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In Pursuit of "Good Trouble": The Sisyphean Quest to Lower the *Mens Rea* Bar for Federal Criminal Civil Rights Prosecutions

Adam Harris Kurland*

Do not get lost in a sea of despair. Be hopeful, be optimistic. Our struggle is not the struggle of the day, a week, a month, or a year, it is the struggle of a lifetime. Never, ever be afraid to make some noise and get in good trouble, necessary trouble.

John Lewis+

It's been a long, long time coming
But I know change gon' come,
Oh yes it will

Sam Cooke++

Trouble ahead, trouble behind
And you know that notion just crossed my mind

Jerry Garcia and the Grateful Dead+++

* Professor Emeritus, Howard University School of Law; former Assistant United States Attorney, Eastern District of California. I thank my Howard University School of Law research assistants, Darryl Williams, J.D. 2022, Cenadra Gopala-Foster, J.D. 2024, and Morigan Tuggle, J.D. 2024, for their invaluable research assistance. I also thank Howard University School of Law for providing generous research funding.

+ Josh Bote, '*Get in good trouble, necessary trouble': Rep. John Lewis in his own words*, USA Today (Jul. 18, 2020), https://www.usatoday.com/story/news/politics/2020/07/18/rep-john-lewis-most-memorable-quotes-get-good-trouble/5464148002/ (quoting @repjohnlewis, X (Jun. 27, 2018, 11:15 AM), https://x.com/repjohnlewis/status/1011991303599607808?lang=en; John Lewis: Good Trouble (CNN Films 2020)).

++ Sam Cooke, A Change is Gonna Come (RCA Victor 1964). This lyrical refrain is reproduced in Michael Eric Dyson, Long Time Coming: Reckoning With Race in America (St. Martin's Press 2020).

+++ Grateful Dead, Casey Jones (Pacific High 1970).

Introduction

Civil rights advocates have long asserted that federal civil rights prosecutions against law enforcement personnel undertaken pursuant to Title 18, Section 242 of the United States Code ("§ 242")[1] require clearing an unnecessarily high mens rea hurdle, or "high bar," in order to obtain a conviction. In the quest for broader accountability in police misconduct cases, proponents of police reform have long sought various ways to lower the requisite mens rea in order to increase the number of prosecutions authorized for federal prosecution and to increase the likelihood of obtaining a conviction.

Proposals to alter § 242's mens rea requirement are regularly included in various police accountability reform legislation addressing numerous topics, many of which are perceived as controversial and blatantly partisan. The proposed George Floyd Justice in Policing Act ("Justice in Policing Act"), introduced in the wake of Floyd's 2020 murder in Minneapolis, Minnesota, represents one of the latest such legislative efforts.[2]

This article focuses on the sole issue that, in light of the futility of legislative reform efforts, the United States Department of Justice ("DOJ") should advocate for a uniform nationwide interpretation of § 242's willfulness requirement that unequivocally includes a "recklessness" standard as set forth in Justice Douglas's plurality opinion in *Screws v. United States*.[3] This approach represents a modest, constructive, achievable advancement for effective federal criminal civil rights enforcement.

Section 242's perplexing "willfulness" mens rea is often prone to mischaracterization and misunderstanding.[4] What may first appear

1. 18 U.S.C. § 242 provides in relevant part: "Whoever, under color of law or any statute . . . willfully subjects any person in any State, Territory, Commonwealth, Possession, or District . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . [shall be punished according to law]."

2. H.R. 7120, 116th Cong. (2020) (passed the House by vote of 236-181; 3 Republican "Yea" votes); S. 3912, 116th Cong. (2020) (the Senate took no action on the house bill during the 116th Congress).

3. Screws v. United States, 325 U.S. 91, 104–06 (1945).

4. Numerous articles address § 242's mens rea requirement. *See, e.g.*, Taryn A. Merkl, *Protecting Against Police Brutality and Official Misconduct: A New Federal Criminal Civil Rights Framework*, Brennan Ctr. for Just. Pol'y Rept., Apr. 29, 2021; Mia Teitelbaum, *Willful Intent: U.S. v. Screws and the Legal Strategies of the Department of Justice and NAACP*, 20.3 U. Pa. J.L. & Soc. Change 185 (2017); Michael Pastor, *A Tragedy or a Crime?: Amadou Diallo, Specific Intent, and the Federal Prosecution of Civil Rights Violations*, 6 N.Y. J. Legis. & Pub. Pol'y 171 (2002); Steven Puro, *Federal Responsibility for Police Accountability Through Criminal Prosecution*, 22 St. L. U. Pub. L. Rev. 95 (2003); James Turner, *Police Accountability in the Federal*

as a routine effort to amend a statutory mens rea element has proven Sisyphean.[5] Precipitated by several highly publicized lethal law enforcement-citizen encounters during the summer of 2020, the nation seemed to have finally arrived at its long overdue racial reckoning.[6] In 2020, House Democrats, in pursuit of some "good trouble," promptly passed the Justice in Policing Act.[7] After the Senate failed to consider the bill during that legislative session,[8] the House passed a virtually identical bill in the early days of the 117th Congress with an updated 2021 designation. However, congressional legislative reform efforts predictably stalled, again a casualty of partisan intransigence.[9]

Upon close examination, these legislative efforts were, in any event, inherently flawed. Over the years, Congress and other organizations have considered several proposals to modify § 242 to make it a more effective federal law enforcement tool. Some have focused on a total reworking of the statute to specify precisely the type of law enforcement misconduct proscribed under the statute. Other proposals, such as the Justice and Policing Act, sought to amend the mens rea requirement in 18 USC § 242 by replacing "willfully" with "knowingly or recklessly." The legislative history of this most recent quest suggests that many of

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System, 30 McGeorge L. Rev. 991 (1999); Robert Spurrier, McAlestar *and After: Section 242, Title 18 of the United States Code and the Protection of Civil Rights*, 11 Tulsa L.J. 347 (1976).

5. "Sisyphean" describes a task of endless futility and derives from the character Sisyphus in Greek mythology, who was sentenced for his wrongdoing to push a boulder up a hill and watch it roll back down, again and again, forever. *Sisyphean*, Vocabulary.com, https://www.vocabulary.com/dictionary/Sisyphean (last visited Sep. 4, 2024).

6. The myriad far-reaching dimensions of the comprehensive racial reckoning include significant, albeit largely symbolic actions such as the removal of Confederate statues, the renaming of military bases and sports franchises to remove Confederate and racist iconography, Major League Baseball's decision to confer major league status on the Negro Leagues, as well as more substantive actions such as enactment of federal anti-lynching legislation, recognition of racism as a public health and national security issue, and congressional consideration of a variety of voting rights and racial justice legislative reform proposals. *See generally* Michelle L. Norris, *Don't call it a racial reckoning. The race toward equality has barely begun,* Wash. Post (Dec. 18, 2020), https://www.washingtonpost.com/opinions/dont-call-it-a-racial-reckoning-the-race-toward-equality-has-barely-begun/2020/12/18/90b65eba-414e-11eb-8bc0-ae155bee4aff_story.html (asserting purported racial reckoning in 2020 is a "race toward equality [that] has barely begun"). For a poignant account of the racial reckoning delivered in a series of highly personal essay letters addressed to prominent victims of racial violence, including Emmett Till and Breonna Taylor, see Dyson, *supra* note ‡ at 11–49, 99–137.

7. H.R. 7120, 116th Cong. (2020) (passed House by vote of 236–181; 3 Republican "Yea" votes).

8. S. 3912, 116th Cong. (2020) (the Senate took no action on the house bill during the 116th Congress).

9. H.R. 1280, 117th Cong. (1st Sess. 2021); Cong. Rec. H1067 (comments of Rep. Carter) (considered same partisan bill in last Congress). In May 2024, Democratic House Member Sheila Jackson Lee again reintroduced the Justice in Policing Act, with virtually no chance of passage in the Republican-controlled Congress. Chayanne M. Daniels, *Sheila Jackson Lee reintroduces George Floyd Justice in Policing Act*, The Hill (May 23, 2024, 3:47 PM), thehill.com/himenews/house/4682700-sheila-jackson-lee-reintroduces-george-floyd-justice-in-policing-act.

the proponents did not fully appreciate how a recklessness standard would actually operate in this *sui generis* context.[10]

The article examines § 242 and concludes that the most promising avenue to achieve some constructive broadening of the statute is for DOJ to pursue a "test case" litigation strategy seeking a uniform nationwide interpretation of the existing statutory "willfulness" element that would expressly include a form of "recklessness." It would further clarify that "recklessness" means acting in *subjective* conscious disregard of a known risk, whether the subject actions constitute excessive force or any other constitutional violation. These principles derive from the *Screws* plurality opinion itself, which the Court, in subsequent decisions, has endorsed as akin to a majority opinion. Consequently, the *Screws* "recklessness" standard currently represents the settled law in several federal circuit courts of appeals.

DOJ bears some responsibility for further perpetuating "the bar is too high" myth and the resulting circuit split. It has done so by first considering but then ultimately abandoning litigation efforts advocating for a uniform nationwide recklessness standard expressed in *Screws*. Over the next several decades, DOJ further compounded the problem by promulgating policies embodying unduly narrow interpretations of § 242's statutory requirements. Moreover, DOJ consistently larded press releases with solemn platitudes intoning that § 242 "requires the prosecution prove 'specific intent,' the highest mens rea known to the criminal law," often to justify a declination decision involving lethal excessive use of force by law enforcement.[11] Uniform nationwide recognition and application of a § 242 "recklessness" standard through judicial interpretation represents a modest but important step towards

10. As further discussed in this article, the Democratic proponents of the bill, most notably former congresswoman and now current Los Angeles Mayor Karen Bass, articulated the recklessness standard as akin to how the term would apply in a standard reckless homicide statute, which is not quite the same as how it would have to be constitutionally interpreted in § 242. 167 Cong. Rec. H1055 (daily ed. March 3, 2021). Some Republicans, for their part, appeared to merely restate partisan talking points, and conflated a modest recalibration of the mens rea with abrogating sovereign immunity, which, strictly speaking, is not at issue in a federal criminal civil rights trial. *See id.* (comments on Rep. Biggs complaining proposed bill lowers mens rea and removes qualified immunity, which "will result in an ineffectual police force and leave our communities vulnerable to crime"); *id*. at H1067 (comments of Rep. Clyde noting that "bill would lower legal threshold to criminally prosecute a police officer … and at best, lead to a torrent of frivolous cases against officers").

11. *See, e.g.*, Press Release, U.S. Dep't of Just., Justice Department Announces Closing of Investigation into 2014 Officer Involved Shooting in Cleveland, Ohio at 1–2, 6 (Dec. 29, 2020), https://www.justice.gov/opa/pr/justice-department-announces-closing-investigation-2014-officer-involved-shooting-cleveland (describing the high "specific intent" standard and concluding evidence insufficient to establish that officer willfully violated Rice's constitutional rights) [hereinafter Tamir Rice Press Release].

achieving appropriate broader accountability in police misconduct prosecutions.

I. The George Floyd Justice in Policing Act: A Case Study in Misunderstanding of What Constitutes Acting in Reckless Disregard of A Constitutional Right

A. The Proposed Justice in Policing Act

Section 101 of the Justice in Policing Act sought to amend the mens rea requirement of 18 U.S.C. § 242, the principal federal criminal statute used to prosecute police brutality. Currently, § 242 proscribes the "willful" depravation of a constitutional right when such conduct is undertaken "under color of law." This supposed exacting "willfulness" requirement is commonly referred to as the "high bar" and has often been viewed as the main culprit why federal civil rights prosecutions are supposedly so difficult to win.[12]

As discussed further below, the willfulness burden, while considerable, is not as exacting as many contend.[13] Nonetheless, in several quarters, the so-called high bar is often accepted as gospel. The Justice in Policing Act House Judiciary Committee Report asserted that the existing mens rea created an almost insurmountable obstacle to conviction and that the proposed amendment was designed to make it easier to obtain convictions:

> Section 242 is a specific intent crime. To sustain a conviction, the Justice Department must prove beyond a reasonable doubt that the defendant . . . acted willfully. To establish that [element], the government must demonstrate that the defendant intended to commit an act that results in a constitutional depravation.
>
> In the excessive force context . . . the government must prove that the defendant intentionally applied an amount of force that he or she *knew* was objectively unreasonable under the circumstances.

12. For a discussion of the genesis of the "high bar" to prosecute federal criminal civil rights cases, *see* Adam Harris Kurland, *The Enduring Virtues of Deferential Federalism: The Federal Government's Proper Role in Prosecuting Law Enforcement Officers for Civil Rights Offenses*, 70 Hastings L.J. 771, 776–78 (2019); *see also* discussion *infra* Part II; Christian Farias, *Eric Holder Wants to Lower the Bar for Civil Rights Prosecutions. That's Trickier Than it Sounds,* New Republic (Feb. 27, 2015), https://newrepublic.com/article/121177/eric-holder—we-might-lower-bar-civil-rights. Sometimes, other exacting DOJ case selection policies create an additional "bar" that needs to be cleared before a federal civil rights prosecution can even be authorized. *See, e.g.*, Justice Manual 9-2.031 (1) ¶1 (updated Jan. 2020) (suggesting coordination with state prosecutors); *id*. ¶4 (preference to find most appropriate single forum).

13. *See infra* notes 58–63 and accompanying text.

> This required showing of willful intent on the defendant's part effectively makes prosecution of police officers who commit civil rights violations through their use of excessive force very difficult, if not impossible.[14]

The theme was similarly advanced at Attorney General Merrick Garland's 2021 confirmation hearing. There, Democratic Senator Richard Blumenthal concluded his friendly questioning by querying:

> I really welcome your very sincere and passionate commitment to ending racism and racial injustice. We are in the midst of a racial justice movement right now. One of the areas that most concerns me is holding accountable public officials when they violate individual rights and liberties.
>
> As you know, section 242 makes it a federal crime to willfully deprive a person of their constitutional rights while acting under color of law, but prosecutors have to show that the public official had specific intent to deprive constitutional rights which, as you know, is a pretty high bar. I believe, as I have advocated we, in effect, lower the state of mind requirement in Section 242 from willfully to knowingly or with reckless disregard, because this stringent mens rea requirement makes Section 242 prosecutions rare or impossible.[15]

Garland, a former high ranking DOJ official before his elevation to the federal bench, and thus no stranger to the Department's abstruse, passive-aggressive approach to interpreting the requisite mens rea element of § 242, deftly responded to the "impossibility" claim, noting:

> Well, what I can agree is that — I'll consult with the career lawyers in the civil rights division, who are the ones who . . . would be bringing these cases and have brought them in the past.
>
> I actually just don't know. I know everyone says that they're very difficult to make. On the other hand, in the Clinton administration, we did successfully make quite a number of those cases. So I'd like to know from talking to them what kinds of changes might be necessary in the statute and what the consequences of changing the mens rea requirement would be.[16]

14. H.R. Rep. No. 116-434, at 49–50 (2020) (emphasis in original) (citations omitted).
15. *The Nomination of Hon. Merrick Brian Garland to be Attorney General of The United States: Confirmation Hearing on S. Hrg. 493 Before the S. Comm. on the Judiciary,* 117th Cong. 77 (2021) (questioning by Sen. Richard Blumenthal, Member, S. Comm. on the Judiciary).
16. *Id.*

The Department's passive-aggressive history concerning the interpretation of § 242's willfulness requirement is further discussed below. Apart from whether the requirement is nearly impossible to satisfy, amending a statutory mens rea element in a criminal statute is often a routine drafting exercise where one mens rea term is replaced with another in order to achieve the preferred legislative policy goals. In this regard, enactment of Section 101 of the Act — even as stand-alone legislation divorced from many other politically toxic provisions making passage of a more comprehensive criminal justice reform bill impossible — could have represented an achievable modest, yet constructive, reform.

However, as then-nominee Garland recognized, the consequences of any proposed statutory modification must be acknowledged and carefully addressed. Many of the concerns that underlie a potential legislative response are confusing and overblown, lending credence to the more practical and effective solution of DOJ pressing for a uniform nationwide interpretation of the current statute. This avenue builds on decades of judicial precedents supporting a "recklessness" interpretation that is broader than the prevailing narrow interpretation which arguably makes current prosecutions unduly onerous.

B. Screws Void for Vagueness Concerns and the Problems with Legislative Efforts to Amend the Mens Rea in Section 242

The Justice in Policing Act's House Judiciary Committee Report acknowledges that the proposed legislation "addresses the concern that the required showing of willfulness is too high a burden for prosecutors to meet by modifying the required showing of intent under Section 242,"[17] and thus"[m]akes it easier to prosecute offending officers by amending the federal criminal statute to prosecute police misconduct."[18] Any legislative effort designed to make convictions easier to achieve should be scrutinized carefully to ensure that fundamental justice principles are sustained.[19] Efforts to make it easier to convict law

17. H.R. Rep. No. 116-434, pt. 1, at 49–53 (2020) (asserting that establishing proof of willful intent in civil rights prosecutions is "very difficult, if not impossible").

18. *Fact Sheet: Justice In Policing Act Of 2020,* Cong. Black Caucus and House Judic. Comm. https://conduitstreet.mdcounties.org/wp-content/uploads/fact_sheet_justice_in_policing_act_of_2020.pdf (last visited Nov. 15, 2024).

19. *See generally* United States v. Weitzenhoff, 35 F.3d 1275, 1293 (9th Cir. 1994) (dissent from denial of rehearing en banc, arguing that panel majority's interpretation of statute as including a strict liability element "impairs a fundamental purpose of criminal justice," further noting "the one thing that makes their conduct felonious is something they do not know"); Kenneth W. Simmons, *When Is Strict Criminal Liability Just?*, 87 J. Crim. L. & Crim. 1075 (1997) (philosophically

enforcement officers for excessive force should be treated similarly, while still recognizing legitimate policy objectives designed to enhance effective federal criminal civil rights enforcement.

Section 242 is a criminal statute enacted pursuant to Congress's enforcement powers under Section Five of the Fourteenth Amendment.[20] As noted above, altering — or clarifying — the mens rea requirement of § 242 touches on constitutional issues unique to this statute, requiring analysis of both jurisdictional and related "void for vagueness" due process dimensions.[21]

"Recklessly," "[a mens rea term] not frequently used to define the state of mind requirement in federal criminal statutes,"[22] if included in any legislative mens rea modification of § 242, must be interpreted so as to satisfy the "void for vagueness" constitutional concerns inherent in § 242 as currently drafted. DOJ has noted that "[s]ection 242 does not criminalize any particular type of abusive conduct. Instead, it incorporates by reference rights defined by the Constitution, federal statutes, and interpretive case law."[23] The manner in which the 116th Congress addressed this issue in its prelude to passage of the Justice in Policing Act did not adequately address this issue.

Any attempt to "merely" amend the mens rea requirement in 18 U.S.C. § 242 is no simple task. Section 242's statutory structure is

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discussing retributive theory and criminal statutes possessing at least one strict liability element). Fundamental fairness concerns are also prevalent when Evidence rules are altered to make it easier to convict particular criminal defendants. *See, e.g.*, FED. R. EVID. 413(a) Pub. L. 103–322, Historical Notes (1994). The rule provides that evidence of a criminal defendant's prior sexual assaults may be admitted in a sexual assault case for "any matter to which it is relevant." The rule was drafted directly by Congress, and faced near unanimous Advisory Committee opposition because of a lack of empirical evidentiary support and fact, and that such a rule abrogated long-standing principles fundamental to American jurisprudence which "could diminish significantly the protections that have safeguarded the criminal accused] against undue prejudice." *Id.*, Historical Notes Part III (Discussion).

20. United States v. Lanier, 520 U.S. 259, 272 n.7 (1997). Section 242 also reaches the conduct of federal officials acting under color of federal law. *See Screws*, 325 U.S. at 97 n.2 (recognizing inherent constitutional "protective jurisdiction" principles to reach conduct of federal officers acting under color of law); *see also Deprivations Of Rights Under Color of Law*, justice.gov/crt/deprivation-rights-under-color-law (updated May 31, 2021) (under § 242 "'under color of law' [includes acts of] federal … officials acting within their lawful authority, but also [also includes] acts… done while the official is purporting to …act in the performance of his/her official duties").

21. *Screws*, 325 U.S. at 103–08 (interpreting willfulness requirement to require a species of specific intent, or at least extreme recklessness, in order to salvage fair notice due process concerns).

22. THIRD CIRCUIT COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS, Instruction 5.08 (Recklessly), ca3.uscourts.gov/sites/ca3/files/Crim. Jury Intro, Jan.18 2018.pdf, Comment at 26-27.

23. Even this modest helpful explanation does not capture the full extent of due process and other interpretive issues present where a statute is drafted in such an opaque manner. *Statutes Enforced by Criminal Section*: *18 U.S.C. § 242 Deprivation of Rights Under Color of Law*, CIV. RTS. DIV., U.S. DEP'T JUST., justice.gov/crt/statutes-enforced-criminal section (last updated Aug. 15, 2023).

imbued with inherent *sui generis* constitutional, jurisdictional, and due process "void for vagueness" concerns that are inexorably related to the actor's subjective awareness of the criminality of the conduct. Aside from the hyperbolic House assertion that a conviction is virtually impossible under current law, the Justice in Policing Act's sparse legislative history did not adequately address the relevant jurisdictional and constitutional consequences of this proposed change to this seminal federal criminal civil rights statute whose origins traces back to Reconstruction.[24]

As noted above, in 1945, in *Screws v. United States*, the Supreme Court addressed the interrelationship between the mens rea requirement in the predecessor statute to § 242 and constitutional due process and companion "void for vagueness" concerns.[25] The Court, in a plurality opinion, salvaged the constitutionality of the statute by interpreting the statutory willfulness requirement to require a species of "specific intent," but not in such an absolute sense that makes proving that element virtually impossible. The *Screws* interpretation of "willfulness" was deemed necessary in light of the inherently vague statutory parameters which did not delineate with specificity and clarity the universe of proscribed unlawful conduct.[26]

"Willfully" has long been a vexing common law term, capable of many definitions depending on the context, and definitely not inextricably synonymous with "specific intent" as that term is generally understood. When recklessness makes a rare appearance in a federal criminal statute, it is almost always a mens rea element in an offense where the specifically statutorily defined social harm or result is death or serious bodily injury.[27] In its usual form, recklessness is a sensible and relatively straightforward concept that often yields comprehensible jury instructions. However, the concept of "recklessly" depriving

24. Further compounding matters, section 101 of the Justice in Policing Act purported to add disjunctive "knowingly" or "recklessly" mens rea requirements. These terms are not synonymous, each laden with its' own latent ambiguity. This only created more interpretive difficulties that could adversely impact the intended effect of the new language. Because this article endorses the judicial interpretation route, it does not address the myriad interpretive and pleading problems that would arise if the "knowingly" mens rea were added to the statute.

25. *Screws*, 325 U.S. at 91.

26. For a further discussion, *see infra* notes 28–30 and accompanying text and notes 47–55 and accompanying text; *see also* Paul J. Watford, *Hallows Lecture:* Screws v. United States *and the Birth of Federal Civil Rights Enforcement*, 98 Marq. L. Rev. 465 (2014) (discussing plurality opinion sufficient to salvage statute for future use and development).

27. *See, e.g.*, 18 U.S.C. § 113(b)(4) (defining reckless assault by strangling); 18 U.S.C. § 40A (reckless interference with wildlife fire suppression); 18 U.S.C. § 1365(a) (acting "with reckless disregard than another person will be placed in danger of death or bodily injury" by tampering with a consumer product); 25 C.F.R. § 11.40 (1993) (recklessly endangering another person in Indian Country).

someone of their constitutional rights, where the universe of such rights and the correlative proscribed conduct are not specifically delineated in the criminal statute, taps into an unusual dimension extending beyond simply establishing that the conduct created a risk of death or serious bodily injury.[28]

In light of the open-ended nature of the conduct proscribed in the statute, the *Screws* Court observed:

> The constitutional requirement that a criminal statute be definite serves a high function. It gives a person acting with reference to the statute fair warning that his conduct is within its prohibition. This [statutory] requirement is met [for willful acts] when one who does [an] act with such specific intent is aware that what he does is precisely what the statute forbids . . . . He is under no necessity of guessing whether the statute applies to him *for he either knows or acts in reckless disregard of its prohibition of the deprivation of a defined constitutional or other federal right* . . . . He who defies a decision interpreting the Constitution knows precisely what he is doing. If sane, he hardly may be heard to say that he knew not what he did . . . . *When they act willfully in the sense we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite*.[29]

As the italicized language makes clear, the *Screws* plurality recognized an analogous recklessness standard inherent in the statutory "willfulness" requirement, which the plurality asserted satisfied extant due process concerns.[30]

Over seventy-five years later, *Screws* remains the Supreme Court's most significant pronouncement on the interpretation of § 242's "willfulness" requirement. Although a plurality opinion, subsequent Supreme Court decisions have cemented the opinion with the imprimatur of established precedent.[31] Many proponents of lowering

28. *See also infra* notes 53, 89–92 and accompanying text (discussing Farmer v. Brennan, 511 U.S. 825, 835–43 (1994), and subjective recklessness in 18 U.S.C. § 242 (dictum)).

29. *Screws*, 325 U.S. at 103–05 (emphasis added).

30. *Id.* at 101–07.

31. The *Screws* Court affirmation of a recklessness standard in what is now current § 242 cannot be dismissed as inconsequential dictum or random tangential speculation. In addition to the two separate "recklessness" references noted in the text above, the *Screws* plurality further observed that a defendant may not necessarily be thinking in constitutional terms, but if their aim is to deprive a citizen of a protected constitutional right, they would be acting willfully under the statute if they act in "*reckless disregard* of constitutional prohibitions or guarantees." *Id.* at 105–06 (emphasis added). Moreover, as further discussed below, the *Screws* plurality opinion has, by virtue of several subsequent Supreme Court majority opinions endorsing the mens rea interpretation, effectively achieved the gravitas of a majority decision. *See* United States v. Johnstone, 107 F.3d 200, 208 n.8 (3d Cir. 1997) (listing Anderson v. United States, 417 U.S. 211, 223 (1974), United States

the bar for federal civil rights prosecutions have long misinterpreted or otherwise overlooked the full import of the alternative recklessness standard already constitutionally sanctioned in *Screws.* But what does "recklessly" in the statute actually mean in this context?

II. Revisiting The So-Called High "Willfulness" Bar

Federal criminal law remains governed by "traditional" or "common law" principles. Despite several attempts over the last several decades to enact comprehensive federal criminal law reform, Congress has never mustered sufficient political will to do so. Federal criminal law scholars have long deplored that federal criminal law remains archaic and abstruse, lacking the modern nomenclature and structural coherence of the influential and relatively non-ideological Model Penal Code.[32] Professor Julie O'Sullivan has aptly derided "the term 'federal criminal code'" as "simply a shorthand for an 'incomprehensible,' random, …

v. Guest, 383 U.S. 745, 753–54 (1966), and United States v. Williams, 341 U.S. 70, 81–82 (1951) as cases where Supreme Court had accorded the *Screws* "reasoning with respect to the intent element as binding"); *see also* Joanna Lampe, CRS Legal Sidebar, Federal Police Oversight: Criminal Civil Rights Violations Under 18 U.S.C. § 242, at 3 (June 15, 2020) (noting numerous binding opinions of the Supreme Court have since adopted [the *Screws*] analysis"). This undercuts various complaints that the *Screws* "specific intent" requirement is too onerous, a fact borne out when one compares the manner in which the circuits have diverged in the specific language used in the relevant § 242 jury instructions on willfulness. *See infra* Part IV (analyzing circuit split). Moreover, on other related issues as well, strong majorities on the Court have consistently cited *Screws* with approval. *See, e.g.*, United States v. Lanier, 520 U.S. 259, 263–67 (citing *Screws* with approval several times) (unanimous decision).

32. American Law Institute, Model Penal Code (Proposed Official Draft 1962) ("MPC"). The MPC was a mid-twentieth century endeavor of the American Law Institute which sought to comprehensively address structural criminal law reform in a relatively non-ideological manner. The MPC culpability provisions "have been widely copied in the state Penal Code revisions and are generally considered by scholarly commentators … to be …the most important section of the entire Code for resolving conceptual difficulties with regard to culpability, the MPC term for what was previously called mens rea." Phillip E. Johnson & Morgan Cloud, Criminal Law: Cases, Materials and Text 70 (7th ed. 2002). The closest Congress has come to enacting a comprehensive Criminal Code was the creation of Title 18 in 1948, an "exercise which accomplished little more than sweeping a host of internally-disorganized statutes containing fragmentary coverage into a series of chapters laid out in alphabetical order." Julie R. O'Sullivan, *The Federal Criminal Code is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Crim. 643 (2006) (citing Robert L. Gainer, *Federal Criminal Law Reform: Past and Future*, 2 Buff. Crim. L. Rev. 45, 93 (1998)). The last major comprehensive federal criminal law reform effort occurred in 1970. *See* Final report of the Nat'l Comm. on Reform of Fed. Crim. L., Proposed New Fed. Crim. Code (1971). The proposed legislation was not enacted. Many other significant federal criminal law efforts addressing discrete topics such as sentencing reform have been considered over the years, and some have been enacted. *See* Gainer, *supra* note 32 (authoritative history of federal criminal law reform efforts); *see also* Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 So. Cal. L. Rev. 367, 416–24 (1989) (highlighting various decades-long federal criminal law reform efforts relating to public corruption). However, none of those efforts constitute comprehensive federal criminal law reform writ large. A plethora of scholarship critiques the numerous ultimately futile efforts at federal criminal law reform. *See, e.g.*, O'Sullivan, *supra* note 32, at 643.

incoherent, 'duplicative, ambiguous, incomplete, and organizationally nonsensical' mass of federal legislation that carries criminal penalties."[33]

Federal criminal law remains larded with nebulous mens rea terms, of which "willfully" is perhaps the most pernicious. In 1909, the "willfully" mens rea was added to the predecessor of § 242 as part of a comprehensive statutory revision that what would eventually become Title 18 of the United States Code.[34] The sparse legislative history reveals that this amendment was championed at the behest of Senator John Daniel of Virginia, a former Confederate Officer and unabashed "Lost Cause" adherent, who sought to make civil rights prosecutions more difficult; a peculiarly nefarious motivation given that prosecutions under the statute had been virtually nonexistent for at least a quarter century.[35]

Molière wrote that "the greater the obstacle, the more glory in overcoming it."[36] Civil rights advocates have focused on overcoming the more temporal challenges of proving the requisite mens rea in criminal civil rights prosecutions beyond a reasonable doubt. As noted above, in the wake of the seemingly endless reporting of shocking police killings of unarmed civilians, often persons of color, former Attorney General Eric Holder, Senator Richard Blumenthal, and the Reverend Al Sharpton are among the latest in a long line of civil rights proponents who have advocated for lowering the "unnecessarily high mens rea bar" for federal civil rights prosecutions under § 242.[37]

Even apart from the constitutional concerns inherent in § 242 laid bare in *Screws*, "willfully" has long been a problematic mens rea term. The Supreme Court has repeatedly noted that depending on the context, "willfully" is subject to different interpretations and meanings. It may mean an act done with a) an evil intent to violate a specific law, b) an intent to do something known to be generally unlawful, or

33. O'Sullivan, *supra* note 32, at 643 (citing numerous federal criminal law scholars similarly critical of the incoherent state of federal criminal law).

34. Kurland, *supra* note 12, at 784–85, nn.57–59. Congress formally created current Title 18 in 1948 as part of a comprehensive federal statutory recodification effort. For the most part, the creation of Title 18 did little more than gather scattered federal criminal statutes enacted piecemeal over the preceding 160 years and reorganized them in alphabetical order, a sophomoric organizational structure that Title 18 still retains today. O'Sullivan, *supra* note 32, at 643.

35. Kurland, *supra* note 12, at 784–85, n.58.

36. Flavia Medrut, *25 Molière Quotes to Make You Love Speaking the Truth*, Goalcast (Jan.8, 2018), goalcast.com/2018/01/08/moliere-quotes.

37. Kurland, *supra* note 12, at 776–78 & nn.13–16 (citing numerous sources); *see also*, Garland Confirmation Hearing Trans., *supra* notes 14–15 and accompanying text (noting colloquy between Sen. Blumenthal and Garland). Christian Farias, *Eric Holder Wants to Lower the Bar for Civil Rights Prosecutions: That's Trickier Than it Sounds*, New Republic (Feb. 27, 2015), https://newrepublic.com/article/121177/eric-holder-we-might-lower-bar-civil-rights-prosecutions.

c) "nothing more than 'an act which is intentional, knowing, or voluntary, as distinguished from accidental.'"[38] Roughly speaking, "willfully" could either connote a specific intent crime, a general intent crime—themselves Delphic concepts, as well as other *sui generis* cryptic mens rea permutations.

The Model Penal Code drafters so abhorred the term "willfully" that it was not only rejected as a culpable mental state,[39] but consigned a separate rule of construction where "willfully" meant "knowingly" absent a clear legislative intent to the contrary.[40]

As noted above, *Screws*, the seminal case concerning the interpretation of and ultimate constitutionality of § 242,[41] upheld the willfulness requirement in the statute that remains to this day. Justice Douglas, writing for a four Justice plurality, held that the willfulness mens rea element, as interpreted, satisfied both jurisdictional and due process "void for vagueness" concerns so as to avoid significant constitutional difficulties that might otherwise arise where a criminal statute did not expressly define the proscribed conduct.

These concerns remain foremost in the Court's mind. In a recent ten-year span, in *Skilling v. United States*,[42] *McDonnell v. United States*,[43] and *Kelly v. United States*,[44] the Court rejected federal prosecutors' "shapeless" and "amorphous" expansive interpretations of various federal anti-corruption statutes as part of a deliberate judicial endorsement of "more constrained [statutory] interpretation[s to] avoid . . . this 'vagueness shoal.'"[45]

The *Skilling* Court even favorably cited *Screws*, recognizing the circumstances where a "statute's mens rea requirement further blunts any notice concerns."[46] As such, any proposed *easing* of the mens rea requirement in § 242 should face heightened "void for vagueness" scrutiny given the statute's inherent amorphous scope of the concept

38. Bryan v. United States, 524 U.S. 184, 201 (1998) (Scalia, J., dissenting); *see also Screws*, 325 U.S. at 101–05.

39. Model Penal Code § 2.02(1) (general requirements of culpability include purposely, knowingly, recklessly, and negligently).

40. *Id.* § 2.02(8). The Drafters noted that "[t]hough the term 'willfully' is not used in the definitions of crimes contained in the Code, its currency and its existence in offenses outside the criminal code suggest the desirability of clarification… [as the term] is unusually ambiguous standing alone." *Id.* § 2.02 (Explanatory Note).

41. *Screws,* 325 U.S. at 91.

42. Skilling v. United States, 561 U.S. 358 (2010).

43. McDonnell v. United States, 579 U.S. 550 (2016).

44. Kelly v. United States, 590 U.S. 391 (2020).

45. *Skilling*, 561 U.S. at 368.

46. *Id.* at 412.

of recklessly disregarding a "due process" right that is not further statutorily defined and whose contours may be limited only by the ingenuity of the prosecutor crafting the indictment.[47]

Here, the void for vagueness problems would become even more pronounced because the actus reus in most § 242 police excessive force cases is the deprivation of a "due process" right, with no further statutory elucidation. Coupled with a lower mens rea requirement as proposed in the Justice in Policing Act or in a further judicial refinement or clarification of the existing willfulness requirement in § 242, this presents possibly even more nebulous and amorphous concerns than the "official act" conundrum in *McDonnell* or the "honest services" conundrum in *Skilling.* Thus, the quest for a clear interpretation of the mens rea in § 242 raises even more pronounced fair notice and "void for vagueness" concerns not present in most other criminal statutes where the proscribed conduct is set forth with more precision.[48]

In order to uphold the constitutionality of the predecessor to § 242 and to mollify these void for vagueness concerns, the *Screws* plurality interpreted the statute's willfulness requirement as a cryptic species of specific intent, stating:

> If we construe "willfully" . . . as connoting a purpose to deprive a person of a specific constitutional right, we would introduce no innovation. The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid.[49]
>
> . . .
>
> We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a *specific intent to deprive a person of a federal right* made definite by decision or other

47. *See, e.g.*, United States v. Baroni, 909 F.3d 550, 585–88 (3d Cir. 2018) (reversing civil rights convictions because due process right to intrastate travel based on political hijinks in closing local traffic access lanes and causing gridlock on George Washington Bridge because such a due process right was not sufficiently established so as to put defendants on adequate notice such conduct is prohibited), *remaining convictions rev'd on other grounds sub. nom* Kelly v. United States, 590 U.S. 391 (2020).

48. *See, e.g.*, Ratzlaf v. United States, 510 U.S. 135, 138 (1994). There, the Court reversed the conviction, holding that the crime of willfully structuring a monetary transaction (conducting a monetary transaction in an amount less than $10,000) required that the government prove a specific intent to knowingly evade those precise financial regulations and know that it was a crime to do so). Congress responded to the decision by subsequently amending the statute to eliminate the willfulness requirement so that the prosecution only had to prove that the defendant wanted to evade the bank's reporting requirements, even if the defendant not know it was criminal to do so.

49. *Screws*, 325 U.S. at 101 (emphasis added).

> rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.[50]

And thus, the supposedly insurmountable "high bar" that must be cleared in order to successfully prosecute a federal criminal civil rights case was born. But that did not fully reflect the significant intricacies of the *Screws* opinion and its impact on the obstacles for successful prosecution. As noted above, Justice Douglas's plurality opinion in *Screws* further proclaimed that a form of recklessness or conscious disregard could also satisfy the willfulness requirement, stating "[o]ne who does an act with such ["willful"] specific intent . . . either knows or acts in reckless disregard of its prohibition of the deprivation of a defined constitutional or other federal right." As this author has written previously, the *Screws* plurality further amplified:

> [w]hen they act willfully in the sense in which we use the word, they act in open defiance *or in reckless disregard* of a constitutional requirement which has been made specific and definite." One who acts with such conscious disregard to a known constitutional right is, in effect, acting in a manner indistinguishable from specific intent. Therefore, such a mens rea could also satisfy the statutory "willfulness" requirement where no sane person "may be heard to say that he knew not what he did.[51]

For good measure, the *Screws* plurality emphasized "recklessness" a third time, concluding:

> When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite. *When they are convicted they are not punished for violating an unknowable something.*[52]

This third reference is particularly significant because it is a harbinger of further interpretive Supreme Court refinement to support a subjective recklessness standard. In *Farmer v. Brennan*,[53] a civil case, a near-unanimous Court endorsed, albeit in dicta, the Model Penal Code subjective recklessness concept, emphasizing that "[a]ppropriate allusions would [likewise] . . . be proper during criminal prosecutions . . .

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50. *Id.* at 103.

51. Kurland, *supra* note 12 at 788 (citing key language in *Screws* at 325 U.S. at 105) (emphasis added) (other citations omitted).

52. *Screws*, 325 U.S. at 105 (italics added).

53. Farmer v. Brennan 511 U.S. 825, 839–40 n.7 (1994) (citing MPC 2.02(c) (defining recklessness)).

for . . . 18 U.S.C. § 242."[54] Thus, applying a subjective recklessness standard prevents a defendant from being convicted "for violating an unknowable something."

Accordingly, the void for vagueness concerns are most clearly assuaged when recklessness is interpreted to require that the defendant acted in subjective conscious disregard of whether the use of force was excessive. In other words, a defendant may be convicted, even, as the *Screws* Court noted, if the defendant was not specifically thinking in constitutional terms. This represents the Model Penal Code recklessness standard, as adapted to address the *sui generis* void for vagueness concerns in § 242 concerning what it means to act in conscious disregard of whether one's conduct violates a constitutional right, as opposed to merely engaging in conduct that, viewed from an objective standpoint, recklessly places a person or persons in harm of death or serious bodily injury.[55] This interpretation is most faithful to the perplexing plurality

54. *Id.* Note the above italicized *Screws* language, along with the "no sane person" language noted above, which is consistent with the *Farmer v. Brennan* dicta that § 242 should be interpreted so as to require a subjective recklessness standard.

55. Comments by former Congresswoman and now Los Angeles Mayor Karen Bass illustrate the subtle but substantial consequences of interpreting the recklessness standard too broadly so as to likely run afoul of the void for vagueness dictates required by *Screws*. Bass, (one of major authors of the proposed legislation) offered an interpretation of recklessness as if the statute merely proscribed conduct undertaken without regard to whether such conduct was dangerous to human life, ignoring the void for vagueness considerations that must be confronted given the sui generis structure of § 242 which does not delineate the precise conduct proscribed under the statute and thus must require some level of *subjective awareness*:

> The way the law is structured, the fact that officers are rarely prosecuted because the bar for prosecuting officers is so high, [it] can virtually never be met, which is why the Justice in Policing Act we lower the bar to recklessness, and recklessness is perfect. In this case, because they were completely reckless. It wasn't a question as to what they were thinking about what was in their mind which is the way the law is now- willful intent.

Transcript, Interview with Ari Melber, THE BEAT, MSNBC, Sept. 23, 2020, at 31:07, https://playcast.com/s/the-beat-with-ari-melber/gid%3A52F%2Fart119-episode-locator%2FDCalMw7dk395MacskxZd-dXGAfCNZTcidxqt8Kiv_U (copy on file in the offices of the Howard Law Journal). Rep. James Clyburn also fell into a similar trap, seemingly endorsing an objective recklessness standard more akin to negligence because it focuses on what the reasonable person would recognize, an interpretation that the Supreme Court would likely reject. During an interview with Rep. Clyburn, MSNBC Host Lawrence O'Donnell commented:

> The Justice and (sic) Policing Act that the House has considered becomes all the more vivid because . . . the act . . . would change the standard of proof for criminal conduct in federal cases from willfulness to recklessness. And that is a very important distinction because willfulness requires you to get into the brain of the police officer and know what his or her intent was, whereas recklessness is something you can see with your own eye. And I think everyone in that [George Floyd murder] courtroom agrees that when the conduct on the street was reckless…[s]o it seems likes this change in federal law would be very, very important in these kinds of prosecutions in the future.

language in *Screws,* which the Court has elevated to precedential status in numerous majority opinions.[56]

Thus, even if one gives full breadth to the recklessness avenue, as discussed in more detail below, the statutory willfulness requirement, as interpreted by *Screws,* still imposes considerable prosecutorial obstacles. However, though the statute remains fundamentally unchanged since *Screws* was decided in 1945, several subsequent legal developments have altered the legal landscape for federal civil rights prosecutions.

First, the mens rea hurdle is not the sole reason why such prosecutions are so challenging. Current DOJ policies still substantially rely on quaint notions of Federalism, and generally promote deference to state prosecution in the first instance.[57] As discussed further below, this position is not necessarily illogical; however, application of various DOJ policies concerning the order of prosecution presently seems to be in a state of flux, and may require further reexamination and revision to better comport with present day realities and actual DOJ decision making.[58]

Rep. Clayburn responded "absolutely, absolutely." *Transcript: The Last Word with Lawrence O'Donnell, 3/31/21*, MSNBC, (March 31, 2021, 10:00 PM), msnbc.com/transcripts/last-word-3-31-21-n1262735 (copy on file in the offices of the Howard Law Journal); *see also* Hernandez Stroud, *How Congress Can Give Teeth to the Federal Law on Police Accountability,* (May 14, 2021) Brennan Ctr. Just., brennancenter.org/our-work/analysis-opinion/how-congress-can-give-teeth-federal-law-police-accountability (Professor Stroud commenting on the Brennan Justice Center proposed statute that contained a recklessness mens rea similar to the proposed Justice in Policing Act, and asserting that by "lowering the mens rea [from "willfully"] …to 'recklessly, [n]o longer would a jury need to try to peer into a defendant's mind as part of finding a defendant guilty").

56. Farmer v. Brennan, 511 U.S. at 839–40 n.7 (citing MPC 2.02(c) (defining recklessness) and further noting "[a]ppropriate allusions would . . . be proper during criminal prosecutions . . . for . . . 18 U.S.C. § 242")).

57. *See* Kurland, *supra* note 12, at 804–17 (discussing DOJ authorization policies for civil rights prosecutions where the act is also subject to state prosecution and where DOJ seeks "to promote coordination and cooperation between federal prosecution," Justice Manual 9-2.031 (1) ¶1(updated Jan. 2020)). Since 1994, DOJ guidelines have also directed federal prosecutors to "consult with their state counterparts to determine the most appropriate single forum in which to proceed to satisfy the substantial federal and state interests involved, and, if possible, to resolve all liability for the acts in question. *Id.* ¶4; Kurland, *supra* note 12, at 805.

