea is that “place-based interventions are far more likely to succeed than people-based ones.”¹⁴⁵ It is better to fix a wound and make sure that it heals properly rather than slapping a bandage on to hide the wound which is what Broken Windows Policing is doing. Klinenberg discusses a research experiment done by John MacDonald, a University of Pennsylvania criminologist, and Charles Branas, the former Chair of Epidemiology at Columbia University. The experiment explored how physical factors of a neighborhood related to gun violence. Studies had already been done that showed abandoned buildings were in direct correlation with crime rates,¹⁴⁶ but the research done by Branas and MacDonald went deeper by collecting massive amounts of data and inviting more scientists to help with the experiment.

The findings from their first study showed a “thirty-nine percent reduction in gun violence in and around remediated abandoned buildings and a smaller-but still meaningful-five-per-cent reduction in gun violence in and around remediated lots.”¹⁴⁷ The decline was material and lasted one to nearly four years, and there was no evidence that violence had just shifted to nearby places.¹⁴⁸ Their experiment suggests that place-based interventions are far more likely to succeed than people-based ones. Therefore, one way to tackle crime is by improving blight within the community, not through gentrification, but by giving the resources to the people in the community to fix the community. Ways to improve blight include fixing the broken windows of buildings, planting community gardens, etc. The underline solution is actually to fix the actual broken windows. As Dr. Martin Luther King Jr. once said, “[d]arkness cannot drive out darkness; only light can do that.” Therefore, the government should work to drive out crime by implementing positive changes within the community that address the core issues to many of these problems. I suggest putting Dr. King’s words into practice.

145. Klinenberg, *supra* note 111.

146. “In 1993, the criminologist William Spelman published a paper showing that, in Austin, “crime rates on blocks with open abandoned buildings were twice as high as rates on matched blocks without open buildings.” In 2005, the sociologist Lance Hannon showed that, in New York City’s high-poverty areas, the number of abandoned houses in a given census tract correlated with homicide levels.” Klinenberg, *supra* note 111.

147. Klinenberg, *supra* note 111.

148. *Id.*

V. CONCLUSION

The reconstruction amendments were put in place to establish full equality and freedom for previously enslaved Black people. Yet much oppression has continued to work in direct conflict of these amendments. Different institutions are maintained to reinforce this system of oppression against Black people. The roots began during slavery and continue through modern-day policing techniques. Racial profiling and vague ordinances that allow such systems to continue are nearly impossible to overcome with the current jurisprudence. The Fourteenth Amendment standard is almost impossible to overcome, and it is also only a way to redress a constitutional injury rather than preventing it. To be proactive and prevent injuries from occurring, Congress has full power to address modern-day policing techniques.

Embedded in Broken Windows policing are the racial prejudices this country has promoted since the beginning of slavery. The basis is a theory that is superficial and works under the façade of addressing crime. Police use excessive force for small infractions, all in the name of Broken Windows policing. This widespread action aimed at the descendants of enslaved Africans mimics slave codes that were in place during slavery. Even the most innocent conduct by Black people are seen as criminal simply because they are Black, just like slave codes that only criminalized activities done by Black people. Crime reform should not transpire through the same tactics that were implemented during slavery. Policing origins are rooted in slavery, and those roots continue in many Black communities.

Police use this policing method to ensure oppression and control over a group of people who were once enslaved by this country's laws. Stereotypes that Black people are violent criminals continue to grow as policing works to reinforce such stereotypes. If the real issue is addressing crime, there are better ways to tackle that issue than the subjugation of an entire group of people. The solution is to attend to the core of the problem by using resources to uplift the community rather than oppressing it. Many lives have been severely affected due to this policing method, and it is time for a change. Thus, Broken Windows policing must be prohibited through an act of Congress under their Thirteenth Amendment power because Broken Windows policing is an incident and badge of slavery.