58. *Id.* at 805. Many recent high-profile prosecutions, including those concerning the deaths of George Floyd, Ahmaud Arbery, and Breonna Taylor included prosecutions at both the state and federal level, even where, as in the *Floyd* and *Arbery* cases, a state trial proceeded first and resulted in a significant sentence. A 2018 revision to the DOJ guidelines concerning enforcement of the civil rights criminal statutes recognizes increased DOJ-local prosecutor tension, now providing "it is [DOJ policy] to cooperate with the local prosecutor unless there is a good faith basis that is supported by the law, the facts, or other established [DOJ] policy, to disagree with the state's decision to prosecute or with its conduct of a prosecution." Justice Manual 8-3.170 (updated March 2018). In any event, in police misconduct cases resulting in death or serious bodily injury, prosecutions by both state and federal authorities based on the same conduct appear to be occurring with greater frequency.

Next, *Screws* was decided in an era where prosecutors had to awkwardly allege that the defendant "willfully" deprived a victim of a then narrow category of recognized federal constitutional rights, such as the right to a trial, the right to be free from trial by ordeal, or the right to be subject to lawful punishment upon conviction.[59] Any convolution of jury instructions often redounds to the benefit of a defendant because the prosecution bears the burden of proof.[60] However, contemporary excessive force prosecutions, which make up the lion's share of § 242 prosecutions, no longer need to be so awkwardly alleged:

> As a result of . . . Supreme Court decisions [from the 1980s] further defining seizures for Fourth Amendment purposes, indictments based on pre-arrest confrontations now allege a willful deprivation of the right to be free from unreasonable force. Given that is unfathomable that a law enforcement officer [today] would [largely as a result of basic training] be unaware of the existence of these bedrock constitutional rights, any claim of such subjective ignorance invariably would be rebutted by evidence that the officer was well-versed in these principles, and any claim of lack of subjective awareness would almost certainly be rejected by a[n unbiased] rational trier of fact.[61]

Accordingly, the most significant barriers to conviction are not necessarily the high "willfulness" mens rea bar, even if modified by a prosecution favorable recklessness prong. Rather, convictions often remain difficult because of prevailing self-defense and use of lethal

59. Writing in 2017, one commentator noted that in the decades after *Screws*, DOJ was still indicting excessive force cases based on the stilted allegation of depriving the victim of their right to a trial. Teitelbaum, *supra* note 4, at 213. This criticism ignores a key point — that the Supreme Court decisions that definitively established that law enforcement use of excessive force constituted a seizure under the fourth amendment were not decided until 1985. Tennessee v. Garner, 471 U.S. 1 (1985), followed four years later by Graham v. Connor, 490 U.S. 386 (1989). Only after those decisions could DOJ craft a § 242 indictment using much more comprehensible allegations that did not rely on the convoluted theory that, in killing the victim, the defendant had to specifically intend to deprive the victim of the right to a trial. Instead, the indictment could more coherently allege that the law enforcement defendant had willfully deprived the victim of his right to be free from excessive force. The concept of what constitutes a fourth amendment seizure continues to evolve. *See, e.g.*, Torres v. Madrid, 592 U.S. 306 (2021) (application of physical force to the body with intent to restrain is a seizure even if the person does not submit and is not subdued). For an example of a contemporary § 242 indictment, *see* Indictment of Defendant at 2, United States v. Derek Chauvin, No. Cr. 21-108 (D. Minn. May 6, 2021) (alleging Defendant "willfully deprived George Floyd of the right, secured and protected by the Constitution . . . to be free from an unreasonable seizure, which includes the right to be free from the use of unreasonable force by a police officer.")

60. *See* United States Comm'n on Civil Rights, Who is Guarding the Guardians: A Report on Police Practices 113–14 (U. Cal. Lib. Reprint Ed. 1981) (discussing jury confusion on willful intent instruction in § 242 cases increases difficulty in obtaining a conviction).

61. Kurland, *supra* note 12, at 789.

force doctrines, which are invariably raised by law enforcement in every excessive force prosecution.[62] And, as noted above, the issue is not whether the officer was aware he used lethal force or any level of physical force — the issue is whether the defendant knew — or consciously disregarded whether the use of such force was excessive.

Fortunately, cell phone videos and police body cams now provide significant evidence in many cases. Thus, in those circumstances, a police officer's testimony concerning what allegedly occurred no longer stands unrefuted.[63] Nevertheless, even the most seemingly extreme acts of excessive force by law enforcement caught on camera become grist for zealous defense counsel and are micro-analyzed through the lens of "vigorous" legal lethal use of force doctrines, which tend to favor law enforcement.[64]

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62. Rebecca R. Ruiz & Matt Apuzzo, *Sessions Closed Sterling Case, His Predecessors Would Have Too*, N.Y. Times (May 4, 2017), https://www.nytimes.com/2017/05/04/us/jeff-sessions-police-shooting-civil-rights.html (noting criminal justice system favors police officers in line of duty shootings).

63. *See generally* Bobbi Bernstein, *The Upside Down World of Excessive Force Prosecutions*, 70 DOJ J. Fed. L. & Prac. 35, 38–40 (2022) (discussing increased availability of video and cell phone recordings evidence).

64. *Id.* For a further general overview, *see* Mark Berman & Kimberly Kindy, *Struggle to convict in killings by police: After Ferguson, officials brought more cases but wins remained elusive*, Wash. Post, (Sept. 6, 2020) at A1. The Breonna Taylor killing in Louisville is further illustrative. There, Kentucky State Attorney General Daniel Cameron, responsible for prosecuting the fatal shooting of Taylor, declined to ask the grand jury to consider any homicide charges involving the actual killing of Ms. Taylor. In a less than candid press conference where he refused to acknowledge that he did not even ask the grand jury to consider homicide charges, Cameron opined that the Detectives who forcibly entered Ms. Taylor's apartment and fired their weapons which resulted in her death "were justified in returning their fire because they were fired upon," emphasizing that "[w]e have vigorous self-defense laws in this state." *AG Cameron Press Conference Transcript September 23: Breonna Taylor Decision*, Rev (Sept. 23, 2020), https://www.rev.com/blog/transcripts/ag-daniel-cameron-press-conference-transcript-september-23-breonna-taylor-decision. Cameron ultimately reluctantly acknowledged he did not instruct the grand jury on any homicide charges and did not ask them to even consider any such related charges. Marty Johnson, *Kentucky attorney general, didn't recommend any murder charges to Breonna Taylor grand jury*, The Hill (Sept. 30, 2020), thehill.com/homenews/administration/518951-ag-cameron. DOJ ultimately indicted several officers for federal crimes related to Taylor's death, but did not indict the officers who actually fired the fatal shots. *See* Press Release, U.S. Dep't of Just., Current and Former Officers Louisville, Kentucky officers Charged with Federal Crimes Related to Death of Breonna Taylor (Aug. 4, 2022), https://www.justice.gov/opa/pr/current-and-former-louisville-kentucky-police-officers-charged-federal-crimes-related-death [hereinafter Breonna Taylor Press Release]. For a further discussion on the one federal criminal trial arising out of Taylor's death, see text and accompanying notes 169–93 *infra*.More recently, a Maryland Police Officer was prosecuted for murder in state court where he shot and killed a person who was handcuffed while seated in the police cruiser. The officer testified that he feared for his life while in the vehicle and described a violent life-threatening attack that took place out of view of what the eyewitnesses were able to observe. Katie Mettler, *Accused officer takes stand*, Wash. Post, (Dec. 5, 2023) at B1. The Defendant was acquitted of all charges, including second degree murder and manslaughter. *Acquittal in fatal Md. Shooting of cuffed man*, Wash. Post, (Dec. 7, 2023) at A1.

III. Post-*Screws* Efforts to Modify Section 242's Mens Rea Requirement

Concerted efforts to legislatively lower the mens rea bar in § 242 or its predecessor statutes trace back to at least 1947 when, in the aftermath of *Screws*, President Harry Truman's Committee on Civil Rights addressed the issue.[65] The Commission proposed a modest reform to enact a supplementary statute that would expressly enumerate the rights protected for which the statute was most commonly employed.[66] It did not otherwise attempt to clarify the meaning or scope of "willfulness."

In 1971, the National Commission on Reform of the Federal Criminal Laws remained at loggerheads concerning § 242.[67] The Commission proposed changing "willfully" to "intentionally," purportedly to comply with the directives in *Screws*.[68] However, because of a lack of consensus, the Commission did not endorse a radical reworking of the statute to remove due process and void for vagueness concerns that would have delineated the specific conduct that would be proscribed.[69] In any event, the ambitious endeavor to reform the entirety of federal criminal law was unsuccessful.

In 1981, the United States Commission on Civil Rights issued its landmark report, *Who is Guarding the Guardians? A Report on Police Practices.*[70] In addressing proposals to amend § 242, future Solicitor General Drew Days testified:

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65. To Secure These Rights: The Report of President Harry S. Truman's Committee on Civil Rights (Steven F. Lawson ed. 2004); *see also* Lynda G. Dodd, *Presidential Leadership and Civil Rights Lawyering in the Era Before Brown*, 85 Ind. L.J. 1599 (2010).

66. *Id.* at 142–47, 172–73 (Committee Recommendation No. 4).

67. Nat'l Comm'n on Reform of Fed. Crim. Laws, Pub. L. 89-801, Final Report (1971) [hereinafter Crim. Law Reform Comm'n Final Rept.].

68. The relevant Comment notes that "'[w]illfully' in present § 242 has been changed …to 'intentionally' in Code § 1502 to adopt the culpability requirement articulated in *Screws*." *Id.* at 155 (Comment to §§ 1501 and 1502). This brief comment is misleadingly incomplete. It ignores the conundrum inherent in the *Screws* "willfulness" requirement, and is detrimental to including "recklessness," as "intentionally" much more clearly excludes the concept of "recklessness." *See, e.g.*, Model Penal Code § 2.02 (2)(a)(b)(c) (amended 2021) (Am. L. Inst. 1962) (providing separate levels of culpability for "purposely," "knowingly," and "recklessly").

69. The Comment further provides that "[o]ther Commissioners favor deletion of these provisions entirely on the grounds that they do not meet modern standards of due process in the definiteness of the language" and further condemned the potential expansion of the statute via "judicial construction." Crim. Law Reform Comm'n Final Rept., *supra* note 67, Comment to Sections 1501–02, at 156.

70. Who is Guarding the Guardians, *supra* note 60, at 113–14, 144, 161 (culminating in Recommendation 4.3 (4) (proposing amendment to § 242 "to remove the impediment to prosecution presented by the judicially imposed 'specific intent' requirement")). As noted above, criticism of the onerous mens rea mandated by *Screws* occurred almost immediately. *See* To Secure These Rights, *supra* note 65 (Truman Commission's 1947 Report which proposed enactment of

> In response to a constitutional challenge on grounds of vagueness, [T]he Supreme Court read . . . into [§ 242's willfulness requirement] a finding of "specific intent" to deprive the victim of a constitutional right. This ruling has made prosecutions for this offense more difficult because the offender is held to a higher standard: it must be proved that he intended to accomplish the precise act prohibited by law rather than simply proving the consequences of his act were substantially certain to occur, which is all that is required for a showing of "general intent."[71]

The Civil Rights Commission also noted the companion concern that this standard often resulted in confusing jury instructions, creating further impediments for a conviction.[72] The Commission concluded that § 242 "suffer[s] from substantive and procedural defects that impede prosecution efforts," and recommended that "[§] 242 should be amended to . . . remove the impediment to prosecution presented by the judicially imposed 'specific intent' requirement."[73] No specific lower mens rea standard was proposed, but the report implied that the mens rea perhaps should be lowered to "general intent." Virtually identical findings and recommendations resulted from the Commission's 1983 *Mount Pleasant Report*[74] and its 2000 report *Revisiting Who is Guarding the Guardians*.[75] None of these flawed reform efforts were ever enacted.[76]

The 2020 Justice in Policing Act's provision to amend § 242 derives from these earlier reform efforts, many undertaken when the statute was still a misdemeanor for all actions not resulting in death. Most of these efforts sought to retain the basic structure of the statute but lower the so-called "judicially imposed" specific intent requirement.[77]

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new statute that delineated specific constitutional rights in order to satisfy void for vagueness concerns highlighted in *Screws*).

71. Who is Guarding the Guardians, *supra* note 60, at 113.

72. *Id*. at 114.

73. *Id.* at 161 (Recommendation 4.3(4)(a). *See also supra* note 65.

74. U.S. Civil Rights Comm'n, Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination, The Mount Pleasant Report 39, 144 (vol. 1 1983) (recommending removing § 242's "judicially imposed 'specific intent' requirement").

75. United States Civil Rights Comm'n, Revisiting Who is Guarding the Guardians: A Report on Police Practices and Civil Rights in America (Nov. 2000), ojp.gov/pdfiles1/bja/24901.pdf, Finding & Recommendation 5.4 at p. 73.

76. General intent, however, would likely be deemed unconstitutional as running afoul of *Screws* "void for vagueness" concerns. Moreover, characterizing the specific intent requirement as "judicially created" is misleading if not inaccurate, as it is a necessary offshoot of what the *Screws* Court deemed constitutionally necessary to uphold the statute.

77. The near uniform condemnation of § 242's supposed "specific intent" standard is often accompanied by the derisive platitude that the standard is "judicially imposed." The *Screws* Court effectively rejected the functional equivalent of a general intent standard for § 242. *Screws*, 325 U.S. at 100–07. Thus, the Court's insistence on some variant of a specific intent requirement is not

The Justice in Policing Act likewise sought to lower § 242's mens rea bar from "willfully" to "knowing or recklessly." As noted above, § 242 was enacted, at least in part, pursuant to Congress's broad power pursuant to Section Five of the Fourteenth Amendment. However, the mere invocation of that constitutional provision does not provide talismanic constitutional legitimacy.[78]

As noted earlier, the House Report largely lacked any significant discussion of the constitutional issues concerning lowering the mens rea requirement.[79] The report cursorily noted that two prominent witnesses, Vanita Gupta and Ronald Davis, testified in support of a lower mens rea standard, but neither comprehensively addressed the critical constitutional "void for vagueness" considerations. Davis simply noted approval of the proposed provision giving "DOJ greater authority to prosecute . . . reckless [conduct]."[80] Gupta echoed the familiar objection that the current statute "sets too high a bar that deters many prosecutions," and then endorsed a "lower mens rea of 'reckless negligence,'"[81] a nebulous standard that deviated from the actual language in proposed modified § 242, thereby creating further potential constitutional and other interpretive difficulties.[82] The haste

an arbitrary high-handed exercise of "judicially imposed" statutory interpretation. Rather, it was deemed constitutionally necessary to satisfy void for vagueness concerns uniquely applicable to criminal statues such as § 242 which proscribe amorphous, abstract constitutional concepts such as deprivations of due process. This is unlike most criminal statutes which are drafted with a greater degree of specificity. *Screws*, 325 U.S. at 101 (in order to avoid void for vagueness constitutional infirmity, "something more than [doing a proscribed] act which is voluntary or intentional" is required); *Id*. at 106–07 (not sufficient to convict upon mere finding that defendant "had a generally bad purpose"); *compare* Brian Johnson & Naoki Kanaboshi, *Using 18 USC Section 242 to Prosecute Private Security Personnel for Civil Rights Violations: An Analysis*, 13 J. Applied Sec. Rsch. 411, 414 (2018) (describing *Screws* holding as the defendant "not only intentionally engaged in activities to deprive a person of his rights, but also knew that 'what he does is precisely' the violation of an established constitutional right or is in 'reckless disregard of its prohibition").

78. *See generally* United States v. Morrison, 529 U.S. 598, 614–27 (2000); *see also* Coolidge v. New Hampshire, 403 U.S. 443, 461 (1971) ("fourth amendment not a talisman where protections fade away upon mere invocation").

79. The original "Guardians" report expressly recognized the constitutional dimension of the "willfully" specific intent requirement. *See, e,g*., Guardians, *supra* note 60, at 113–14.

80. George Floyd Justice in Policing Act of 2020, H. Rep. 116-434, pt. 1 at 49–50 (citing Statement of Ronald L. Davis, Chair, Legislative Committee Chair, National Organization of Black Law Enforcement Executives).

81. *Id.* at 49–50 (citing Statement of Vanita Gupta, President, Leadership Conference on Civil and Human Rights). Gupta had previously served as Assistant Attorney General for the Civil Rights Division in the Obama Administration and later served as Associate Attorney General in the Biden Administration.

82. Any modification of the mens rea requirement that purports to reach negligent conduct arguably exceeds the constitutional reach of § 242. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 328 (1986) ("[w]e conclude that the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life"). Notably, Congress has recently proposed other legislation to reach murder, manslaughter and other criminally negligent homicides

with which the House, in both 2020 and 2021, passed the legislation likely contributed to these analytical deficiencies.

In 2021, the Brennan Center for Justice authored a report outlining another proposal to modify § 242.[83] This legislative proposal largely rehashed previously covered ground and provided the most recent articulation of a lower mens rea requirement that included some form of recklessness,[84] and delineated specific proscribed conduct for excessive force cases.[85] In the foreword, Former Attorney General Eric Holder acknowledged the goal was to "make . . . it easier to bring cases and win convictions for civil rights violations of this kind" and emphasized the sometimes overlooked importance of a uniform nationwide standard.[86]

None of these flawed legislative proposals had a realistic chance of becoming law in the foreseeable future. Therefore, the most productive route to lower § 242's mens rea bar is for DOJ to initiate a comprehensive nationwide litigation strategy endorsing the *Screws* "recklessness" standard as controlling Supreme Court precedent and

committed by law enforcement officers by relying on constitutional provisions other than the Fourteenth Amendment, and thereby raising separate constitutional concerns. *See* H.R. 5777, 116th Cong. (2020) (relying on Spending Clause); *see also* Kurland, *supra* note 12 at 884 (citing JARED P. COLE, CRS: FEDERAL POWER OVER LOCAL LAW ENFORCEMENT REFORM: LEGAL ISSUES 14 (2016) (noting proposed criminal statute that "might stretch the boundaries of legislation justified under the Spending Clause"); John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789 (2000) (proposing a standalone excessive force statute based on modified International Criminal Court mode but possessing uncertain constitutional concerns and only reaching conduct under color of state, but not federal, law).

83. BRENNAN CENTER REPORT, *supra* note 4, at 14–15 (Proposed amendments to § 242).

84. The proposed statute uses the identical "knowingly or recklessly" formulation as does the Justice in Policing Act. BRENNAN CENTER REPORT, *supra* note 4. It differs by providing a new statutory structure that changes the essential elements of the offense. *Id.* at 9 (attempt to differentiate "willfully versus knowingly and recklessly"). It also is hamstrung by suggestions that a jury would "no longer … need to try to peer into a defendant's mind as part of finding a defendant guilty." *Id*. (contending that proposed statute "would remove one of the most challenging barriers to prosecution [under current law]"); *see also* Stroud, *supra* note 55 (making similar argument). As previously discussed, this seems inconsistent with the subjective recklessness standard the Court has intimated is likely required to satisfy extent due process and constitutional jurisdiction concerns. *See* Farmer v. Brennan, 511 U.S. 825, 839–40 (1994) (discussing subjective recklessness standard appropriate for 18 U.S.C. § 242).

85. BRENNAN CENTER REPORT, *supra* note 4, at 3 (Foreword by former Attorney General Holder). For a different legislative proposal to enact an improved excessive use of force statute, *see* Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629 (2018) (model statute providing better guidance to juries by statutory delineating specific factors, including whether the victim/suspect had or appeared to have a weapon and whether the officer engaged in de-escalation measures prior to using deadly force).

86. BRENNAN CENTER REPORT, *supra* note 4, at 3 (Foreword by Former Attorney General Holder) (stating the importance of attempting "to deter future misconduct by acting as a nationwide reminder to law enforcement and other public officials of the constitutional limits of their authority" and concluding that this "proposal will better allow the Justice Department to pursue justice in every appropriate case, across the country").

thus a valid route to establish "willfulness." The remainder of this article examines the current circuit split and DOJ's internal guidelines addressing this issue, which further demonstrate DOJ's need to pursue this course of action nationwide.[87]

IV. "Willfulness" As Including "Recklessness": Circuit By Circuit

The "recklessness" concept as sufficient to establish the requisite "willfulness" in § 242 is grounded in the *Screws* plurality opinion's *three* express references—in addition to several further explications in the *Screws* concurrence and Justice Murphy's dissent which would have affirmed the conviction outright.[88] Recognizing the myriad challenges in successfully prosecuting a § 242 charge, the recklessness standard, if applied, provides a subtle but not insignificant more prosecution-favorable standard.[89] Given that any legislative fix for § 242 is unlikely, application of a uniform nationwide standard through Supreme Court reaffirmation of the "reckless disregard" standard is the only realistic path forward.

This tack comes with the risk that a Supreme Court majority will continue to be hostile to arguments supporting broad federal prosecutorial theories of criminal liability. However, it is a risk worth taking. Since *Screws*, the Supreme Court has not directly ruled on what "recklessly" may mean in § 242, although it has left several circuit court decisions upholding convictions applying that theory undisturbed.

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87. The proposed nationwide utilization of a recklessness theory might have resulted in different charging decisions in several cases where DOJ declined to pursue charges based on a perceived inability to prove willfulness. *See generally* Sean Collins, *The House has passed the George Floyd Justice in Policing Act,* Vox (Mar. 4, 2021), vox.com/2021/3/3/22295856/George-floyd-justice-in-policing-act-2021-passed-house (Tamir Rice, Diallo, Sean Bell cases may have been resolved differently under amended statute). *See also* Tamir Rice Press Release, *supra* note 11 (declining federal prosecution in Tamir Rice killing because of inability to establish that officer acted willfully beyond a reasonable doubt); s*ee also infra* notes 169–93 and accompanying text (discussion of Breonna Taylor case*); see also infra* notes 160–67 and accompanying text (discussion of Gashair case).

88. *Screws*, 325 U.S. at 113 (Rutledge, J., concurring in the result). Rutledge would have affirmed the conviction outright but wrote a separate opinion concurring in the result in order to create a five vote majority to remand the case for retrial. *Id.* at 134. Justice Rutledge expounded repeatedly on the willfulness requirement, noting that the verdict "concluded against them their denial of bad purpose and reckless disregard of rights," *id*. at 118, and further stated "the statute … condemns … something more than [negligent conduct or an honest] error in judgment…officials who violate [the statute] must act in intentional or reckless disregard of individual rights and cannot be ignorant that they do great wrong." *Id.* at 130 n.32; *see also id*. at 131 (mens rea satisfied if "state official abuses his place consciously or grossly in abnegation of its rightful obligation"). For good measure, Justice Murphy, who would have affirmed the conviction outright, opined that the evidence overwhelmingly established that the defendants "willfully, or at least with wanton disregard, deprived Hall of his life without due process." *Id*. at 137 (Murphy, J., dissenting).

89. *See supra* note 86.

Moreover, the Court has provided significant observations suggesting approval. Most notably, in *Farmer v. Brennan*,[90] decided in 1994, the Court addressed whether a prison official's deliberate indifference to a substantial risk of serious harm violated the Eighth Amendment. The Court, in a near-unanimous opinion,[91] determined that subjective recklessness, as used in the criminal law, is the proper test for deliberate indifference and further defined such indifference as equivalent to the criminal law's subjective recklessness, "[p]ermitting a finding of recklessness only when a person has disregarded a risk of harm of which he was aware." In dictum, the Court endorsed the appropriateness of subjective recklessness in the context of an 18 U.S.C § 242 criminal prosecution, further noting:

> Appropriate allusions to the criminal law would, of course, be proper during criminal prosecutions, for example, 18 U.S.C. § 242, which sets penalties for depravations of rights under color of law.[92]

Thus, DOJ should be guardedly optimistic that the Supreme Court will not reject the *Screws* recklessness alternative, which already represents the controlling law in several circuits. Moreover, in light of the extant constitutional "void for vagueness" concerns present in § 242, the Court, when squarely faced with the issue, should interpret the *Screws* recklessness standard to require subjective recklessness as explicated in *Farmer v. Brennan.* Despite the views of many civil rights advocates who believe it possible to sufficiently tinker with the mens rea to avoid having to "get into the mind of the defendant," that does not appear to be a realistic outcome.[93]

Can these principles be articulated in a comprehensible jury instruction? To satisfy this reckless disregard standard, a defendant must be consciously aware of the risk that their conduct violates a particular constitutional right — (i.e, the Fourth Amendment right to be free from an unreasonable seizure). Even if one factors in the qualifying principle that the defendant need not be specifically thinking in "constitutional terms," defendants must still be consciously aware of the risk that their conduct might constitute excessive force, regardless

90. *Farmer*, 511 U.S. 825 at 839–40 n.7 (citing MPC 2.02(c) (defining recklessness)).

91. *Id.* at 826. There was no formal dissent. Eight Justices joined the opinion of the Court, with Justices Blackmun and Stevens also filing concurring opinions. Justice Thomas filed an opinion concurring only in the judgment.

92. *Farmer*, 511 U.S. 825 at 839–40 n.7.

93. *See, e.g.*, Stroud, *supra* note 55 (asserting "recklessness" standard differs from "willfulness" because it avoids having to peer into a defendant's mind as part of finding a defendant guilty).

of whether the defendant contends they were unaware that use of excessive force violates the constitution.

Thus, DOJ should embark on a coordinated nationwide "test case" litigation strategy to bring the willfulness issue before the Supreme Court in the most favorable legal and factual posture. This would put an end to the various differing circuit interpretations of willfulness in § 242. As further discussed below, more than a handful of circuits have already endorsed the *Screws* recklessness standard in one form or another.[94] While some may quibble with the quantum of divergence amongst the various circuit standards, the present circuit standards are sufficiently divergent to yield different results in some cases. It is one thing to endorse a trial court's discretion in crafting jury instructions in general and not requiring lock-step nationwide conformity.[95] However, it is quite another to countenance disparate inter-circuit interpretations

94. Gupta's comments in support of the Justice in Policing Act seem inconsistent with these principles. Her puzzling "reckless negligence" standard appears to endorse a mens rea lower than subjective recklessness and may not withstand constitutional scrutiny. *See supra* notes 80–81 and accompanying text. So too with any attempt to only require "general intent." Any attempt to lower the mens rea to those levels would require a fundamental statutory restructure of the statute rather than merely substituting a lesser mens rea. However to do so in a constitutional manner would require a constitutional structural overhaul to § 242, an effort which the congressional authors of the Justice in Policing Act did not attempt. George Floyd Justice in Policing Act of 2020, H. Rep. 116-434, pt. 1 at 49–50.

There are at least two other statutory options Congress could utilize to redefine a federal criminal statute proscribing police brutality to reach knowing or even negligent conduct. First, Congress can attempt to draft a statute based on the spending clause or commerce clause. *See generally* Jared P. Cole, Cong. Research Serv., R44104, Federal Power of Local Law Enforcement Reform: Legal Issues 14 (2016) (discussing several legislative criminal law proposals that arguably "stretch the boundaries of legislation justified under the Spending Clause"). Second, Congress could specifically define the categories of proscribed conduct instead of relying on amorphous and ill defined "due process" principles which trigger the constitutional void for vagueness concerns. This second option was considered by the Truman Commission in 1947. *See* To Secure These Rights, *supra* note 65, at 142–43, 172–73 (Recommendation II(4) endorsed enactment of supplemental civil rights statute which would include specific enumeration of the most commonly utilized federal rights running against law enforcement officers, recognizing any statutory attempt to list all protected rights would inevitably prove incomplete with the passage of time). The issue was revisited during the 1971 debate on comprehensive Federal Criminal Law reform. The commentary to the proposed "Deprivations of Rights Under Color of Law" statute, which essentially was a wholesale recodification of existing section 242 but substituting 'willfully" for "intentionally," noted:

> Other commissioners favor deletion of these provisions entirely on the grounds that they do not meet modern standards of due process in the definiteness of the language . . . and new crimes in the area, if any, should not be created by judicial construction but expressly by the Congress. Crim. Law Reform Comm'n Final Rept., *supra* note 67, Commentary to §1502 at p.156.

95. *See, e.g.*, Criminal Pattern Instructions, United States Court of Appeals for the Tenth Circuit ix (2021 Ed.) (introductory note advising that use of instructions are discretionary and "never need to be given *verbatim*").

of the mens rea requirement in the most important federal criminal civil rights statute.

Several circuits have seized on the "recklessness" language in *Screws* that forms of reckless conduct are already actionable under the § 242 "willfulness" standard. Consequently, these circuits have endorsed slightly more prosecution-favorable jury instructions on this issue.[96] The inter-circuit divergence on the mens rea requirement has resulted in an untenable phenomenon that § 242 prosecutions are prosecuted under different standards depending on the federal circuit where a particular incident occurs.[97]

The void for vagueness concerns are most clearly assuaged when recklessness is interpreted to require that the defendant acted in subjective conscious disregard of whether his use of force was excessive. In other words, a defendant may be convicted if he acted in conscious disregard for whether the amount of force used was unlawfully excessive, even, as the *Screws* Court noted, if the defendant was not specifically thinking in constitutional terms. This represents the Model Penal Code recklessness standard, as adapted to address section 242's *sui generis* void for vagueness concerns regarding the meaning of acting in conscious disregard of whether one's conduct violates a constitutional right (as opposed to merely engaging in conduct that recklessly places one in harm of death or serious bodily injury).

DOJ has faced other crossroads moments whether to press the Supreme Court for a reinvigorated interpretation of the federal criminal civil rights laws. In the immediate aftermath of *Screws*, where six Justices had endorsed some form of a recklessness theory,[98] DOJ debated whether to aggressively press the federal courts for the utilization of

96. For an excellent circuit by circuit analysis of this issue, *see* Richard Thompson II, Cong. Research Serv., Police Use of Force: Rules, Remedies, and Reforms 16 (2015) (recognizing the recklessness standard as "a mens rea standard significantly lower than specific intent"). The Report notes the lack of empirical data as to whether the more prosecution favorable standard has resulted in more § 242 prosecutions in those Circuits. *Id.* at 16–19; *see also* Joanna R. Lampe, Cong. Rsch. Serv., Federal Police Oversight: Criminal Civil Rights Violations Under 18 U.S.C. § 242, 3–5 (2020) (concluding "[l]ower federal courts vary in how they apply the willfulness analysis in *Screws*). For excellent analysis of the perplexities of the willfulness requirement, *see* Teitelbaum, *supra* note 4; Watford, *supra* note 26. For a thorough analysis of recklessness as satisfying willfulness in § 242, *see* Pastor, *supra* note 4; Letter from over Fifty Criminal Law Professors to Asst. Attorney General Kristen Clarke (Jan, 3, 2022) (regarding Reinvestigation of Fatal Shooting of Tamir Rice, letter to DOJ Civil Rights Division asking DOJ to reopen investigation, and exhaustively examining circuit caselaw that supports reckless disregard standard that would support authorizing prosecution) [hereinafter Tamir Rice Letter] (copy on file at offices of Howard Law Journal); *see also infra* Part V (1)(A & B) (discussion of Rice and Gashair cases).

97. Teitelbaum, *supra* note 4; Merkl, *supra* note 4.

98. *See Screws*, 325 U.S. at 92–113 (plurality opinion); *see also supra* note 87 and accompanying text (discussing the four-vote plurality, and the concurring and relevant dissenting opinion).

the recklessness theory nationwide. However, a dispute with the ACLU ensued, and DOJ ultimately decided to forgo aggressive pursuit of the recklessness theory, largely out of concern that the Supreme Court would eliminate even the few limited legal avenues from *Screws* that still remained.[99] Ultimately, DOJ declined to seek jury instructions that would have attempted to liberalize the interpretation of specific intent out of fear that any appeal "would result in further evisceration of the status [of civil rights enforcement] at the Supreme Court."[100]

Approximately two decades later, with reinvigorated Klan violence in the South spiraling unchecked and out of control during the 1960s Civil Rights protests, DOJ again faced difficult decisions about whether to press ahead with appellate litigation in an attempt to push the Court to interpret the relevant civil rights statutes more broadly in order to enhance the federal government's ability to effectively prosecute acts of racial violence. Despite deep divisions within DOJ, many of whom feared adverse decisions would render the federal government even more impotent to prosecute Klan murders, DOJ decided to seek Supreme Court review to establish whether the few federal criminal civil rights statutes remaining on the books could be used to prosecute private actors for violations of fourteenth amendment rights. DOJ ultimately determined pressing forward was essential, as the federal government could not be seen as abjectly impotent in the face of unchecked racial violence.[101]

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99. Teitelbaum, *supra* note 4, at 212-13.

100. *Id.* at 213. DOJ strategy faced further criticism that its legal strategy in police excessive force cases was still almost exclusively relying on the use of stilted, arcane indictment terminology that alleged that the defendant deprived the victim of his right to trial by a court rather than by ordeal, which further resulted in reluctance to aggressively prosecute § 242 cases. *Id.* at 212-213. This may not be a fair criticism. For at least four decades following the *Screws* decision, DOJ was constrained by the existing state of selective incorporation and Supreme Court decisions delineating the scope of federal constitutional protection, including what constitutes excessive force and a seizure under the fourth amendment. Only after 1985 could the DOJ allege a police brutality claim as a deprivation of the constitutional right to be free from unreasonable seizure. *Id.* Finally in 1985, the Supreme Court held that excessive force during an arrest constituted a fourth amendment "seizure." The contours of this constitutional right are still being refined. *See* Torres v. Madrid, 592 U.S. 306 (2021) (application of physical force to a body of a person with intent to restrain is a fourth amendment "seizure" even if the person does not submit and is not subdued).

In light of the current political and legal climate, DOJ, in other civil rights contexts, still must weigh the possibility of adverse court decisions serving as a catalyst to accelerate other challenges in other federal programs. *See* Julian Mark & Peter Whorisky, *Justice Dept. declines to defend affirmative action programs*, Wash. Post A15 (July 30, 2024) (DOJ opts not to appeal various racial preference adverse decisions out of fear that losing at a higher court would create important precedent and accelerate challenges to other programs).

101. *See* Michal R. Belknap, Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post- Brown South 158 (1995 ed.) ("[t]he bombing, burning and bloodshed that convulsed parts of the South during the summer of 1964, and the persistent failure

This course of action eventually resulted in the twin decisions in *United States v. Guest* and *United States v. Price*.[102] Decided on the same day, *Guest* and *Price* nudged the cause of effective federal criminal civil rights enforcement forward.[103] Even after successful outcomes in *Price* and *Guest*, DOJ authorized relatively few prosecutions, and many courts still focused exclusively on the *Screws* language addressing a rigid willfulness requirement — that the defendant had to "specifically intend" to deprive the victim of a relevant constitutional right that was covered under the statute. This became tantamount to gospel, recited by legal experts in congressional hearings and other legal publications,[104] and by DOJ itself when deemed tactical or otherwise expedient to do so.

Nevertheless, several circuits approved, to one degree or another, anomalous resolute DOJ efforts to bring charges that included a recklessness theory consistent with the relevant *Screws* language. This resulted in the current circuit schism on the requisite § 242 willfulness requirement.

United States v. Corder[105] is an example of the use of a tendered jury instruction that specifically includes the term "reckless." There, the Sixth Circuit recently upheld a § 242 conviction where the jury was instructed:

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of local authorities to control this violence, had rendered [the federal] policy of avoiding substantial federal intervention in southern law enforcement no longer tenable"). In that several southern states were unwilling to prosecute white defendants for killings blacks and civil rights workers, and even when a rare state prosecution went forward, the likelihood of a conviction was virtually nil. Mississippi officials refused to prosecute the killers of Chaney, Goodman and Schwerner— which eventually resulted in a federal prosecution yielding the *Price* decision. One defendant was finally tried in state court for those murders in 2005. The murder of African American serviceman Lemuel Penn resulted in a state court acquittal, and a subsequent federal conviction resulted in the *Guest* decision. *See* Michael Belknap, *The Legal Legacy of Lemuel Penn*, 25 How. L. J. 467 (1982). The killers of Viola Liuzzo (Selma to Montgomery protest march) experienced two hung juries in state court before being convicted in federal court on civil rights charges. Wilkins v. United States, 376 F.2d 552 (5th Cir. 1967) (affirming conviction). For a comprehensive review, *see* James Turner, Selma and the Liuzzo Murder Trials: The First Modern Civil Rights Convictions (2018).

102. *Price*, 383 U.S. 787 (1966); *Guest*, 383 U.S. 745 (1966).

103. *See* Teitelbaum, *supra* note 4, at 215 (noting DOJ's post-*Screws* reluctance to press for broader interpretation of "willfulness" requirement); *see also* Belknap, Federal Law and Southern Order, *supra* note 101, at 159–83 (*Price* and *Guest* cases enhanced capacity of DOJ to move against racial violence with a statute already on the books).

104. *See* Tim Arango & Katie Benner, *With New Grand Jury, Justice Department Revives Investigation Into Death of George Floyd*, N.Y. Times (Feb. 23, 2021), https://www.nytimes.com/2021/02/23/us/george-floyd-death-investigation-doj.html (quoting Jonathan Smith, former DOJ Civil Rights Division official and former executive director of Washington Lawyers Comm. For Civil Rights, on the difficulty of proving willfulness, asserting that it is "the highest intent standard under criminal law . . . you need to prove that the law enforcement officer actually knew that he was going to violate someone's rights and acted with that purpose in mind… [i]t's akin to proving first degree murder").

105. United States v. Corder, 724 F. App'x. 394 (6th Cir. 2018).

> A person acts willfully if he acts voluntarily and intentionally, with the specific intent to do something the law forbids. You may find that the defendant acted willfully if you find that he acted in open defiance or reckless disregard of [the victim's] right to be free from unreasonable seizure. In other words, the defendant acted willfully if he seized [the victim] knowing or *recklessly disregarding the possibility* that the seizure was constitutionally unreasonable.[106]

At the other extreme, only the Fifth Circuit apparently wholly ignores the recklessness concept and endorses the most extreme specific intent standard in § 242. In *United States v. Kelsey*,[107] the Fifth Circuit reversed a § 242 conviction because the district court's failed to instruct that the defendant must have "the specific intent to deprive the victim of his constitutional rights"; acting with bad purpose or evil motive was not sufficient. This principle is also reflected in the most recent pertinent Fifth Circuit Pattern Jury Instruction, which provides in relevant part:

> That the defendant acted willfully, that is, that the defendant committed such act or acts with a bad purpose or evil motive to disobey or disregard the law, specifically intending to deprive the person of that right. . .
>
> To find that the defendant was acting willfully, it is not necessary for you to find that the defendant knew the specific constitutional provision or federal law that his conduct violated. But the defendant must have a specific intent to deprive the person of a right protected by the constitution or federal law.[108]

The Fifth Circuit Drafting Committee expressed unabashed self-satisfaction with its formulation, noting its "belie[f] that the combination of the definition of the term 'willfully' provided in the second element

106. *Id.* at 403–04 (emphasis in original). Although not a perfect model instruction, the Sixth Circuit decision, buried in the catacombs of opinions "not selected for publication" in the Federal Reporter system, held that the tendered instruction did not constitute "plain error." *Corder*, 724 F. App'x. at 403–04. *See also* United States v. Couch, 1995 WL 369318 at *3 (6th Cir. 1995) (upholding § 242 conviction based on willfulness instruction containing "recklessness disregard" language). Note the *Corder* instruction sufficiently captures the subjective recklessness requirement endorsed in *Farmer.* The instruction could be further improved with express reference to permitting a finding of recklessness in a criminal case only where a defendant "disregard[s] a risk of harm of which they are aware." *See, e.g.*, Third Circuit Pattern Instructions 5.08 comments (Recklessly) (citing *Farmer v. Brennan*). Instructively, the Sixth Circuit pattern instructions do not contain a specific instruction for § 242, and "[do not] recommend any general instruction defining the term 'willfully,'" instead recommending "that the district court define the precise mental state required for the particular offense charged." Sixth Circuit Pattern Criminal Jury Instructions, Committee Commentary (2023).

107. United States v. Kerley, 643 F.2d 299, 303 (5th Cir. 1981).

108. Fifth Circuit Pattern Jury Instructions (Criminal) 2.12 (2015 ed.)

of the instruction and the explanation of 'willfully' as not requiring particular knowledge of the constitution adequately covers all caselaw."[109]

Interestingly, DOJ seems, at first blush, to endorse this most prosecution-unfavorable position as a matter of policy and appears to use it to justify many of its publicly available declination decisions, even when the incidents in question occurred outside the geographic boundaries of the Fifth Circuit. As discussed below, DOJ often opaquely hedges its bets, not explicitly rejecting, but not overtly endorsing, a recklessness standard.[110] In any event, the Fifth Circuit's extreme position plainly ignores the *Screws* "recklessness" language and similarly ignores the Court's more recent explication of the propriety of a recklessness instruction in *Farmer v. Brennan*.[111]

On a different point on the spectrum, several circuits have endorsed the recklessness standard in one form or another.[112] In addition to the Sixth Circuit case noted above, the Third Circuit, in *United States v. Johnstone*,[113] has held that "willful in 242 means either particular purpose or reckless disregard . . . [t]herefore it is enough to trigger 242 liability if it can be proved by circumstantial evidence or otherwise- that a defendant exhibited reckless disregard for a constitutional or federal

109. *Id.* at 139 (note to instruction 2.12). Older cases in other circuits sometimes reflect this absolutist view as well. Interestingly, although more recent district court cases within the Sixth Circuit utilize instructions that reference recklessness, in a famous 1974 case arising out of the Kent State campus massacre, the trial court granted a Rule 29 motion applying something akin to the Fifth Circuit strict specific intent standard. United States v. Shafer, 384 F. Supp. 496, 503 (N.D. Ohio 1974). The Fifth Circuit comment differs substantially from other pattern instructions which recommend not giving any general instruction defining "willfully" because "no single instruction can accurately encompass the different meaning the term has in federal criminal law." *See, e.g.*, Eighth Circuit Model Criminal Jury Instructions 1.38 at 60 (2023).

110. *See* discussion of various DOJ guidelines and DOJ press releases *infra* notes 131–134 and accompanying text (Ghaisar and Rice cases).

111. Ironically, the Fifth Circuit stands alone in its interpretation of willfulness as setting forth the most difficult standard for the government to establish in order to achieve a conviction. The Circuit is composed entirely of States of the Old Confederacy and carries its own historical baggage of hostility towards civil rights enforcement. *See generally* Deborah J. Barrow & Thomas G. Walker, A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform 32–61 (1988) (noting resistance of some Fifth Circuit judges to civil rights enforcement who saw the ways of the Old South dying at the hands of liberal federal court rulings) (*see id*. at 55).

112. As far back as 1999, a former high ranking DOJ Deputy Attorney General of the Civil Rights Division asserted that, although "serious problems" remain for prosecutors and judges in applying the specific intent requirement of *Screws*, he nevertheless thought the recklessness principle sufficiently established to confidently reference a purported model section 242 instruction that provided "[i]t is not necessary to show or prove that the defendant was thinking in constitutional terms at the time of the incident, for a reckless disregard of a person's constitutional rights is clear evidence of specific intent to deprive that person of those rights." James Turner, *Police Accountability in the Federal System*, 30 McGeorge L. Rev. 991, 1011 n.118 (1999).

113. United States v. Johnstone, 107 F.3d 200 (3d Cir. 1997).

right." Despite the fact that the challenged instruction did not contain the term "reckless," the opinion endorses the inclusion of the term "reckless" in a relevant § 242 jury instruction. Moreover, the *Johnstone* court further endorsed, albeit in dicta, that a § 242 prosecution almost certainly required application of a subjective recklessness standard, which means that the defendant consciously disregarded a risk of which he was aware, a result necessary to comply with the Supreme Court guidance on the issue.[114]

The key point is that the inquiry is not whether the defendant was merely subjectively reckless in using lethal force, or any type of force. Rather, the proper inquiry is whether the defendant was subjectively reckless; consciously aware of the risk of whether he was executing an unreasonable seizure. In other words, framing the inquiry in "non-constitutional" terminology, whether he consciously disregarded the risk that the amount of force used was excessive.This, in turn, yields a model instruction in police misconduct cases that:

> The government must prove that Defendant willfully deprived the victim of his right to be free from an unreasonable seizure, that he intentionally or recklessly disregarded the Victim's right to be free from the use of excessive force by law enforcement. The government need not show that he was necessarily thinking in constitutional terms. However, the government must show that Defendant intended to engage in conduct that violated the constitution, and consciously disregarded the risk of which he was aware as to whether the use of force was excessive.

Even the generally conservative Fourth Circuit has upheld a § 242 jury instruction which provides that to satisfy the "willful" conduct element, the government must prove that the defendant acted "with particular purpose of violating a protected right made definite by the rule of law or recklessly disregarded the risk that he would do so."[115] In addition, Seventh and Ninth Circuit case law also acknowledges that willfulness in a § 242 prosecution can be satisfied by a showing that the officer acted with reckless disregard for the victim's constitutional rights. However, the particular jury instructions in those cases are

114. Third Circuit Pattern Instructions 5.08 Instruction note 5.08 (recklessly) (2018 revision) Referencing *Johnstone*, the Third Circuit noted that although the Supreme Court has not defined "reckless disregard" under § 242, the Court stated in dicta in *Farmer v. Brennan* that in criminal cases reckless disregard required subjective awareness and disregard of the risk, *Johnstone*, 107 F.3d at 836–37, and that this definition was appropriate in criminal prosecutions under 18 U.S.C. § 242. *Id*. at 839 n.7 (relying on influential Model Penal Code recklessness principles).

115. United States v. Cowden, 882 F.3d 464, 472 (4th Cir. 2018).

somewhat circular and need to be further refined to address the subjective recklessness concerns that are, to some degree, grounded in analogous *Screws* "void for vagueness" concerns.[116]

Other circuits rely on pattern § 242 jury instructions that are abstruse to say the least, making it difficult to determine if they are more akin to the Fifth Circuit's unduly narrow interpretation or if they fully embody the recklessness option even if that term is not specifically used, or represent something in between. The Eighth, Tenth, and Eleventh Circuits pattern instructions are representative. Overall, this paints a frustrating and confusing picture leading to inconsistent applications of the relevant legal principles from circuit to circuit.[117]

The Eleventh Circuit Pattern Instruction provides in relevant part that the defendant "willfully exceeded and misused or abused the Defendant's authority under state law." The companion Annotation and Comment provides that the "committee believes that the general definition of 'willfully' in Basic Instruction 9.1A would usually apply to this crime."[118]

The comments to Instruction 9.1 explain that "willfulness" in this situation is defined so as to require the offense be committed "voluntarily and purposely with the intent to do something unlawful… [h]owever the person need not be aware of the specific law or rule that his or her conduct may be violating."[119] The commentary further distinguished this instruction from the heightened mens requirement set forth in Instruction 9.1B, where the Government must prove that the defendant intends to violate a known legal duty, "that is with the specific intent to do something which the law forbids."[120]

At best, it is unclear what the government must prove in a § 242 case in the Eleventh Circuit. Perhaps the Eleventh Circuit is endorsing some type of "general intent" crime, although that seems inconsistent

116. *See, e.g.*, United States v. Gwaltney, 790 F.2d 1378, 1386 (9th Cir. 1986) (acting in "reckless disregard for a person's constitutional rights is evidence of specific intent to deprive a person of those rights); United States v. Bradley, 196 F.3d 762, 769 (7th Cir. 1999) (government must establish that defendant acted "in open defiance or reckless disregard of a constitutional requirement").

117. *See supra* note 96 (citing various Congressional Research Service Reports noting the various circuit courts' definitions of willfulness in § 242); *see also infra* notes 149–59 and accompanying text (discussion of Tamir Rice case and letter by 50 law professors arguing that prosecution should be revived by applying recklessness theory of § 242 liability, which represents the law in several circuits, including the Sixth Circuit, where Rice was killed).

118. Eleventh Circuit Pattern Instructions 9.1A (Annotation and Comment).

119. Note there is no reference to not having to think in constitutional terms.

120. Eleventh Circuit Pattern Instructions 9.1B (2020)

with *Screws*.[121] It does not appear to be as extreme as the Fifth Circuit interpretation, but whatever the definition, it hardly provides clear guidance to the jury. It does not seem to encompass a subjective recklessness standard.

The Eighth Circuit Model Instruction, at first blush, seems similar to the stringent Fifth Circuit instruction, defining "willfully" as an act "committed with a bad purpose or improper motive to disobey or disregard the law, specifically intending to deprive a person of that right."[122] The instruction somewhat contradictorily and incomprehensively adds that:

> [T]o find a defendant acted willfully, it is not necessary for you to find that the defendant knew that his or her conduct violated . . . you may find the defendant acted willfully even if you find that [her or she] had no real familiarity with the constitution or with the particular constitutional right involved. However, you must find that the defendant had a specific intent to deprive the person of a right protected by the constitution or federal law.[123]

Whatever this means, it does not clearly address the subjective recklessness amplification as *Farmer v. Brennan* would seem to require.[124]

The Tenth Circuit Pattern Instructions reflect similar ambiguity. The § 242 instruction defines "willfully" as "act[ing] with bad purpose, intending to deprive [the victim] of that right," and cryptically adds a comment based on *Screws* that it is "necessary that they have the actual purpose of depriving the victim of the rights enumerated in the indictment, but such a purpose need not be expressed [and] may at times be reasonably inferred from all the circumstances." However, it omits any reference to "recklessness."[125]

Other commentators have noted the mishmash of inter-circuit inconsistencies and incomprehensiveness in § 242's willfulness

121. *Screws*, 325 U.S. at 101–03 (noting general intent insufficient to establish criminal liability under predecessor statute to § 242, stating that "something more is required than doing of the act proscribed by the statute," which is effectively a rejection of the definition of "general intent").

122. Eighth Circuit Model Instruction at 208–09 (2023).

123. *Id*.

124. *See* Dep't Just. Report Regarding the Criminal Investigation into the Shooting of Michael Brown by Ferguson Police Officer Darren Wilson 86–87 (March 4, 2015) (DOJ analysis determining no federal criminal civil rights charges will be pursued, where DOJ analysis includes an extreme recklessness component, although without citation to any Eighth Circuit supporting authority) [hereinafter DOJ Michael Brown Rep.]. *See also infra* notes 135–142 and accompanying text (discussion of jury instructions in federal civil rights prosecution arising out of murder of George Floyd (*Thao* discussion).

125. Tenth Circuit Pattern Instructions 2.17 comment (2021).

requirement.[126] What is clear, however, is that several circuits utilize some variant of the recklessness option that does not fully address or otherwise comply with the *Farmer v. Brennan* subjective recklessness standard.

V. The Need for DOJ Strategic Advocacy in Support of A Nationwide "*Screws*" Recklessness Standard

The untenable situation described above must be rectified. Given that any legislative fix for § 242 is unlikely, the only realistic option available that offers any possibility of clarification and improvement is for DOJ to identify appropriate test cases and pursue Supreme Court review in order to establish that "recklessness" is included within the definition of § 242's "willfulness" mens rea.

Taking the subjective recklessness standard derived from *Farmer v. Brennan* into account, the *Screws* recklessness standard must mean that the statutory willfulness requirement can be met by establishing that a defendant was consciously aware of the risk that their conduct violated a particular constitutional right — (i.e. the Fourth Amendment right to be free from an unreasonable seizure). Even if one adds the qualifying principle that the officer need not be specifically thinking in constitutional terms, one must still be consciously aware of the risk that their conduct might constitute improper excessive force. Either way, there is no escaping the requirement to get into the state of mind of the defendant—but proof of conscious disregard is sufficient, as opposed to having to prove specific intent as the sole avenue to establish willfulness sufficient to support a conviction.

DOJ has no reason to avoid this challenge. The Supreme Court is obliged to resolve multi-dimensional circuit conflicts concerning the interpretation of significant federal criminal statutes.[127]

For example, in *Elonis v. United States*,[128] the Court confronted a circuit split on an analogous recklessness issue. Justice Alito was particularly disturbed by the manner in which the Court ultimately avoided resolving the issue, complaining that:

> [t]he Court's disposition . . . is certain to cause confusion and serious problems. Attorneys and judges need to know which mental state is required for conviction under 18 USC 875 (c) . . . This [failure to

126. *See supra* note 96 (citing two CRS Reports which discuss the inter-circuit inconsistency on the meaning of willfulness in § 242).

127. *See* Sup. Ct. R. 10 (a) (listing Circuit Court conflict on an "important matter" that may qualify as "compelling reason" to justify Supreme Court grant of petition for writ of certiorari).

128. Elonis v. United States, 575 U.S. 723 (2015).

> resolve the issue] will have regrettable consequences . . . . If purpose or knowledge is needed and a district court instructs the jury that recklessness suffices, a defendant may be wrongly convicted. On the other hand, if recklessness is enough, and the jury is told that a conviction requires proof of more, a guilty defendant may go free. We granted review in this case to resolve a disagreement among the Circuits . . . . There is no justification for the Court's refusal to provide an answer.[129]

Here, DOJ seems content to let the existing circuit split fester, creating the situation where this critical statute is enforced and interpreted differently depending on the geographic location where the offending conduct occurred. This is untenable. As noted above, this has resulted in the most onerous specific intent standard, as evidenced by the relevant jury instructions, being applied in the Fifth Circuit. Yet, in the Ninth, Third, Seventh, and District of Columbia Circuits, and perhaps other circuits as well, pattern instructions and relevant circuit court decisions endorse broader definitions of "willfully" to include acting "recklessly," in conscious disregard — although what that actually means in a particular case is still open to considerable debate.[130]

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129. *Id.* at 742–43 (Alito, J., concurring in part and dissenting in part). Justice Thomas similarly noted that the Court's "failure to decide" the circuit split "throws everyone . . . into a state of uncertainty." *Id.* at 750 (Thomas, J., dissenting). The importance of DOJ taking the lead on these issues is significant. *See* Brief for Petitioner-Appellant at 11–12, Natale v. United States, No. 13-744 (E.D. Pa. Mar. 14, 2014) (government acknowledges circuit split and announces shift in its stance on mens rea in 18 U.S.C. §§ 1001 and 1035, stating "it is now the view of the United States that . . ."willfully" . . . [in two statutes] requires proof that the defendant made a false statement with knowledge his conduct was unlawful").

130. The D.C. Circuit has recognized a recklessness theory of liability ever since United States v. Ehrlichman, 546 F.2d 910, 921–922 (D.C. Cir. 1976) (citing *Screws*). Because of the unique jurisdictional status of the District of Columbia where the federal government is the same sovereign as the District under the double jeopardy clause, local murder charges may be joined in the same federal prosecution of civil rights offenses. *See* D.C. Code §11-502 (3)(authorizing the United States District Court for the District Court to exercise jurisdiction over '[a]ny offense under any law applicable to the District of Columbia which offense is joined in the same offense or indictment with any Federal offense"). This creates unique opportunities for interpretive mischief of the willfulness requirement when a § 242 charge is joined with a local D.C. murder of manslaughter charge. Such joinder of federal and local offenses cannot occur in the 50 states because of constitutional and other jurisdictional limitations. In *United States v Jevric*, 1:23-cr-0063 (RDM)(2023), the defendant Jevric shot and killed a motorist who was sleeping in his car and was observed with a handgun in his waistband. Jevric was indicted in federal court on a federal § 242 charge and a second degree murder charge under the D.C. Code. Jevric agreed to plead guilty to the federal § 242 charge and to involuntary manslaughter under local D.C. law, admitting he used unreasonable force and acting willfully and in reckless disregard of the victim's constitutional rights. Spenser Hsu, *D.C. sergeant is given 5 years*, Wash. Post B1 at 1, 4 (Aug. 30, 2024). In arguing for a sentence near the bottom of the applicable guidelines range, Jevric intimated the government's joinder decision was akin to forum shopping, and argued that his conduct was not intentional, an interpretation he contended was required because otherwise "there would be no way to reconcile the mens rea required for the § 242 charge, *i.e.* "willful," with the mens rea for the involuntary manslaughter charge, i.e. negligent or unintentional." Defendant's Supplemental

In other circuits, the applicable standard is unclear, as the holdings of appellate decisions do not always correspond to the language in the challenged jury instructions.

DOJ, in press releases involving high profile incidents where it often announces its decision not to proceed with federal civil rights charges, invariably recites the platitude that § 242 requires the government to prove "beyond a reasonable doubt that that the officers acted willfully . . . [t]his high legal standard — one of the highest standards of intent imposed by law — requires proof that the officer acted with the specific intent to do something that the law forbids."[131] This terse characterization, so brief so as to be incomplete if not overtly misleading, captures the most onerous specific intent interpretation of willfulness that represents a minority view in the circuits. If reflected in a jury instruction, it requires the government to prove that the officer acted with the specific intention to deprive the victim of a particular constitutional right alleged in the indictment.[132]

However, in the next breath, the DOJ arguably implicitly endorses some type of "recklessness" component of willfulness. Those same press releases, which concern incidents occurring in almost every circuit, as well as the current DOJ Civil Rights Division website, dutifully recite, "'[m]istake, panic, fear, misperception, or even poor judgment does not constitute willful conduct prosecutable under the statute."[133]

Sentencing Memorandum in Response to Government's Supplement, no. 23-cr-63-RDM, filed 8/3/24, at p. 2.

This conundrum raises several complex issues regarding how to interpret the recklessness standard in § 242. Jevric's interpretation of § 242's willfulness requirement seems at variance with the *Farmer v. Brennan* explication of the *Screws* standard, which requires a subjective recklessness, a degree of culpability more than negligence or unintentional conduct. Moreover, it is unclear whether every charge in a plea agreement to which a defendant pleads guilty must be consistent in every respect. The law is well-settled that jury verdicts need not be consistent in every respect. *See* Bravo-Fernandez v. United States, 580 U.S. 5 (2016). As long as the trial court found a sufficient factual basis for the § 242 plea, the defendant might have received a favorable plea agreement permitting him to plead to involuntary manslaughter, a lesser form of homicide than the murder count charged in the indictment, although the requisite mens rea in the § 242 charge to which he pled may have supported a guilty plea to an even more serious homicide charge than the one the parties agreed would be sufficient to resolve the case.

131. Virtually identical language is found in the Bijan Ghaisar and Tamir Rice press releases. Both were high profile incidents where DOJ ultimately declined to pursue federal criminal civil rights charges. Press Release, U.S. Att'y's Off., D.C., Federal Officials Close Investigation Into the Death of Bijan Ghaisar (Nov. 14, 2019), https://www.justice.gov/usao-dc/pr/federal-officials-close-investigation-death-bijan-ghaisar (last updated Dec. 3, 2019) [hereinafter Ghaisar Press Release]; Tamir Rice Press Release, *supra* note 11. These incidents are discussed in further detail in Part V. 1. *Infra*.

132. *See, e.g.*, Fifth Circuit Pattern Jury Instructions, *supra* notes 106–110 & accompanying text.

133. *Law Enforcement Misconduct*, C.R. Div., U.S. Dep't of Just., www.justice.gov/crt/law-enforcement-misconduct (last visited Dec. 8, 2023), states:
"To prove a violation of section 242 . . . the government must prove . . . beyond a reasonable doubt that the defendant acted willfully . . . . Establishing intent beyond a reasonable doubt that the law

This author has previously noted, "[i]nstructively, reckless conduct is *not* included [in the DOJ list of] . . . non-prosecutable conduct — thus implying such [reckless] conduct is prosecutable."[134] That comports with the fact that some federal prosecutors in a number of circuits have successfully prosecuted under the recklessness standard, and those convictions have been affirmed on appeal.

DOJ's schizophrenic approach to the issue extends beyond its opaque negative implication endorsement of a recklessness standard in press releases. In an atypical 87-page declination report on the Michael Brown killing in Ferguson, Missouri, DOJ engaged in an exhaustive legal and factual analysis and concluded that no federal civil rights charges would be pursued because of the inability to establish willfulness beyond a reasonable doubt.[135] Despite governing Eighth Circuit precedent requiring that the prosecution prove the defendant acted with "specific intent" and where the relevant Circuit model instruction contains no reference to "recklessness," the DOJ Ferguson Report nevertheless suggested that, in making the determination whether to pursue federal charges, recklessness was the legal equivalent to willfulness—a legal conclusion arguably contrary to the controlling circuit law.[136] Apparently, DOJ is willing to occasionally endorse a nationwide recklessness standard outside of court where there is no legal consequence or precedential effect in doing so.

The Eighth Circuit experience epitomizes everything that is wrong with DOJ's feckless approach. In a recent federal trial arising out

enforcement officer knew what he/she was doing was wrong and against the law and decided to do it anyway." *See* Ghaisar Press Release, *supra* note 131; Tamir Rice Press Release, *supra* note 11 (summarizing the government's purported extraordinary high burden of proof in these cases).

134. Kurland, *supra* note 12 at 788 n.79 (emphasis in original). This conclusion is consistent with the legal maxim *"expressio unius est exclusion alterius,"* a canon of statutory construction expressing the principle that when a matter is specified in a legal document, "the particulars are exhaustive, and other similar matters not included can be presumed to have been omitted intentionally." *Expressio unius,* Oxford English Dictionary (Sept. 2023).

135. DOJ Michael Brown Rep., *supra* note 124 at 86–87.

136. Brown was killed in Ferguson, Missouri, within the boundaries of the Eighth Circuit. Eighth Circuit pattern jury instructions provide that "the defendant acts willfully [when] the defendant committed such act or acts with bad purpose or improper motive to disobey or disregard the law, specifically intending to deprive the person of that right." Eighth Circuit Criminal Pattern Instruction 6.18.242. Notably, the instruction does not mention recklessness. In the federal civil rights trials concerning the George Floyd murder, tried in Federal District Court in Minnesota, also within the Eighth Circuit, the trial judge tendered the Eighth Circuit Pattern Instruction 6.18.242. United States v. Thao, No. 0:21-CR-00108- PAM-TNZ, Jury Instructions at 16–17, 27, 2022 WL 562905 (Feb. 24, 2022). However, the DOJ Ferguson Report cited the *Screws* language referencing recklessness but ultimately determined "[b]ecause Wilson did not act with the requisite criminal intent, it cannot be proven beyond a reasonable doubt that he violated [section] 242," such that prosecution should be declined. DOJ Michael Brown Rep., *supra* note 124, at 85–86.

of the George Floyd killing, *United States v. Thao*,[137] defense counsel sought the most defense favorable mens rea instruction, which defined "willfulness" as "commit[ing] such act or acts with bad purpose or improper motive to disobey or disregard the law, specifically intending to deprive the person of that right."[138] As noted above, this definition substantially comports with the highest and most difficult prosecutorial burden, and which DOJ dutifully recites in most publicly released declination decisions.

The government countered with a page-long more prosecution-favorable proposed instruction defining "willfulness" in a manner that emphasized the use of circumstantial evidence, the lack of a requirement to prove familiarity with the constitutional right involved, and the permissible use of inferences and intention based on "the natural and probable consequences of any acts he knowingly takes or knowingly fails to take."[139] The government then cited several authorities in support of this proposed instruction derived from Eighth Circuit Model Instructions regarding § 242 and a general instruction defining willfully. Two of those authorities referenced the concept that recklessness can satisfy the willfulness requirement, *but no reference to recklessness was included in the government's proposed instructions*.[140]

The trial court tendered the relevant jury instructions, none of which contained a single reference to recklessness.[141] Defendant Thao challenged his conviction, arguing that the evidence was legally insufficient to establish the requisite willfulness. In affirming the conviction,[142] the Eighth Circuit emphasized the recklessness prong and twice cited *Screws*, even though the trial instructions did not include this theory of establishing willfulness. The Court held:

> [T]he government had to show that Thao acted with specific intent to deprive Floyd of his constitutional rights. This includes "act[ing] in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite."…In simpler terms, 'willful[]' means either particular purpose or reckless disregard. Therefore, it is enough to trigger § 242 liability if it can be proved- by

137. United States v. Thao, 76 F.4th 773 (8th Cir. 2023), *cert denied*, 144 S. Ct. 610, 217 (2024).
138. United States v. Thao, 2022 WL 562905 (D. Minn.) (Jury Instruction).
139. *Id.* at n.132.
140. *See* Proposed Jury Instruction of the U.S. at No. 25, United States v. Thao, 76 F.4th 773 (8th Cir. 2023), 2022 WL 195724, Proposed Instruction No. 25, Authorities (referencing as authorities *Screws,* 325 U.S. at 106, and United States v. Brugman, 364 F.3d 613, 616 (5th Cir. 2004)).
141. Jury Instructions at No. 13 (Elements of the Offense); 15 (Willfulness); No. 19 (proof of Willfulness, Intent or knowledge), United States v. Thao, 2022 WL 562905 (Feb. 24, 2022).
142. United States v. Thao, 76 F.4th 773 (8th Cir. 2023).

> circumstantial evidence or otherwise- that a defendant exhibited reckless disregard for a constitutional or federal right.[143]

How can this be? If the Eighth Circuit is sufficiently certain so as to include the above language in a published opinion, the least it could do is ensure that the critical language and terminology defining the mens rea are actually included and adequately explained in the relevant jury instructions.[144]

On the other hand, the Fifth Circuit approaches the matter from a far different direction. As noted above, the Fifth Circuit Pattern Instructions seem to require an absolute specific intent requirement that reinforces the mythic "impossible high bar" standard. DOJ may parrot that standard on its website and in numerous official statements. However, U.S. attorneys in the field seem to evaluate the situation a bit differently.

For example, a DOJ press release declining prosecution in the 2016 police shooting death of Alton Sterling in Baton Rouge, Louisiana, contained two statements on the prosecution's heavy burden under federal civil rights law and also contained the equivocal language not expressly ruling out recklessness as grounds to establish criminal culpability.[145] However, the local federal prosecutor, in a separate press statement, expressed a different view concerning the circuit's governing standard, stating "[willfulness is] the highest standard in federal criminal law, …*[whereas [b]]eing reckless*, escalating a situation that may have been de-escalated -- *those things are not a basis, under the law, for a federal civil rights prosecution*."[146]

This absurd level of DOJ equivocation erodes confidence in the criminal justice system, sows needless confusion, and undermines effective nationwide federal criminal civil rights enforcement. As noted above, Supreme Court majorities have routinely cited *Screws* with

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143. *Id.* at 777 (citations omitted).

144. *See generally infra* note 182 (arguments of counsel are not a substitute for legal theories set forth in court's instructions).

145. Press Release, Dep't of Just., Federal Officials Close Investigation Into Death of Alton Sterling (May 3, 2017) (willfully is "one of the highest legal standards of intent imposed by law-and requires specific intent. . . not enough to show mistake, negligen[ce], accident, mistake, or even . . . bad judgment"; government must establish specific intent to violate [victim's] rights . . . that officers knew what they were doing was unreasonable or prohibited, and chose to do it anyway.")

146. Richard Fausset & Alan Blinder, *2 Fatal Shootings Yield Different Results*, N.Y. Times (May 3, 2017), https://www.nytimes.com/2017/05/03/us/police-shootings-alton-sterling.html (quoting local federal prosecutor Amundson) (emphasis added). *But cf.* United States v. Brugman, 364 F.3d 613, 616 (5th Cir. 2004) (Fifth Circuit cites *Screws* recklessness language but there is no indication that recklessness was referenced in the jury instructions). For a discussion on how juries might evaluate de-escalation evidence in determining the reasonableness of an officer's decision to use deadly force, *see* Lee, *supra* note 85.

approval,[147] and almost fifty years after *Screws*, the Court suggested in dicta that a subjective recklessness standard is appropriate for § 242 prosecutions.[148] At least two non-partisan Congressional Research Center reports have noted these significant inter-circuit inconsistencies. A clearly defined recklessness standard could yield different charging decisions and different trial results in some cases.

1. Would Outcomes be Affected?

Would a willfulness instruction specifically stating that subjective recklessness constitutes willful conduct make a difference, perhaps resulting in more convictions? Consider the following three cases, where the law enforcement misconduct was sufficiently egregious to result in huge civil settlements and termination of the officers' employment, and where the facts were sufficient to support a conclusion that the conduct was criminally reckless. As such, each case was well positioned to clear the subjective recklessness hurdle presented in a § 242 prosecution. Yet in all three cases, either because no federal criminal prosecution was authorized in the first instance or in the one case where a federal prosecution went forward, the jury was unable to receive a subjective recklessness instruction and thus could not deliberate whether the conduct established subjective recklessness beyond a reasonable doubt.

A. The Killing of Tamir Rice

> On Saturday, November 22, 2014, at approximately 3:30 pm in the afternoon, Tamir Rice — 12-year-old boy — was shot and killed at close range by Cleveland Police Officer Timothy Loehmann. The shooting took place at Cudell Recreation Center, a park where Tamir and other children regularly played.
>
> That afternoon, Tamir had been playing in the park with a toy gun which had been given to him by another boy. A man who was drinking and waiting for a bus saw Tamir playing with a toy gun and called 911 to make a report. He twice relayed to the 911 officer that the gun was 'probably fake' and that Tamir was 'probably a juvenile' who was sitting on the swing in the park. He did not report that he or anyone else had been shot at or that any altercation had taken place.

147. *Lanier*, 520 U.S. at 267–272 (unanimous opinion); Williams v. United States, 341 U.S. 97, 101–102 (1951) (5-4 opinion); United States v. Price, 383 U.S. 787, 793 (1966) (near unanimous opinion with one partial concurrence).

148. Farmer v. Brennan, 511 U.S. 825, 839 n.7 (1994).

> According to the Cuyahoga County Prosecutor's report of the incident, the dispatcher advised [the responding officers] that someone was sitting on the swings at the park with a gun. The dispatcher did not tell the officers that the gun had been fired or that anyone had been shot or injured. [The dispatcher also did not relay the caller's comments that the pistol 'is probably fake' and the person on the swing 'is probably a juvenile'].
>
> According to a video of the incident, when the officers arrived, they drove into the park and pulled up a few feet of Tamir. Officer Loehmann jumped out of the car while it was still moving, with his gun drawn, and shot Tamir in the *abdomen, all within less than two seconds* . . . . Loehmann jumped out of the car while the car was still in motion, his gun was drawn, he aimed the weapon and then intentionally shot and killed Tamir even though neither of the officers or any civilians were in any actual or observable danger.[149]

The state criminal investigation traversed a tortured path. In the face of official intransigence, a citizen petition was filed before a municipal judge, who agreed that the officers should be charged with crimes ranging from involuntary manslaughter to dereliction of duty and forwarded his findings to the local district attorney. The local prosecutor presented the case to a local grand jury. Several use-of-force experts testified, including some who concluded the officers acted recklessly. Amidst allegations of prosecutorial irregularities, including accusations of deliberate prosecutorial sabotage, the grand jury declined to indict on any charges.[150]

Thereafter, a DOJ civil rights investigation ensued. [151] In the waning days of the Trump administration, DOJ issued a report declining to pursue any federal criminal civil rights charges.[152] The DOJ press report cited the familiar "willfulness-specific intent" high bar, along with the usual disclaimer that "[i]t is not enough to show that the officer made a mistake, acted negligently, acted by accident or mistake, or even exercised bad judgment." [153] Unsurprisingly, "recklessly" was not included in the list of culpable mental states insufficient to support liability under § 242.[154] DOJ ultimately rested its declination decision

149. Tamir Rice Letter, *supra* note 96 (emphasis in original). The letter asks DOJ to reconsider its earlier declination decision and present the case to a grand jury utilizing the recklessness theory.

150. For a general review, *see Killing of Tamar Rice*, en.Wikipedia.org/wiki/killing_ of _Tamir_ Rice (last visited June 5, 2024).

151. *See generally* Tamir Rice Press Release, *supra* note 11.

152. *Id.*

153. *Id.* at 6.

154. *Id.*

on the purported existence of conflicting evidence on several points, including dueling conclusions of excessive force experts.[155]

After a change in administrations as a result of the 2020 presidential election, a group of approximately fifty prominent criminal, constitutional, and civil rights law professors authored a letter to DOJ asking to reopen the Tamir Rice investigation and presented a comprehensive factual and legal analysis advocating that the case should be reevaluated under a recklessness theory, which was consistent with Sixth Circuit case law and represented the law in several other circuits as well.[156] The letter emphasized the officer's near instantaneous resort to lethal force, although neither responding officer nor any civilians were in any actual or observable danger, and there was significant evidence—albeit somewhat conflicting—that Tamir did nothing to suggest he was reaching for a weapon.[157]

Even with what many would consider a group of DOJ Civil Rights Section decision makers arguably more receptive to robust federal criminal civil rights enforcement, DOJ declined to reopen the probe into Tamir's death. Assistant Attorney General Clarke's brief response letter focused on the "willfulness" requirement, which she defined as acting with the "specific intent to do something the law forbids- to deprive a person of their constitutional rights," and concluded:

> [a]fter thorough consideration of . . . [all] the available evidence, the Justice Department's career prosecutors have concluded that this information does not change its earlier 2020 decision . . . . *By no means should you view the Department's 2020 decision as an exoneration of Timothy Loehmann's actions*.[158]

Clarke's letter made no mention of the recklessness theory.[159]

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155. U.S. Dept of Justice, *Justice Department Announces Closing of Investigation into 2014 Officer Involved Shooting in Cleveland, Ohio* (Dec 29, 2020), justice.gov/opa/pr/justice-department-announces-closing-investigation-officer-involved-shooting.

156. Tamir Rice Letter, *supra* note 96.

157. The letter argued, inter alia, that "the record supports the conclusion that a federal prosecutor should convene a grand jury to present evidence that the officers used excessive force and acted in reckless disregard for Tamir's constitutional rights . . . . [Even] openly carrying a gun is legal in Ohio. The officer's actions in shooting Tamir within two seconds of arriving on the scene, even though he had no weapon in his hands and they did not observe him threatening anyone, doing anything illegal, or fleeing . . . A reasonable jury could . . . find that the officers' failure to even *attempt* to determine whether Tamir posed a significant [lethal] threat . . . indicates reckless disregard for his constitutional rights." *Id.* at 5–6 (emphasis in original).

158. Letter from Kristen Clark, Assistant Att'y Gen. to Johnathan Abady (Jan. 28, 2022), *reprinted at* scalawagmagazine.org/2022/03/doj-tamir-rice-civil-rights-investigation-response (emphasis in original).

159. *Id. See also* Coleen Long, *Justice Department won't reopen probe into Tamir Rice death*, AP News (Feb. 10, 2021), apnews.com/article/ahmaudarbery-shootings-cleveland-tamir-rice-20b0

B. The Killing of Bijan Ghaisar

On November 17, 2017, Bijan Ghaisar, a 25-year-old American Citizen, was the victim in a minor fender bender along the George Washington Memorial Parkway in Virginia, on a stretch of highway within the exclusive territorial jurisdiction of the United States. Ghaisar, who was not armed, pulled away without exchanging vehicle and insurance information, an action that constituted a misdemeanor offense. In the Fairfax County section of the Parkway, U.S. Park Police, later joined by Fairfax County Police, pursued Ghaisar.

Ghaisar stopped once, was approached by armed officers, and drove off. Several miles later, Ghaisar pulled off the parkway and stopped again. Again, the officers ran at him with guns drawn, and he drove off. A little further down the road, Ghaisar stopped again. Park Police tried to prevent him from fleeing again by maneuvering their vehicle in front of his vehicle, thus affirmatively choosing to place themselves in more immediate danger than otherwise necessary under the circumstances. As he slowly maneuvered away again, Park Police fired ten shots at him, hitting him in the head four times. Ghaisar was mortally wounded and died several days later at a local hospital.[160] In 2019, the Trump DOJ declined to bring federal criminal charges in the shooting death of Ghaisar, stating that it could not prove the officers committed a "willful violation" of the federal civil rights laws, but offered no explanation why the Park Police shot into the vehicle as it drove away from them. DOJ repeated its mantra that "[[a]s the willfulness] requirement has been interpreted by the courts, evidence that an officer acted out of fear, mistake, panic, misperception, negligence, or even poor judgment, cannot establish the high level of intent required under Section 242."[161] Notably, despite Fourth Circuit case law supporting a recklessness avenue to establish willfulness,[162] and a record which established Park Police Officers 1) lack authority to follow a vehicle outside of their jurisdiction unless a felony had been committed, 2) operate under strict limitations that prohibit firing at a moving vehicle except when there is

9690b34bfa689c54d438da8153e. The Rice family settled a civil wrongful death lawsuit for six million dollars. Lauren Hodges, *Cleveland To Pay $6 Million To Settle Tamir Rice Lawsuit,* NPR (Apr. 25, 2016) https://www.npr.org/sections/thetwo-way/2016/04/25/475583746/cleveland-to-pay-6-million-to-settle-tamir-rice-lawsuit.

160. The above factual summary is based on *Killing of Bijan Ghaisar*, Wikipedia https://en.wikipedia.org/w/indexphp?=killing_of_Bijan_Ghaisar&oldid=1188637091i (last visited June 5, 2024).

161. *See* Ghaisar Press Release, *supra* note 131.

162. United States v. Cowden, 882 F.3d 464, 472 (4th Cir. 2018).

a reasonable belief that the subject poses an imminent deadly threat, and that 3) no explanation was offered why the officers knowingly positioned their vehicle directly in front of Ghasair's vehicle and then, as the vehicle crept slowly forward and turned away from the approaching officers, the officers opened fire on Ghasair, a recklessness theory of liability was not addressed or otherwise examined.[163]

With no cooperation from federal authorities, a Virginia special grand jury indicted the officers on manslaughter and reckless use of a firearm charges. The case was removed to federal court, where a federal district judge dismissed the state prosecution based on "supremacy clause" immunity without any factual examination or analysis. A Fourth Circuit appeal by the State Attorney General was dismissed shortly after the newly elected Republican Attorney General took office in January 2022.[164]

In May 2022, the family, supported by a group of Civil Rights, Religious, and Human rights groups, asked the DOJ, now led by Merrick Garland and Christen Clarke, to reopen the federal investigation and pursue federal criminal civil rights charges, asserting that the record established a colorable claim of a federal criminal civil rights violation and that the supremacy clause dismissal never addressed the merits of the case.[165] However, the DOJ declined to reopen the case, again engaging in a mantra-like recitation of the high willfulness bar but continuing to refuse to address or acknowledge whether subjective recklessness presented a valid theory of liability.[166]

If the Supreme Court had clearly endorsed a subjective recklessness standard for § 242 cases, DOJ's decision whether to pursue these charges might have been different. The several violations of Park Police policy concerning firing at a moving vehicle, the use of deadly force against unarmed motorists not posing an imminent threat of serious bodily injury or death, and the officers' decision to escalate by needlessly moving into the path of the vehicle, suggest that

163. Tom Jackman, *U.S. Park Police officers will not face federal charges in shooting of Bijan Ghaisar,* Wash. Post (Nov. 14, 2016), washingtonpost.com/local/public-safety/us-park-police-officers-will-not-face-charges-in-shooting-of-bijan-ghaisar/2019/11/14/1497a788-f1ab-11e9-89eb-ec56cd414732_story.html.

164. Letter to Honorable Merrick Garland from Amnesty International (May 19, 2022), *available at* Amnestyusa.org/wp-content/uploads/2022/05/Bijan-Ghaisar-FINAL-LETTER-2.pdf (copy on file with the offices of the Howard Law Journal).

165. *Id.*

166. Press Release, U.S. Dep't of Just., Federal Officials Decline to Reopen Investigation Into the Death of Bijan Ghaisar (June 10, 2022), https://www.justice.gov/opa/pr/federal-officials-decline-reopen-investigation-death-bijan-ghaisar.

a recklessness theory of criminal liability may have had validity.[167] At minimum, it could have compelled the DOJ to forthrightly address whether, consistent with DOJ policy, a sufficient case for subjective recklessness could be established, and whether to present the case to a federal grand jury.[168]

C. Killing of Breonna Taylor

> Breonna Taylor was fatally shot early March 13, 2020, after officers attempted to serve a warrant in a drug investigation. After being awakened by the disturbance, Taylor's boyfriend, Kenneth Walker, fired a gunshot that struck Louisville Police Sergeant Johnathan Mattingly. Mattingly and another officer . . . returned fire, fatally striking Taylor . . .
>
> . . . [Officer Brett] Hankison retreated to a position outside the apartment and fired 10 gunshots through a window and door covered with blinds and curtains. None of the bullets struck anyone, but some pierced the walks of a neighboring apartment, endangering three people, including a child . . . .[169]

Hankison was the only officer to face state charges and was acquitted on three felony counts of wanton endangerment, which were based on his firing into the adjacent apartment.[170]

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167. *See generally* Lee, *supra* note 85 (discussing use of evidence whether officer utilized any de-escalation techniques).

168. The family settled a wrongful death lawsuit against the United States for $5 million dollars. Rebekah Reiss, *Family of man shot and killed by US Park Police officers reaches $5 million settlement with US government*, CNN Apr. 22, 2023, cnn.com/2023/04/22/us/bijan/ghaisar-shooting-family-settlement/index/html. As of July, 2024, the officers involved in the shooting remain on paid administrative leave and filed a federal lawsuit to compel the Interior Department to follow standard disciplinary procedures and render a decision on whether to fire them. Tom Jackman, *Park Police officers on leave since fatal shooting file suit*, Wash Post, B3 (July 31, 2024).

169. David Nakamura, *Verdict Expected in case of former Louisville officer charged in Breonna Taylor raid*, Wash. Post, Nov. 12, 2023. The two undercover officers who entered Taylor's apartment and fired their weapons after being fired upon, were not charged. Officers who falsified the warrant and knowingly relied on stale information were prosecuted in a separate federal indictment, as was Hankison, the only officer to face both state and federal charges.

170. Nicholas Bogel-Burroughs, *Officer Acquitted of Endangering Breonna Taylor's Neighbors in Raid*, N.Y. Times (Mar. 3, 2022), nytimes.com/2022/03/03/us/breonna-taylor-brett-hankison-acquitted.html. The crime of wanton endangerment in Kentucky requires that the defendant "wantonly" act to create a substantial danger of death or serious bodily injury and did so with "extreme indifference to the value of human life." The verdict was criticized in some circles, with the lawyer for the neighbors whose apartment was hit by the bullets calling the jury's decision a "knee-jerk, emotional verdict" which could not have adequately considered the evidence in a mere three hours of deliberation. *Id.*

The Garland DOJ indicted Hankison and several other officers on federal criminal civil rights charges utilizing innovative theories of criminal liability to reach actors other than the officers who fired the fatal shots.[171] Hankison was indicted separately for two § 242 violations in federal district court in Louisville, Kentucky, within the United States Court of Appeals for the Sixth Circuit. The first count alleged he willfully violated Taylor's constitutional rights, and the second count charged he willfully violated the civil rights of three neighbors in the adjacent apartment.[172] The case seemed tailor-made to expressly rely on a subjective recklessness theory, which would have been more closely aligned with the facts than would the more onerous specific intent-willfulness theory, and a recklessness instruction had recently received some level of approval by the Sixth Circuit.[173]

Not surprisingly, the case largely turned on the battle over the key willfulness jury instruction. Jury instructions often play a critical role in influencing the outcome of a trial. A favorable mens rea and related theory of the case instruction provides the party with a concrete positive reference point upon which the jury can utilize to guide their deliberations.[174] Counsel's use of a favorably worded instruction can then be invested with the significance and import that the jury attaches to the court's instructions. Often, the jury carries this weighty significance and import into their deliberations.[175]

171. Breonna Taylor Press Release, *supra* note 64 (discussing federal charges against various officers for their roles in preparing and approving false search warrant and affidavit that resulted in Taylor's death).

172. Indictment, United States v. Hankison, (No. 3:22-CR-84-RGJ), 2024 WL 130166 [hereinafter Hankison Indictment].

173. United States v. Corder, 724 F. App'x 394, 403–404 (6th Cir. 2018). The court upheld the conviction based on plain error review of the challenged instruction that included a "recklessness" prong. *Id.* The court also noted that "willful" was synonymous with "reckless" in this context, citing *Screws.*

174. For a discussion on the importance of "weaving jury instructions into final argument as part of an effort to set forth a positive theory of the case," *see* Adam H. Kurland, *Prosecuting* Ol' Man River: *The Fifth Amendment, the Good Faith Defense, and the Non-Testifying Defendant,* 51 U. Pitt. L. Rev. 841, 858-59 n.54 (1990) (citing Abbe Lowell, *When Inviting the Jury to Your Party,* 5 ABA Crim. Just. 15, 46–48 (Spr. 1990)).

175. Lowell, *supra* note 174 (discussing technique of "appropriating the judge's prestige" by the use of jury instructions in closing argument"); *see also* M. Michael Cramer, *A View From the Jury Box*. In The Litigation Manual: A Primer for Trial Lawyers 403–07 (J. Koetl 2d ed. 1989):

> Some commentators have theorized that emphasis on the court's jury instructions was the single most important factor in modern jury trial technique. … Jurors evinced a substantial appreciation for the legal principles given to them by the court. Jurors commented on the ability, or lack thereof, of counsel to structure their case within the context of the instructions. Some lawyers effectively repeated in closing arguments several instructions that favored their position. Closing arguments that integrated and analyzed the evidence in connection with the court's instructions were commended.

The defense, predictably, tendered a proposed willfulness instruction that emphasized the high standard of willfulness as requiring specific intent to violate a constitutional right — and nothing more.[176] The government sought a broader instruction, adding the qualifying language that the defendant did not necessarily have to be thinking in constitutional terms.[177]

In support of the government-tendered instruction — but not in the proposed instruction itself, the government cited *Screws* as authority for the proposition that:

> The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right protected by the Constitution. When they so act they at least act in reckless disregard of constitutional protections or guarantees.[178]

Inexplicably, the language of the proposed instruction did not mention recklessness as satisfying the willfulness requirement, although Sixth Circuit case law supports giving an instruction with express reference to recklessness.[179] In support of its proposed "willfully" instruction, DOJ cited the *Screws* "reckless disregard" language as authority in the annotations and comments section of its submission, but did not request the specific recklessness language to be included in their proposed instruction.[180] Why would the government needlessly disadvantage its own case at this critical juncture of the trial?

The evidence adduced at trial presented a textbook case of a defendant acting "recklessly"—in conscious disregard of whether his conduct violated constitutional rights. At the outset of closing argument, the prosecutor reminded jurors that Hankison's act of "firing blindly" into two apartments was disbelievingly "shocking, dangerous, unfathomable [and] stomach churning."[181] He further argued that Hankison knew it was "wrong to [blindly] spray bullets into an apartment building where a bunch of innocent people live, " but "*[h]e just didn't care*."[182]

176. Hankison Indictment, *supra* note 172; Defendants Proposed Instruction at No. 4, United States v. Hankison, (No. 3:22-CR-84-RGJ), 2024 WL 130166.

177. Government's Proposed Instruction at No. 7, United States v. Hankison, (No. 3:22-CR-84-RGJ), 2024 WL 130166.

178. *Id.*

179. *See Corder* discussion, *supra* note 105–106 & accompanying text.

180. Government Proposed Instruction at No.7 16–17, United States v. Hankison, (No. 3: 22-CR-84-RGJ), 2024 WL 130166, 16.

181. Transcript of Government's Closing Argument at 158–59, United States v. Hankison, (No. 3: 22-CR-84-RGJ).

182. *Id.* at 187.

This was, in effect, a recklessness argument consistent with the *Screws* parameters. However, as noted above, the specific term "recklessly" was not offered in the government's proposed instruction, and the court tendered the proposed government instruction verbatim that did not include the term "recklessly."[183] The government's argument that Hankison, in effect, acted recklessly, with no jury instruction to buttress the persuasiveness of the forensic effort, was toothless.[184]

The defendant's closing argument, on the other hand, was shaped by the court's instruction that defined willfulness as requiring "specific intent."[185] Defense counsel concisely quoted the relevant tendered jury instruction and asserted that Hankison lacked the requisite "specific intent."[186] After three days of deliberation and a receipt of an *Allen* charge, the Hankison trial resulted in a hung jury.[187] A more comprehensive instruction that specifically included term "recklessness" may have nudged the jury toward a unanimous guilty verdict. At minimum, it would have provided the jurors leaning toward conviction with a powerful tool to persuade holdouts during deliberations that the mens rea required for conviction was anchored by the express language of the court's instructions.[188] Unforced error and opportunity lost.

In October, 2024, federal prosecutors retried Hankison on the same two charges in a slightly tweaked superseding indictment,[189] and had the opportunity to rectify some of their strategic errors concerning the willfulness instruction that may have contributed to the hung jury. The retrial resulted in an acquittal on the 242 charge alleging Hankison

183. Hankison Indictment at Doc. 127, jury instruction defining "willfully" *supra* note 176; Transcript of Government's Closing Argument at 151–52, United States v. Hankison, (No. 3: 22-CR-84-RGJ).

184. Taylor v. Kentucky, 436 U.S. 478, 488–89 (1976) (arguments of counsel are not a substitute for instructions by the court); *see also* Kurland, *Prosecuting* Ol' Man River, *supra* note 174, at 859, n.54 (citing cases holding that "the jury might well have concluded that counsel's hollow argument … was contrary to, and precluded by, the judge's statement of the law.")

185. Transcript of Defendant's Closing Argument at 205, United States v. Hankison, (No. 3: 22-CR-84-RGJ).

186. *Id.*

187. Perry Stein, *Judge declares mistrial in case of ex-officer charged in Breonna Taylor raid*, Wash. Post., Nov. 17, 2023, at A20.

188. Ward Jolles, *Jury deliberations continued to Tuesday after no decision made in Brett Hankison trial*, Wave (Nov. 13. 2023), https://www.wave3.com/2023/11/13/jury-deliberations-continued-tuesday-after-no-decision-made-brett-hankison-trial/.

189. Noelle Friel, *Federal prosecutors prepare to re-try Brent Hankison, cases against 2 other officers still pending*, Wave (Mar. 13, 2024), wave3.com/2024/03/14/federal-prosecutions-prepare-to-try-brett-hankison-cases-against-2-other-officers-still-pending; Sarah Dewberry, *Breonna Taylor case: Former Louisville police detective Brett Hankison to be retried*, CNN (Dec. 13, 2023), cnn.com/2023/12/13/us/brett-hankison-detective-retrial-breonna-tatlor/index.html.

used excessive force on Taylor's neighbors.[190] The jury appeared to be heading toward a deadlock on the 242 charge alleging a violation of Taylor's constitutional rights.[191] Later in the evening, the jury ultimately returned a guilty verdict on this charge.[192] Unlike the first trial, the prosecution argued for conviction by specifically contending in closing argument that Hankison had acted recklessly, although it did not have a specific recklessness instruction upon which to rely.[193] Hankison may be in position to press the issue on appeal that the government improperly relied on a recklessness theory contrary to the tendered jury instructions and the law. The government would then be compelled to counter with many of the arguments set forth in this article.

D. Summary

At present, a typical DOJ Press release often purports to justify a declination of a police excessive force case by perfunctorily citing the high bar to establish willfulness, essentially equating "willfulness" with "specific intent," and usually ignoring the recklessness avenue.[194] In evaluating whether to authorize a federal prosecution in these challenging and critically important cases, a DOJ committed to robust federal criminal civil rights enforcement should embrace the reckless indifference theory. This should lead to approval of more § 242 civil rights prosecutions, and should result in more clear, precise jury instructions on the requisite intent requirement.[195] This subtle but

190. Timothy Easley, *Jury convicts former Kentucky officer of using excessive force on Breonna Taylor during deadly raid*, CNN (Nov. 1, 2024, 10:43 PM), cnn.com/2024/11/01/us/kentucky-breonna-taylor-jury-brett-hankison/index/ (noting jury, earlier in evening, cleared Hankison on the charge he used excessive force against Taylor's neighbors).

191. *Id.*

192. *Id.*

193. In Hankison's retrial, the prosecution contended in its' opening statement that Hankison's actions in shooting blindly into the covered windows of Taylor's apartment unit were "unfathomably dangerous." Rachael Smith, *Brett Hankison's federal retrial has begun. What each side said in their opening arguments*, https://www.courier-journal.com/story/news/crime/2024/10/21/former-louisville-cop-brett-hankison-now-in-federal-trail-in-breonna-taylor-case-what-verdict/755765007/. The trial court tendered the identical willfulness instruction as in the first trial, which contained no express reference to acting "recklessly" or "with reckless indifference." Jury Instruction, United States v. Hankison, No: 3:22-cr-84-RGJ (filed 10/30/24) Third Element, Counts 1 and 2: Willfully. Press reports indicated that, in closing argument, contrary to what occurred in the first trial, the prosecution expressly argued Hankison acted recklessly. Easley, *supra* note 190 (in closing argument, "[p]rosecutors said Hankison acted *recklessly,* firing 10 shots into doors and a window where he couldn't see a target") (emphasis added).

194. *See, e.g.*, Ghaisar Press Release, *supra* note 131.

195. For example, the Ghaisar case out of the Fourth Circuit, *see* text and accompanying notes 160–168 *supra,* could have resulted in a decision to initiate federal prosecution based on a determination that, applying the *Screws* recklessness standard, an unbiased trier of fact could likely find the officers' recklessness established beyond a reasonable doubt. US DEP'T OF JUST.,

substantial change expressly endorsing the recklessness avenue in § 242 prosecutions should, in turn, increase the likelihood that the government can meet its burden of convincing a jury to unanimously find guilt beyond a reasonable doubt.

Conclusion

18 U.S.C. § 242 and its predecessor statutes have been an enigma since their enactment in the aftermath of the Civil War. This most important federal criminal civil rights statute should not be subject to different interpretations depending on the federal circuit where the alleged crime occurred. Accordingly, DOJ should advocate for a uniform mens rea interpretation that endorses a clear, concise meaning of subjective recklessness as a route to establish "willfulness."

DOJ has already tepidly embarked on this strategy in a passive-aggressive, if not Machiavellian, manner. It is long past the time for DOJ to forcefully advocate for a uniform nationwide "recklessness" standard consistent with the Supreme Court's directive in *Screws v. United States* and as further amplified by the Court's more recent pronouncements in *Farmer v. Brennan*. If this litigation strategy is successful, DOJ would likely authorize more civil rights prosecutions, which, in turn, should result in more uniform, predictable, and understandable jury instructions nationwide. That could increase the likelihood of obtaining convictions in these challenging cases.

Some civil rights advocates will object that this approach does not sufficiently "lower the bar" to a level that would make it even easier to obtain even more convictions. However, given the current realities, DOJ strategic litigation efforts pressing for a slightly broader uniform nationwide "recklessness" interpretation of the statute is the only realistic and legally sound alternative. DOJ should stop being coy and embrace this issue head-on, as it has done at other "crossroads" moments when the fate of effective federal civil rights enforcement hung in the balance.

Although the Supreme Court has not been particularly hospitable to federal civil rights enforcement in recent years, it has signaled its willingness to accede to an interpretation of "willfulness" in § 242 that incorporates a subjective recklessness standard. Several circuits have upheld convictions based on jury instructions in § 242 cases where

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Justice Manual, § 9-27.220, comment (provision last updated June 2023) (DOJ guideline for initiating federal criminal prosecution).

acting "recklessly" was deemed consistent the statutory "willfulness" requirement, and the Court has left those convictions undisturbed. Moreover, through careful selection of the most appropriate "test case," DOJ can minimize the damage from an adverse Supreme Court decision.[196]

As a spate of § 242 convictions now percolate throughout the federal appellate courts, DOJ's shadow boxing strategy and passive-aggressive approach to § 242's mens rea requirement may finally have to yield. Perhaps DOJ's hour to unequivocally advocate for a uniform nationwide interpretation of § 242's mens rea requirement has finally "come 'round at last."[197]

196. For example, DOJ could indict a case in a jurisdiction where state law does not limit state prosecutors from prosecuting even after a federal prosecution based on the same conduct (so an adverse trial verdict would not legally bar a successive state prosecution) *see, e.g.*, Adam Harris Kurland, Successive Criminal Prosecutions: The Dual Sovereignty Exception to Double Jeopardy in State and Federal Courts 103–106 (2001) (discussing California statutes which prohibit, under some circumstances, a subsequent state prosecution where defendant was previously tried by the federal government "founded upon the same "act or omission"). Second, in many cases DOJ can draft an indictment containing other federal charges in addition to § 242 that would not rise or fall on any reversal of a § 242 conviction or of any deficiency with a particular jury instruction. *See, e.g.*, Indictment, United States v. Slager, D.S.C., (2016) (No. 2:16-cr-00378-CRI) (obstruction of justice charge related to providing false information to criminal investigators investigating officer involved shooting). Third, if possible, DOJ could pursue a litigation strategy where a proposed jury instruction regarding a recklessness theory can be litigated prior to trial, thus permitting a government appeal if necessary, thereby avoiding a double jeopardy bar, should the trial court reject the government's legal theory and dismiss the 242 charge. *See generally* Fed. R. Cr. P. 12(b)(1); Adam H. Kurland, *I Would Not be Convicted by a Jury of My Peers" (Because the Judge Erroneously Granted my Motion for Judgment of Acquittal):* Evans v. Michigan *and the Future of the Pre-Verdict Judgment of Acquittal*, 47 U. Toledo L. Rev. 279, 318–320 (2016) (discussing framing government "theory of the case" proposed instructions in a Rule 12 motion where adverse decision could be subject to pre-trial government appeal).

197. W.B. Yeats, *Second Coming* (1919) (concluding stanza).

Truth-Telling in Legal and Political Movements for Equality: Debunking Critical Race Theory Myths

Lia Epperson*

Introduction

This Essay will discuss the recent attacks on Critical Race Theory ("CRT") taking place across the nation and how we might understand them in the context of the larger legal and political movements for justice and equality.[1] One of the great founders of Critical Race Theory, the late Professor Derrick Bell, has suggested that CRT is about education—education that unmasks our challenging history and teaches its truth.[2] Growing up in Professor Bell's childhood hometown of Pittsburgh, Pennsylvania,[3] I learned of his trailblazing scholarly and legal work, which buoyed me through my own legal studies and work as a civil rights lawyer and law professor. These experiences provide a foundation for understanding some of the attacks on this school of thought, as well as possibilities for redress.

Before a more detailed discussion of Critical Race Theory, however, I would like to offer a brief story about teaching the law that provides real context for the larger debate encircling this legal theory. As a law

* Professor of Law, American University, Washington College of Law. J.D., Stanford Law School; B.A., Harvard University, magna cum laude. This article originated as the Dr. J. Clay Smith Memorial Equal Justice Lecture for the Washington Bar Association 2022. This article was finalized before the 2024 presidential election.

1. *See* Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, Brookings Inst. (Nov. 21, 2021), https://www.brookings.edu/articles/why-are-states-banning-critical-race-theory/; *see also* Taifha Natalee Alexander, *Tracking the Attack on Critical Race Theory in Education*, U.S. News & World Report (Apr. 11, 2023, 3:21 PM), https://www.usnews.com/opinion/articles/2023-04-11/tracking-the-attack-on-critical-race-theory-in-education.

2. *See, e.g.*, Derrick A. Bell, Faces at the Bottom of the Well: The Permanence of Racism 150 (Basic Books, 1992) [hereinafter Bell, Faces at the Bottom of the Well] ("[E]ducation leads to enlightenment. Enlightenment opens the way to empathy. Empathy foreshadows reform."); *see also* Jelani Cobb, *The Man Behind Critical Race Theory*, New Yorker (Sept. 13, 2021), https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory.

3. *See* Cobb, *supra* note 2.

professor, I have taught Constitutional Law for a number of years. Truth-telling is a big part of my teaching. I tell my students that Constitutional Law is about three things: doctrine, theory, and history. It is steeped in American history. Every case students learn is about the "micro," or the specific facts of the case. Yet, it is also about the "macro," the larger laws and norms that inform the context of that case. In *Dred Scott v. Sandford*, for example, the Supreme Court deemed Black people non-citizens, of an inferior race, and having "no rights which the white man was bound to respect."[4] The case is not just about diversity jurisdiction and the birth of the notion of "substantive due process," it is about the highest court of the land enshrining racial subjugation and white supremacy.[5] In canonical cases such as *Dred Scott*, therefore, professors need to contextualize the cases to ensure that students understand the complex history behind the decisions. It is important for us to be able to convey the whole picture.

Interestingly, however, the most offensive language of the *Dred Scott* opinion does not appear in the Constitutional Law casebook that I use in the class—an omission some of my students found troubling.[6] This is an example of the "whitewashing" of history, the subverting of the history of racial subjugation and white supremacy embedded in our canon and in our founding documents.[7] In teaching Constitutional Law, we have to work to consciously tell the whole challenging and messy truth—that the Constitution was an elaborate compromise on enslavement, and racial subjugation is embedded into its fabric.[8]

4. Dred Scott v. Sandford, 60 U.S. 393, 407 (1857), superseded by constitutional amendment, U.S. CONST. amend. XIV § 1. (holding that "a negro, whose ancestors were imported into [the U.S.], and sold as slaves," "whether emancipated or not," "or who are born of parents who had become free before their birth" cannot be considered a U.S. citizen "in the sense in which the word citizen is used in the Constitution of the United States"). In addition, this Article adopts the custom articulated by Professor Kimberlé Crenshaw of capitalizing "Black," "Blacks," and "Black people." *See* Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

5. *See* Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott, 82 CHI.-KENT L. REV. 49, 73–74 (2007) (discussing that many scholars regard the Supreme Court's *Dred Scott* decision as the birth of substantive due process even though the concept emerged formally during the *Lochner* Era).

6. NOAH FELDMAN & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW (21st ed. 2022); *see Dred Scott*, 60 U.S. at 407 (stating that Black people "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit").

7. *See* Channon Hodge, Breeana Hare, Tami Luhby, Elias Goodstein, Priya Krishnakumar, Toby Lyles, Amy Roberts & Clint Alwahab, *Burned from the Land: How 60 Years of Racial Violence Shaped America*, CNN (May 30, 2021), https://www.cnn.com/interactive/2021/05/us/whitewashing-of-america-racism/; *Dred Scott*, 60 U.S. at 407.

8. *See* Sandra L. Rierson, *Tracing the Roots of the Thirteenth Amendment*, 91 UMKC L. REV. 57, 69–70 (2022) (discussing how the Constitution accommodated and perpetuated slavery); Frederick Douglass, *The Constitution and Slavery*, NORTH STAR, Feb. 9, 1849, *reprinted*

Over the years, I have taught and lectured about Professor Bell's work, its insightful commentary on the Constitution's promise of equality,[9] and what it suggests regarding what Professor Bell calls "*The Elusive Quest for Racial Justice*."[10] Throughout his life's work, Professor Bell and other scholars of CRT challenged us to unmask the more difficult parts of our constitutional history to better understand present circumstances.[11] Bell used history to craft parables, and these parables served as forewarnings of future crises that would arise if we did not heed their lessons.[12]

We can best understand attacks on Critical Race Theory by examining this teaching of history and truth in the movement for social, political, and legal reform. Professor Bell admonished that to see true progress toward meaningful equality, we must reckon with the challenging truth of our history—that we are a nation founded on a "contradiction."[13] As Bell has noted,[14] this American contradiction promises equality while consciously condemning a population to enslavement. This lies at the heart of Critical Race Theory and understanding the role this legal theory plays in explicating, enlightening,

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in Frederick Douglass, Selected Speeches & Writings 130–31 (Philip S. Foner ed., 2000) ("Had the Constitution dropped down from the blue overhanging sky, upon a land uncursed by slavery, and without an interpreter, . . . so cunningly is it framed, that no one would have imagined that it recognized or sanctioned slavery. But . . . we find no difficulty in ascertaining its meaning in all the parts which we allege to relate to slavery . . . and in a manner well calculated to aid and strengthen that heaven-daring crime.").

9. *See, e.g.,* Lia Epperson, *Are We Still Not Saved? Race, Democracy, and Educational Inequality*, 100 Or. L. Rev. 1 (2021).

10. Derrick A. Bell, And We Are Not Saved: The Elusive Quest for Racial Justice 3, 8 (2d ed. 1987) [hereinafter Bell, And We Are Not Saved]; *see id.* 89, 89–91.

11. *See* Cobb, *supra* note 2; *see, e.g.*, Meredith v. Fair, 305 F.2d 343, 345 (5th Cir. 1962) (holding that there were no valid, non-discriminatory grounds for refusing admission to James Meredith into the University of Mississippi); HLS News Staff, *Derrick Bell (1930-2011)*, Harv. L. Bull. (Oct. 6, 2011), https://hls.harvard.edu/today/derrick-bell-1930-2011/ (discussing Derrick Bell's legacy).

12. *See, e.g.*, Bell, Faces at the Bottom of the Well, *supra* note 2; Bell, And We Are Not Saved, *supra* note 10. Professor Bell is widely viewed as the preeminent Critical Race Theory and narrative scholar, who used literary tales to unpack the intractable, deeply rooted forms of racial subjugation in American constitutionalism. *See, e.g.*, George H. Taylor, *Derrick Bell's Narratives as Parables*, 31 N.Y.U. Rev. L. & Soc. Change 225, 228 (2007). For critiques of the narrative form of scholarship in Critical Race Theory as successful means for lasting legal changes, *see, e.g.*, Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 Tex. L. Rev. 121, 135–36, 151–52 (2003).

13. Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 Harv. L. Rev. 4, 4 (1985).

14. *Id.* Bell noted:

> The framers made a conscious, though unspoken, sacrifice of the rights of some in the belief that this forfeiture was necessary to secure the rights of others in a society embracing, as its fundamental principle, the equality for all. And thus the framers, while speaking through the Constitution in an unequivocal voice, at once promised freedom for whites and condemned Blacks to slavery.

fostering empathy, and galvanizing reform.[15] It is about unmasking the myth of historic equality, acknowledging where democracy has failed, and using education to improve our democracy.[16]

This Essay will proceed in four parts. First, it will briefly introduce the concept of Critical Race Theory.[17] How did it evolve as a school of thought, and what are its key tenets?[18] Second, and relatedly, this Essay will clarify what Critical Race Theory is *not* by debunking some of the mischaracterizations that we have seen in recent media and political discourse.[19] Third, this Essay will briefly explain the recent attacks on Critical Race Theory, which are part of a broader anti-democratic movement.[20] In doing so, this Essay will also touch on the implications of these attacks.[21] Finally, it will offer some thoughts on how we might address these attacks.[22]

I. What is Critical Race Theory?

In the simplest terms, Critical Race Theory is a legal academic framework to understand historic and present forms of racism in the United States.[23] It examines how laws, policies, and institutions maintain and replicate racial inequalities.[24] Critical Race Theory began as a movement by Professor Derrick Bell and other legal scholars and activists who wanted to transform the relationship between race, racism, and the law and legal power structures.[25]

15. *Id.* at 4–5.
16. *Id.*
17. *See infra* Part I.
18. *See id.*
19. *See infra* Part II.
20. *See infra* Part III.
21. *See id.*
22. *See infra* Part IV.
23. *See* Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. Times (Nov. 8, 2021), https://www.nytimes.com/article/what-is-critical-race-theory.html; Cobb, *supra* note 2.
24. *See* Fortin, *supra* note 23; Cobb, *supra* note 2.
25. *See generally* Kimberlé W. Crenshaw, *This Is Not a Drill: The War Against Antiracist Teaching in America*, 68 UCLA L. Rev. 1702, 1705 n.3 (2022); Critical Race Theory: Key Writings that Formed the Movement (Kimberlé Crenshaw et al. eds., 1996); Critical Race Theory: The Cutting Edge (Richard Delgado & Jean Stefancic eds., 2d ed., 1999); Derrick A. Bell Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 523 (1980) ("The interest of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of whites."); Janel George, *A Lesson on Critical Race Theory*, 46 Hum. Rts. Mag. 2, 2 (2021) ("Crenshaw . . . coined the term 'CRT' . . . ."); Devon W. Carbado, *Critical What Commentary*: *Critical Race Theory: A Commemoration: Afterword*, 43 Conn. L. Rev. 1593, 1601–03, 1639–40 (2011); Cheryl I. Harris, *Critical Race Studies: An Introduction*, 46 UCLA L. Rev. 1215, 1216–18 (2002).

As a civil rights lawyer with the NAACP Legal Defense Fund, Professor Bell was at the seat of some of the most significant civil rights victories of the era like *Brown v. Board of Education* and *Loving v. Virginia*, as well as groundbreaking legislation such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.[26] These landmark opinions and laws signaled tremendous progress for the elimination of racial discrimination. Yet, the reality is that true progress was sluggish and non-linear. A full decade after *Brown*, ninety-eight percent of Southern schools remained fully segregated.[27]

Professor Bell and other scholars wanted to know how to reconcile these civil rights legal victories with the reality of continued intractable forms of racial discrimination.[28] In doing so, they looked specifically to structural racism, which is the social structure in which policies, practices, and other norms both create and perpetuate racial inequalities.[29] The foundational tenet of Critical Race Theory is that, by exposing and understanding historic and present forms of racism, we can better undo and eradicate such racism in our society.[30] It is about truth-telling because this history lives within us.

As James Baldwin said,

> [T]he great force of history comes from the fact that we carry it within us, are unconsciously controlled by it in many ways, and history is literally present in all that we do. It could scarcely be otherwise, since it is to history that we owe our frames of reference, our identities, and our aspirations.[31]

Critical Race Theory is also a recognition that we define race in the United States through a legal framework that relies on case law and statutes that do not reflect the full experience of all people in this country.[32] Critical Race Theory scholars have used narrative[33] and

26. *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Loving v. Virginia, 388 U.S. 1 (1967); 42 U.S.C. §§ 1981–96b; 52 U.S.C. §§ 10301–14; 42 U.S.C. at §§ 3604–19.

27. Erica Frankenberg, Chungmei Lee & Gary Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream? 17 (2003), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/a-multiracial-society-with-segregated-schools-are-we-losing-the-dream/frankenberg-multiracial-society-losing-the-dream.pdf.

28. *See* Carbado, *supra* note 25.

29. *See id.*

30. *See id.*

31. James Grossman, *James Baldwin on History*, Am. Hist. Ass'n (Aug. 3, 2016), https://www.historians.org/perspectives-article/james-baldwin-on-history-september-2016/.

32. *See* Crenshaw, *supra* note 25; Carbado, *supra* note 25.

33. *See, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411 (1989); *see also* Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C Davis L. Rev. 9421 (2005).

storytelling, like Derrick Bell's parables, to amplify and make accessible those voices that are unique and often omitted from the development of historic legal frameworks.[34] Relatedly, Critical Race Theory refutes the oft-quoted refrain from Justice Harlan's famous dissenting opinion in *Plessy v. Ferguson*, "Our Constitution is color blind."[35] At the time of the *Plessy* decision, his was a radical notion. Yet, it lacked a sufficient factual foundation, at least one consistent with the framers' intention at the inception of the Constitution, and at the time of the adoption of the Fourteenth Amendment's Equal Protection Clause.[36] One cannot eliminate racism by ignoring its existence.[37] This is why it is so important to listen to the unique voices of people of color, voices traditionally omitted from legal discourse.[38] Ultimately, Critical Race Theory is a lens through which to view our laws and our common history. It helps us to understand how this history has shaped our frames of reference and our identities, and how we can learn from these truths to make our society a better place.

II. The Mythology of Critical Race Theory

There are a number of misconceptions about Critical Race Theory that have gained attention in the court of public opinion.[39] My aim

34. *See* Taylor, *supra* note 12, at 244 n.159; The Derrick Bell Reader (Richard Delgado & Jean Stefancic eds., 2005); Derrick Bell, *supra* note 13, at 4–5 (1985); *see, e.g.*, Bell, Faces at the Bottom of the Well, *supra* note 2; Bell, And We Are Not Saved, *supra* note 10; Derrick Bell, Afrolantica Legacies (1998); Derrick Bell, Gospel Choirs: Psalms of Survival for an Alien Land Called Home (1996); Derrick Bell, Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform (2004); Derrick Bell, Ethical Ambition: Living a Life of Meaning and Worth (2002); Derrick Bell, Confronting Authority: Reflections of an Ardent Protester (1994).

35. Plessy v. Ferguson, 163 U.S. 537, 559 (1896); *see* Crenshaw, *supra* note 25.

36. *See, e.g.*, Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll., 600 U.S. 181 (2023) (Jackson, J., dissenting) ("Our country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well documented 'intergenerational transmission of inequality' that still plagues our citizenry") (citation omitted). Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. Mia. L. Rev. 191, 219 (1997) ("In essence, colorblindness is held together by a conglomeration of baseless contradictions which are illuminated with increasing intensity the more we try to ignore race.").

37. Neil Gotanda, *A Critique of "Our Constitutions is Color-Blind,"* 44 Stan. L. Rev. 1 (1991); Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. Rev. 87, 103 (2022) ("In recent years, some of the most egregiously racist cases have involved the Court resting on constitutional colorblindness to establish why it will not attempt to deal in reasoning or remedies focused on race.").

38. *See* Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. Mich. J. L. Reform 51, 63 (1994); Monica Bell, *The Obligation Thesis: Understanding the Persistent "Black Voice" In Modern Legal Scholarship*, 68 U. Pitt. L. Rev. 643, 656 (2007).

39. *See, e.g.*, Chris Kahn, *Many Americans Embrace Falsehoods About Critical Race Theory*, Reuters (July 15, 2021, 2:13 PM), https://www.reuters.com/world/us/many-americans-embrace-falsehoods-about-critical-race-theory-2021-07-15/ (explaining that, of people familiar with critical

is to dispel a few of these mischaracterizations that are shaping and intensifying current legal and political attacks. First, Critical Race Theory does not focus on any individual bad actors or demonize white people.[40] Rather, it is looking at the structures that have produced and reinforced racial inequity.[41] Second, it does not look at race as a biological construct.[42] Instead race is viewed as a social construct, developed through a variety of factors, including history and politics.[43] This is why "race" means different things in different countries such as Brazil or South Africa.[44] Yet, there are very real costs to the social construction of race in America.[45] Finally, contrary to suggestions otherwise, Critical Race Theory is not taught in American public elementary or

race theory, 22% think it is taught in most public high schools and 33% believe that it says white people are inherently bad or evil).

40. *See* Khiara Bridges, Critical Race Theory: A Primer 36–37 (Found. Press, 1st ed. 2019) ("[I]f acts of racism are perpetrated by *bad actors*, it means that when we are trying to figure out how to dismantle racial hierarchies, we need to be on the lookout for culpable individuals. We can safely ignore the structures within which individuals exist, and we can safely ignore the institutions that operate within society."); Sara Rimer, *Defining, Not Debating, Critical Race Theory*, B.U. Today (Feb. 12, 2022), https://www.bu.edu/articles/2022/defining-not-debating-critical-race-theory/ ("[C]ritical race theory does not contend that a person is inherently racist or oppressive because of their race. Critical race theory is generally not focused on individual bad actors . . . .").

41. *See* Ian Haney López, White by Law: The Legal Construction of Race 78 (N.Y.U. Press, 10th ed. 2006) (discussing the law as "an exceptionally useful vehicle for exploring the processes by which legal institutions and practices fabricate race"); Bridges, *supra* note 40, at 36 ("Traditional civil rights discourse tends to define racism as discrete, easily identifiable, invariably intentional, always irrational acts perpetrated by bad actors."); Rimer, *supra* note 40.

42. *See* Haney López, *supra* note 41; Megan Gannon & LiveScience, *Race Is a Social Construct, Scientists Argue*, Sci. Am. (Feb. 5, 2016), https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue/ ("American sociologist W.E.B. Du Bois was concerned that race was being used as a biological explanation for what he understood to be social and cultural differences between different populations of people. He spoke out against the idea of 'white' and '[B]lack' as discrete groups, claiming that these distinctions ignored the scope of human diversity.").

43. *See* Haney López, *supra* note 41 ("Races are social products. It follows that legal institutions and practices, as essential components of our highly legalized society, have had a hand in the construction of race."); Gannon & LiveScience, *supra* note 42 ("Today, the mainstream belief among scientists is that race is a social construct without biological meaning. And yet, you might still open a study on genetics in a major scientific journal and find categories like 'white' and '[B]lack' being used as biological variables.").

44. *See* Angela Onwuachi-Willig, *Race and Racial Identity Are Social Constructs*, N.Y. Times (Sept. 6, 2016, 5:28 PM), https://www.nytimes.com/roomfordebate/2015/06/16/how-fluid-is-racial-identity/race-and-racial-identity-are-social-constructs ("Were race 'real' in the genetic sense, racial classifications for individuals would remain constant across boundaries. Yet, a person who could be categorized as [B]lack in the United States might be considered white in Brazil or colored in South Africa."); Haney López, *supra* note 41.

45. *See* Derrick A. Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 Vill. L. Rev. 767, 768 (1988); Onwuachi-Willig, *supra* note 44; Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America (2017); Shelley Stewart III et al., *The Economic State of Black America*, (2021); I. Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America 29–35 (2005)

secondary schools.[46] It is a legal academic framework, first espoused by law professors and taught primarily in law schools and graduate programs.[47] However, at its roots, Critical Race Theory emphasizes the importance of teaching American history.[48] Concepts of the role of racial discrimination in American history are important concepts that can be building blocks of students' foundational education.[49]

III. Multipronged Attacks on Legal Theory

There has been a rising anti-Critical Race Theory movement in the United States in recent years.[50] It is important to understand the timing of these attacks.[51] After the murder of George Floyd, the United States, and indeed the world, saw the largest social awakening to racial injustice in recent history.[52] This reckoning forced many Americans to face a truth

46. *See* Kiara Alfonseca, *Critical Race Theory in the Classroom: Understanding the Debate*, ABC News (Feb. 2, 2023, 12:33 PM), https://abcnews.go.com/US/critical-race-theory-classroom-understanding-debate/story?id=77627465; Phil McCausland, *Teaching Critical Race Theory Isn't Happening in Classrooms, Teachers Say in Survey*, NBC News (July 1, 2021), https://www.nbcnews.com/news/us-news/teaching-critical-race-theory-isn-t-happening-classrooms-teachers-say-n1272945; Caitlin O'Kane, *Head of Teachers Union Says Critical Race Theory Isn't Taught in Schools, Vows to Defend "Honest History*," CBS News (July 8, 2021, 12:07 PM), https://www.cbsnews.com/news/critical-race-theory-teachers-union-honest-history/.

47. *See id.*

48. Bridges, *supra* note 40, at 461 ("CRT in education proposes that when we analyze the curriculum that commonly is taught in U.S. schools, we will see an erasure of the contributions that people of color have made throughout history, a prioritization of white people's achievements and works, and a general sanitization of the brutality that is embedded in the fabric of this nation."); Bell, Faces at the Bottom of the Well, *supra* note 2.

49. *See* Bell, Faces at the Bottom of the Well, *supra* note 2; Bridges, *supra* note 40, at 461.

50. *See* Olivia B. Waxman, *Exclusive: New Data Shows the Anti-Critical Race Theory Movement Is 'Far from Over'*, Time (Apr. 6, 2023, 5:00 AM), https://time.com/6266865/critical-race-theory-data-exclusive/ ("Researchers found the [anti-CRT] activity was roughly consistent year over year in the first two years of Biden's Administration: In 2021, 280 anti-CRT measures were introduced, and in 2022, 283 were introduced."); Anjalé D. Welton, Sarah Diem & Sarah D. Lent, *Let's Face It, the Racial Politics Are Always There: A Critical Race Approach to Policy Implementation in the Wake of Anti-CRT Rhetoric*, Educ. Pol'y Analysis Archives (Sept. 26, 2023); Ray & Gibbons, *supra* note 1.

51. *See* Eesha Pendharkar, *The Evolution of the Anti-CRT Movement: A Timeline*, Educ. Week (Dec. 13, 2022), https://www.edweek.org/leadership/the-evolution-of-the-anti-crt-movement-a-timeline/2022/12.

52. *See* Derek A. Applewhite, *A Year Since George Floyd*, 32 Molecular Biology of Cell 1797, 1797–99 (2021); Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS News (June 4, 2021, 7:39 PM), https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact/. *But see* Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 Hous. L. Rev. 817 (2021) (concluding that the cultural trauma needed to produce lasting social, political, and legal reform in the United States did not occur and, as a result, the "reckoning" is temporary); Jhumpa Bhattacharya & Anne Price, *How Far Has America Actually Come Since the George Floyd Protests?*, Time (July 20, 2021, 3:08 PM), https://time.com/6082021/america-since-promises-of-the-george-floyd-protests/ ("While it may be uncomfortable to many to acknowledge that race is a powerful force in America, it is the truth. It seemed like we were ready

that simply had not been a part of their education.[53] Subsequently, the anti-confederate memorial movement gained success, as did a rise in calls for anti-racist education in schools.[54] Yet, once the truth of racial injustice had been laid bare, there were those who invented new ways to subvert this truth, beginning with then-President Donald Trump's executive order prohibiting federal agencies, contractors, U.S. military institutions, and grant recipients from conducting trainings and programs that address systemic racism and sexism.[55] Often referred to as the "equity gag order," the order forbade speech activities such as trainings in the workplace that promote diversity, equity, and inclusion.[56] The order conditioned the receipt of federal funding on adhering to an ahistorical system.[57]

Though President Biden rescinded this order on his first day in office, groups in opposition mounted well-funded disinformation campaigns against Critical Race Theory and other forms of racial and gender justice discourse.[58] Such campaigns resulted in the widespread introduction of local and state legislative initiatives that had the aim of prohibiting academic and educational discussions regarding race, racism, gender, and American history.[59] Dozens of states introduced

to lean into that last year, yet now conservative activists are leading a charge (and winning) to ban critical race theory, and some white-majority communities are reinforcing a color-blind philosophy which changes nothing."); Gabriel R. Sanchez, *Americans Continue to Protest for Racial Justice 60 Years After the March on Washington*, Brookings Inst. (Aug. 25, 2023), https://www.brookings.edu/articles/americans-continue-to-protest-for-racial-justice-60-years-after-the-march-on-washington/.

53. *See* Onwuachi-Willig, *supra* note 52, at 817; Silverstein, *supra* note 52.

54. *See* Aimee Ortiz & Johnny Diaz, *George Floyd Protests Reignite Debate Over Confederate Statues*, N.Y. Times (June 3, 2020), https://www.nytimes.com/2020/06/03/us/confederate-statues-george-floyd.html; Nicole Pelletiere & Katie Kindelan, *Teachers Are Reinventing How Black History, Anti-Racism Are Taught in Schools as System Falls Short*, ABC News (June 30, 2020, 4:08 AM), https://abcnews.go.com/GMA/Living/teachers-reinventing-black-history-anti-racism-taught-schools/story?id=71450018.

55. Exec. Order 13,950, *Executive Order on Combating Race and Sex Stereotyping*, 85 Fed. Reg. 60683, 60683-89 (Sept. 22, 2020).

56. *See id.*

57. *See id.*; *National Urban League v. Trump: Important Facts About LDF's Case Challenging the Trump Truth Ban*, NAACP Legal Def. Fund, https://www.naacpldf.org/important-facts-about-ldfs-case-against-the-trump-truth-ban (last visited Apr. 8, 2024).

58. *See Biden Reverses Trump Executive Order Banning Diversity Training*, UCLA L. News (Mar. 17, 2021), https://law.ucla.edu/news/biden-reverses-trump-executive-order-banning-diversity-training; *See* Waxman, *supra* note 50; Katharina Bucholz, *Anti-CRT Measures Adopted by 28 U.S. States*, Statista (Apr. 19, 2023), https://www.statista.com/chart/29757/anti-critical-race-theory-measures/ (providing a chart showing anti-CRT measures adopted in the United States as of April 2023). For example, between January and September 2021, nearly two dozen legislatures in the United States introduced fifty-four separate bills designed to limit or wholly prohibit teaching and training in elementary, secondary, and higher education, as well as state agencies and institutions. *See Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach* 4, PEN America (2022), https://pen.org/wp-content/uploads/2021/11/PEN_EducationalGagOrders_01-18-22-compressed.pdf (last visited Sept. 29, 2024) [hereinafter PEN America].

59. *See* PEN America, *supra* note 58.

legislation to erase the truth about what students can learn and content they can access about United States history.[60]

The vast majority of states have introduced anti-Critical Race Theory measures, and at least eighteen states have banned Critical Race Theory.[61] Over 800 such laws have been introduced in the United States at the local, state, and federal levels.[62] For example, in 2023, some Republican legislators embedded anti-Critical Race Theory language in spending bills introduced in Congress whose language mirrors that of President Trump's executive order as well as his report on the teaching of American History.[63] Some of the legislation introduced forbids specific teaching materials such as the New York Times' 1619 Project, resulting in a chilling effect on educators that some have dubbed the "Ed Scare."[64] The 1619 Project is a series of essays conceived by Pulitzer Prize-winning journalist Nikole Hannah-Jones, and published by the New York Times, which sought to reframe America's origin story around the legacy of enslavement, ushering scholarly dialogue about the impact of racism on U.S. history into the mainstream.[65] Some forbid

60. As of 2024, at least forty states and nearly 250 local, state, and federal government entities in the United States have introduced anti-CRT legislation. *See CRT Forward*, UCLA Sch. L. Critical Race Studies Program, https://crtforward.law.ucla.edu/ (last visited Apr. 9, 2024) [hereinafter *CRT Forward*, UCLA]; *Critical Race Theory Ban States 2024*, World Population Rev., https://worldpopulationreview.com/state-rankings/critical-race-theory-ban-states (last visited Apr. 9, 2024).

61. *See CRT Forward*, UCLA, *supra* note 60; Bucholz, *supra* note 58.

62. By April 2023, the number of such measures skyrocketed to 567. *See Democracy in Peril: Confronting the Threat Within*, Nat'l Urb. League, https://soba.iamempowered.com/sites/soba.iamempowered.com/files/NUL-SOBA-Executive-Summary-2023-web.pdf (last visited Sept. 29, 2024). Now, the latest statistics indicate that 805 such laws have been introduced. *See CRT Forward*, UCLA, *supra* note 60 (providing an interactive map tracking introduction of legislation nationwide); *see also* Keenan Colquitt, *Counteracting Educational Censorship, Book Bans, and Anti-DEI Legislation*, Univ. Mich., Nat'l Ctr. for Inst. Diversity (Mar. 6, 2024), https://lsa.umich.edu/content/dam/ncid-assets/ncid-documents/v2%20Issue%20Brief%20-%20Academic%20Freedom%20Mar%202024.pdf (last visited Sept. 29, 2024).

63. *See* Catie Edmondson, *House G.O.P. Uses Spending Bills to Pick Partisan Policy Fights*, N.Y. Times (June 23, 2023), https://www.nytimes.com/2023/06/23/us/politics/house-republicans-spending-bills.html; *see also* The President's Advisory 1776 Commission, 1776 Report (Jan. 18, 2021), https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf.

64. *See* Colquitt, *supra* note 62 ("Book bans have occurred in 86 school districts comprising 2,899 schools with a combined enrollment of over 2 million students in 26 states."). U.S. Senator Tom Cotton of Arkansas, for example, introduced the Saving American History Act of 2020, which was designed to "defund the 1619 Curriculum," https://www.cotton.senate.gov/imo/media/doc/200723%20Saving%20American%20History%20Act.pdf. Also, state legislators in Arkansas, Iowa, and Mississippi all introduced bills that would ban the project on the grounds that the material is "racially divisive and revisionist." The Iowa bill alleges that the 1619 Project "attempts to deny or obfuscate the fundamental principles upon which the United States was founded."

65. *The 1619 Project*, N.Y. Times, https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html (last visited Sept. 29, 2024). *See also* Nikole Hannah-Jones, 1619 Project: A New Origin Story (Nikole Hannah-Jones, Caitlin Roper, Ilena Silverman, Jake Silverstein eds., Random House Rev. ed. 2021).

other texts, or use vague terms, that have led to the cancellation of courses and the firing of teachers.[66] Oklahoma's law, for example, says public school classes should not include the idea that "any individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex."[67]

This is like the new McCarthyism.[68] Similar to the "Second Red Scare," so-called "parents' rights" groups helped to galvanize a movement to repress information, sow fear of alleged "dangerous" and "threatening" ideologies, and prosecute those educators that may teach material regarding historic and systemic racial discrimination.[69] For example, in support of recent legislation that banned the teaching

66. *See* H.F. 802, 89th Gen. Assemb., Reg. Sess. (Iowa. 2021) (prohibiting all "race and sex-stereotyping trainings" at all state and local schools, colleges, and government agencies), https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=hf802.

67. *See* H.B. 1775, General Assembly, Reg. Sess. (Okla. 2021), *https://legiscan.com/OK/text/HB1775/id/2387002.* The Oklahoma State Board of Education subsequently provided guidance on the bill, suggesting a more capacious understanding, "It shall be the policy of the Oklahoma State Board of Education to prohibit discrimination on the basis of race or sex in the form of bias, stereotyping, scapegoating, classification, or the categorical assignment of traits, morals, values, or characteristics based solely on race or sex." *See* Oklahoma State Board of Education, Prohibition of Race and Sex Discrimination, https://sde.ok.gov/sites/default/files/documents/files/HB%201775%20Emergency%20Rules.pdf. Public schools in this state shall be prohibited from engaging in race or sex-based discriminatory acts by utilizing these methods, which result in treating individuals differently on the basis of race or sex or the creation of a hostile environment." *Id.*; *see also* Carmen Forman, *Oklahoma Board of Education Approves Rules to Limit Classroom Discussions on Race, Gender*, Oklahoman (July 13, 2021), https://www.oklahoman.com/story/news/2021/07/12/oklahoma-ed-board-bans-critical-race-theory-certain-gender-teachings/7917847002/. The Oklahoma law uses the same language as President Donald Trump's Executive Order Combating Race and Sex Stereotyping, issued on September 22, 2020. *See* Exec. Order No. 13,950, 85 Fed. Reg. 60, 683 (Sept. 28, 2020). Notably, President Joe Biden revoked this Executive Order soon after he was inaugurated on January 20, 2021. *See* Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

68. *See* Colquitt, *supra* note 62. The rise of conservative "parents' rights" groups such as Moms for Liberty galvanize to ignite Republicans and rally against sex education, public health mandates, and critical race theory, which they allege leads to "indoctrination" of their children. *See* Hannah Knowles, *The 'Parental Rights' Group Igniting the GOP*, Wash. Post (July 25, 2023), https://www.washingtonpost.com/podcasts/post-reports/the-parental-rights-group-igniting-the-gop/; Libby Stanford, *Parents' Rights Groups Have Mobilized. What Does It Mean for Students?*, Educ. Week (Aug. 31, 2023), https://www.edweek.org/leadership/parents-rights-groups-have-mobilized-what-does-it-mean-for-students/2023/08; Ali Swenson, *Far-Right Group Moms for Liberty Poised to Clash with Teachers Unions over School Board Races Nationwide*, PBS News Hour (July 2, 2023), https://www.pbs.org/newshour/education/moms-for-liberty-poised-to-clash-with-teachers-unions-over-school-board-races-nationwide.

69. *See* Colquitt, *supra* note 62 (describing the "Ed Scare"); *See also Moms For Liberty*, S. Poverty L. Ctr., https://www.splcenter.org/fighting-hate/extremist-files/group/moms-liberty (last visited Sept. 29, 2024) (noting that it is "a far-right organization that engages in anti-student inclusion activities."). Regarding new "anti-Critical Race Theory" legislation, Moms For Liberty tweeted, "We've got $500 for the person that first successfully catches a public school teacher breaking this law. Student, parents, teachers, school staff . . . We want to know! We pledge anonymity if you want." *Id.*

of material that touches on historic and systemic racism in the United States, one chapter of Moms for Liberty used an Adolph Hitler quote on its masthead.[70] Media has promoted such ignorance by framing these new attacks as a legitimate school of thought.[71]

Today, legal battles implicating the First Amendment and other constitutional concerns continue. Most recently, the U.S. Circuit Court of Appeals for the Eleventh Circuit blocked Governor Ron DeSantis's Stop WOKE Act, which prohibited schools and businesses from teaching concepts related to race, racism, gender, and privilege.[72] The court held it unconstitutional under the First Amendment.[73] The Eleventh Circuit deemed the Act an affront to the Constitution, as it committed the "greatest First Amendment sin" of censoring protected speech.[74]

What do we lose when we omit the truth, when we legislate ignorance? *Brown v. Board* told a story of the detrimental impact of segregation on Black *and* white children.[75] Though that story

70. The masthead of the Moms for Liberty newsletter, *The Parent Brigade*, featured the following quote on its cover: "He alone, who OWNS the youth, GAINS the future." Hitler famously uttered these words at a Nazi rally in 1935. Sana Sinha, Nicolas Zerbinio, Jon Valant & Rachel M. Perera, *Moms for Liberty: Where Are They, and Are They Winning?*, Brookings Inst. (Oct. 10, 2023), https://www.brookings.edu/articles/moms-for-liberty-where-are-they-and-are-they-winning/ (citing *Moms for Liberty's Hamilton County Chapter Apologizes for Quoting Hitler in Newsletter*, Indianapolis Star (June 23, 2023, 8:33 AM), https://www.indystar.com/story/news/2023/06/21/moms-for-liberty-hamilton-county-indiana-quotes-hitler-in-newsletter/70344659007/).

71. *See, e.g.*, Dalton Barthold, *Inflating the Monster: The Systematic Co-Optation, Commodification, and Colonization of Critical Race Theory in the News Media,* (April 2023) (B.A. thesis, University of Michigan) (on file with the University of Michigan Library); Ann LoBue & Sonya Douglass, *When White Parents Aren't so Nice: The Politics of Anti-CRT and Anti-equity Policy in Post-pandemic America* 98 Peabody J. Educ. 548 (2023)*;* Julia Carrie Wong, *From Viral Videos to Fox News: How Rightwing Media Fueled the Critical Race Theory Panic,* The Guardian (Jun. 30, 2021, 6:00 AM).

72. Honeyfund.Com Inc. v. DeSantis, 94 F.4th 1272 (11th Cir. 2024).

73. *Id*. *See* Andrew Atterbury, *Appeals Court Slams Florida's 'Stop-Woke' Law for Committing 'Greatest First Amendment Sin*,*'* Politico (Mar. 4, 2024), https://www.politico.com/news/2024/03/04/desantis-woke-law-court-00144801; Sarah Mervosh, *DeSantis Faces Swell of Criticism Over Florida's New Standards for Black History*, N.Y. Times (July 21, 2023), https://www.nytimes.com/2023/07/21/us/desantis-florida-black-history-standards.html.

74. *Honeyfund*, 94 F.4th at 1277.

75. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) ("Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."). While the *Brown* opinion did not specifically cite to the harms of racial segregation on white children, it is a foundational tenet of the advocacy to end segregation, both legislatively and in courts. For example, in the congressional debates surrounding the passage of post-Reconstruction legislation to make real the promise of the Fourteenth Amendment's provision of equal citizenship for the formerly enslaved, arguments centered on this harm:

> You should not begin life with a rule that sanctions a prejudice. Therefore do I insist … that we should banish a rule which will make [children] grow up with a separation which will be to them a burden—a burden to the white, for every prejudice is a burden to him who has it, and a burden to the [B]lack, who will suffer always under degradation.

produced feelings of discomfort, it was absolutely essential to the achievement of the Supreme Court decision that broke the back of legal apartheid in the United States.[76] We lose valuable lessons about institutional racism, and the role that social movements play in addressing it, simply because it may produce feelings of discomfort for parents or students.[77] Denying the truth is not new, and in fact shares a common history with those who favored maintaining racial segregation, lynching, and Jim Crow, and decried the *Brown* decision.[78]

It is important that we call out these attacks on the truth as what they are: concerted efforts to distort history and reality. They are designed to silence future generations. In doing so, they are a part of a broader anti-democratic movement and a dangerous path toward authoritarianism.[79] Elected officials who support these efforts are the same ones who support voter suppression and enact anti-voter laws.[80] Such theories galvanize the belief that to be "anti-racist" is to be racist against white people, a common refrain from resistors to Black civil rights movements throughout history.[81] It is best to proactively confront this rise in suppression.

Cong. Globe, 41st Cong., 3d Sess. 1055 (1871) (statement of Sen. Sumner in debates over 1875 Civil Rights Act). In the Clarendon County, South Carolina case *Briggs v. Elliot*, one of the school desegregation cases accompanying Brown v. Board of Education, U.S. District Court Judge Waties Waring noted the deleterious psychological effects of segregation "appl[y] to white as well as Negro children." Briggs v. Elliot, 98 F. Supp. 529, 547 (E.D.S.C. 1951) (Waring, J., dissenting), *vacated*, 342 U.S. 350 (1952).

76. *See* Peter Minowitz, *Discomfort Is Still Legal*, Inside Higher Ed. (May 2, 2022), https://www.insidehighered.com/views/2022/05/03/journalists-scholars-mischaracterize-crt-bills-opinion.

77. *See* Bridges, *supra* note 40, at 461; Jeanne Theoharis, A More Beautiful and Terrible History: The Uses and Misuses of Civil Rights History 173, 187–89 (2018).

78. For a critical perspective on the "whitewashing" of history in this regard, there are a number of historians and legal scholars who provide such an analysis. *See generally*, Theoharis, *supra* note 77; Tomiko Brown-Nagin, Civil Rights Queen: Constance Baker Motley and the Struggle for Equality (2022).

79. *See, e.g.*, John R. Wood, *The Authoritarian Big Chill: Critical Race Theory Versus Nostalgia in a Deep Red State*, 13 Am. Ass'n Univ. Professors' J. Acad. Freedom (2022) (examining the passage of Oklahoma House Bill 1775 as an example of the rise of authoritarianism). *See also* Jason Stanley, How Fascism Works: The Politics of Us and Them (2018); Anne Applebaum, Twilight of Democracy: The Seductive Lure of Authoritarianism (2020); Timothy Snyder, *The War on History is a War on Democracy,* N.Y. Times (June 29, 2021), https://www.nytimes.com/2021/06/29/magazine/memory-laws.html.

80. *See, e.g.*, Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory,* The New Yorker *(*Jun. 18, 2021); Anemona Hartocollis, *He Took on the Voting Rights Act and Won. Now He's Taking on Harvard,* N.Y. Times (Nov. 19, 2017).

81. *See* Ibram X. Kendi, *The Mantra of White Supremacy*, Atlantic (Nov. 30, 2021), https://www.theatlantic.com/ideas/archive/2021/11/white-supremacy-mantra-anti-racism/620832/; *See generally* Anthea Butler, White Evangelical Racism: The Politics of Morality in America (2021).

IV. Avenues for Redress

In such an environment of widespread mischaracterizations and misinformation, advocates and scholars must countermand threats in state and federal courts, legislatures, the academy, and the court of public opinion.[82] Indeed, one may find solutions in the very tenets of Critical Race Theory. It teaches us the power that narrative provides in education, enlightenment, and the converging interests that fuel reform. In one of his most famous articles, Derrick Bell talks about the theory of "interest convergence."[83] This is the idea that strategies that unify the interests of those advocating for equality with those who are in power have the greatest chance of success.[84] The point at which those interests unify, is the "sweet spot" for making change.[85]

In seeking to address these attacks on Critical Race Theory, scholars, educators, and advocates may use strategies that tell the story of historic and present-day structural inequity to educate, and ultimately, unify people around the common belief in the importance of an inclusive education for the protection of our democracy. This can take several forms. First, all roads lead back to the importance of education—both what we teach and to whom we teach. The anti-Critical Race Theory movement gained momentum in its quest to legislate ignorance at the very time that we began to see an unprecedented level of support for unmasking these myths of historic equality and laying bare the realities of structural racism.[86] Pedagogically, experts agree that all students benefit from a more culturally responsive, diverse, and inclusive education.[87] Thus, it is imperative to document historic and

82. *See* Kiara Alfonseca, *Critical Race Theory Thrust into Spotlight by Misinformation*, ABC News (Feb. 6, 2022, 10:02 AM), https://abcnews.go.com/US/critical-race-theory-thrust-spotlight-misinformation/story?id=82443791.

83. Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 523 (1980). As Bell famously noted, "The interest of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of whites . . . . [T]he [F]ourteenth Amendment, standing alone will not authorize a judicial remedy providing effective racial equality for [B]lacks where the remedy sought threatens the superior societal status of middle and upper class whites." *Id.*

84. *Id.*; *see also* Haney López, *supra* note 41; Bridges, *supra* note 40, at 36.

85. *See* Bell, *supra* note 84; Haney López, *supra* note 41; Bridges, *supra* note 40, at 36.

86. *See* Haney López, *supra* note 41; Bridges, *supra* note 40, at 36.

87. *See The Very Foundation of Good Citizenship: The Legal and Pedagogical Case for Culturally Responsive and Racially Inclusive Public Education for All Students*, Nat'l Educ. Ass'n (Sept. 29, 2022), https://www.nea.org/resource-library/legal-and-pedagogical-case-culturally-responsive-and-racially-inclusive-public-education-all [hereinafter NEA Report]; *see also* Miguel A. Gonzalez, New Report: Culturally Responsive & Racially Inclusive Education Is Legal and Benefits All Students, Nat'l Educ. Ass'n, (Sept. 29, 2022), https://www.nea.org/about-nea/media-center/press-releases/new-report-culturally-responsive-racially-inclusive-education-legal-and-benefits-all-students.

existing educational inequities and tell these stories to support why we need inclusive education.[88] Education must be inclusive *precisely because of* the history of inequality.

In truth, American history curricula were never neutral. Historically, education about American history was used as a way to construct a very specific narrative about community.[89] One important component, then, in addressing these attacks is to organize around the issue of inclusive education.[90] Multi-racial coalitions already exist, and the majority of parents are not those who are organizing against Critical Race Theory.[91] Specifically, universities also have a special role in leveraging assets to create a more just society by working with communities to document and tell their history, and to help repair the physical, economic, and psychological toll of enslavement.[92]

Secondly, it is important to be clear in teaching and in advocacy: attacks on Critical Race Theory are part of an anti-democratic movement. Examples of this abound throughout global political history. It has happened before and can happen again, especially here in the United States. Our forebears, in fighting to overturn *Plessy*, knew that systems of racial segregation and white supremacy stifled our capacity to have a fully-functioning democracy. Former Supreme Court Justice Thurgood Marshall noted this principle in his argument to the Court in *Cooper v. Aaron*, prior to his appointment to the Court.[93] In litigating on behalf of Arkansas Black school children who were denied

88. *See* NEA Report, *supra* note 87.

89. *See, e.g.*, Theoharis, *supra* note 77.

90. The movement for inclusive education is not new. Scholars such as Professor Gloria Ladson-Billings have extensively studied its benefits. *See, e.g.*, Gloria Ladson-Billings & Django Paris, Culturally Relevant Pedagogy: Asking a Different Question (2021); Gloria Ladson-Billings, *Toward a Theory of Culturally Relevant Pedagogy*, 32 Am. Educ. Rsch. J. 465 (1995).

91. *See* Ishena Robinson, *Why Truthful, Inclusive Education Benefits All Students—and How to Make It Happen*, NAACP Legal Def. Fund (Apr. 28, 2022), https://www.naacpldf.org/protect-truth-and-inclusivity-in-public-schools/; *see, e.g.*, Geoff Garin & Guy Molyneux, *The Nation's Education Agenda,* Hart Rsch. Assocs. (Jan. 13, 2023), https://www.aft.org/sites/default/files/media/documents/2023/Hart-Education-Survey_jan2023.pdf (reporting findings of American Federation of Teachers national poll showing voters and parents overwhelmingly do not worry about teacher indoctrination, pushing "woke" agenda, or teaching "critical race theory."); *see* Kayla Gogarty, *Right-wing Media and Republican Lawmakers Are the Only Ones Talking About Critical Race Theory on Facebook*, Media Matters For America (May 20, 2021, 4:54 PM), https://www.mediamatters.org/facebook/right-wing-media-and-republican-lawmakers-are-only-ones-talking-about-critical-race-theory (noting that of the political Facebook pages that mention Critical Race Theory, nearly 90 percent are from right-leaning pages).

92. There is a rise, for example, in national networks of college and university-based scholars working in partnership with community-based organizations to develop research-informed solutions for community-specific challenges seen as the present-day results of historic enslavement. *See, e.g.*, U. Mich. Ctr. for Soc. Solutions, Center for Social Solutions Annual Report 1 (2022).

93. *See generally* Cooper v. Aaron, 358 U.S. 1 (1958).

entrance to an all-white high school even after the *Brown* decision, he noted that submitting to "mob violence" and withdrawing from school "rather than go[ing] to school with Negroes" is a "horrible destruction of [the] principle of citizenship."[94] Indeed, it is a message that may be most harmful to the white students who protested the desegregation of schools pursuant to the Court's order in *Brown*.[95] This is the message of *Brown*: "[E]ducation . . . is the very foundation of good citizenship."[96] We cannot sincerely promote this message in a system that discriminates based on race.

Let me state it plainly: to be anti-racist is imperative for a fully-functioning democracy. We need unifying strategies, helping not just Black people but all people to do well. This scale of reform cannot be successful without government intervention.[97] Thus, it is important to not only fight back against these disinformation attacks and campaigns, but also to affirmatively advocate for what is necessary for our democracy to work. This includes pushing state legislators for more inclusive curricula.[98]

Finally, with respect to today's challenges, there is reason to be hopeful: despite the massive resistance we face, we are in a markedly different place than in decades past. When the legal arm of the movement started, we did not have the tools we have now, even those that have been undermined, abrogated, or eliminated.[99] With our legal

94. May It Please the Court: The Most Significant Oral Arguments Made Before the Supreme Court Since 1955 254 (Peter Irons & Stephanie Guitton eds., 1993) [hereinafter May It Please the Court] (quoting then-attorney Thurgood Marshall in *Cooper v. Aaron*).

95. "I worry about the white children in Little Rock who are told, as young people, that the way to get your rights is to violate the law and defy the lawful authorities. I'm worried about their future." May It Please the Court (quoting Thurgood Marshall's *Cooper* Oral Argument, argued on Sept. 11, 1958).

96. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

97. *See, e.g.*, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021). Passed by President Biden on his first day in office, the order states that "[a]ffirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government." *Id.* Over the next three years, the Administration issued a second Executive Order on equity, Exec. Order No. 14,091, 88 Fed. Reg. 10825 (Feb. 16, 2023), as well as legislation such as the Inflation Reduction Act and executive actions. *See Advancing Equity and Racial Justice Through the Federal Government*, The White House, https://www.whitehouse.gov/equity (last visited Nov. 15, 2024).

98. *See, e.g.*, H.B. 198, General Assembly, (Delaware 2021) (amending the Delaware Code to provide that "[e]ach school district and charter school serving students in 1 or more of the grades K through 12 shall provide instruction on Black history."), https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=48487&legislationTypeId=1&docTypeId=2&legislationName=HB198; S.B. 5462 (Washington 2024) (an Act "promoting inclusive learning standards and instructional materials in public schools"), https://lawfilesext.leg.wa.gov/biennium/2023-24/Pdf/Bills/Session%20Laws/Senate/5462.SL.pdf?q=20241022115440.

99. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq.; Voting Rights Act of 1965, 52 U.S.C. §§ 10301 et seq.; Fair Housing Act, 42 U.S.C. §§ 3601 et seq.

toolbox, we must continue to press on all fronts, including through litigation, legislation, and social movements. Efforts to subvert the truth are indeed a form of discrimination that need to be challenged under the First and Fourteenth Amendments.[100] Other fundamental rights relating to freedom of speech, equality, and academic freedom are also threatened by this subversion.

Conclusion

This brings me back to the beginning: the importance of truth-telling. There can be an element of shame that is necessary in legal and social movements–collective shame in a fractured history that spurs all of us to face the ways our democracy has failed. But, this is not un-American. Rather, it is what it means to be patriotic. It is to love one's country enough to want to make real the promise of our Constitution, of our democracy, and true equality. It is about understanding our history that as Maya Angelou has said, "despite its wrenching pain, [c]annot be unlived."[101] We face this history, we teach this history, and we tell these truths with "[w]ith courage, [so that they] need not be lived again."[102]

100. U.S. Const. amend. I; U.S. Const. amend. XIV, § 2.

101. Maya Angelou originally performed this poem, *On the Pulse of Morning*, at the inauguration of President Bill Clinton on January 20, 1993. *See* Maya Angelou, *On the Pulse of Morning, in* The Complete Collected Poems of Maya *A*ngelou (1994).

102. *Id.*

Critical Race Thinking in a Pro-Black Space: An Asian American Law Professor's Reflections on Teaching at an HBCU

Philip Lee*

Introduction

Historically Black colleges and universities (HBCUs) have been the subject of both scholarly criticism and praise.[1] Some of these colleges have shut down in recent years.[2] Many HBCU law schools could face the same fate due to bar passage and other issues.[3] However, with the recent Supreme Court decision in *Students for Fair Admission, Inc. (SFFA) v. Harvard* invalidating long-standing race-conscious admissions policies in higher education, HBCUs have become even more relevant in the

* Professor of Law, St. John's University School of Law; formerly at UDC David A. Clarke School of Law (2013–2023); B.A., Duke University, 1996; J.D., Harvard Law School, 2000; Ed.M., Harvard Graduate School of Education, 2012; Ed.D., Harvard Graduate School of Education, 2013. I would like to thank Sue Lee, Marc Johnson, and Jamaal Castang for their comments on earlier drafts of this article. I would also like to thank Victoria Anderson for her research assistance. I dedicate this article to my mom, who is suffering severe memory loss and makes me realize how precious our stories of the past are.

1. *Compare* Roland G. Fryer, Jr. & Michael Greenstone, *The Causes and Consequences of Attending Historically Black Colleges and Universities*, 2 Amer. Econ. J.: Applied Econ. 116, 144 (2010) (finding that "by the 1990s . . . by some measures, HBCU attendance appears to retard black progress.") *with* Stacy Hawkins, *Reverse Integration: Centering HBCUs in the Fight for Educational Equality*, 24 U. Pa. J. L. & Soc. Change 351, 388 (2021) ("HBCUs, consistent with their mission, are uniquely designed to foster Black student success in a number of ways that find resonance with the institutional factors influencing student learning and achievement.").

2. *See* Wadzanai Mhute, *"Your Heritage is Taken Away": The Closing of 3 Historically Black Colleges*, N.Y. Times (June 28, 2019), https://www.nytimes.com/2019/06/28/us/hbcu-closed-graduates.html (discussing the closing of Concordia College in 2018, Morristown College in 1994, and Saint Paul's College in 2013).

3. *See* Dannye Holley, Danielle Holley-Walker, John Pierre, Felecia Epps, Phyliss Craig-Taylor & James Douglass, *HBCU Law Deans Say ABA Bar-Passage Rule Changes Will Hurt Profession's Diversity*, Law.com (Oct. 19, 2016) https://www.law.com/nationallawjournal/almID/1202770271784/ (expressing opposition to a 75% bar passage rule that was later adopted by the ABA as Standard 316), https://www.law.com/nationallawjournal/almID/1202770271784/; *see also* Karen Sloan, *Here Are the US Law Schools with the Lowest Bar Pass Rates in 2023*, Reuters (Mar. 14, 2024) (presenting a list of 15 law schools with the lowest bar passage rates that includes four of the six HBCU Law Schools).

educational landscape.[4] As admission to historically White institutions (HWIs) become more elusive and as racial diversity at these places plumets, HBCUs are expected to admit even more people of color and continue their powerful tradition of educational access.[5]

I taught at an HBCU for ten years. In my experience, even though they face serious challenges, HBCU law schools continue to have much value. This Article is my personal account of how teaching at an HBCU transformed my thinking about race and justice in America and the powerful contributions that these institutions continue to make for their students, the people who work at them, and for our society.[6]

This Article proceeds in four parts. Part I discusses my experiences applying for a professorship and teaching at an HBCU law school. I then describe the important lessons that I have learned during that time. Part II describes how I realized that race and law were socially constructed concepts. Part III details how I learned that what we understand as governing equal protection principles were socially constructed by mostly White male decisionmakers to the detriment of people of color. Finally, Part IV explains how I came to know that racial

4. *See* Lauren Lumpkin & Corrine Dorsey, *HBCUs Revise Admission Policies Amid Expected Surge in Applications*, Wash. Post (July 15, 2023), https://www.washingtonpost.com/education/2023/07/15/hbcu-admissions-affirmative-action-ruling/ ("Some [HBCU] leaders are expecting to field more applications from students who are seeking environments they perceive to be more welcoming—echoing trends that followed anti-racism uprisings in 2020 as Black students sought academic safe havens—while also looking for ways to allow students to talk openly during the admissions process about race."); Andre M. Perry, Hannah Stephens & Manann Donoghoe, *The Supreme Court's Decision to Strike Down Affirmative Action Means that HBCU Investment is More Important Than Ever*, Brookings (June 29, 2023), ps://www.brookings.edu/articles/the-supreme-courts-decision-to-strike-down-affirmative-action-means-that-hbcu-investment-is-more-important-than-ever/ (arguing that HBCUs are in a position to fill the racial equity gap after the Supreme Court ended affirmative action in higher education).

5. Lumpkin & Dorsey, *supra* note 4.

6. In this Article, I use counter-storytelling as a form of anti-racist resistance. Richard Delgado reminded us,

> Traditional legal writing purports to be neutral and dispassionately analytical, but too often it is not. In part, this is so because legal writers rarely focus on their own mindsets, the received wisdoms that serve as their starting points, themselves no more than stories, that lie behind their quasi-scientific string of deductions. The supposedly objective point of view often mischaracterizes, minimizes, dismisses, or derides without fully understanding opposing viewpoints. Implying that objective, correct answers can be given to legal questions also obscures the moral and political value judgments that lie at the heart of any legal inquiry.

Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2440–2441 (1988). Delgado asserted,

> "Legal storytelling is an engine built to hurl rocks over walls of social complacency that obscure the view out from the citadel. But the rocks all have messages tied to them that the defenders cannot help but read. The messages say, let us knock down the walls, and use the blocks to pave a road we can all walk together."

Id. at 2441.

identity was also socially constructed and can be re-constructed in more empowering ways.

PART I: GETTING HIRED AND TEACHING AT AN HBCU

When I was applying for my first full-time teaching position after receiving my doctorate in education in 2013, I interviewed at several law schools. I could tell that some professors at these institutions were hostile to the ideas I brought to the table. When I was discussing racial justice during my interviews, the negative reactions of some of the faculty members were palpable. I remember one White male professor telling me that my research ideas centering on race were "not really legal scholarship." He asked me if I was also applying for "policy programs," which he stated would be a "better fit" for me. He then took out his smartphone, held it in front of his face, and texted someone for the rest of my interview, showing me his complete disregard for what I had to say.[7]

At the time, tenured full-time law faculty were 85.2% White and tenure-track full-time law faculty were 70.2% White.[8] The racial backgrounds of my interviewers were reflective of these statistics. My typical hiring panel had either all White faculty members or a single person of color on it. The single minority interviewer was usually assigned to field my questions about diversity, equity, and inclusion at their law school.

My interview with the University of District of Columbia David A. Clarke School of Law (UDC Law) was different than the others. This law school had a statutory mandate to enroll students who have been underrepresented in the legal profession and to help low-income people in the district.[9] Unlike the other schools

7. This hostile reaction to my speaking about issues of racial justice during my interview is consistent with the idea that law schools can be spaces of academic terror for people of color. *See* Renee Nicole Allen, *Get Out: Structural Racism and Academic Terror*, 29 Wm. & Mary J. Race, Gender, & Soc. Just. 599, 604 (2023) ("For people of color, law schools are a metaphorical Sunken Place. Though not literally screaming, legal scholars and law students have been telling stories of academic horror for decades.").

8. *Data From the 2013 Annual Questionnaire: ABA Approved Law School Staff and Faculty Members, Gender and Ethnicity: Fall 2013*, ABA (2013), https://www.americanbar.org/groups/legal_education/resources/statistics/statistics-archives/ (scroll down and click "Law School Faculty & Staff by Ethnicity and Gender") (for 2013 data). Figures are based on all full-time faculty listed in the AALS Directory of Law Teachers for whom race/ethnicity is known.

9. UDC Law has as its statutory mission:

> The establishment and operation of a law school which recruits and enrolls students from racial, ethnic, and other population groups which have been underrepresented among persons admitted to the bar in the District of Columbia and the United States of America; and The establishment and operation of a clinical law school that is committed to representing the legal needs of low-income persons, particularly persons who reside in the District of Columbia.

I met with, the interview process at UDC Law was mostly run by professors of color. This law school is a public historically Black college or university (HBCU)—a pro-Black space in the nation's capital.[10]

The genesis of many public HBCUs date back to the Second Morrill Act of 1890.[11] The federal government granted money to the states in "support of the colleges for the benefit of agriculture and mechanical arts."[12] No states would get the funds if the states "made a distinction of race or color . . . in the admission of students" unless the states established and maintained "colleges separately for white and colored students."[13] In conformance with this law, southern states and the District of Columbia created separate higher education institutions for their African American students. Hence, the land-grant HBCU was born. These educational spaces were meant to provide higher education opportunities for African Americans when historically White colleges and universities refused to admit or severely restricted the admission of non-White students. HBCUs, both public and private, have become the major pipeline for African American students becoming lawyers, judges, medical doctors, engineers, and research doctoral degree holders.[14]

Legal scholar Stacy Hawkins wrote about the three key components of the HBCU pedagogical model: "(1) substantial numbers of Black faculty and administrators; (2) a culture of high expectations within a supportive and nurturing environment; and (3) a curriculum rich in

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D.C. Municipal Regulations § 8-A200 (2017). Furthermore,

> The School of Law shall maintain an educational program designed to prepare graduates for the effective and ethical practice of law, and which prepares graduates to deal with the recognized problems of the present and the anticipated problems of the future. Consistent with this mission, the School of Law shall emphasize the persuasion of graduates to devote themselves to the practice of law in the public interest and preparation for that practice.

Id.

10. HBCUs can also be private, the main differences being that public HBCUs are funded and run by the states. Despite these differences, both public and private HBCUs center their work on achieving Black excellence.

11. Second Morrill Act of 1890, Pub. L. No. 111-122, 26 Stat. 417 (1890).

12. *Id.*

13. *Id.*

14. *See* Michael T. Nietzel, *HBCUs Lead Nation in Black Baccalaureates Who Later Earn Doctoral Degrees*, Forbes (Aug. 19, 2022), https://www.forbes.com/sites/michaeltnietzel/2022/08/19/hbcus-are-nations-leading-institutions-for-black-baccalaureate-graduates-who-later-earn-a-phd/; Horacio Sierra, *What Are HBCU Colleges? Facts About Historically Black Colleges and Universities*, Forbes (Oct. 19, 2023), https://www.forbes.com/advisor/education/online-colleges/hbcu-colleges-and-universities/.

experiential learning and culturally relevant content."[15] All three of these components were present at my HBCU.

When I was first interviewed by UDC Law faculty members, Wilhelmina Reuben-Cooke, who was chair of the hiring committee, gave me the warmest of greetings. She said, "Hello, my fellow Dukie"—a term of endearment among Duke University graduates. Wilhelmina was one of the first five African American Duke students when she enrolled in 1963.[16] She had been a practicing attorney, higher education administrator, and was now a law professor at an HBCU. As her first question, she asked me, "What makes you who you are?" When I was describing how I absorbed critical theory and multicultural literature as an undergraduate at Duke and was also engaged in protests against racism, sexism, and homophobia while there, she was tickled. She responded with a smile, "So Duke radicalized you?" We would get along so well.

I was hired and started work at UDC Law in the summer of 2013. As the years went on, Wilhelmina would come by my office frequently to check in on me. She was unassuming and listened more than she talked, but when she spoke, people listened. We both taught Property at UDC. I remember telling her in my first year that I found the material confusing. She said, "So do I! I have to re-learn this stuff every year so I can teach it to my students." That gave me so much comfort that such an experienced colleague would admit that she also found the material difficult to teach. She would call me at home to compare notes on our classes. I loved those calls. During the year, Wilhelmina would come by my office with small items she would pick up for me at the Duke gift shop when she was on campus fulfilling her trustee duties. She got me bookmarks, calendars, and t-shirts. She would, in her modest way, tell me that she was in Durham anyway so she thought she would just get me something small—no big deal. Wilhelmina did this every semester. It was a big deal to me. Her generosity had a significant impact on me.

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15. Hawkins, *supra* note 1, at 373. Hawkins further explained,

> This unique pedagogical approach is distinct from the dominant pedagogical model employed by many comparable HWIs, which centers faculty rather than students, and where there is a dearth of diversity among faculty and administrators who so often fail to reflect the increasing racial and ethnic diversity among their student bodies. HWIs are settings where many Black students not only feel isolated from an overwhelmingly white faculty and their own peers, but also find themselves alienated by a heavily Eurocentric curriculum that offers little to affirm their cultural identities or engage them directly in the learning process.

Id.

16. Geoffrey Mock, *Iconic West Campus Building Named After a Duke Pioneer*, Duke Today (Sept. 25, 2020), https://today.duke.edu/2020/09/reuben-cooke-building.

She had a sign in her office that read, "Love one another." She was such a wonderful mentor and colleague.

Wilhelmina passed away on October 22, 2019. Duke would name a building after her—the Sociology-Psychology Building, which is the same building I took most of my classes in the early 1990s.[17] Wilhelmina passed away so suddenly, I did not get the chance to tell her what she meant to me. The best thing I could think of to express my gratitude was to take over her teaching responsibilities for her evening Property class for the rest of the semester. I did this without hesitation even though it meant doubling the number of Property students I had to teach. In my first class with her students, I told them that I was teaching the remainder of her classes to honor her, not to replace her. I could never replace her. They were so open to my sudden presence and grateful for my willingness to do this, I felt that we clicked right away. I taught them possessory estates, future interest, rules furthering marketability by destroying contingent future interests, and concurrent estates. In other words, I used our time together to teach them the most difficult concepts in Property. As a group, they took the material seriously and did well. They worked together and figured it out. It was a collaborative effort. This collaboration was consistent with much of my classroom experiences at UDC Law. It was unlike my time as a law student at a historically White institution.

In my ten years at UDC Law, I have worked with some outstanding colleagues.[18] I would get to know civil rights legend Bill Robinson, who was one of the lead attorneys on the cases that set up the legal framework for certain types of employment discrimination claims under Title VII.[19] Bill was the founding dean of UDC's predecessor institution, DC School of Law, which I heard was run like a training camp for civil rights lawyers. I would be mentored by Howard University School of Law graduate John Brittain, former Dean of Thurgood Marshall School of Law (another HBCU) in Houston, Texas, and a civil rights legend who litigated a Connecticut case that established the fundamental right to education in the state.[20] Early in my teaching career, I gave

17. *Id.*

18. I had too many wonderful colleagues to fully acknowledge here, but I will proceed to name a few to give the reader a sense of whom I worked with.

19. *See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (establishing the disparate impact theory of discrimination under Title VII); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing guidelines for allocation of the burden of proof for disparate treatment claims with indirect evidence of discrimination under Title VII).

20. *See* Sheff v. O'Neill, 238 Conn. 1 (Conn. 1996). John Brittain took a strong interest in my professional development starting on my first day at UDC. He would come by my office every week to share his wisdom and provide feedback on my work. He once wrote in an author's note,

a presentation to the Hartford School District about racial justice in education and everyone I met seemed to know John Brittain. I would work with Edgar Cahn who, with his first wife Jean Camper Cahn, co-founded DC School of Law's predecessor, Antioch School of Law, which was another social justice institution.[21] I would learn from other legal giants like Christine Jones, Kristina Campbell, Saleema Snow, and Susan Waysdorf. Christine, a Howard University graduate, had a calm and kind demeanor, yet she could be so effectively forceful when the situation called for it. Kristina was a caring colleague whose religious faith was a call to action against injustice in the world—particularly in the immigration law realm. Saleema, another Howard University graduate, was instrumental in helping me connect the historical overlap between anti-Blackness, Islamophobia, and anti-Asian hate. Her passion for social justice lived in everything she did. Susan, whose family members were murdered in the Holocaust, had incredible compassion for others and was always pushing back against unjust expressions of power. I would work closely with Vivian Canty, who was the long-standing Dean of Admission, and Annamaria Steward, who was the kind and compassionate Dean of Students, both beloved members of our community. I would learn something different from each of these colleagues and friends. They all made me better as a person and as a scholar.

I did not know much about HBCUs until I became a teacher at one. I would learn what these institutions were all about through the work we did every day. Although HBCUs have been significantly underfunded compared to HWIs, a tradition of intellectual, cultural, and professional empowerment against a system of White supremacy has been one of

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> If I may digress to share a privileged part of my autobiography, Howard University School of Law J.D. 1969 trained me to become a social engineer. Charles Hamilton Houston mentored Justice [Thurgood] Marshall and also, my mentor, the late Herbert O. Reid, the Charles Hamilton Distinguished Professor of Law at Howard University School of Law. Thus, Houston taught Marshall and Reid, and Reid trained me from 1966–1969 in civil rights theory and practice. Therefore, I consider myself a third-generation social engineer.

John C. Brittain, *Affirmative Action Survives Again in the Supreme Court on a Legal Technicality: An Analysis of* Fisher v. University of Texas at Austin, 57 How. L.J. 963, 963 (2014). As Brittain mentored me, I consider myself privileged to be a fourth-generation social engineer and advocate.

21. Jean Camper Cahn passed away on January 2, 1991. *See* Glenn Fowler, *Jean Camper Cahn is Dead at 55; Early Backer of Legal Aid to Poor*, N.Y. Times (Jan. 6, 1991), https://www.nytimes.com/1991/01/06/obituaries/jean-camper-cahn-is-dead-at-55-early-backer-of-legal-aid-to-poor.html. Edgar Cahn passed away when I was still at UDC on January 23, 2022. *See* Clay Risen, *Edgar S. Cahn, Legal Reformer in Defense of the Poor, Dies at 86*, N.Y. Times (Jan. 27, 2022), https://www.nytimes.com/2022/01/27/us/edgar-s-cahn-dead.html.

their most powerful modern legacies.[22] Senior Fellow at the Brookings Institute Andre M. Perry wrote, "Since their beginnings prior to the Civil War, HBCUs have prepared their students to be leaders. They imbued students with a unique set of academic skills, an acute sense of justice, a passion for public service, and the confidence to achieve beyond their walls. HBCU alumni pushed the country closer to its lofty democratic ideals."[23] As co-chair of the UDC Law admissions committee, I can attest to the fact that social justice leaders were exactly who we were looking for. This was apparent in our admissions process.

Author Malcolm Gladwell argued that higher education admissions can operate as treatment-effect institutions or selection-effect institutions.[24] Treatment-effect institutions are like the Marine Corps. Gladwell explained, "It's confident that the experience of undergoing Marine Corps basic training will turn you into a formidable soldier."[25] On the other hand, selection-effect institutions are like a modeling agency. Gladwell wrote, "You get signed up by an agency because you're beautiful."[26] In other words, a treatment-effect institution produces the desired qualities by the process it offers people coming in, while a selection-effect institution chooses people because they already possess the desired qualities.

I was the co-chair of the admissions committee at my law school for several years. Based on my experiences, I can say that UDC Law has been more Marine Corps than modeling agency. We mostly admitted applicants who demonstrated strong potential and a passion for social justice, and we aimed to carve them into social justice lawyers through three to four years of practice-oriented legal education. When I worked at Harvard Law Admissions, on the other hand, we were more

22. *See* Katherine Knott, *States Underfunded Historically Black Land Grants by $13 Billion Over 3 Decades*, Inside Higher Educ. (Sep. 20, 2023), https://www.insidehighered.com/news/government/2023/09/20/states-underfunded-black-land-grants-13b-over-30-years; Ivory A. Toldson, *The Funding Gap Between Historically Black Colleges and Universities and Traditionally White Institutions Needs to be Addressed*, 85 J. of Negro Educ. 97, 97 (2016).

23. Andre M. Perry, *HBCUs Are Leading Centers of Education—Why Are They Treated as Second-Class Institutions?,* Brookings (Nov. 22, 2019), https://www.brookings.edu/blog/brown-center-chalkboard/2019/11/22/hbcus-are-leading-centers-of-education-why-are-they-treated-as-second-class-institutions/; Shaun R. Harper, Lori D. Patton & Ontario S. Wooden, *Access and Equity for African American Students in Higher Education: A Critical Race Historical Analysis of Policy Efforts*, J. of Higher Educ. 389, 395 (2009) (noting that after the Second Morrill Act of 1890, "HBCUs founded during this period were generally of poorer quality than their white public counterparts established under the 1862 Morrill Act.").

24. Malcolm Gladwell, *Getting In: The Social Logic of Ivy League Admissions*, New Yorker (Oct. 2, 2005), https://www.newyorker.com/magazine/2005/10/10/getting-in-ivy-league-college-admissions.

25. *Id.*

26. *Id.*

modeling agency than Marine Corps.[27] While I was there, we, generally took students with the strongest academic credentials (top 1% of LSAT scores, *summa cum laude* graduates, Rhodes Scholars, etc.) and subsequently provided mostly theory-based education. The unstated expectation was that these elite students would learn the legal rules during bar preparation courses and practical skills after law school in actual law practice. Under this expectation, law school was primarily about legal theory. This was consistent with my legal education at the same institution in the late 1990s.

Again, UDC Law was different. We trained our students to be lawyers while they were here. We even looked for students that would be good fits for this model. We required an injustice essay, in addition to the personal statement, which asked our applicants to tell us about an injustice that they have experienced or witnessed, how they reacted to it, and what they would do differently if they could. Our strongest applicants told powerful stories of injustice and connected them to the reasons they wanted to pursue a law degree.

I remember one student writing about driving while Black in a White neighborhood and how a White police officer pulled out his gun as he searched the people in the car and how much this traumatized her. I remember another student explaining some of the difficulties of having biracial identity—in particular, how one of her parents was mistreated for having dark skin, while the other parent was treated well because of her white skin. Or another student talking about what it is like to grow up a Hmong refugee in Minnesota, where young people struggled in his neighborhood to stay in school. All three of these students connected their injustice statement to their desire to attend law school. Law would be a tool for these future advocates to change society for the better.

These students were able to connect their motivation to attend law school to different aspects of race. Organizational behaviorist Scott Page identified three aspects of race. First, race can be external and created by how others see us.[28] This type of race is ascribed based on socially significant physical characteristics such as skin color, hair texture, and eye shapes. Second, race can be internal and constructed by how people see themselves.[29] This type of race is a form of self-identification and can

27. I worked as an Assistant Director of Admissions at Harvard Law School from 2005 to 2009.

28. *See* Scott E. Page, The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies 306 (2007).

29. *Id.*

be informed by how others see us, but the defining feature of internal race is that it is based on a choice of what racial categories applies to us. Third, race can be expressive and created by how people present themselves to others.[30] Expressive race is based on a choice on how we put ourselves out in the world. This final form of race can change based on social context. For example, legal scholar Cheryl Harris wrote about how her light-skinned Black grandmother "presented herself as a white woman" in Chicago's central business district in order to get a job that would otherwise be closed off to her because of her race.[31] The students who wrote their compelling essays connected their external race with their internal and expressive race—or at least they wrestled with the complexity of it all.

My students also possessed grit—a concept that psychologist Angela Duckworth has defined as a personal quality consisting of passion and perseverance.[32] These students had a passion for social justice and had shown determination to overcome the obstacles in their lives. They simply refused to quit in order to become the advocates they wanted to be. Even if their test scores or grades were a little lower than others in the applicant pool, I have been willing to fight for these students to get in. And at my HBCU, this type of advocacy in the admissions committee has made a difference.

I have learned that the students you look for to fill your class can have a substantial effect on what classroom learning is like. I have taught at several institutions, and the depth of the dialogue at an HBCU is hard to match anywhere else—particularly involving issues involving race and the law. When I talked about desegregation after *Brown I*, my students shared stories from their own histories as to how these efforts affected their families.[33] Or when I talked about racial profiling, my students had much to say based on things that have happened to them.[34] Or when I talked about predatory lending during the mortgage foreclosure crisis, my students either had personal experience or knew someone who was tricked into taking a subprime loan during this time.[35]

30. *Id.*

31. *See* Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709, 1710 (1993). This is an example of how expressive race can change based on the situation.

32. Angela Duckworth, Grit: the Power of Passion and Perseverance 8 (2016).

33. *See* generally Brown v. Bd. of Educ., 347 U.S. 483 (1954) (*Brown I*) (holding "separate but equal" unconstitutional in public schools).

34. *See generally* Cato T. Laurencin & Joanne M. Walker, *Racial Profiling is a Public Health and Health Disparities Issue*, 7 J. Racial and Ethnic Health Disparities 393 (2020).

35. *See generally* Monique W. Morris, Discrimination and Mortgage Lending in America: A Summary of the Disparate Impact of Subprime Mortgage lending on African Americans (2009).

Another lesson that has been reinforced at my HBCU law school is the importance of teaching. I have come to view it as a magical space in which teacher and student learn from each other and transform their worldviews together. Building on Paulo Freire's work, feminist scholar and activist bell hooks wrote about education as the practice of freedom.[36] She contended,

> To educate as the practice of freedom is a way of teaching that anyone can learn. That learning process comes easiest to those of us who teach who also believe that there is an aspect of our vocation that is sacred; who believe that our work is not merely to share information but to share in the intellectual and spiritual growth of our students. To teach in a manner that respects and cares for the souls of our students is essential if we are to provide the necessary conditions where learning can most deeply and intimately begin.[37]

I have adopted the liberatory pedagogy of hooks and, with it, the belief that teaching is both holistic and sacred.

Part of the job of an effective teacher is to instill confidence in students. When I attended the Association of American Law School's Workshop for New Law School Teachers the summer before I started my full-time law teaching job, I was assigned to the property professors' group. At one point, one of my colleagues asked if any of us plan on teaching the Rule Against Perpetuities (RAP). The RAP, in a nutshell, is a property rule that invalidates certain future interests in land if there is too much uncertainty about when the future interest holders will take the land.[38] It is considered one of the most difficult rules in property law—indeed, in all of law school—to understand. It is so complicated that the Supreme Court of California has held that it is not legal malpractice if an attorney applies it incorrectly.[39]

Almost every person in the new property teachers' group said that they were going to skip teaching the RAP, or give it very cursory treatment, because it was too difficult to teach or that the great amount of time spent teaching it properly did not justify preparing the students for the small number of questions that may be on the bar exam. I took this general reluctance to cover this material as a challenge. If I could learn to teach the RAP clearly and my students could learn it well, then

36. BELL HOOKS, TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM (1994).
37. *Id.* at 13.
38. *See e.g.*, Jee v. Audley, (1787) 1 Cox. 324 (explaining that if certain future interests can possibly vest too far into the future, then they are void).
39. Lucas v. Hamm, 56 Cal. 2d 583, 592 (Cal. 1961) ("These closely akin subjects have long perplexed the courts and the bar.").

we would have proven to each other that we can overcome big obstacles together. I have explained this to my students during the first class for every year I have been teaching Property. And every year, I take the RAP as another opportunity to become better as a teacher and instill confidence in my students that they can learn one of the most difficult concepts in law school. For some of my students, it becomes a personal challenge to learn the RAP so they can explain it to anyone. More than one has told me that in job interviews, their ability to clearly explain the RAP landed them job offers with judges, public interest organizations, or law firms.

Teaching is also a way for a teacher to connect to students on a human level—to find out who they are and why they are here; to discover what or whom do they care about; learn what they want to do with their lives; and how can I help them do all of these things. I believe that the classroom changes both the teacher and the student and, so transformed, we can go out and change the world together. This is what makes the teaching vocation sacred.

PART II: RACE AND LAW AS SOCIAL CONSTRUCTIONS

Another thing I have learned by teaching at an HBCU is that law is constructed by people in power, and it can change when power shifts in society. This has been one of the most important lessons for me—especially at a predominantly Black institution that has evolved into an engine of educational opportunity in a White supremacist society.

The socially constructed nature of the law is powerfully illustrated when a legal opinion is not unanimous. In these cases, the concurring and dissenting opinions clearly show you that there were other possible reasonings and outcomes. These alternatives show you that the law is not set in stone. There are multiple possible outcomes in every case and the operation of power has much to do with what the legal rule eventually becomes. This seems like a radical proposition to some because it resists the dominant narrative that the law is neutral, logical, and consistent. The history of race, racism, and law in this country shows otherwise.

The benefit of viewing law as a social construction is that it is no longer perceived as static and fixed. It is now seen as malleable. It can be adjusted and altered. Or it can be deconstructed and then reconstructed. Abolitionists were aware of this in the 1860s. Civil rights lawyers knew this one hundred years later. I make sure my students are aware of this now. To introduce them to this idea, I make it a point

to teach about two cases that I did not learn in my law school classes, but I had to teach myself about. These two cases exemplify the power to construct the rules—and in turn, reality itself—that is embedded in judicial decision-making.

In 1922, *Ozawa v. United States* was decided by the U.S. Supreme Court.[40] Takao Ozawa was a person of Japanese ancestry who had lived in America for twenty years.[41] He went to high school in Berkeley, California, and had attended the University of California for about three years.[42] He had educated his children in American schools and his family attended American churches.[43] His family spoke English in their home.[44] The Court noted, "That he was well qualified by character and education for citizenship is conceded."[45] However, he was denied naturalization when he applied for citizenship in the federal district court of the then-Territory of Hawaii.[46] The naturalization law starting in 1790 only allowed "white persons" to become U.S. citizens.[47] The district court held that being of the "Japanese race," Ozawa was not eligible for naturalization.[48] His good character was irrelevant.[49]

On appeal, the Supreme Court, in an opinion written by Justice George Sutherland, noted that since 1878, "the federal and state courts, in an almost unbroken line, have held that the words 'white person' were meant to indicate only a person of what is popularly known as the Caucasian race" and it saw "no reason to differ."[50] Justice Sutherland immigrated to America from England and became a naturalized American citizen before the federal district court in Provo, Utah in 1871.[51] Note that this White man was policing the boundaries of Whiteness by constructing a rule that would benefit people who looked like him. In addressing Ozawa's eligibility for naturalization, the Court held,

> The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side. A large number of the

40. Ozawa v. United States, 260 U.S. 178 (1922).
41. *Id*. at 189.
42. *Id.*
43. *Id*.
44. *Id.*
45. *Id.*
46. *Id.* at 189–90.
47. *Id.* at 192–93.
48. *Id.* at 189–90.
49. *Id.*
50. *Id.* at 197.
51. Hadley Arkes, The Return of George Sutherland, Restoring a Jurisprudence of Natural Rights 39 (1994).

> federal and state courts have so decided and we find no reported case definitely to the contrary. These decisions are sustained by numerous scientific authorities, which we do not deem it necessary to review. We think these decisions are right and so hold.[52]

The Court was reinforcing a familiar dichotomy in American law: anyone White, which the Court held was synonymous with Caucasian, was granted access and inclusion into American life and anyone non-White, or as the Court explained not Caucasian, was excluded. Interestingly, an exception was made after the Civil War. Starting in 1870, people of African descent were allowed to become naturalized citizens by a change in the law.[53] However, Asian people, who were categorically neither White nor African, would continue to be generally excluded from naturalization until 1952.[54]

From 1790–1952, gray areas continued to exist between who was White and who was not. Three months after *Ozawa* was decided, the same justices issued an opinion *United States v. Thind*.[55] Bhagat Singh Thind must have been hopeful. He was born in Punjab, a district in northwestern India, and despite being a practicing Sikh, the Court described him as a "high-caste Hindu."[56] Thind first entered the United States in 1913 and served in the U.S. army during World War I.[57] For his naturalization application, Thind was relying on the scientific authorities at the time that classified Punjabi people as Caucasian because they were considered Aryans from India.[58] Therefore, applying the reasoning of *Ozawa*, Thind was White, which meant he was eligible for naturalization. At least one federal judge agreed.[59] When Thind applied for naturalization in the federal District Court of Oregon, it was granted to him.[60] The United States government subsequently challenged this grant of citizenship arguing that Thind was not White.[61] The government's appeal of Thind's naturalization was how this case reached the Supreme Court.

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52. *Ozawa*, 260 U.S. at 198.
53. *Id.* at 193.
54. Ian F. Haney-López, White by Law: The Legal Construction of Race 11 (2006).
55. *See* United States v. Thind, 261 U.S. 204 (1923).
56. *Id.* at 206. *See also* Doug Colson, *British Imperialism, the Indian Independence Movement, and the Racial Eligibility Provisions of the Naturalization Act:* United States v. Thind *Revisited*, 7 Geo. J. L. & Mod. Crit. Race Persp. 1, 16 (2015).
57. Erika Lee, The Making of Asian America: A History 322 (2015).
58. *Id.*
59. *Thind*, 261 U.S. at 207.
60. *Id.*
61. *Id.*

Justice Sutherland wrote the opinion in *Thind*.[62] Even though he deferred to scientific authorities in *Ozawa* for their definition of Whiteness, he changed the definition three months later.[63] It no longer meant Caucasian because brown-skinned Thind would be in that category. Instead, Sutherland turned to a generalized societal understanding of who was White. He wrote,

> What we now hold is that the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs.[64]

So now, the "understanding of the common man" would decide who was White and who was not. Justice Sutherland, in explaining what the common man thought, continued,

> It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry.[65]

Justice Sutherland thought that it was "commonly recognized" that Thind could never be White.[66] His military service was irrelevant to the Court. His desire to become a full-fledged member of this society did not matter. All that mattered was his racial status as understood by general understanding. To preempt any potential claims of bigotry against people who looked like Thind, Sutherland concluded, "It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation."[67]

62. *Id.* at 206.
63. *Ozawa*, 260 U.S. at 197–98; *Thind*, 261 U.S at 208–09.
64. *Thind*, 261 U.S. at 215–16.
65. *Id.* at 215.
66. *Id.*
67. *Id.*

Whiteness and its benefits became invisible in this language of cultural difference. Sutherland reasoned that it was not racial prejudice, but something that was normal and natural that Thind be legally excluded in this way, while White people were being included.[68]

Ozawa and *Thind* illustrate how race has been socially constructed.[69] In the first case, a White male Supreme Court justice held that White means Caucasian, and in the second case three months later, the same judge held that White means whatever he and other White people thought it was.[70] The concept was created to prevent dark-skinned people from becoming U.S. citizens. Legal scholar Devon Carbado observed,

> [A] significant reason for paying attention to *Ozawa* is that it helps, particularly when discussed alongside *Thind*, to make concrete an argument critical race theorists have advanced for more than two decades—namely, that race is a social construction and that the law plays a key role in that process.[71]

This is not to say that the social construction of race only exists in the mind. The effects of this category have certainly been experienced in the real world.

After the Supreme Court's ruling in 1923, Thind lost his citizenship. Other Indian Americans did as well.[72] Between 1923 and 1927, the federal government cancelled the naturalization certificates of sixty-five people of Indian descent.[73] People stripped of U.S. citizenship would lose the ability to travel with a U.S. passport and would lose their homes and businesses because of alien land laws that would prohibit "aliens ineligible to citizenship" from owning land.[74] This is what happened to Vaishno Das Bagai.[75] Bagai was a father of three from Peshawar in what is present-day Pakistan.[76] He entered the United States with his wife and three young sons in 1915.[77] They settled in California.[78] In 1921, he became a naturalized citizen at a federal district court in San

68. *Id.*
69. *See* Haney-López, *supra* note 54, at 7 ("[T]o say race is socially constructed is to conclude that race is at least partially legally produced. Put most starkly, law constructs race.").
70. *Ozawa*, 260 U.S. at 198; *Thind*, 261 U.S. at 214–15.
71. Devon W. Carbado, *Yellow by Law*, 97 Calif. L. Rev. 633, 691 (2009).
72. Mae M. Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America 49 (2004).
73. *Id.*
74. *See* Keith Aoki, "*No Right to Own: The Early Twentieth-Century Alien Land Laws as a Prelude to Internment*, 19 B.C. Third World L.J. 37, 38 (1998).
75. Erika Lee & Judy Yung, Angel Island: Immigrant Gateway to America 145 (2010).
76. *Id.*
77. *Id.*
78. *Id.*

Francisco.[79] Upon losing his citizenship after *Thind*, he was forced to liquidate his property—including his general store in San Francisco—and was refused a U.S. passport to visit friends and relatives in India.[80] Feeling despondent by his country's betrayal, he committed suicide by gas poisoning in 1928.[81] In the suicide note that he left for his family and the local newspaper, he wrote,

> I came to America thinking, dreaming and hoping to make this land my home . . . and tried to give my children the best American education . . . . But now they come and say to me I am no longer an American citizen. Now what am I? What have I made of myself and my children?[82]

Bagai was just one example. Other stories are waiting to be told.

In short, although the arbitrary rules of race and exclusion were invented by those in power, they were not imaginary. They had the force of law. They became real. People were excluded from American life because of them.

PART III: EQUAL PROTECTION AS A SOCIAL CONSTRUCTION

Teaching at an HBCU has taught me that the judicial interpretation of the Equal Protection Clause is also a social construction. It has been preoccupied with formal equality in process, and not fairness in outcome. For many of my students, this lesson is a lived reality. Let me start with the proposition that the concept of equality has not been sufficient to protect people of color from the vicious legacy of White supremacy. A few examples will illustrate this proposition.

In *Plessy v. Ferguson*, the Supreme Court relied on formal equality to justify racial segregation on railroad cars in New Orleans.[83] In reflecting upon the purpose of the Fourteenth Amendment, the Court noted,

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.[84]

79. *Id.*
80. Lee & Yung, *supra* note 75, at 146.
81. *Id.*
82. *Id.*
83. Plessy v. Ferguson, 163 U.S. 537 (1896).
84. *Id.* at 544.

In upholding the segregation law in the "social" sphere, it reasoned that African Americans break the law if they sit in the White section and White people break the law if they ever chose to sit in the African American section—the latter being an exceedingly rare occurrence. This was "absolute equality of the two races before the law."

Legal scholar Lani Guinier connected formal equality to the *Brown I* case and subsequent school desegregation cases.[85] She wrote,

> *Brown*'s holding became the gold standard for defining the terms of formal equality: treating individuals differently based on the color of their skin was constitutionally wrong. However, once the Court's membership changed in the 1970s, advocates of color blindness used Brown's formal equality principle to equate race-conscious government decisions that seek to develop an integrated society with the evils of de jure segregation.[86]

This was evident in the cases that weakened *Brown I*. For instance, in *Millikin v. Bradley*, the Court held that race-conscious busing across district lines was unfair to the White people living in the suburbs who did not initially segregate the schools in inner-city Detroit.[87] In other words, unless the African American plaintiffs could prove intentional discrimination on the part of the White suburbanites, then the suburban school children had to be treated in a colorblind way—race-based busing was not allowed. In *Board of Education of Oklahoma City v. Dowell*, the Court held that it would not be fair to the school districts to continue court supervision when they tried to desegregate in good faith for many years.[88] Again, the Court was looking for intentional discrimination to justify desegregation remedies based on race. When it found that state-sponsored segregation laws were no longer in effect, it ruled that African American and White children had to be treated equally.[89] This meant that the district court could not order desegregation anymore. In furtherance of formal equality, the school children would remain educationally separate and unequal. In *Parents Involved in Cmty Schs. v. Seattle Sch. District No. 1*, the Court held that schools could not voluntarily use race for student assignment because they should treat everyone the same by not making assignment decisions based on race.[90]

85. Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. Am. Hist. 92, 92–93 (2006).
86. *Id.*
87. *See generally* Milliken v. Bradley, 418 U.S. 717 (1974).
88. Bd. of Educ. v. Dowell, 298 U.S. 237 (1991).
89. *Id.* at 250.
90. Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

Formal equality was the legal standard in these cases, but it was unjust.[91] Minority children were being adversely affected by these rules that were being applied evenly to different groups of people.[92]

Arguments for formal equality were also operating in the reverse discrimination lawsuits at colleges and universities. In *Regents of the Univ. of California v. Bakke*, Alan Bakke, after being denied to UC Davis Medical School twice, argued that he was not being treated the same as racial minority students, so he was being discriminated against as a White person.[93] Barbara Grutter, Jennifer Gratz, and Abigail Fisher argued the same in their subsequent cases.[94] However, treating everyone the same by ending race-conscious admissions would mean that higher education institutions would be even less racially diverse than they are now.[95]

Starting in 1978, the Court allowed for a form of differential treatment framed in a way that it was comfortable with—the use of holistic review and race as a "plus" factor in the admissions process.[96] In a plurality opinion written by Justice Powell, the Court held that UC Davis Medical School had a compelling state interest in the educational benefits of diversity in the classroom.[97] In summary, this public university was legally allowed to treat people differently based on race if

91. *See* Cedric Merlin Powell, *Justice Thomas, Brown, and Post-Racial Determinism*, 53 Washburn L.J. 451, 451–52 (2014) (noting that since *Brown I*, the Fourteenth Amendment's anti-subjugation underpinnings have been abandoned by the Supreme Court in favor of strict formal equality).

92. *See, e.g.*, Girardeau Spann, *Disintegration*, 46 U. Louisville L. Rev. 565, 600 (2008) ("In the [*Parents Involved*] case, the Supreme Court chose to give a seat in an oversubscribed school to a white student rather than a minority student, knowing that the likely result would be to promote segregation over integration.").

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

94. Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013).

95. *See*, *e.g.*, Anthony P. Carnevale, Zachary Mabel & Kathryn Peltier Campbell, *Race-Conscious Affirmative Action: What's Next*, Georgetown Univ. Ctr. on Educ. and Workforce (2023), https://cew.georgetown.edu/cew-reports/diversity-without-race/ (statistical models show that banning affirmative action would require the entire college admissions system to be reinvented if institutions of higher education want to maintain or increase existing levels of racial diversity).

96. *Bakke* stated,

> The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Bakke, 438 U.S. at 318

97. *Id.* at 311–12.

it was necessary to achieve this compelling interest.[98] Nonetheless, after 45 years of race-conscious admissions in higher education based on the *Bakke* plus factor at most selective institutions, the Supreme Court abruptly ended the practice and made formal equality the governing rule in 2023.[99] In *Students for Fair Admissions, Inc. v. Harvard*, faced with a challenge to the holistic race-conscious admissions policies at Harvard College and UNC-Chapel Hill, the Court struck them down.[100] In an opinion by Chief Justice Roberts, the Court observed, "Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points."[101] Applicants would no longer be given a "plus" based on race.[102]

Formal equality did not have to be the rule. For example, in *Loving v. Virginia*, a case that struck down an anti-miscegenation law as unconstitutional, the Supreme Court rejected formal equality, which was the rationale for its earlier decision in *Plessy v. Ferguson*.[103] The Court wrote, "[W]e reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations."[104] Instead, the Court in *Loving* adopted an anti-subordination principle in its Equal Protection Clause analysis. Under this approach, in finding the statute unconstitutional, the Court recognized the White supremacist sentiment behind a statute that criminalized marriage between White and non-White people.[105]

Anti-subordination has had an inextricable relationship with racial equity in America. Legal scholars Jack Balkin and Reva Siegel critiqued the Supreme Court's embrace of a rigid anti-classification

98. *Id*. at 320.

99. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 230 (2023).

100. *Id.* at 230.

101. *Id.*

102. Although Roberts's majority opinion strikes down the use of race as an automatic "plus factor" in higher education admissions, it concludes that applicants are nonetheless free to explain how race has impacted their lives "be it through discrimination, inspiration, or otherwise." *Id.* I have argued in a prior article that this is how the *Bakke* plus factor was to work in the first place. *See* Philip Lee, *On Checkbox Diversity*, 27 J. Civ. Rts. & Econ. Dev. 203, 211–15 (2013).

103. Loving v. Virginia, 388 U.S. 1, 11–12 (1967).

104. *Id.* at 8.

105. *Id*. at 11 ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

approach that started in the 1970s.[106] To advocates of anti-classification, the real societal evil is the very act of categorizing anyone by race. In explaining the consequence of such an approach, Balkin and Siegel wrote, "The anticlassification principle impugned affirmative action, while legitimating facially neutral practices with a racially disparate impact."[107] However, these scholars argued that despite the embrace of anti-classification, "antisubordination values have often guided application of the anticlassification principle in practice."[108]

Balkin and Siegel provided several examples in which courts refused to apply the anti-classification principle or interpreted it in ways that took into account status-harm, both of which are inconsistent with anti-classification.[109] Under anti-classification, the analysis should be simple. Either there is a distinction made based on a protected group or not. The analysis should pay no attention to social or historical contexts of the classifications. Yet, in some cases, courts have been unable to extricate anti-classification from what was happening in the world. Balkin and Siegel wrote their article to reclaim the anti-subordination approach, which has had deeply historical roots, and has served as "the expression of the American revolutionary tradition in our own time, the living source of our commitment to the Declaration and its promises of equality, the warm lifeblood of the American spirit."[110]

Consistent with an anti-subordination approach, equity or fairness is a better standard than equality. The Property class that I teach covers everything from the acquisition of property to the rights and duties of property possessors. One thing I have noticed over the years is that judges in some of the cases I assign use the court's equitable powers to ensure that rigid applications of rules do not create unjust outcomes. The strongest example I teach is in a New Jersey Supreme Court case, *Shack*.[111] *Shack* involved a farmer who employed and housed migrant farm workers on his property.[112] This was a highly vulnerable population. The farmer refused to allow a health services worker and a legal services attorney access to the workers to provide

106. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 Miami L. Rev. 9, 29 (2003).
107. *Id.* at 12.
108. *Id.* at 28.
109. *Id.* at 24–28. Their examples included employment discrimination, adoption, and sexual harassment cases and the slowness that anti-miscegenation laws were struck down by the Supreme Court compared to other things.
110. *Id.* at 32–33.
111. State v. Shack, 58 N.J. 297 (N.J. 1971).
112. *Id.* at 299.

their professional services without the farmer being in the room.[113] When the health services worker and attorney refused the condition and insisted on private meetings, the farmer called the police and had them removed for trespass.[114] A formalistic application of the law would find in favor of the farmer—who as a landowner has a right to exclude people from his property. However, the highest court in New Jersey refused to take this approach. Instead, the court held that no trespass occurred. It wrote,

> Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.[115]

What an amazing interpretation of what the law should be. Indeed, what would Equal Protection and other areas of the law look like if the underlying principle of the cases that interpret them was that the law is meant to serve human values? If we start from the idea that law is socially constructed, there is no reason to settle for any regime that does not live up to this mandate or, at least, try to realize it in the work we do and the lives we live.

PART IV: RACIAL IDENTITY AS A SOCIAL CONSTRUCTION

My time at an HBCU has helped me realize that expressive racial identity is also a social construction. Many of my students and colleagues wrestled with this idea every day. Some legal scholars have focused their attention on racial identity as inauthentic racialized presentations of self for a White audience and have proceeded to critique the burden that such performances have for people of color.[116] I do not deny that this phenomenon occurs. However, there is another side of racial identity—a positive side—that I try to explore and highlight in my research. In particular, I focus on the issue of what authentic and

113. *Id.* at 300–01.
114. *Id.*
115. *Id.* at 303.
116. *See, e.g.*, Devon W. Carbado & Mitu Gulati, Acting White?: Rethinking Race in "Post-Racial" America (2013).

empowering expressions of racial identity look like.[117] A trademark case decided by the U.S. Supreme Court is illustrative.

Simon Tam, lead singer of "The Slants," chose his band's name to reclaim the racially derogatory term and transform it into a positive expression of Asian American identity. Tam explained,

> We grew up and the notion of having slanted eyes was always considered a negative thing. Kids would pull their eyes back in a slant-eyed gesture to make fun of us . . . . I wanted to change it to something that was powerful, something that was considered beautiful or a point of pride instead.[118]

When Tam sought federal trademark protection of his band's name, the Patent and Trademark Office (PTO) denied the application under the Trademark Act that prohibited the registration of any trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead."[119] The PTO found that "there is . . . a substantial composite of persons who find the term in the applied-for mark offensive."[120] Although acknowledging that this word was originally derogatory, Tam's purpose was to transform the word into something that was both ironic and positive. Therefore, Tam challenged the law and this dispute reached the Supreme Court. The Court held the disparagement provision violated the First Amendment because, among other grounds, it unconstitutionally discriminated based on viewpoint.[121] The First Amendment law is not what I find most interesting about this case. Instead, it is the assertion made by Tam that he can take ownership of a word that has been used to dehumanize people who look like him and make it something different than what was originally intended.

This case made me recall a dialogue I watched in 2017 with author Ta-Nahesi Coates when he was speaking on his *We Were Eight Years in Power* book tour. Coates was asked by a White member of the audience what she should say if her White friends want to use the

117. *See, e.g.*, Philip Lee, *Identity Property: Protecting the New IP in a Race-Relevant World*, 117 W. Va. L. Rev. 1183 (2015).

118. Bill Chappell, *The Slants Win Supreme Court Battle Over Band's Name in Trademark Dispute*, NPR (June 19, 2017), https://www.npr.org/sections/thetwo-way/2017/06/19/533514196/the-slants-win-supreme-court-battle-over-bands-name-in-trademark-dispute.

119. Matal v. Tam, 582 U.S. 218, 223 (2017).

120. *Id.* at 228.

121. *Id.* at 243 ("Our cases use the term 'viewpoint' discrimination in a broad sense, *see ibid.,* and in that sense, the disparagement clause discriminates on the bases of 'viewpoint.' . . . Giving offense is a viewpoint.").

n-word while singing along with hip hop songs.[122] He began, "Words don't have meaning without context."[123] He then explained that the use of language is relational, and it is a cultural norm that some people can use certain words that others cannot. He gave some illuminating examples.

Coates's said that his wife calls him "honey," but it would be unacceptable for a strange woman walking down the street to do the same.[124] Furthermore, he told the audience that his dad is known as "Billy" to certain relatives, but it would be unacceptable for him to call his father by that name.[125] Coates explained, "That's because the relationship between myself and my dad is not the same as the relationship between my dad and his mother and his sisters who he grew up with. We understand that."[126]

Coates noted that the same concept applied to groups as well. Coates said, for example, "My wife, with her girl friend, will use the word 'bitch. I do not join in . . . . I don't do that. And perhaps more importantly, I don't have a desire to do it."[127] That was this group's word to claim and use, not his. Coates also noted that LGBTQ activist Dan Savage was thinking about calling his show "Hey Faggot."[128] Coates explained that, as a straight man, he would never call Savage that word.[129] Coates gave another example of a White friend who owned a cabin in upstate New York that he called "the White trash cabin." Coates said, "I would never tell him, 'I'm coming to your White trash cabin.'"[130] That was Coates's friend's moniker of his own self-identified group affiliation to claim and use. [131] Indeed, Coates argued that all of these examples were group insiders using derogatory labels in an ironic way. And this was widely understood and accepted. [132]

Coates pondered, "The question one must ask is why so many White people have difficulty extending things that are basic laws of how

122. Random House, *Ta-Nehisi Coates on Words That Don't Belong to Everyone*, YouTube (Nov. 7, 2017), https://www.youtube.com/watch?v=QO15S3WC9pg.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. Random House, *Ta-Nehisi Coates on Words That Don't Belong to Everyone*, YouTube (Nov. 7, 2017), https://www.youtube.com/watch?v=QO15S3WC9pg.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*

human beings interact to Black people."[133] He responded to his own question,

> When you're White in this country, you're taught that everything belongs to you. You think you have a right to everything . . . . You're conditioned this way. It's not because your hair is a texture or your skin is light. It's the fact that the laws and the culture tell you this. You have a right to go where you want to go, do what you want to do, be however—and people just got to accommodate themselves to you.[134]

In characteristic brilliance, Coates concluded,

> So here comes this word that you feel like you invented. Now someone's going to tell you how to use the word that you invented. "Why can't I use it? Everyone else gets to use it. That's racism that I don't get to use it. That's racist against me." . . . For White people, . . . [t]his will give you just a little peek into the world of what it means to be Black. Because to be Black is to walk through the world and watch people doing things that you cannot do . . . . There's a lot to be learned from refraining.[135]

This power dynamic is why Simon Tam called his band "The Slants."[136] His group membership in Asian America gave him a certain insider status to claim and transform certain words that have been imposed on Asian Americans. In doing so, it was no longer other people's word imposed on him to denigrate him; it was his word that he was using in an ironic fashion to call attention to what he has been through and generate a sense of healing and pride. Tam further asserted that it was inappropriate for an outsider to tell him that he has no right to reclaim historically negative terms that have been imposed on him.[137] He had more of a social and cultural right to do this than anyone who was not Asian American.

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133. *Id.*

134. Random House, *Ta-Nehisi Coates on Words That Don't Belong to Everyone*, YouTube (Nov. 7, 2017), https://www.youtube.com/watch?v=QO15S3WC9pg.

135. *Id.*

136. Matal v. Tam, 582 U.S. 218, 228 (2017) ("[Tam] chose this moniker in order to 'reclaim' and 'take ownership' of stereotypes about people of Asian ethnicity.").

137. *See* Simon Tam, *The Slants on the Power of Repurposing a Slur*, N.Y. Times (June 23, 2017), https://www.nytimes.com/2017/06/23/opinion/the-power-of-repurposing-a-slur.html ("The process of turning negative words, symbols or ideas into positive parts of our own identity can involve repurposing a racial epithet or taking on a stereotype for sociopolitical empowerment. But reappropriation can be confusing. Sometimes people can't figure out the nuances of why something is or isn't offensive—government bureaucrats in particular.").

These are powerful insights with possibilities for broader application. For example, although "model minority" is not a racial slur, it has been used for purposes of racial subordination.[138] As such, this label should be reclaimed and transformed by Asian Americans. They are in the best position to do so. Historically, model minority has meant something seemingly positive, but has always been defined against the negative qualities of other racial minorities.[139] Asian Americans cannot separate themselves from this history. They have existed in a space with this idea superimposed on them for decades. Their collective identity is, in part, based on this history. Historian Ellen Wu explains,

> While the model minority gave rise to novel modes of racial subordination, it also opened up new possibilities for racial justice by catalyzing the rise of an Asian American political consciousness. By refusing to allow themselves to be used in upholding the distinction between good and bad minorities, those who adapted an Asian American identity articulated a critique of white supremacy and imperial domination—an intent that was the precise opposite of the ideological work of the model minority.[140]

Wu suggests that Asian Americans do not have to accept the dominant construction. While Asian Americans cannot deny the way model minority has been used to facilitate racial subordination, they can reject that construction and transform it into something new. But what would a transformation of the model minority be like?

Being one of the few Asian Americans in a predominantly Black space forced me to confront the externally imposed racial construction of the model minority. One of my African American colleagues would tell me when we first met that she considered me an honorary White person. She had been acculturated with mainstream narratives of Asian Americans being in close proximity to Whiteness and as being defenders of the racial status quo.[141] I appreciated her honesty and realized that

138. According to Claire Jean Kim in *The Racial Triangulation of Asian Americans*,

> Since the mid-1960s, Asian Americans have been widely valorized relative to Blacks via the model minority myth. Journalists, politicians, and scholars alike have constructed Asian Americans as a model minority whose cultural values of diligence, family solidarity, respect for education, and self-sufficiency have propelled it to notable success.

See Claire Jean Kim in *The Racial Triangulation of Asian Americans*, 27 Pol. & Soc'y 105, 118 (1999).

139. *Id.*

140. Ellen D. Wu, The Color of Success: Asian Americans and the Origins of the Model Minority 248 (2015).

141. *See generally* Philip Lee, *Rejecting Honorary Whiteness*, 70 Emory L.J. 1475 (2021) (explaining the concept of "honorary Whiteness" and urging Asian Americans to reject this label).

through words and action, I had to re-construct what Asian Americanness meant in this setting.

Part of this meant transforming what the model minority meant. My new definition of this label entailed a racial minority group that understood and resisted the vicious legacy of White supremacy in America. It knew that racism can be individual or systemic and explicit or implicit.

The model minority embraced the values of diversity, pluralism, and mutual respect. Note that I omitted "tolerance" from the list. This was intentional. Tolerance is not what I meant. I remember a White student in a college class trying to convince me that society's goal should be to tolerate people who look like me or the single African American student in the class. All I could think was, "Gee, thanks." Tolerance was spoken from on high and bestowed to those lower than the one doing the tolerating. It was condescending and it was not empowering to those being tolerated. I thought a better way to think about racial justice was in terms of mutual respect. Mutual respect involves education, interaction, and dialogue. It involves choosing to interact with people that are different. It forces people to leave their comfort zones and search for the common humanity in others. In contrast, mere tolerance could be present in hyper-segregated spaces. Tolerance demanded nothing. People could go about their days and not try to change a thing and still be considered tolerant. Therefore, I intentionally rejected tolerance and affirmed mutual respect as a positive quality of the model minority.

The model minority is constantly learning about historical connections with other people of color and oppressed groups. It celebrates moments of solidarity and reflects on the interconnected legacies of Dred Scott, Frederick Douglass, Homer Plessy, W.E.B. DuBois, Martha Lum, Linda Brown, Martin Luther King, Jr., Malcolm X, James Baldwin, Yuri Kochiyama, Frank Emi, Pauli Murray, Thurgood Marshall, Fred Korematsu, Dolores Huerta, Grace Lee Boggs, Ronald Takaki, and the many other historical figures named and unnamed in this article. The model minority listens to the stories and narratives of others as a way of understanding how we got here. It also realizes that what happens to African Americans, Latinx, Native Americans, Muslim Americans, and others affects them too.

This group also seeks out political alliances and advocates for themselves and others to help create a better society. I see the new model minority when former Japanese American internees publicly

speak out on behalf of Muslim Americans. For example, Madeleine Sugimoto, who was six years old when she was sent to a concentration camp in 1942, said in an interview, "When they were talking about 'rounding them up,' that's exactly the term that was used for us, in putting us into the camps. It's very difficult for the Muslims, because they're experiencing kinds of hate and suspicion that was something that we experienced during World War II."[142] Similarly, Teddy Yoshikami, who was born in an internment camp, said, "It was all based on race hysteria, xenophobia in the past, and you don't want that to repeat again. But that's what's being encouraged at this point, and that's not what America stands for."[143] Suki Terada Ports, whose mother was under house arrest until the end of World War II, said, "When somebody says we're going to incarcerate or register all the Muslims, they don't really know what it means. I think part of this ignorance is being shown in the hate crimes . . . People have been given a green light to be hateful."[144] These model minorities were speaking out in support of a group that is being treated in a similar way that Japanese Americans were treated during World War II.

I see the model minority when Asian Americans advocate for Black Lives Matter. The hashtag "#BlackLivesMatter" was created by activists Alicia Garza, Patrisse Cullors, and Opal Tometi after George Zimmerman was acquitted of murder in July 2013 for the killing of Trayvon Martin, an unarmed African American teenager.[145] The social media campaign has been turned into a social movement that draws attention to the ways in which Black life has been dehumanized and devalued in American society—from commodification of Black bodies into chattel property, to being the targets of racial profiling, police violence, and mass incarceration, to being excluded from education, housing, and jobs.[146] Garza explained, "We understand organizing not to happen online but to be built through face-to-face connections and relationships where we build the trust necessary to move as a collective and exercise our collective power in order to win changes in our lives."[147] The connections have occurred between Asian Americans and

142. Jessica Prois & Kimberly Yam, *Japanese Americans Imprisoned for Ethnicity Speak Out in Defense of Muslims*, HUFFPOST (Dec. 7, 2016), https://www.huffpost.com/entry/japanese-internment-survivors-muslims_n_584811b7e4b0b9feb0da5492.

143. *Id.*

144. *Id.*

145. *See* Jessica Guynn, *Meet the Woman who Coined #BlackLivesMatter*, USA TODAY (Mar. 4, 2015), http://www.usatoday.com/story/tech/2015/03/04/alicia-garza-black-lives-matter/24341593/.

146. *Id.*

147. *Id.*

African Americans. For example, on March 21, 2021 over 1,000 people came together for the "Black & Asian Solidarity" protest in New York City.[148] After a rally featuring several speeches on fighting anti-Asian racism and anti-Black racism together, the protesters marched down Broadway chanting, "Black lives matter. Asian lives matter" and in a call-and-response, "Show me what community looks like. This is what community looks like!"[149] Furthermore, a number of Black-Asian townhall discussions has occurred across the country after a White man murdered six Asian American women in Atlanta.[150] The goal was to dismantle White supremacy together. At my historically Black law school during the weeks after the mass shooting and increasing anti-Asian violence, I was flooded with emails and calls from my colleagues and students expressing their concern for me and my family. I was even invited to speak to my students about how Asian Americans and African Americans can work together to overcome racial violence. This is what community looks like.

I see the model minority when Asian Americans advocate against retrograde immigration policies because they connect the government's prior racist policies that targeted them to whomever is being targeted today. For example, actor and social media influencer George Takei, who was interned as a child with his family, in a critique of the former administration's child separation policy, wrote,

> At least during the internment, we remained a family, and I credit that alone for keeping the scars of our unjust imprisonment from deepening on my soul. I cannot for a moment imagine what my childhood would have been like had I been thrown into a camp without my parents. That this is happening today fills me with both rage and grief: rage toward a failed political leadership who appear to have lost even their basic humanity, and a profound grief for the families affected.[151]

Takei is a model minority who refuses to remain silent when he sees injustice in the world. He understands the arbitrary and socially constructed line between a "legal" immigrant and an "illegal" one. He connects his own trauma with those of others and uses his voice to fight back.

148. Kat Moon, *How a Shared Goal to Dismantle White Supremacy is Fueling Black-Asian Solidarity*, Time (Mar. 25, 2021), https://time.com/5949926/black-asian-solidarity-white-supremacy/.

149. *Id.*

150. *Id.*

151. George Takei, *'At Least During the Internment . . .' Are Words I Thought I'd Never Utter*, Foreign Pol'y (June 19, 2018), https://foreignpolicy.com/2018/06/19/at-least-during-the-internment-are-words-i-thought-id-never-utter-family-separation-children-border/.

I am hopeful for more examples in the future. Even in the face of seemingly overwhelming problems—global warming, environmental racism, the global pandemic, anti-Asian hate and other forms of White supremacist hostility, the persistent wealth and educational opportunity gaps based on race, the curtailment of voting rights, and mass incarceration—hope persists. Legal scholar Roberto Unger argues that when "institutional innovation and structural change . . . begin to seem all but impossible," "crisis will appear to be the indispensable cradle of invention."[152] Multiracial alliances and solidarity are at the center of any solutions going forward. These are what lie in the cradle of invention. The model minority understands this.

Finally, the model minority is defiant. It finds power in the act of resisting White supremacy. It finds meaning in fighting back. Legal scholar Derrick Bell recounted a story about an elderly African American woman named Biona MacDonald whom he met in 1964 when he was a civil rights lawyer working in Mississippi.[153] He was assisting the local Black community in its efforts to ensure implementation of a court order mandating school desegregation in the face of mounting White opposition.[154] Bell asked MacDonald "where she found the courage to continue working for civil rights in the face of intimidation that included her son losing his job in town, the local bank trying to foreclose on her mortgage, and shots fired through her living room window."[155] She answered, "I am an old woman. I lives to harass white folks."[156] Bell noted that "she recognized that—powerless as she was—she had and intended to use courage and determination as weapons."[157] He concluded, "her goal was defiance and its harassing effect was more potent precisely because she placed herself in confrontation with her oppressors with full knowledge of their power and willingness to use it."[158] In other words, regardless of the outcome, there was something humanizing in the very act of defiance—something that gave MacDonald's efforts meaning. I argue that defiance does the same thing for the model minority.

152. Roberto Mangabeira Unger, Democracy Realized: The Progressive Alternative 215 (2000).
153. Derrick Bell, *Racial Realism*, 24 Conn. L. Rev. 363, 378 (1992).
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 379.
158. *Id.*

bell hooks wrote,

> Moving from silence into speech is for the oppressed, the colonized, the exploited, and those who stand and struggle side by side a gesture of defiance that heals, that makes new life and new growth possible. It is that act of speech, of 'talking back,' that is no mere gesture of empty words, that is the expression of our movement from object to subject—the liberated voice.[159]

I learned teaching at an HBCU that the time to talk back is now. Asian Americans are not your model minority as has been defined by White America. From now on, we will define who we are.

Conclusion

I learned many things teaching at an HBCU for ten years. The lessons run deep and are particularly relevant in a post-*SFFA v. Harvard* world. I came to understand that race and the law have been socially constructed and this process has been imbued with asymmetrical power relations. I also learned that equal protection principles have been socially constructed by mostly White male decisionmakers to serve their own interests. Finally, I came to know that racial identity has been socially constructed and could be re-constructed in anti-racist ways. There is something special about an HBCU—a student-centered space of Black empowerment—as a place to teach and learn these things. Students and teachers of all backgrounds can benefit from such a place, as can society as a whole.

159. BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 9 (1989).

Lemuel Shaw Reconsidered: Race and Reasonable Doubt*

Stephen Lee Saltonstall**

I. Introduction

Lemuel Shaw was Chief Justice of the Massachusetts Supreme Judicial Court from 1830 to 1860, and he dominated the court with 2,200 written opinions spanning fifty-six volumes of the Massachusetts Reports.[1] Shaw remains the most influential state court judge in American legal history.[2] Supreme Court Justice Oliver Wendell Holmes, Jr. celebrated Shaw as "the greatest magistrate which this country has produced."[3] An early biographer wrote, "the weight of [Shaw's] opinions knows no . . . limits and has been felt the country over. His influence on the development of constitutional law, it is safe to say, has been second only to [U.S. Supreme Court Chief Justice] John Marshall's."[4]

Twentieth century commentators have agreed with these assessments. The late Elijah Adlow, a former Chief Justice of the Boston Municipal Court, said in his biography of Shaw that "the merit of this remarkable man looms large in the perspective of history," and "his contemporaries . . . . regarded him as the greatest magistrate this country had produced[.]"[5] According to the eminent Brandeis University scholar Leonard W. Levy, Shaw "made his name a synonym for integrity, impartiality, and independence," and his tenure was "a model for the American judicial character" whose work evinces an "overpowering sense of public service and devotion to the good of the

** Author of Renegade For Justice: Defending The Defenseless In An Outlaw World (2022).

1. Leonard W. Levy, Lemuel Shaw, The Law Of The Commonwealth And Chief Justice Shaw 3 (1957).
2. *Id*.
3. Oliver Wendell Holmes, Jr., The Common Law 106 (1880).
4. Frederick Hathaway Chase, Lemuel Shaw 159 (1918).
5. Elijah Adlow, The Genius of Lemuel Shaw 1 (1962).

whole community."[6] Professor Levy later added of Shaw that "[The] wonder is that his errors were so few, considering the record number of opinions which he delivered, on so many novel questions, in so many fields of law."[7]

But the magnitude of this man's errors, particularly in the related areas of race discrimination and the burden of proof in criminal cases, requires removal of Lemuel Shaw from his pedestal in the pantheon of American law.

II. Lemuel Shaw, Pioneer of School Segregation

In *Roberts v. City of Boston,* Shaw's opinion held that the Boston School Committee, on which he previously had served,[8] was legally entitled to segregate its schools. [9]

The plaintiff was Sarah Roberts, a five-year-old Black child. Benjamin Roberts, Sarah's father, had been forced "to attend a different school from his peers," a humiliating experience which engendered a "passionate opposition to segregated schools."[10] Mr. Roberts wanted to send Sarah to a school close to home, so she wouldn't have to walk from their home near the harbor, through Boston's hilly, windy, and bitter-cold winter streets, to the designated school for Black children off Joy Street on the "back side" of Beacon Hill.[11] On her route to that school, Sarah would have "passed no less than five other [all-white] primary schools."[12] She was turned away by one all-white school near where she lived, then accepted by another,[13] but when the Boston School Committee learned of her admission, they sent a police officer to remove and expel her.[14] Benjamin Roberts then decided to sue to integrate Boston's public schools.[15]

Attorney Robert Morris, who filed the complaint on behalf of his Black client, was one of only two Black lawyers out of a total of 23,939 admitted to the bar in the United States by 1850.[16] He read the law

6. Levy, *supra* note 1, at 335.
7. Leonard W. Levy, *Lemuel Shaw: America's Greatest Magistrate,* 7 Vill. L. Rev. 389, 408 (1962).
8. Levy, *supra* note 1, at 14.
9. Roberts v. City of Boston, 59 Mass. (1 Cush.) 198, 209–10 (1849).
10. Stephen Kendrick & Paul Kendrick, Sarah's Long Walk 97 (2002).
11. *Id.* at 98.
12. Levy, *supra* note 1, at 111.
13. Kendrick & Kendrick, *supra* note 10, at 98.
14. *Id.* at 98–99.
15. *Id.* at 111.
16. *Id.* at 6.

with Boston attorney Ellis Gray Loring.[17] Morris worked as a lowly scrivener, or document copyist,[18] a support job in the days before carbon paper or xerox. This work was tedious and exacting.[19] Loring promoted Robert Morris to be his law clerk.[20] In that role, Morris would accompany his mentor in court, and "[t]here would be times when this odd duo would be laughed and sneered at . . . but this deterred neither Morris's determination nor Loring's resolve to see Morris's ambitions realized."[21] Morris passed the requisite examination and was admitted to the Massachusetts bar on February 2, 1847.[22] In 1848, Morris became the first Black lawyer to appear in a jury trial, which he won.[23]

Morris lost the Sarah Roberts case in the trial court.[24] He appealed to the Supreme Judicial Court ("SJC"), and he and Sarah's father asked Charles Sumner to join the legal team.[25] Sumner had been bored and depressed by the "unrewarding mediocrity" of his commercial law practice.[26] Hence he was "eager to take the case" and did so without fee.[27]

Charles Sumner's father was the Sheriff of Suffolk County, which includes Boston.[28] His family lived on Hancock Street, on the lower, racially mixed, back side of Beacon Hill "in the heart of the black community,"[29] in stark contrast to Lemuel Shaw's mansion, designed by famed architect Charles Bulfinch, near the ultra-exclusive top of the hill, at 49 Mount Vernon Street.[30]

When Sumner signed on to the Sarah Roberts case in 1849, his career as a lawyer was drawing to a close. He was elected to the U.S. Senate in 1851, where he became "the nation's strongest, clearest, and most resolute antislavery champion,"[31] a role for which he nearly gave his life. On the Senate floor on May 22, 1856, South Carolina House

17. *Id*. at 19.
18. *Id.* at 18.
19. "It is, of course, an indispensable part of a scrivener's business to verify the accuracy of his copy, word by word. Where there are two or more scriveners in an office, they assist each other in this examination, one reading from the copy, the other holding the original. It is a very dull, wearisome, and lethargic affair." Herman Melville, *Bartleby*, *in* The Piazza Tales 31, 47 (1856).
20. Kendrick & Kendrick, *supra* note 10, at 19.
21. *Id.*
22. *Id.* at 20.
23. Jeri Zader, *His Name was Robert Morris*, B.C.L. Sch. Mag. Online, https://lawmagazine.bc.edu/2022/01/his-name-was-robert-morris/ (last visited Oct. 21, 2024).
24. Kendrick & Kendrick, *supra* note 10, at 115.
25. *Id.* at 111–16, 140–42. *See also* Zader, *supra* note 23.
26. David Herbert Donald, Charles Sumner 83 (1996).
27. Kendrick & Kendrick, *supra* note 10, at 141.
28. Donald, *supra* note 26, at 11.
29. Kendrick & Kendrick, *supra* note 10, at 24, 142.
30. 1 Hershel Parker, Herman Melville: A Biography 77 (1996).
31. Stephen Puleo, The Caning 41 (2012).

member Preston "Bully" Brooks savagely beat Sumner on the head at least thirty times with his gutta-percha cane, as Brooks put it proudly, "to the full extent of [my] power," even after the force of his blows broke his cane in half.[32] Sumner was trapped under his desk, but with enormous effort managed to rise "after a dozen or so blows to the head, his eyes blinded with blood . . . and his trapped legs wrenched the desk – which was bolted to the floor by an iron plate and heavy screws – from its moorings."[33] Brooks continued his assault while fellow South Carolinian representative Lawrence Keitt threatened the other Senators present with his pistol, preventing them from coming to the aid of the bleeding, semi-conscious Sumner.[34]

Brooks did this because Sumner had criticized one of Brooks's blood relatives, Senator Andrew Butler,[35] for his pro-slavery views and his "ownership" of many slaves. In a speech on the Senate floor on May 19–20, Sumner said of Butler that: "Of course he has chosen a mistress to whom he has made his vows, and who, though ugly to others, is always lovely to him; though polluted in the sight of the world, is chaste in his sight; — I mean the harlot Slavery."[36] This analogy was particularly offensive to slaveholders, for by implication it referred to a truth that they could not admit or even discuss in "polite" society: that it was commonplace for slave masters to have nonconsensual sexual relations with their female "property."[37]

According to the authors of the history of the *Roberts* case, "Morris and Sumner were the first interracial team ever to cosign (much less argue together) a legal brief, and many at the time thought their easy and respectful partnership was itself sufficient argument against segregation."[38]

The Supreme Judicial Court held oral argument in *Roberts* on December 4, 1849. Charles Sumner's presentation on behalf of his client Sarah[39] was based on Article I of the Massachusetts Declaration of Rights (1780). That state constitutional provision provides that: "All men are born free and equal, and have certain natural, essential, and

32. *Id.* at 111–12.
33. *Id.* at 112–13; *see also* Donald, *supra* note 26, at 294–97.
34. Puleo, *supra* note 31, at 112–13.
35. *Id.* at 109–110.
36. Charles Sumner, The Crime Against Kansas 9 (1856).
37. Puleo, *supra* note 31, at 64. Because slaves were routinely sold or rented out, those of mixed race often were unsure of the identity of their fathers. Frederick Douglass was one of these. *See* David W. Blight, Frederick Douglass 13 (2012).
38. Kendrick & Kendrick, *supra* note 10, at 154.
39. Charles Sumner, Equality Before the Law (1870), http://www.loc.gov/resource/rbaapc.28400 (last visited Oct. 30, 2024).

unalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties . . . ."[40] As Sumner told the SJC during oral argument, "the separation of children in the Schools, on account of their race or color, is in the nature of Caste," similar to "Hindoo" untouchability as well as the confinement of Italian and German Jews in ghettos.[41]

Said Sumner:

> Who can say that [school segregation] does not injure the blacks? Theirs . . . is an unhappy lot. A despised class, blasted by prejudice and shut out from various opportunities, they feel this proscription from the Common Schools as a peculiar brand . . . . It adds to their discouragements. It widens the separation from the community, and postpones the great day of reconciliation that is sure to come.[42]

Sumner went even further in his prescient albeit doomed effort to persuade the SJC that segregation is morally and legally wrong, stressing that it causes permanent harm to white children as well as their Black counterparts: "Hearts yet tender with childhood are hardened and ever afterward testify to this legalized uncharitableness. Nursed in the sentiment of caste, receiving it with the earliest food of knowledge, they are unable to eradicate it from their natures . . . ."[43]

By the time of Sumner's oral argument in Sarah Roberts's case in 1849, the SJC previously had endowed its linchpin, Article I of the Declaration of Rights, with substantive force. In 1783, the court ruled unanimously in *Commonwealth v. Jennison*, a criminal prosecution for assault, that Article I abolished slavery in Massachusetts.[44] The SJC so charged the jury, which then convicted Jennison, whose defense was that he had a legal right to beat the victim because he was his slave.[45] Chief Justice William Cushing recorded in his notebook his jury instruction to the contrary, with an abolitionist interpretation of Article I, and the SJC has since considered it authoritative, despite its absence from the Massachusetts reports.[46] Thirteen years before the SJC decision in the *Roberts* case, Chief Justice Shaw authored *Commonwealth v. Aves,* which also recognized that Article I was

40. Mass. Const. art. I.
41. Sumner, *supra* note 39, at 3, 23.
42. *Id.* at 26–27.
43. *Id.* at 26.
44. *See generally* Horace Gray, The Abolition of Slavery in Massachusetts (1874).
45. *Id.* at 5.
46. *Id.* at 10.

substantive and legally enforceable.[47] In that case, Shaw reasoned that Article I made Massachusetts a free state. Hence, when Mary Slater brought her eight-year-old slave "Med" from Louisiana into Massachusetts, Med automatically became a free person, and the SJC's decision freed her from bondage.[48]

Despite *Jennison* and *Aves*, Shaw's opinion in Sarah Roberts's case inexplicably diminished the force of Article I from the self-executing to the merely hortatory. As the Chief Justice put it, "the proper province of a declaration of rights and constitution of government . . . is to declare great principles and fundamental truths, to influence and direct the judgment and conscience of legislatures in making laws, rather than to limit and control them, by directing what precise laws they shall make."[49]

State legislatures have broad authority to pass laws designed to promote public health and welfare. This is known as the "police power," a bedrock principle of Lemuel Shaw's invention, and deemed by Leonard Levy "his most distinguished contribution" to American law.[50]

Perhaps so, but in *Roberts*, Shaw used this "distinguished" doctrine to legalize race discrimination.[51] He brushed aside Article I and wrote that the Massachusetts legislature had under its police power properly delegated to the Boston School Committee the "power of general superintendence," including the "plenary authority" to segregate public schools.[52] The Chief Justice's opinion held that the School Committee's decision was "conclusive"[53] because it had "reasonably exercised" its delegated power[54] "on just grounds of reason and experience" using "discriminating and honest judgment."[55]

Central to Shaw's belief that the school committee's segregation order was "reasonably exercised" was his factual finding, devoid of reference to any supporting evidence, that the educational facilities for Black students were separate but equal. "The plaintiff had access to a school, set apart for colored children, as well conducted in all respects, and as well fitted, in point of capacity and qualification of

47. *See generally* Commonwealth v. Aves, 35 Mass. (1 Pick.) 193 (1836).
48. *Id.* at 217.
49. Roberts v. City of Boston, 59 Mass. (1 Cush.) 198, 206 (1849).
50. Levy, *supra* note 1, at 229.
51. *Roberts*, 59 Mass. (1 Cush.) at 209.
52. *Id.* at 208.
53. *Id.* at 209.
54. *Id.*
55. *Id.* at 209–10.

the instructors" as white schools.[56] Racial prejudice, said Shaw, "*if it exists*, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion of the community" can be erased "by compelling colored and white children to associate together in the same schools may well be doubted . . . ."[57]

The impact of Shaw's *Roberts* opinion was more lasting and arguably more destructive than *Dred Scott v. Sandford,* which declared that slavery is legal. [58]

The *Dred Scott* decision analyzed the Constitution using methods in vogue again today — textualism and original intent — to rule that under our law, all people of color brought here as slaves, as well as their descendants, are mere property, and as such they are forever barred from achieving the status of citizenship.[59] In the infamous words of Chief Justice Roger Taney, "[t]hey are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."[60]

Taney perorated, with original intent certitude, that "no one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted."[61]

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56. *Id.* at 205. According to the authors of the history of the Roberts case, the Smith School, designated for black children, had only one book in its "library," while each school for white children had hundreds of books. At the Smith School, teenagers "as old as sixteen had to sit at desks designed for seven-year-olds, a humiliating and physically painful experience." KENDRICK & KENDRICK, *supra* note 10, at 114. However, according to Leonard Levy, the Smith School building facilities "were in fact similar to the other schools," because "an expensive face-lifting of the school was completed" three months before the oral argument in the SJC. LEONARD W. LEVY & DOUGLAS L. JONES, JIM CROW IN BOSTON, at xxiii–xxiv (1974).

57. *Roberts*, 59 Mass. (1 Cush.) at 209 (emphasis added). "In the face of an equality-of-rights clause in the Massachusetts Constitution, Shaw should have been felt bound to establish that discrimination on the basis of race was reasonable. Instead, he relied on the reasonableness of the power delegated by the legislature to the school committee . . . ." LEVY & JONES, *supra* note 56, at xxvi.

58. Dred Scott v. Sandford, 60 U.S. 393, 404 (1856).

59. *Id.* at 404–09.

60. *Id.* at 404.

61. *Id.* at 426.

The ratification in 1865 of the Thirteenth Amendment, which abolished slavery,[62] effectively reversed Roger Taney's decision less than a decade after its issuance.

But Chief Justice Shaw's "separate but equal" doctrine persisted in American jurisprudence for 105 years. Many other state courts approved the reasoning of *Roberts,*[63] and the Supreme Court made it nationally binding in *Plessy v. Ferguson,*[64] despite the contrary language of the Fourteenth Amendment.[65] Indeed, *Plessy* relied heavily on Lemuel Shaw's opinion in *Roberts,* using it as its lodestar when it approved "separate but equal" railroad car facilities,[66] and this racist subterfuge remained in full force until *Brown v. Board of Education.*[67]

Lemuel Shaw's *imprimatur* of segregation was so influential that the Supreme Court was able to say in *Plessy* that "laws permitting, and even requiring, their separation in places where they are liable to be brought into contact . . . have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power."[68] Mimicking Shaw's emasculation of Article I of the Massachusetts Declaration of Rights, Justice Henry Billings Brown wrote that the 14th Amendment does not, and was never intended, "to enforce social . . . equality, or a commingling of the races . . . ."[69]

During strategy sessions in the late 1940s and early 1950s at the NAACP Legal Defense Fund ("LDF"), Attorney James Nabrit, Jr., the architect of its plan to attack all forms of segregation as unconstitutional *per se,* would tell his colleagues that *Roberts v. City of Boston* was the case that spawned *Plessy's* "fertile ground for hundreds of Jim Crow laws that extended 'separate but equal' into every corner of life in the south."[70] Nabrit prevailed within LDF in his absolutist equal protection approach, though Thurgood Marshall initially disagreed, advocating a gradualist alternative: that the ramshackle schools for Black children in the south, with their less academically advanced teachers and tattered,

62. That amendment reads, in relevant part, "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall be duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

63. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

64. *Id.* at 544–45.

65. Section 1 of that amendment provides, in relevant part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

66. *Plessy*, 163 U.S. at 544.

67. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

68. *Plessy*, 163 U.S. at 544.

69. *Id.*

70. Dovey Johnson Roundtree & Katie McCabe, Mighty Justice: My Life in Civil Rights 101–02 (2009).

hand-me-down textbooks, violated *Plessy's* requirement that they be "equal" to white institutions.[71]

Chief Justice Warren in *Brown v. Board of Education* repudiated Shaw's "separate but equal" gospel on the ground that school segregation is "inherently unequal" and thereby violates the Fourteenth Amendment.[72] But rather than basing his conclusion on the language of the Fourteenth Amendment, he relied upon a factual finding: that racial separation of Black children "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[73]

In *Brown*, Chief Justice Earl Warren gave a backhanded tip of the hat to Lemuel Shaw when he wrote that *Plessy's* adoption of "separate but equal" "apparently originated in *Roberts v. City of Boston* . . . ."[74] Even Shaw's loyal fan Leonard Levy saw clearly, and reported accurately from his Brandeis University bleacher seat, that the Chief Justice's momentous influence on the American judiciary was such that *Roberts* "became law of the land . . . . after [he] originated it" thanks to an "uncritical acceptance by the highest courts of so many jurisdictions . . . ."[75]

In footnote 11 of *Brown*, Warren cited psychological studies in support of that its finding that segregated schools are "inherently unequal." [76] In one such study, researchers presented young Black children with a pair of dolls, one white and one brown, and asked them the following questions: "Give me the doll you like to play with," "Give me the doll that is the nice doll," "Give me the doll that looks bad," and "Give me the doll that is the nice color."[77] According to the study results, "the majority of these negro children at each age indicated an

71. *Id.*

72. *Brown*, 347 U.S. at 495. James Nabrit argued successfully *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case with *Brown*, which held that segregation of schools in Washington, D.C. violates the Fifth Amendment's Due Process Clause. The Fourteenth Amendment and its Equal Protection Clause do not apply to the District of Columbia, because it is not a state. Hence due process was the only available argument, more difficult to make given the Fifth Amendment's text. As Chief Justice Warren put it, "'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and therefore we do not imply that the two are always interchangeable phrases." *Bolling*, 347 U.S. at 499.

73. *Brown*, 347 U.S. at 494.

74. *Id.* at 491, n.6.

75. Levy, *supra* note 1, at 117. *See also* Levy & Jones, *supra* note 56, at xxxii: "When one considers that *Plessy* became the leading precedent for the separate-but-equal doctrine, the influence of the Roberts case is immeasurable."

76. *Brown*, 347 U.S. at 494 n.11.

77. Kenneth B. Clark, Prejudice and Your Child 22–23 (Wesleyan Univ. Press 1988) (1955).

unmistakable preference for the white doll and a rejection of the brown doll."[78]

The Supreme Court's use of clinical experiments in constitutional jurisprudence has been criticized, not just by the lunatic-fringe John Birch Society and its founder Robert Welch, who funded a call for Earl Warren's impeachment on America's billboards, but also by scholars of repute, including the late Herbert Wechsler, director of the American Law Institute and author of the Model Penal Code.[79] Pulitzer Prize-winning newspaper columnist James Reston belittled Earl Warren's work as "more like an expert paper on sociology than a Supreme Court opinion."[80]

From an historical perspective, Chief Justice Warren's well-intentioned reliance on modern psychology is a species of makeweight, given that Charles Sumner had already made the "inherently unequal" argument a century earlier in *Roberts v. City of Boston*, based not only on the language of Article I, but also his observations and life experience in a racially diverse neighborhood, which made clear that by prohibiting freedom of association, segregation harms white as well as Black children.[81] But Chief Justice Shaw was unmoved by this; indeed, his opinion went so far as to question the reality of race discrimination: as he put it, "if it exists."[82] His decision in the *Roberts* case remains a blot on American law, and it supported a culture of racism in Boston and a continuation of segregated public schools there long after *Brown v. Board of Education*. As U.S. District Court Judge W. Arthur Garrity wrote in *Morgan v. Hennigan*,[83] the Boston School Committee, in an arrogant and defiant response to *Brown*'s mandate, "knowingly carried out a systematic program of segregation affecting all of the city's

78. *Id.* at 23.

79. Matthew Dallek, *The History that Makes it so Difficult for Republicans to Pick a Speaker of the House*, Time (Oct. 20, 2023, 4:21 PM), https://time.com/6326141/gop-house-speaker-history-john-birch/.

See also Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 Harv. L. Rev. 1, 31–34 (1959). Wechsler criticized the reasoning of the decision, not the result. He thought that the Supreme Court should have said that state laws requiring racial segregation are *per se* unconstitutional under the Fourteenth Amendment, and/or that they violate the First Amendment right of freedom of association.

80. James Reston, *A Sociological Decision: Court Founded its Segregation Ruling on Hearts and Minds Rather than Laws*, N.Y. Times (May 18, 1954), https://www.nytimes.com/1954/05/18/archives/a-sociological-decision-court-founded-its-segregation-ruling-on.html; Gregory Briker & Justin Driver, *Brown and Red: Defending Jim Crow in Cold War America*, 74 Stan. L. Rev. 447, 476 (2022).

81. Sumner, *supra* note 39, at 26.

82. *Roberts*, 59 Mass. at 209.

83. Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1975).

students, teachers and school facilities and have intentionally brought about and maintained a dual school system."[84]

The anti-integration atmosphere in Boston was so extreme that School Committee Chairman William O'Connor felt free to declare at a meeting on January 6, 1964, "we have no inferior education in our schools. What we have been getting is an inferior type of pupil that we have been asked to cope with."[85] School Committee Chair Louise Day Hicks, the fiercest, most dedicated, and most effective political opponent of school integration during that period, adopted the facially neutral slogan, readily decoded by her white constituents, "you know where I stand."[86] Hicks, a lawyer, founded Restore Our Alienated Rights ("ROAR"), and led the fight against "forced busing" as a way to achieve integration of Boston's public schools.[87]

III. Lemuel Shaw, Enforcer of the Fugitive Slave Act

Two years after his decision in the *Roberts* case, Chief Justice Shaw was confronted with a legal challenge[88] to the federal Fugitive Slave Act of 1850.[89]

The passage of that statute engendered such widespread horror in Massachusetts that it effectively ended the political future in Massachusetts of one of its two main sponsors, Senator Daniel Webster, whom President Millard Fillmore appointed to be Secretary of State in 1850.[90]

The Fugitive Slave Act required federal law enforcement officers to arrest and detain all fugitive slaves, and if they refused or failed "diligently" to do so, it penalized them with a mandatory fine of one thousand dollars, the equivalent of forty thousand dollars today. [91] Were a fugitive slave to escape custody, the officers involved became

84. *Id.* at 482.

85. William O'Connor, *Proceedings of the School Committee of the City of Boston* (Jan. 6, 1964), *reprinted in* City of Bos. Archives, at 6 (available at https://archive.org/details/proceedingsofsch1964bost/page/n7/mode/2up).

86. Katie Zezima, *Louise Day Hicks Dies at 87, Led Fight on Busing in Boston*, N.Y. Times (Oct. 23, 2003), https://www.nytimes.com/2003/10/23/us/louise-day-hicks-dies-at-87-led-fight-on-busing-in-boston.html.

87. *Id.*

88. In re Sims, 61 Mass. (7 Cush.) 285 (1851) [hereinafter *Sims's Case*].

89. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) [hereinafter Fugitive Slave Act] (repealed 1864).

90. When the Massachusetts legislature rebuked Webster by electing Charles Sumner, a relentless opponent of the Fugitive Slave Act, to Webster's former Senate seat in 1851, "Webster himself was 'grieved and mortified' by the results." Donald, *supra* note 26, at 203.

91. Fugitive Slave Act § 5.

strictly liable to the slaveholder for the "full value of the service or labor" of the human so-called property, even if they weren't at fault.[92] The statute also "commanded" private citizens "to aid and assist in the prompt and efficient execution" of the law, the practical effect of which was to license professional bounty hunters to work in northern states with impunity, sometimes earning their shameful keep by kidnapping free blacks and selling them in slave states.[93]

The 1850 Act set up a system of appointed commissioners "to hear and determine" the cases of fugitive slaves "in a summary manner" without a jury, with an affidavit of the slaveholder constituting "conclusive" proof, and "[i]n no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence . . . ."[94]

Under the Act, each commissioner earned ten dollars if he decided the case in favor of the slaveholder, but only five dollars if the result went the other way, a stark conflict of interest and violation of due process.[95]

The validity of the Fugitive Slave Act in Massachusetts came before the SJC in *Sims's Case*.[96] Robert Rantoul, Jr. was lead counsel for Thomas Sims, assisted by Richard Henry Dana, Jr., author of the memoir *Two Years Before the Mast* (1840).[97]

After reading the law with attorney John Pickering in Salem, Massachusetts, and with Leverett Saltonstall (1783–1845) in Boston,[98] Robert Rantoul became a member of the Massachusetts bar in 1829, and he opened a practice in Salem.[99] The next year, he appeared as associate defense counsel in a murder case remembered as "extremely unpopular and considerably hazardous. Such was the state of public feeling in Salem against the accused" that Rantoul "suffered, undeservedly, the disheartening influence of the averted eyes, and the broken friendship, of many who knew, and ought to have justified, the purity of his motives."[100]

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92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at § 8. It took 77 years for the Supreme Court to recognize that the Due Process Clause forbids judges from financially benefitting from their fines. *Tumey v. Ohio*, 273 U.S. 510 (1927). Chief Justice William Howard Taft's opinion recounts that, in one seven-month period, a small-town Mayor had skimmed a cut of $693.35 off the top of fines he'd imposed. *Tumey v. Ohio*, 273 U.S. 510, 531–32 (1927).
96. *Sims's Case*, 61 Mass. 285 (1851).
97. *Id*. at 286.
98. Robert Rantoul, Jr., Memoirs Speeches And Writings Of Robert Rantoul, Jr. 16–17 (Luther Hamilton, ed., 1854).
99. *Id.* at 17.
100. *Id.* at 17–18.

In modern parlance, it's safe to say that Rantoul was run out of town. After brief stays in South Reading and Gloucester, he repaired to Boston and opened a law office there.[101] According to historian Perry Miller, Robert Rantoul became "a rigorously consistent humanitarian" who "agitated against capital punishment," was "a pioneer advocate . . . of labor unions," and "[n]eedless to say, he was an abolitionist."[102]

Thomas Sims was one of the first victims of the Fugitive Slave Act, and his experience radicalized the anti-slavery movement in Boston.[103] Mr. Sims was a Black bricklayer from Savannah, Georgia, who insisted, to the those few whites who would deign to listen, that his father had purchased his freedom when he was six months old.[104] In 1851, Savannah levied a $100.00 fine on all its freed slaves, a sum that Mr. Sims could not afford.[105] He decided to move to Boston, intending to bring his freeborn Black wife and three children there after finding a job and a place to live.[106] He applied for work as a cook on a ship headed for Boston, but after the captain refused to hire him, he became a stowaway.[107]

In March 1851, Sims emerged on deck as the craft approached Boston Harbor.[108] The crew beat him, and the captain confined him in a cabin, but Sims was able to unscrew its lock with his pocketknife, and he rowed himself to shore on the ship's dingy.[109] He found lodging at a "colored seamen's boarding house"[110] and dutifully wrote to his wife to let her know where he was living.[111] One James Potter, a Georgia rice planter, who claimed to be Mr. Sims's "owner," intercepted the letter and hired a slave-catcher to secure his return.[112] Sims was arrested pursuant to the Fugitive Slave Act and jailed.[113]

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101. *Id.*
102. Perry Miller, The Legal Mind In America: From Independence To The Civil War 221 (1st ed. 1962). Full disclosure: I am related by blood to Leverett Saltonstall and by marriage to Robert Rantoul, whose grandson Neal Rantoul was the husband of my great aunt, Lucy Saltonstall.
103. His story is chronicled in Gordon S. Barker, Fugitive Slaves and the Unfinished American Revolution 54–76 (2013), and Levy, *supra* note 1, at 91–104.
104. Barker, *supra* note 103, at 54.
105. *Id.* at 55.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 56.
111. *Id.*
112. *Id.*
113. Levy, *supra* note 1, at 56.

The plight of Mr. Sims became a *cause celebre* with Black Bostonians and their antislavery allies, the Boston Vigilance Committee.[114] Led by the fiery abolitionist Wendell Phillips, large crowds thronged through Boston demanding the release of Sims, and a meeting of support at Tremont Temple drew a thousand attendees.[115]

On Friday April 4, 1851, U.S. Marshall Charles Devens hauled Thomas Sims before Commissioner George Ticknor Curtis for a rendition hearing under the Fugitive Slave Act.[116] Robert Rantoul and co-counsel Charles Greely Loring represented Mr. Sims.[117]

Edward Barnett testified that he had worked with Mr. Sims as a bricklayer for nearly a year "on the same scaffolding" in Savannah.[118] According to Barnett, Mr. Sims had admitted to him "once" that he was the slave of rice planter James Potter, and that he was required to pay Potter the sum of $10 per month for the privilege of living and working in that city.[119] John Bacon, who was James Potter's hireling slave-catcher, testified that he knew that Potter "owned" Thomas Sims, and claimed that he had seen Mr. Sims pay Potter the $10 charge for living in Savannah and working there. Both Barnett and Bacon made eyewitness identifications of the defendant.[120]

Commissioner Curtis denied attorney Robert Rantoul's request that he admit into evidence Thomas Sims's affidavit to the effect that he was a free person and that he had never heard of James Potter.[121] On April 11, Curtis issued his decision to grant rendition of Mr. Sims to Georgia, a result predetermined by the Fugitive Slave Act.[122]

While the commissioner's kangaroo proceeding droned on, abolitionist lawyer Samuel Sewall appeared before Chief Justice Shaw seeking a writ of *habeas corpus* on behalf of Mr. Sims.[123] Shaw denied his application after conferring with the other Justices and later that day denied it a second time after Sewall requested reconsideration.[124] During the weekend, however, under *ex parte* pressure from prestigious

114. Barker, *supra* note 103, at 58–59, 62–63.
115. *Id.* at 62.
116. *Trial of Thomas Sims*, Libr. Cong., https://tile.loc.gov/storage-services/service/ll/llst/062/062.pdf (last visited Jan. 7, 2025).
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. Levy, *supra* note 1, at 94–95.
122. *Id.* at 103.
123. Levy, *supra* note 1, at 95.
124. *Id.*

members of Boston's legal community, Shaw agreed to hold oral argument before the full court.[125]

On Monday April 7, Robert Rantoul appeared before the SJC seeking the release of Thomas Sims.[126] Rantoul may have been guardedly optimistic that he would succeed, for Shaw in *Commonwealth v. Aves* had stated that Article I of the Declaration of Rights abolished slavery in Massachusetts, "upon the ground that it is contrary to natural right, and the plain principles of justice."[127] Shaw had made clear in *Aves* that when an out-of-state citizen brings a slave into Massachusetts *voluntarily*, the slave becomes automatically free by virtue of Article I of the Declaration of Rights.[128]

Rantoul urged the SJC to rule that the plain language of Article I of the Declaration of Rights should apply as well to a *fugitive* slave, who after crossing the border "is the inhabitant of a free state. Here he is presumed to be free."[129] He asserted that Massachusetts law supersedes the Fugitive Slave Act, because "Congress has no power, under the Constitution of the United States, to legislate at all on the subject of fugitive slaves," and under the Tenth Amendment, "the powers not expressly dedicated to it, are reserved to the states respectively, or to the people."[130]

Rantoul also argued that, even assuming Congress has such legislative authority, the statutorily required use of appointed commissioners in fugitive slave cases violates Article III of the U.S. Constitution, which governs "the whole judicial power" of the federal government, "and congress has no authority to confer any portion of judicial power on any other persons."[131] Commissioners are *not* Article III judges because they serve "at the pleasure of the circuit court of the United States" rather than with life tenure "during good behavior."[132] Moreover, whereas Article III provides that the salary of judges "shall not be diminished during their continuance in office," every fugitive slave case commissioner "is paid by fees, the amount of which depends on his decision."[133]

125. *Id.* at 97. According to Prof. Levy, "a number of high gentlemen, including Charles Loring, spoke privately to Shaw and his associates, persuading them to reconsider their refusal to hear an argument." *Id.*
126. *Sims's Case*, 61 Mass. at 287.
127. *Aves*, 35 Mass. at 210.
128. *Id.* at 219.
129. *Sims's Case*, 61 Mass. at 289.
130. *Id.* at 290.
131. *Id.* at 287.
132. *Id.* at 288.
133. *Id.* at 288.

Shaw's SJC could have ruled, as Robert Rantoul had argued,[134] that, at the very moment Mr. Sims beached his rowboat and set foot on Boston's shore, Article I of the Declaration of Rights made him a free person, immune from the draconian Fugitive Slave Act. From the standpoint of a slave, and from a plain reading of Article I, whether a person in bondage arrives in Massachusetts through the voluntary act of the "owner" or by escaping captivity is the epitome of a distinction without a difference. That is, there can never be a fugitive "slave" in Massachusetts because under Article I no person is a slave.[135]

Had the SJC ruled in favor of Thomas Sims, Chief Justice Shaw would have become a popular hero given the expansive support in Boston for freeing Mr. Sims. Instead, Bostonians were disgusted by Shaw. Large crowds demanding Sims's release gathered in Court Square, only to discover that "the courthouse itself [was] girded in chains, its doorways fettered with ropes, and the entire city police force — reinforced by special deputies recruited among waterfront hooligans — ringing the building."[136] Barred from entry, the disappointed masses witnessed Chief Justice Shaw "stooping under heavy chains to enter the halls of justice," a sight which William Lloyd Garrison condemned as "one of the most disgraceful scenes ever witnessed in this city."[137] To the assembled opponents of the Fugitive Slave Act, Shaw's behavior and decision "made inescapably clear how completely the legal system upheld the interests of slaveholders."[138] After Shaw and Commissioner Curtis issued their rulings against Mr. Sims, it became necessary to utilize "a company of three-hundred policemen, armed with U.S. military sabers," to escort him "weeping … down State Street to the Long Wharf and the ship hired to return him to bondage."[139]

The personal consequences for Thomas Sims were grave. When Mr. Sims arrived in Savannah, he endured 39 lashes and two months in the city jail.[140] Potter, Mr. Sims's "owner" then sold him to a mason in Vicksburg, Mississippi, where he was enslaved for more than a decade.[141] Finally, when union forces captured that city in 1863, Mr. Sims escaped

134. *Id.*

135. After all, as Chief Justice Shaw wrote in Commonwealth v. Aves, 35 Mass. (1 Pick.) 193, 210 (1836), "the terms of the first article of the declaration of rights are plain and explicit" and it "would be difficult to select words more precisely adapted to the abolition of negro slavery."

136. Henry Mayer, All on Fire: William Lloyd Garrison and the Abolition of Slavery 410 (1998).

137. *Id*. at 410–11.

138. *Id*. at 411.

139. *Id*.

140. Barker, *supra* note 103, at 71.

141. *Id.*

again, this time to Washington, D.C., "where he worked as a bricklayer and messenger for the United States Department of Justice."[142]

Why did Shaw do what he did? What was Shaw's rationale for his support of the hated Fugitive Slave Act? The SJC released the Chief Justice's opinion denying Mr. Sims's *habeas corpus* petition on the same day as the oral argument.[143] Shaw's written decision is so lengthy and detailed that he must have decided the case beforehand, an obvious breach of judicial ethics. Lemuel Shaw's opinion is typically exhaustive in its scholarship and authoritative in its tone, but it's based on proslavery, antidemocratic, inhumane legalisms.

The Constitution does not mention the words "slave" or "slavery."[144] However, the founding fathers from slave states inserted two poison pills into the Constitution to protect slavery, which were agreed to reluctantly by their northern counterparts as necessary for passage. At the beginning of the Constitution was the notorious provision that counted each slave as three-fifths of a man for the purpose of determining the amount of each state's Congressional representation, thereby promoting the political dominance of the slave power.[145] Then it provided, with studied vagueness, that:

> No person held to Service or Labour in one State, under the laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[146]

Robert Rantoul's position was that art. IV, § 2 was unenforceable due to the lack of an enabling clause specifically authorizing Congress to pass legislation such as the Fugitive Slave Act.[147] This argument is not without force. The Supreme Court relied on the lack of an enabling clause as recently as 2024, when it held that states have no power to bar a presidential candidate from the ballot under U.S. Const. amend. XIV, §3, even though on its face it appears to be self-executing.[148]

142. *Id*.
143. *Sims's Case*, 61 Mass. at 291.
144. Paul Finkleman, Supreme Injustice: Slavery In The Nation's Highest Court 12 (2018).
145. U.S. Const. art. I, § 2, cl. 3, *repealed by* U.S. Const. amend. XIV, § 2.
146. U.S. Const. art. 4, § 2, cl. 3, *repealed by* U.S. Const. amend. XIII.
147. *Sims's Case*, 61 Mass. at 290–91.
148. Trump v. Anderson, 601 U.S. 100, 109–10 (2024). Section 3 reads, in relevant part, "No person shall … hold any office … under the United States … who, having previously taken an oath … as an officer of the United States … to support the Constitution of the United States … shall have engaged in insurrection or rebellion against the same…." U.S. Const. amend. XIV § 3.

Chief Justice Shaw distinguished Mr. Sims's case from his decision in *Commonwealth v. Aves* on the ground that, because the slave named "Med" had been brought into Massachusetts voluntarily by her "owner," U.S. Const. art. IV, § 2 does not apply, but when the slave is a fugitive, it controls, despite the abolition of slavery set forth in Mass. Const. art. I.[149]

Shaw deemed the absence an enabling clause of no import, citing in its place the "necessary and proper" clause in U.S. Const. art. I, § 8,[150] a singularly weak reed in the context of denial of human rights and freedom.[151]

In addition, Shaw falsely equated article IV, § 2 to a binding treaty between sovereign nations, the legal force of which, he said, extinguishes any purported constitutional right of a slave to a jury trial.[152] Shaw's jumbled analogy ignores the heightened constitutional requirements for treaties, which must be made in the first instance by the President, and "with the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur . . . ."[153]

Shaw also cast aside Robert Rantoul's argument that it is unconstitutional to dispense with Article III judges in fugitive slave cases and to substitute commissioners in their stead to decide the core issue of human freedom.[154] Shaw compared this to the appointment of justices of the peace under state law, petty officers whose functions, such as presiding at weddings or notarizing legal documents, he claimed unconvincingly to require "considerable skill and experience in the administration of justice, and it is just to presume that [fugitive slave commissioners] are duly qualified to perform their duties."[155]

Shaw concluded by emphasizing the importance of "adhering to judicial precedent, especially that of the supreme court of the United States," and after discussing other Supreme Court rulings against slaves, including *Prigg v. Pennsylvania* authored by Joseph Story, he cited as controlling *The Antelope,* authored by Chief Justice John Marshall.[156]

149. *Sims's Case*, 61 Mass. at 298. *See also* Commonwealth v. Aves, 35 Mass. (1 Pick.) 193, 206 (1836).
150. *Sims's Case*, 61 Mass. at 299–300.
151. That is so because legislation whose purpose is to prop up and ensure the continuation of slavery as an American institution is not among the enumerated powers of Congress set forth in art. I, § 8 of the Constitution; nor could it rationally be deemed "an essential instrument in the prosecution of" those enumerated powers. McCulloch v. Maryland, 17 U.S. 316, 422 (1819).
152. *Sims's Case*, 61 Mass. at 296–97, 310.
153. U.S. Const. art. II, § 2, cl. 2.
154. *Sims's Case*, 61 Mass. at 303.
155. *Id.*
156. *See id.* at 310, 314. *See generally* Prigg v. Pennsylvania, 41 U.S. 539 (1842); The Antelope, 23 U.S. 66 (1825).

"The principle is," Shaw wrote, "that although slavery and the slave trade are contrary to justice and natural right, yet each nation, in this respect, may establish its own law, within its own territory," and hence the Fugitive Slave Act is constitutional. [157]

Historian Paul Finkelman has revealed that relevant Virginia public records prove beyond any doubt that John Marshall owned *hundreds* of slaves during his lifetime.[158] Given that fact, it's hardly surprising that in every one of the seven decisions authored by the Chief Justice which involved a Black person's freedom, the slave lost.[159] "When considering the fates of African Americans, slaves, and the people he bought and sold, conveyed to his sons, and used to support his lifestyle, Marshall always supported slavery and consistently opposed liberty."[160]

Other biographers of John Marshall do not mention this, and they distort his shockingly bad record on slavery. For example, Jean Edward Smith in his New York Times prize-winning book on Marshall, wrote that in *The Antelope,* Marshall "balanced his personal abhorrence of the slave trade" with existing law.[161] Mr. Smith claims, without citation, that abolitionists supported the result, and that "[e]qually important, the decision allowed the Court to speak with one voice on an issue that threatened to tear the nation apart."[162] Mr. Smith fails to mention that Marshall's decisions on slavery furthered his own financial interests — or that despite his purported "personal abhorrence,"[163] his buying, selling, and gifting of so many slaves qualifies him as a wheeler and dealer in bulk of Black human beings.

Chief Justice Marshall's opinion in *The Antelope* directs that some of the slaves captured on ships within this country's jurisdiction should be returned to Spanish subjects, as they had sufficiently proved ownership at the trial, but that the other slaves, whose ownership was unproven, should be deported to Africa.[164]

Marshall's use of the English language at the end of *The Antelope* makes it distressingly clear that he thought of slaves as little more than humanoid refuse. Of the enslaved people who survived years of captivity while the litigation was pending, Marshall wrote that "*the residue* of the said ninety-three are to be delivered to the Spanish claimant . . . and all

157. *Sims's Case*, 61 Mass. at 313.
158. Finkelman, *supra* note 144, at 31.
159. *Id.* at 56.
160. *Id.* at 111.
161. Jean Edward Smith, John Marshall: Definer of a Nation 488 (1998).
162. *Id.*
163. *Id.*
164. *The Antelope*, 23 U.S. at 132.

the remaining Africans are to be delivered to the United States, *to be disposed of* according to law . . . ."[165]

This is the glittering gem of *stare decisis* to which Lemuel Shaw points as controlling the fate of Thomas Sims. Of the 281 slaves originally found on board *The Antelope,*[166] only thirty-seven remained at the end of the litigation.[167] Many had died,[168] and most of the survivors had been placed in the custody of a U.S. Marshal, John Morel, who sold or rented out many of them,[169] and used 100 of them to work on his own plantation, all the while collecting funds from the Treasury for maintaining them.[170] The remaining "residue" were sold to a plantation owner in Florida.[171]

Chief Justice Shaw's obsessive and "dogmatic use of precedent"[172] in *Sims's Case* sprung from his conviction that the inclusion in the Constitution of art. IV, § 2 and the passage of the Fugitive Slave Act were necessary to prevent anarchy.[173] That is, Shaw believed that without adherence to these precedents, there would be "a constant effort of slaves to escape into the free state," which would then morph into "a constant border war, leading to interminable hostility, or the subjugation of one [state] by the other."[174]

But the irony is that (with notable exceptions like Frederick Douglass) it wasn't the relatively small number of fugitive slaves who bravely sought freedom, but rather Shaw's very enforcement of the Fugitive Slave Act in *Sims's Case*, which ignited one of the many political brushfires that soon combined with others into the conflagration of succession and civil war.

Leonard Levy admits that Shaw's proslavery opinion was "the first full-dress sustention of the Fugitive Slave Act of 1850 by any court . . . ."[175] Unfortunately, as with Shaw's school segregation decision, *Sims's Case* was heeded as "the highest authority — to the degree that in the opinions of judges in later cases . . . . it [was] taken to preclude all further juridical discussion."[176] In his "dogmatic adherence" to slave

165. *The Antelope*, 23 U.S. at 133 (emphasis added).
166. John T. Noonan, Jr., The Antelope 45 (1977).
167. *Id.* at 151.
168. *Id.* at 46–47.
169. *Id.* at 46.
170. *Id.*
171. *Id.* at 152.
172. Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 251 (1975).
173. *Sims's Case*, 61 Mass. at 296.
174. *Id*.
175. Levy, *supra* note 1, at 98.
176. 2 J.C. Hurd, The Law of Freedom and Bondage in the United States 653 (1862).

case precedent, Shaw "personified complicity with a sense of duty."[177] His "duty," as he saw it, was to view fugitive slaves as mere objects subject to replevin, rather than as fellow human beings with a state constitutional right to be free.[178]

The prevailing portraits of Lemuel Shaw by Leonard Levy and his predecessors unduly minimize the tenor and effect of his decisions on race issues. Shaw's slave opinions reveal a distressing lack of empathy for people of color, bereft of any recognition of their humanity and personhood. They evince a false fealty to the vows of equality set forth in the Declaration of Independence and the Massachusetts Declaration of Rights, promises which remain unfulfilled today.

Leonard Levy trumpets at the end of his biography that Lemuel Shaw belongs in the in the same pantheon as John Quincy Adams, "whom he resembled in so many ways," and that "none but an Adams could compare with Shaw" in "a devotion to the good of the whole community."[179]

With all due respect to a deceased, distinguished scholar and the hoary maxim *de mortuis nil nisi bonum,* this comparison is ludicrous given Shaw's decisions on race. In contrast to Shaw's treatment of Black people in his judicial opinions, John Quincy Adams was an abolitionist and an implacable foe of the political dominance of the slave states. As one biographer put it: "Confronting and defeating the power in Congress – the 'slaveocracy' as he called it – would be the great achievement of his life."[180] After losing his bid for reelection in 1828 to Andrew Jackson, Adams was elected to the House of Representatives in 1830,[181] where he led a long, ultimately successful fight to eliminate the "gag rule," which banned any discussion or consideration whatsoever of antislavery petitions presented to them.[182] On December 3, 1844, Adams finally prevailed; the "gag rule" was struck down by a vote of 108 to 80.[183]

John Quincy Adams successfully argued *The Amistad*[184] before the Supreme Court, whose holding[185] freed more than 50 slaves.[186]

177. Cover, *supra* note 172, at 250.
178. *Id.*
179. Levy, *supra* note 1, at 336.
180. James Traub, John Quincy Adams; Militant Spirit 430 (2016).
181. *Id.* at 390.
182. *Id.* at 434.
183. *Id.* at 509.
184. United States v. The Amistad, 40 U.S. 518 (1841).
185. *Id.* at 597.
186. *Id.* at 587.

Adams fell unconscious on the House floor in 1848 after rising to his feet to vote "no" to a resolution thanking the veterans of the Mexican War,[187] a conflict that he opposed as a ruse to expand slave territory.[188] Colleagues carried the comatose former president to the chamber of the House Speaker, where he died. [189]

Lemuel Shaw was no John Quincy Adams.

IV. Intermission: Shaw as Father-in-Law

Looking backward, it seems odd that the cogent arguments of the highly regarded abolitionist Boston lawyers who appeared before Shaw had so little impact on his jurisprudence. It's also puzzling that Shaw's views were unaffected by one of the men closest to him: his son-in-law, the self-taught intellectual and artistic giant, Herman Melville, who married the Chief Justice's daughter Elizabeth on August 4, 1847.[190] Melville was no stranger. His father Allan and Lemuel Shaw were close friends, and Shaw had been engaged to marry Allan's sister, Herman's aunt Nancy, who died suddenly in 1813 before they were able to formalize their union.[191]

As Melville biographer Newton Arvin tells us, Nancy's death triggered in Shaw an extended period of deep depression and "intense grief."[192] Nonetheless, Shaw's "affectionate friendship" with the Melville family "continued interruptedly and" it was a "natural token"[193] of this closeness, which led Herman Melville to dedicate his first (and best-selling) published book *Typee* (1846) as follows: "To Lemuel Shaw, Chief Justice of the Commonwealth of Massachusetts, This Little Work is Gratefully Inscribed."[194] In a later edition of that book, Melville changed the word "Gratefully" to "Affectionately."[195] Melville moved with his wife "Lizzie" in 1850 to their 160-acre farm "Arrowhead" in Pittsfield, the purchase of which was made possible by Lemuel Shaw's largesse of $3,000.00.[196]

We can do no more than speculate about the discussions in which these two men must have engaged when they were together, but they

187. Traub, *supra* note 180, at 525–26.
188. *Id.* at 499.
189. *Id.* at 526–27.
190. Parker, *supra* note 30, at 543.
191. Newton Arvin, Herman Melville: A Critical Biography 126 (1957).
192. *Id.*
193. *Id.*
194. Parker, *supra* note 30, at 408.
195. *Id.*
196. *Id.* at 778–79.

were likely deep, far-reaching, and even politely contentious given Melville's life experience as a sea-going adventurer and world traveler. And Melville's rich and humorous writing style was so different from Shaw's dry and tedious, albeit influential, court opinions.

Melville's *Moby-Dick* (1851), though fiction in the ordinary cubbyhole sense, is far more than that. It's without parallel. As the British critic Philip Hoare has written, said in the November 2, 2011, issue of *The New Yorker,* it:

> is not a novel. It's barely a book at all. It's more an act of transference, of ideas and evocations . . . an extended musing on the strange meeting of human history and natural history. It is, above all, a sui-generis creation, one that came into the world as an unnatural, immaculate conception.[197]

There are at least three narrative voices in *Moby-Dick*. First, we meet a pair of disembodied, unintentionally amusing pedants, not without a resemblance to the uber-scholar Lemuel Shaw: the "pale Usher" — "threadbare in coat, heart, body, and brain" who begins the book with an "Etymology,"[198] including various definitions and translations of the word "whale,"[199] and his alter-ego, the "poor devil" of a "Sub-Sub-Librarian," who after meandering "through the long Vaticans and street-stalls of the earth," collects and provides us with "Extracts,"[200] a mini-tome of quotations on whales and whaling, oft-dredged from obscure sources.[201]

Second, we have the book's main character, who asks us in the book's first sentence to "Call me Ishmael" from a dimension which, in Melville's words, is "not on any map; true places never are," and who speaks to us from the dead of the sunken Pequod to tell his story.[202] Third, there is the engaging, journalistic being who emerges from some Erewhon to author the chapter "The Whiteness of the Whale,"[203] a conversational treatise on the global significance of that color, touching upon its every conceivable connotation: symbolic, sociological, philosophical, poetical, geographical, mythological, political, and racial.[204]

197. Philip Hoare, *What "Moby-Dick" Means to Me,* The New Yorker (Nov. 3, 2011), https://www.newyorker.com/books/page-turner/what-moby-dick-means-to-me.
198. Herman Melville, Moby-Dick, xvii (1851).
199. *Id.* at xviii.
200. *Id.* at xix–xxxv.
201. *Id.*
202. *Id.* at 79.
203. *Id.* at 272–83.
204. *Id.*

It's clear from *Moby-Dick*'s second voice that Herman Melville's views on race were vastly different from those of his father-in-law. The whaling ship *Pequod* is integrated. The officers are white, but Queequeg, Tashtego, and Daggoo, the Pequod's harpoonists, are dark-skinned,[205] and of course without their skilled work, no whaling voyage could be successful. In the chapter "The Street,"[206] Ishmael marvels at the sight of people of color from all over the world gathered in New Bedford. They "unheeded wheel about" the town, including even "actual cannibals [who] stand chatting at street corners," commingling peacefully with "scores of . . . Vermonters and New Hampshire men . . . as green as the Green Mountains whence they came."[207] Set amidst this racial polyglot, "the town itself is perhaps the dearest place to live in, in all New England . . . . [N]owhere in America will you find more patrician-like houses; parks and gardens more opulent; than in New Bedford."[208]

Ishmael's close relationship with Queequeg is further evidence of Melville's strong belief in the desirability of racial diversity and harmony. Though forced against his will to spend the night in the same bed as Queequeg due to overcrowding in the Spouter Inn, Ishmael tells us that the next day he sees that his roommate's head is as "phrenologically excellent" as George Washington's.[209] Later, sometime after watching Queequeg contentedly shave his face with the blade of his harpoon, he says "I felt a melting in me. No more my splintered heart and maddened hand were turned against the wolfish world. This soothing savage had redeemed it. There he sat . . . a nature in which there lurked no civilized hypocrisies and bland deceits." [210] "I'll try a pagan friend, thought I, since Christian kindness has proved but a hollow courtesy."[211]

By 1861, Herman Melville's career as a writer was finished. *Moby-Dick* had failed in the marketplace,[212] and his books after that, *Pierre* (1852), *Israel Potter* (1853) and *The Confidence Man* (1857) were

205. Ishmael describes Queequeg's face as "of a dark, purplish yellow color," *id.* at 29, from the fictional south sea island of Kokovoko. *Id.* at 79. Tashtego is a full-blooded Gay Head Indian from Martha's Vineyard. *Id.* at 172. Dagoo is an African with "coal-black" skin. *Id.* at 173.

206. *Id.* at 45–48.

207. *Id.* at 45–46.

208. *Id.* at 47.

209. *Id.* at 71.

210. *Id.* at 72–73.

211. *Id.*

212. 2 Hershel Parker, Melville: A Biography 30 (1993) (explaining that his publisher, Harper & Brothers, was able to sell only 1,535 copies).

critical and commercial disasters.[213] His publishing-house had burned, destroying the only manuscript of an unpublished novel, *Isle of the Cross,* along with unsold copies of his other books, the value of which was deducted from his royalties.[214] By 1861, Melville needed a job, and he hoped that Abraham Lincoln would appoint him as a consul in Europe. [215] There was one Massachusetts man in Washington with the power and position sufficient to grease the skids and make that possible: Senator Charles Sumner, chair of the foreign relations committee.

Lemuel Shaw, recently retired from the SJC, wrote to the abolitionist Senator asking for his help.[216] Melville himself asked Richard Henry Dana, Jr. (co-counsel for Thomas Sims with Robert Rantoul), to write to Sumner on his behalf, but Dana refused.[217] According to Hershel Parker, Dana did so because of "coldness between him and Shaw over the fugitive slave issue."[218] Ultimately, Dana wrote to Sumner on Melville's behalf after Shaw asked him to do so,[219] but Dana told Sumner that "duty requires me to suggest a doubt whether his health is sufficient" for a consular post.[220] Melville then traveled to Washington, D.C. in an effort to find people who might help him get appointed, but he wrote to his wife Lizzie on March 24, 1861, that "as yet I have been unable to accomplish nothing in the matter of consulship -- have not in fact been able as yet so much as even to *see* any one on the subject."[221]

Finally, on the strength of his father-in-law's letter, Melville was able to meet briefly with Sumner, who apparently did no more than "bundle" various letters of recommendation into a file.[222] In a letter to Sumner, Melville bemoaned the fact that he hadn't been able to speak personally with the Senator after their first and only meeting. "I have tried to find you this afternoon and evening without success," Melville wrote, glumly adding that his ability to obtain a consulship is "pretty

213. Melville had to endure reviews such as "the craziest fiction extant," "the style is maniacal — mad as a March hare – mowing, gibbering, screaming, like an incurable Bedlamite," and "HERMAN MELVILLE CRAZY." *Id.* at 632.

214. *Id.* at 187–88 ("As the defeated Melville came to see, the coolly avaricious Harpers in effect blamed him for the fire, charging him all over again for their new costs, costs which they had already deducted from his account before paying him any royalties.").

215. *Id.* at 462.

216. *Id.* at 463.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 464.

221. Letter from Herman Melville to Elizabeth Melville (Mar. 24, 1861), *reprinted in* The Writings of Herman Melville, Correspondence 365 (Lynn Horth ed., 1993) [hereinafter Writings].

222. Parker, *supra* note 212, at 466.

much entirely in your hands."[223] No job was forthcoming,[224] and it is ironic that Melville's inability to get a consular post appears at least in part to be the result of his father-in-law's decisions on race.

Lemuel Shaw died on March 30, 1861, two days after Melville's plaintive missive to Sumner. [225] In 1863, Melville moved with his family to New York City and finally found work for 20 years in 1866 as a bottom-dog Deputy Customs Inspector at a salary of $4.00 a day. [226] In 1875, his *per diem* was reduced to $3.60; it was later restored to $4.00, but his work hours were increased.[227]

V. Lemuel Shaw's Unfair Definition of Reasonable Doubt

Chief Justice Shaw's influence has survived to this day in standard jury charges on the meaning of reasonable doubt.[228] Given the racial disparities in the treatment of defendants generally, Chief Justice Shaw's confusing and skewed jury instructions on reasonable doubt have had a disproportionate impact on Black defendants. Specifically, in today's criminal justice world, "innocent Black Americans are seven times more likely than white Americans to be falsely convicted of serious crimes."[229] A recent statistical study found that, while Caucasians use and sell illegal drugs at the same rate, Black people are 14.6 times more likely to be arrested and prosecuted for felony drug offenses in Vermont, one of the most politically liberal states in America.[230] Shaw's charge to the jury in an 1850 murder trial[231] is still viewed as the "the gold standard against which instructions on reasonable doubt have been measured."[232] Shaw defined that concept as follows:

> It is not *mere possible doubt*; because every thing relating to human affairs, and depending on moral evidence, is open to some *possible or imaginary doubt*. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of

223. Letter from Herman Melville to Charles Sumner (Mar. 28, 1861), *reprinted in* Writings, *supra* note 221, at 369.
224. Nicholas Delbanco, Melville: His World And Work 265 (2006).
225. Parker, *supra* note 212, at 467.
226. Arvin, *supra* note 181, at 259–60.
227. Stanley Edgar Hyman, *Melville the Scrivener,* 23 N.M. Quarterly 381, 397 (1953).
228. Bobby Greene, *Reasonable Doubt: Is it Defined by Whatever is at the Top of the Google Page?*, 50 J. Marshall L. Rev. 933, 937 (2017).
229. National Registry Of Exonerations, Race And Wrongful Convictions In The United States 1, 3 (2022).
230. Council On State Governments Justice Center, Justice Reinvention In Vermont, at table A6 (Apr. 2022).
231. Commonwealth v. Webster, 59 Mass. 295, 320 (1850).
232. Commonwealth v. Russell, 470 Mass. 464, 475 (2015).

> the jurors in that condition that they cannot say *to an abiding conviction, to a moral certainty, of the truth of the charge*. The burden of proof is on the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to it by the benefit of an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances that the fact charged is more likely to be true than the contrary, *but the evidence must establish the truth of the fact to a reasonable and moral certainty*; *a certainty that convinces and directs the understanding, and satisfies the reason and judgment,* of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt; because if the law, which *mostly depends upon considerations of a moral nature*, should go further than this, and *require absolute certainty*, it would exclude circumstantial evidence altogether.[233]

While courts have criticized or disapproved of Shaw's definition of reasonable doubt, its essence survives in various forms; like his invention of the "separate but equal" doctrine, it has had a lasting impact on American law. In fact, his jury charge has "served as a foundation for more than a century as basis for most jurisdictions' reasonable doubt jury instructions."[234]

There are several problems with this charge. In the first place, it begins and ends with an emphasis on what a reasonable doubt *is not*. It is not "mere possible doubt;" nor is it an "imaginary doubt;" nor is proof to "an absolute certainty" required. [235] This negative approach trivializes the concept of reasonable doubt and reduces it to a barrier to acquittal rather than what it should be: the criminal justice system's indispensable check on state power to prevent wrongful convictions.

The fallacy in equating proof beyond a reasonable doubt with proof to a "moral certainty" is that morality is a subjective and debatable concept on the ethics of human behavior, wholly unrelated to an objective determination of the required degree of proof. Hence, it's inherently confusing and out of place in this context. Moreover, criminal trials nearly always revolve upon evidence of behavior that most people consider to be morally wrong. Equating proof beyond reasonable doubt with "moral certainty" may cause some jurors to

233. *Webster*, 59 Mass. at 320 (emphasis added).
234. Greene, *supra* note 228, at 937.
235. *Webster*, 59 Mass. at 320.

confuse or conflate the degree of a defendant's lack of morality with the quantum of evidence necessary to meet the prosecution's burden.

The problem with the phrase "abiding conviction . . . of the truth of the charge" is that it does not refer to a degree of certainty. It is perfectly possible to have an "abiding conviction" of guilt on less than proof beyond a reasonable doubt. "Abiding" means "enduring" or "lasting,"[236] i.e. remaining over a long period of time, by definition extending far beyond the end of a trial. Whether the juror's "conviction" is "abiding" cannot be determined at the time of the juror's deliberation, so the adjective "abiding" makes no sense in this context.

Nor is it the job of the jury to determine "the truth of the charge." Rather, as the Supreme Court held in *In re Winship*,[237] it is to determine whether the prosecution has proven beyond a reasonable doubt *every fact necessary* to establish *each element* of the alleged crime.[238] The jury may never be able to determine "the truth," especially when conflicting testimony or the lack of evidence perforce leaves the jury unclear or confused as to what actually occurred.

The Supreme Court in *Cage v. Louisiana*[239] reversed a conviction because of an unconstitutional jury charge on reasonable doubt derived from Shaw's in *Webster*.[240] The Court singled out for criticism the phrase "moral certainty," when what is required is "evidentiary certainty." [241] The trial court had used in its charge other phrases taken directly from *Webster*, including that reasonable doubt is not "some possible doubt" or "imaginary doubt," and that the prosecution need not prove its case with "absolute certainty."[242]

The United States Supreme Court retreated from *Cage* in its most recent decision on the constitutionality of Shaw's reasonable doubt instruction, *Victor v. Nebraska*.[243] There the Supreme Court analyzed a California jury charge which had "its genesis in a charge given by Chief Justice Shaw of the Massachusetts Supreme Judicial

236. Webster's New Collegiate Dictionary 2 (3d ed. 1997).
237. In re Winship, 397 U.S. 358 (1970).
238. *Id.* at 364.
239. Cage v. Louisiana, 498 U.S. 39 (1990).
240. The trial judge's charge, in relevant part, was as follows: "This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty." *Id.* at 40–41.
241. *Id.* at 41.
242. *Id.* at 40–41.
243. Victor v. Nebraska, 511 U.S. 1 (1994).

Court more than a century ago," noting that the California Supreme Court has "characterized the *Webster* instruction as 'probably the most satisfactory definition ever given to the words "reasonable doubt" in any case known to criminal jurisprudence,'"[244] and which quoted much of Shaw's work verbatim.[245] Also at issue was a similar, Nebraska jury charge based on *Webster*.[246]

Justice O'Connor's opinion for a 7-2 majority rejected the contention of the two appellants that the Shaw-based instructions on reasonable doubt violated their constitutional rights.[247] Both charges used Shaw's definitions of beyond a reasonable doubt as proof to a "moral certainty" which leaves jurors with an "abiding conviction" of guilt.[248] Both charges also used Shaw's repeated negative explications: that reasonable doubt is not a "mere possible doubt," "imaginary doubt," "doubt arising from mere possibility" or a doubt based on lack of proof to an "absolute certainty."[249]

The Court in *Victor* criticized the use of "moral certainty," which was one of the Shaw phrases cited by it in *Cage* as a ground for reversal.[250] Nonetheless, *Victor* affirmed both convictions.[251] Concurring, Justice Kennedy wrote that "It was commendable for Chief Justice Shaw to pen an instruction that survived for more than a century, but . . . what once might have made sense to jurors has long since become archaic."[252] This is hardly an endorsement of Shaw's definition of reasonable doubt, and it is likely that the Court recognized that Shaw's instruction in *Webster* has been so widely adopted that a reversal in *Victor* would open the floodgates to constitutional challenges of thousands of convictions where it was used, either verbatim or in an enhanced version.

By "enhanced version," I refer to the product of judges who have been unable to resist the temptation to one-up or "improve" upon the work of the great Massachusetts Chief Justice Lemuel Shaw by adding embellishments of their own to his jury charge in *Webster*.

Bumpus v. Gunter[253] is one such example. This was a post-conviction federal *habeas corpus* petition brought on behalf of Robert Bumpus,

244. *Id.* at 9.
245. *Id.* at 7.
246. *Id.* at 18.
247. *Id.* at 22–23.
248. *Id.* at 7, 18.
249. *Id.*
250. *Id.* at 22 ("[W]e reiterate that we do not countenance its use….").
251. *Id.* at 22–23.
252. *Id.* at 23.
253. Bumpus v. Gunter, 635 F.2d 907, 911–13 (1st Cir. 1980).

a Black defendant convicted at trial of the first-degree murder of a Boston bank vice president during an armed robbery.[254] The defense at trial was mistaken eyewitness identification.[255]

According to the New York City-based Innocence Project, mistaken identification "contributes to an overwhelming majority of wrongful convictions later overturned by post-conviction DNA testing."[256] One cause of mistaken identification is what the Innocence Project calls "estimator variables" such as faulty memory, stress, and — particularly important in cases with white witnesses who point the finger at a Black defendant — the well-known inability of people to identify accurately persons of a different color.[257]

Bertrand Russell has examined estimator variables in a philosophical context that is nonetheless directly relevant to the inherent problems with eyewitness testimony.[258] He wrote that any group of people looking at the same table "at the same moment"[259] will describe it differently in color, shape, smell and feel, depending on such factors as lighting, distance, angle of view, and the personal quirks of the observer.[260] The challenge for seekers of objective fact becomes how, or whether it is even possible, to determine accurately the true nature of the table, because "what we directly see and feel is merely 'appearance', which we believe to be a sign of some 'reality' behind. But if the reality is not what it appears, have we any means of knowing whether there is any reality at all?"[261] In a criminal trial, where witnesses may honestly describe a person or an event quite differently, a fair jury instruction on reasonable doubt is crucial, particularly in cases involving cross-racial eyewitness identification.

The Innocence Project also cites "system variables" as causes of eyewitness misidentification, including police misconduct and the use of overly suggestive identification procedures.[262] A particularly egregious example of this occurred when the prosecution failed to disclose to the defense or the court that its eyewitness was legally blind.[263]

254. Commonwealth v. Bumpus, 362 Mass. 672, 673 (1972).
255. *Id.* at 674–76.
256. *Eyewitness Misidentification*, Innocence Project, innocenceproject.org/eyewitness-misidentification/ (last visited Jul. 8, 2024).
257. *Id.*
258. Bertrand Russell, The Problems of Philosophy 16 (1912).
259. *Id.* at 8.
260. *Id.* at 8–11.
261. *Id.* at 16.
262. *Eyewitness Misidentification*, *supra* note 256.
263. Frances Vinall, *Freed murder convict sues Chicago over eyewitness who turned out to be Blind,* Wash. Post (May 28, 2004), https://www.washingtonpost.com/nation/2024/05/28/

At the trial of the Robert Bumpus murder case, the defense unsuccessfully raised eyewitness misidentification on both grounds mentioned by the Innocence Project.[264] Walter H. McLaughlin, the Chief Justice of the Massachusetts Superior Court, who presided, gave Shaw's *Webster* "moral certainty" jury charge with embellishments of his own,[265] including the following:

> Reasonable doubt "has to be a doubt in your mind that you can stand up and argue with principle and integrity to your fellow jurors . . . ."[266]

After a total of fourteen assertions of what a reasonable doubt *is not,* Chief Justice McLauglin warned the jury that:

> If an unreasonable doubt or mere possibility of innocence were sufficient to prevent a conviction, practically every criminal would be set free to prey upon the community. Such a rule would be wholly impractical and would break down the forces of law and order and make the lawless supreme.[267]

Chief Justice McLaughlin added that proof beyond a reasonable doubt doesn't exclude

> . . . . the possibility of being wrong, so don't let that be a haunting thought that bother you. If you are satisfied in accordance with the standard that I have indicated beyond a reasonable doubt, to a moral certainty, because otherwise you place a burden on the Commonwealth that it does not have.… A moral certainty is less than a mathematical certainty and less than a scientific certainty; because human beings are endowed with a free mind and a free will, that you can't put their conduct into a computer or test tube and come out with an answer.[268]

Chief Justice McLaughlin continued:

> I don't want you to be deterred on the identification evidence by the possibility that you might be wrong, because that is not the burden of the Commonwealth.

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chicago-blind-witness-murder-sued/#. The unreliability of eyewitness identification is dramatized in Hollywood films such as *12 Angry Men* (1957) and *My Cousin Vinny* (1992).

264. The Supreme Judicial Court on direct appeal summarized the trial testimony and legal issues on eyewitness identification in *Commonwealth v. Bumpus*. *See* Commonwealth v. Bumpus, 362 Mass. 672, 673–79 (1972).

265. Bumpus v. Gunter, 635 F.2d 907, 910–13 (1st Cir. 1980) (setting forth the relevant portions of the jury charge)..

266. *Id.* at 910.

267. *Bumpus*, 635 F.2d at 911.

268. *Id.*

> If you are satisfied to a moral certainty that having weighed and evaluated everything that can be considered on the subject, the course you are taking is the right course for you to take. If you have a settled conviction that you are doing the right thing, that is what the law considers to be satisfaction to a moral certainty. That is what the law is looking for when they ask you to be satisfied to a moral certainty in pondering this issue of reasonable doubt. It asks nothing more.[269]

Defining "moral certainty" as equivalent to a belief that "you are doing the right thing" allows jurors to determine guilt based on their emotions and gut feelings, rather than using the objective standard of proof beyond a reasonable doubt on every fact necessary to prove each element of the crime. Moreover, telling the jurors they shouldn't worry about being wrong, and warning them of the possibility of setting criminals free to "prey upon the community" rather than emphasizing the danger of convicting the innocent, essentially reverses the burden of proof. Nor should the reasonableness of a doubt be so substantial that a juror must be able to stand up in the jury room and argue it "with principle and integrity" to fellow jurors. Some jurors may not be capable or self-confident enough to do that, and in any event, as the First Circuit emphasized in an earlier case, reversing a conviction where the trial judge had required jurors to answer interrogatories rather than simply rendering a general verdict, "the jury, as the conscience of the community, must be permitted to look at more than logic."[270]

Despite all of this, the First Circuit in *Bumpus* held that Chief Justice McLaughlin's variation of the *Webster* charge did not constitute error of constitutional magnitude,[271] and the Supreme Court denied certiorari.[272]

The Massachusetts Supreme Judicial Court, while continuing to give homage to Lemuel Shaw's "gold standard" definition of reasonable doubt as essentially correct, has recently changed it to make it somewhat fairer and more accurate, and to require that a standard charge be given

269. *Id.* at 912.

270. United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969).

271. *Bumpus*, 635 F.2d at 913 ("In refusing to grant the writ of habeas corpus we do not mean to put our stamp of approval upon the language used in the criticized instructions."). As in *Victor v. Nebraska*, where Justice Kennedy's concurrence suggested that the Supreme Court may well have been worried about a "floodgates" effect in the event of a reversal of the Shaw reasonable doubt instruction, *see supra* note 252, the First Circuit likely had similar concerns.

272. Bumpus v. Gunter, 450 U.S. 1003 (1981). Once again, full disclosure: I was one of the lawyers who lost Mr. Bumpus's federal case.

in every criminal case, thereby preventing the sort of frolic and detour exhibited by Chief Justice McLaughlin in *Bumpus*.[273]

Nonetheless, the SJC has felt constrained to continue to praise and defer to Shaw's work. "The enduring virtue of the Webster charge has been that it conveys to the jury not only the degree of certainty required, but also 'the proper solemn consideration,' in reaching a judgment of conviction."[274] But "[a]lthough the traditional Webster charge has been and continues to be a constitutionally sufficient source . . . we are mindful of the criticism surrounding some of the outmoded language employed therein."[275] Accordingly, the SJC used its "supervisory power" to require a uniform instruction on proof beyond a reasonable doubt which employs more modern language, but "preserves the power, efficacy, and essence of the Webster charge."[276]

The "modernized version" is a slight improvement, but the SJC couldn't bring itself to free itself entirely from Shaw's linguistic hopples.

The new mandatory jury charge reads, in relevant part, as follows, with Shaw's work italicized:

> Proof beyond a reasonable doubt *does not mean proof beyond all possible doubt*. A charge is proved beyond a reasonable doubt if, after you have compared and considered all of the evidence, *you have in your minds an abiding conviction, to a moral certainty, that the charge is true.* When we refer to a moral certainty, we mean the highest degree of certainty in matters relating to human affairs . . . . *It is not enough for the Commonwealth to establish a probability, even a strong probability, that the defendant is more likely guilty than not guilty . . . . Instead, the evidence must convince you of the defendant's guilt to a reasonable and moral certainty, a certainty that convinces your understanding and satisfies your reason and judgment as jurors who are sworn to act conscientiously on the evidence.*[277]

Shackled by the weight and enduring reputation of Lemuel Shaw, the SJC begins its "new" jury charge with Shaw's language on what proof beyond a reasonable doubt is *not,* and it retains his phrases "abiding conviction" and "to a moral certainty that the charge is true."[278]

It's helpful to equate "moral certainty" with the "highest degree of certainty in matters relating to human affairs," but the instruction

273. Commonwealth v. Russell, 470 Mass. at 477–78.
274. *Id.* at 475 (internal citation omitted).
275. *Id.* at 476.
276. *Id.* at 477.
277. *Id.* at 477–78 (emphasis added).
278. *Id.*

then waters down that definition by comparing it to the "probability" standard in civil cases.[279] It would be far more accurate and helpful to differentiate it also with the higher, intermediate burden of proof used in civil litigation, that of "clear and convincing evidence," which is less stringent than proof beyond a reasonable doubt.

One commentator has proposed that jury instructions on reasonable doubt contrast that burden of proof with *both* the preponderance of evidence and clear and convincing proof standards.[280] Others have suggested that judges charge juries to keep in mind during deliberations "the extraordinary injustice in the possibility of convicting an innocent person."[281]

In the opinion of this writer, the best way to explain reasonable doubt is to do all of these. In addition to telling the jury that reasonable doubt is self-defining, "a doubt that is reasonable,"[282] judges should contrast that burden with the preponderance and clear and convincing standards, and couple that with an instruction detailing *the reasons why* the reasonable doubt standard is constitutionally required.

The paramount reason for proof beyond a reasonable doubt is to protect the innocent. As the Supreme Court stressed in the seminal case *In re Winship*,[283] there is a "margin for error" in all litigation; in criminal cases, where the defendant's liberty and reputation are at stake, a high burden of proof reduces the possibility that an innocent person will be convicted and the tragedy that invariably follows from such an error.[284]

Second, "it is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty" of a crime unless by convincing a jury "of his guilt with utmost certainty." Otherwise, wrongful convictions would become routine rather than the exception, "the respect and confidence of the community" in the criminal justice system would be lost,[285] and a culture of fear and hesitation would arise if government could railroad anyone to prison on flimsy evidence. "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we

279. *Id.*
280. Lawrence T. White & Michael D. Cicchini, *Is Reasonable Doubt Self-Defining?*, 64 Vill. L. Rev. 1, 24 (2019).
281. Hon. James A. Shapiro & Karl T. Muth, *Beyond a Reasonable Doubt: Juries Don't Get It*, 52 Loy. U. Chi. L.J. 1029, 1044 (2021).
282. Dunn v. Perrin, 571 F.2d 21, 23 (1st Cir. 1978) (attempting to define reasonable doubt may result in "an impermissible reduction of the prosecution's burden of proof").
283. In re Winship, 397 U.S. 358, 364 (1970).
284. *Id.* at 363–64.
285. *Id.* at 364.

explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[286]

Explanation by trial judges to jurors of the reasons for the reasonable doubt rule, rather than making unnecessary and misleading efforts to define it, will endow that concept with the primacy it deserves and which the constitution requires. Such an instruction will make it less likely that jurors may view reasonable doubt as a mere "legal technicality" or a naive intellectual construct of little validity in the "real world" of the street. It should reduce the understandable temptation of some jurors to resort to a lesser, "gut feeling" standard of proof when they arrive at a decision.

In sum, it is time to dispense entirely with Chief Justice Shaw's reasonable doubt instruction, which is confusing, unfairly skewed against the accused, and tilted in favor of conviction.

VI. Conclusion: The Need to Reassess Lemuel Shaw

I have endeavored here to highlight areas of Shaw's jurisprudence which demonstrate that his continued placement on a common law pedestal is unwarranted. A fair reassessment of Shaw's entire judicial career will require a scholar with "world enough, and time" (as Andrew Marvell wrote in another connection)[287] to analyze his 2,200 Supreme Judicial Court opinions and their impact on American law. An objective critique of Shaw's body of work, without hero-worship or undeserved encomia, is long overdue.

286. *Id.*

287. *To His Coy Mistress* (1681), https://www.poetryfoundation.org/poems/44688/to-his-coy-mistress (last visited Oct. 22, 2024).

Education Unchained: Constitutionally Challenging Zero- Tolerance Policies for Education Equity

Abryana Marks*

Introduction

Turning eighteen is a pivotal moment that comes with many of the freedoms of being an adult, but also the responsibilities of adulthood. For high school senior, Niya Kenny, being eighteen meant sitting in an adult detention center for "disturbing schools."[1] On October 26, 2015, Niya Kenny's algebra class was disrupted by former Deputy, Ben Fields, a school resource officer, at Spring Valley High School in South Carolina, whose reputation landed him the nickname "Officer Slam."[2] Fields was called to the class to remove sixteen-year-old Shakara Murphy, who refused to leave the room after allegedly using her cellphone during class.[3] When Fields entered the classroom, he placed Murphy in a chokehold, flipped her out of her desk, and slammed her on the floor.[4] He then threw Murphy "across the room, berated her in front of her classmates, and dragged her from the room."[5]

* Abryana Marks is a 2024 graduate of Howard University School of Law and served as a Senior Articles Editor for Volume 67 of the *Howard Law Journal*. She would like to thank both Volume 67 and 68 of the *Howard Law Journal* for their hard work and support on this article. She would also like to send a special thanks to Professor Cedric Powell for his assistance with this article.

1. Kristin Henning, The Rage of Innocence: How America Criminalizes Black Youth 34 (2021).

2. Kat Chow, *Two Years After A Violent Altercation At A S.C. High School, Has Anything Changed?*, NPR (Oct. 24, 2017, 6:00 AM), https://www.npr.org/sections/ed/2017/10/07/548510200/what-s-changed-in-south-carolina-schools-since-violent-student-arrest; Amy Davidson Sorkin, *What Niya Kenny Saw*, The New Yorker (Oct. 30, 2015), https://www.newyorker.com/news/amy-davidson/what-niya-kenny-saw.

3. Henning, *supra* note 1, at 33–34.

4. *Id.* at 33.

5. *Id.*

Niya, shocked[6] by what she witnessed and recorded, stood up for Murphy by verbally objecting to Fields's conduct.[7] Fields turned to Niya and stated "[s]ince you have so much to say, you coming, too."[8] Niya and Murphy left the school in handcuffs, but Niya never went back.[9] Both girls were arrested for the South Carolina misdemeanor of "disturbing schools"; however, while Murphy was released to a guardian, Niya — because she was eighteen — was held in the Alvin S. Glenn Detention Center for nine hours until she was released by a judge.[10] Niya decided to withdraw from Spring Valley and instead got a GED.[11]

Spring Valley High School, like many public schools in America,[12] based its disciplinary procedures on a zero-tolerance policy.[13] Zero tolerance policies are defined as "administrative rules intended to address specific problems associated with school safety and discipline."[14] These policies require schools to refer students to law enforcement for a predetermined range of conduct.[15] During the 2020–2021 school year, almost 61,900 students were referred to law enforcement with almost 8,900 of them being subject to a school-based arrest.[16]

However, zero tolerance policies make no differentiation between actual crimes and childish curiosity.[17] Take Kiera Wilmot for example. Kiera was sixteen when she was expelled and arrested due to zero tolerance policies.[18] The honor roll student's science project consisted of mixing toilet cleaner and aluminum foil in a water bottle which caused a loud

6. Chow, *supra* note 2.
7. Henning, *supra* note 1.
8. Sorkin, *supra* note 2.
9. Henning, *supra* note 1.
10. *Id.*
11. *Niya Kenny*, Represent Justice, https://www.representjustice.org/speakers-all/niya-kenny (last visited Nov. 18, 2024).
12. S. David Mitchell, *Midwestern People of Color Legal Scholarship: Symposium: Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 Wash. U. L. Rev. 271, 274, 277 n.29 (2014).
13. Andre Perry, *Violent South Carolina Classroom Arrest Damages a Whole Community*, Wash. Monthly (Nov. 3, 2015), https://washingtonmonthly.com/2015/11/03/violent-south-carolina-classroom-arrest-damages-a-whole-community/.
14. Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 UC Davis J. Juv. L. & Pol'y 289, 301 (2005).
15. Mitchell, *supra* note 12, at 279.
16. U.S. Department of Education Office for Civil Rights, *Student Discipline and School Climate in U.S. Public Schools*, 2020-21 Civil Rights Data Collection, 9 (Nov. 2023), https://civilrightsdata.ed.gov/estimations/2020-2021.
17. Mitchell, *supra* note 12, at 273; Jose Cruz Zavala-Garcia, *The Battle Between Schools' Disciplinary Measures and Students' State Constitutional Right to an Education: A Discussion on School Discipline and a Call for Reform*, 12, L.J. Soc. Just. 104, 107 (2019) ("As a consequence, zero tolerance policies typically ignore the dangerousness of the offense and do not take in consideration the students age, cognitive capacity, or intent.").
18. *Id.*

popping sound.[19] Even though no one was hurt nor was there any damage to any property, she was expelled under the school's zero-tolerance policy and charged with possession of or discharging of a firearm and possession of a destructive device.[20] Had these felony charges not been dropped, Kiera would have been tried as an adult, and had Kiera been convicted, she would have been disenfranchised before turning eighteen.[21]

This adultification of youth through zero tolerance policies take schools from a place of learning to one that mirrors the carceral state and systematically deprives children of education. As of now, there is nothing to stop that deprivation because education — specifically quality public education — is not legally recognized as a fundamental right under the Constitution.[22] Even though zero-tolerance policies deprive students of not only education opportunities but also liberty interests, the Supreme Court has remained silent on affirmatively recognizing a fundamental right to public education. The deprivation of liberty interests is two-fold; the first being the disenfranchisement of the student amongst their peers and professors, and the second being future employment and higher education opportunities.[23]

The 28th Amendment to the United States Constitution should be an amendment creating a fundamental right to a public education to promote educational equality. Throughout history, the United States has asserted that an education is the key to ideal citizens,[24] however, the Federal Government has refused to solidify this assertion by not federally protecting the right to an education and, instead, has perpetuated educational inequality.[25] This problematic perpetuation has stifled the production of ideal citizens as seen by the mass incarceration rates in the United States. There is no question there are multiple causes to mass

19. *Id.*; Rebecca Klein & Kiera Wilmot, *Teen Arrested in Botched Science Experiment, Haunted by Felony Record*, HuffPost (May 30, 2014), https://www.huffpost.com/entry/kiera-wilmot-college_n_5420612.

20. Mitchell, *supra* note 12, at 273.

21. *Id.*

22. *See* Derek W. Black, *The Constitutional Compromise to Guarantee*, 70 Stan. L. Rev. 735, 746–47 (2018) ("Indeed, consistent with Rodriguez, this interpretation of the Fourteenth Amendment does not create a fundamental right that would require the Court to define a quality education or scrutinize every educational inequality.").

23. Betsy Levin, *The United States of America*, *in* Comparative School Law 1, 64 (Ian K. Birch & Ingo Richter eds., 1990) ("The Supreme Court held that there can be state-created entitlements to a public education that are protected by the Due Process Clause. In other words the right to education may not be withdrawn on the grounds of misconduct, absent fair procedures for determining whether the misconduct has occurred.").

24. *See* Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. Fla. J.L. & Pub. Pol'y 45, 63–64 (2011) [hereinafter *Fifth Freedom*].

25. *See* Helen Hershkoff & Nathan Yaffe, *Unequal Liberty and a Right to Education*, 43 N.C. Cent. L. Rev. 1, 10–11 (2020).

incarceration, however, this note argues that the refusal to recognize public education as a fundamental right allows the school-to-prison pipeline to proliferate and is seen especially in states where schools that employ zero-tolerance policies. The long-term impact of zero-tolerance policies is the increased risk of interaction with the criminal justice system; these introductions through the juvenile infractions feed future run-ins with the criminal justice system as adults.[26]

Due to the lack of explicit federal protection of the right to public education, states are not required to provide education to its citizens.[27] As such, federal courts only weigh-in on educational decision making if a state decides to provide education and a subsequent Fourteenth Amendment issue arises.[28] However, states do not have to provide public education, they can choose to provide public education and what it looks like.[29] Because states don't have to provide public education, it is easier for states to deprive students of a quality education. Each state has language in their respective constitutions pertaining to the right to education.[30] However, these constitutional provisions are not enough when discussing the protection of the right to education. There are four categories in which a state's educational provisions can fall into — basic, sound qualitative or efficient[31] — with each category having different levels of protection when bringing claims about education to state courts.[32] Since education is a statutory right, federal courts will

26. Mitchell, *supra* note 12, at 283–84.

27. Harper v. Va. St. Bd. of Elections, 383 U.S. 663, 665 (1966) (stating that States do not have to provide for [voting] rights that are not expressly provided for in the US Constitution, however, if the state decides to confer them, they cannot do so in a way that is "inconsistent with the Fourteenth Amendment."); *see generally* Plyler v. Doe, 457 U.S. 202 (1982) (holding that although the states are not required to provide the right to education, if they do confer the right, they cannot deprive from one group unless they can show a compelling interest behind doing so); *see also* Baker v. Carr, 369 U.S. 186, 210 (1962) (stating that issues of political question cannot be heard in federal court).

28. *Id.*; Levin, *supra* note 23, at 64 ("The Supreme Court held that there can be state-created entitlements to a public education that are protected by the Due Process Clause. In other words, the right to education may not be withdrawn on the grounds of misconduct, absent fair procedures for determining whether the misconduct has occurred.").

29. Kimberly Jenkins Robinson, *Introduction: The Essential Questions Regarding a Federal Right to Education*, *in* A Federal Right to Education: Fundamental Questions for Our Democracy 1 (Kimberly Jenkins Robinson ed., 2019).

30. Derek W. Black, Schoolhouse Burning: Public Education and the Assault on American Democracy 15 (2020).

31. Zavala-Garcia, *supra* note 17, at 114.

32. In his note, Thro explains the categories,

> Category I education clauses impose the minimal educational obligation on a state. Category II education clauses impose a greater obligation than Category I clauses because Category II provisions mandate that the system of public schools meet a certain minimum standard of quality, such as "thorough and efficient." The eight Category III education clauses are distinguished from the Category I and II clauses by both a "stronger and more specific education mandate" and

defer to the lawmaker, and if a state meets the level of education it chose to provide, federal courts will not intervene.[33] This Note posits that deference is not enough and federal protection is indeed necessary. By setting a federal standard for public education, education equality will be achievable thereby aiding in the reversal of mass incarceration.

The purpose of this Note is to explore the link between the lack of federally protected right to education and the school-to-prison pipeline. Specifically, because public education is not currently a fundamental right under the United States Constitution, there is not a set quality standard of education when outlining what public education should look like and barring its deprivation. The current scheme of zero tolerance policies deprives students of quality education and instead bolsters the school to-prison pipeline. Some scholars believe that the solution can be found in simply reforming the current school discipline tactics, however, this Note posits that reform is not enough to protect against the deprivation of education caused by zero tolerance policies, instead, federal protection is necessary.[34]

Part I of this Note will identify both the current issue with zero tolerance policies and the school to prison pipeline. The features of the school-to-prison pipeline will be identified in Part II. Part III will conceptualize public education as a fundamental right. It will start by outlining the Supreme Court's implicit acknowledgment of the importance of education and their refusal to recognize education as a fundamental right, then transition to a discussion of relevant scholarship. Part IV will illustrate how creating a fundamental right to public education is necessary to disrupt the school to prison pipeline. Lastly, Part V will

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> "purposive preambles." By their texts, the Category IV clauses impose the greatest obligation on the state legislature. Typically, they provide that education is "fundamental," "primary," or "paramount." Despite the apparently greater commitment of these clauses, however, state courts have, with one exception, consistently rejected challenges based on Category IV provisions.

William E. Thro, *Note: To Render them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 Va. L. Rev. 1639, 1661–68 (1989).

33. Harper v. Va. St. Bd. of Elections, 383 U.S. 663, 665 (1966) (stating that States do not have to provide for [voting] rights that are not expressly provided for in the US Constitution, however, if the state decides to confer them, they cannot do so in a way that is "inconsistent with the Fourteenth Amendment."); *see generally* Plyler v. Doe, 457 U.S. 202 (1982) (holding that although the states are not required to provide the right to education, if they do confer the right, they cannot deprive from one group unless they can show a compelling interest behind doing so); *see also* Baker v. Carr, 369 U.S. 186, 210 (1962) (stating that issues of political question cannot be heard in federal court).

34. Zavala-Garcia, *supra* note 17, at 109; Jason P. Nance, *Students, Police, and the School-To-Prison Pipeline*, 93 Wash. U. L. Rev. 919, 927 (2016); Janel George, *Article and Speech, Populating the Pipeline: School Policing and the Persistence of the School-To-Prison Pipeline*, 40 Nova L. Rev. 493, 497 (2016).

discuss the benefits of the Twenty-Eighth Amendment to the United States Constitution creating a fundamental right to public education, specifically in the context of aiding in the reversal of mass incarceration.

I. Identifying the School-to-Prison Pipeline

a. Zero Tolerance Polices

Zero tolerance policies are defined as "administrative rules intended to address specific problems associated with school safety and discipline."[35] In schools that operate under zero-tolerance policies, school administrators are mandated to refer students to law enforcement.[36] However, zero-tolerance policies did not begin in the schools.[37] In the 1990s, the federal government began the implementation of zero-tolerance policies to fight crime — no matter its magnitude.[38] All levels of government implemented this policy and as a result, the nation's prison population tripled in the span of twenty years.[39] Undisputedly, this demonstrates that zero tolerance does play a part in mass incarceration. The question then turns to who is filling these prisons. In the nineties, juveniles were branded as "super predators" who were just as dangerous as adults but had to be stopped before they became adults and wreaked even more havoc.[40] And as such, juveniles were not exempted from zero tolerance policies.[41] However, this was before zero tolerance policies were introduced to the public school system.

Zero tolerance officially made its way to schools in 1994 with the passage of the Gun-Free Schools Act ("GFSA").[42] The GFSA required schools to expel any student who brought a firearm to school for a year.[43] Along with the mandatory expulsion, school officials are required to refer the students in violation of the policies to local law enforcement.[44] All fifty

35. Hanson, *supra* note 14.
36. Mitchell, *supra* note 12, at 274.
37. *Id.* at 277 ("While zero tolerance as a policy appears to have always been associated with school-related discipline, the concept of zero tolerance was originally developed outside of the school context as a law enforcement approach to drug trafficking.").
38. Derek W. Black, Ending Zero Tolerance: The Crisis of Absolute School Discipline 42 (N.Y. Univ. Press 2016) [hereinafter Ending Zero Tolerance].
39. *Id.*
40. *Id.*
41. *Id.*
42. Mitchell, *supra* note 12, at 278.
43. Zavala-Garcia, *supra* note 17, at 106; 20 U.S.C. § 8922(a) (1994) ("No funds shall be made available under this chapter to any local educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to a school served by such agency.").
44. Mitchell, *supra* note 12, at 274.

states adopted the zero tolerance policies for weapons and implemented them into their schools.[45] Since 1995, at least seventy-five percent of the schools in America have maintained zero tolerance policies.[46] Even though the number of students who bring weapons to school is small, implying that the original implementation wouldn't spiral to where it is today,[47] the tragedy of Columbine justified the policy mandate.[48] If this were the extent of zero tolerance policies, there arguably would not need to be a discussion of the school to prison pipeline.[49]

The reasonable intent behind the GFSA spiraled when zero-tolerance policies were expanded to include infractions that did not include weapons or violence and instead punished more minor offenses.[50] The GFSA conditions federal funding on states making this commitment to keep weapons out of their schools,[51] however, it does not require a zero-tolerance approach to any other wrongs such as drugs or other misconduct, nor does it bar states from allowing students expelled under the Act to receive alternative education.[52] Although, the United States Department of Education has stated that there is no empirical evidence that the zero-tolerance policies actually curb school violence; statistics have illustrated that before the implementation of the GFSA, juvenile crime rates were decreasing, that students are better behaved today than they were in prior eras, and that zero tolerance policies have expanded beyond their original meaning.[53]

While school safety is a legitimate state concern, the data shows that the means don't meet the ends. Therefore, there is a problem in the current expansion of the zero tolerance policies from dangerous conduct to non-violent behaviors. Specifically, because states are only required to meet the low burden of showing a legitimate state interest, such as safety to further educational pursuits, to justify their actions, not creating a higher threshold perpetuates the problematic expansion

45. Ending Zero Tolerance, *supra* note 38, at 43.

46. Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 Am. U.L. Rev. 1039, 1047–48 (2001).

47. Ending Zero Tolerance, *supra* note 38, at 43.

48. George, *supra* note 34, at 501.

49. *See* Ending Zero Tolerance, *supra* note 38, at 43 ("Given the relatively small number of students who bring weapons to school, the school discipline system probably could have weathered the get-tough storm had it stopped with weapons.").

50. Zavala-Garcia, *supra* note 17, at 106.

51. Insley, *supra* note 46, at 1046.

52. *Id.* at 1049; 20 U.S.C. § 8921(b).

53. Areto A. Imoukheude, *The Right to Public Education and the School to Prison Pipeline*, 12 Alb. Gov't Rev. 52, 75 (2018); Zavala-Garcia, *supra* note 17, at 106, 123.

of zero tolerance policies.[54] This can be seen by the fact that the new zero tolerance on drugs in schools does not differentiate between illicit drugs and over-the- counter medications.[55] For example, a nine-year old who was getting over a cold brought cough drops to school, and after a friend asked for one in exchange for a dollar, she faced punishment and was labeled a drug dealer.[56] In another example, a middle schooler was suspended for drug trafficking after attempting to share her inhaler with a friend who was having an asthma attack.[57] Zero tolerance at its inception was rooted in the war on drugs and drug trafficking;[58] so while these examples are albeit outrageous, the nexus between the policy and punishment can be argued. However, the nexus is not as clear with the prohibition of "oppositional culture," as referenced in *Tinker*,[59] such as the suspension of a third grader who says "yeah" instead of "yes ma'am."[60] Take Darryl George for example. In August of 2023, Darryl was suspended for wearing locs that fell below his ears.[61] While there was no visible threat, the controlling superintendent justified the suspension by stating that the issue was that Darryl was not in conformity, which is a requirement as an American.[62] The punishment for minor or trivial infractions unnecessarily pads the school-to-prison pipeline as "the most irrational aspect of zero-tolerance [policies] . . . is that they turn kids into criminals for acts that would rarely constitute a crime when committed by an adult."[63]

This has a disastrous effect on students. These effects are also not limited to the direct victim; this method of punishment affects

54. Mitchell, *supra* note 12, at 303–04. Levin points out that,

> In the absence of a specific statutory delegation of authority to regulate behavior, rules to be valid:
>
> (a) Must perform an educational function;
>
> (b) Must be related to those aspects of the educational function that take precedence over other social interests that might be involved;
>
> (c) Must be related to the successful management, good order, and discipline of the schools, and thus must be necessary to enable the educational enterprise to carry out its function of educating students.

Levin, *supra* note 23, at 20–21.

55. Mitchell, *supra* note 12, at 300.

56. WND Staff, *9-year-old called drug dealer over cough drops*, World Net Daily (Dec. 19, 2008), https://www.wnd.com/2008/12/83973/.

57. Margaret Graham Tebo, *Zero Tolerance, Zero Sense*, 86 A.B.A. J. 40, 44 (2000).

58. *Fifth Freedom*, *supra* note 24, at 68; Mitchell, *supra* note 12, at 277.

59. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 510 (1969).

60. Mitchell, *supra* note 12, at 280 n.46.

61. Rashad Grove, *Texas Superintendent Defends Suspension of Teen Over Wearing of Locs*, BET (Jan. 19, 2024, 2:03 PM) https://www.bet.com/article/0m68wp/texas-superintendent-defends-suspension-of-teen-over-wearing-of-locs.

62. *Id.*

63. *Id.* at 276 n.25.

the education quality of all the students in that school.[64] During the inception of zero-tolerance policies, the country stopped viewing children as children and instead as adult criminals which flooded "youth into the criminal justice system where rehabilitation is not a primary goal."[65] Thus, birthing the perpetual cycle of referrals to the criminal justice system which results in continued run-ins with the criminal justice system. Even though data shows this process is ineffective, students being detained like criminals has become the new normal.[66] Take the 2011-2012 school year for example, during that school year approximately 260,00 students were referred to law enforcement by their schools and there were 92,000 school-based arrests.[67]

The deprivation of education is also found because there is no mandate that requires schools to provide alternative education for suspended or expelled students.[68] As noted above, the GFSA did not bar states from providing alternative education options for students who violated the act, but there otherwise is no guarantee of their provision.[69] So not only are these students missing days of school, but the risk of them falling behind is even greater because there is no guarantee that they are able to gain the education they missed. For example, a student who is expelled in the spring for a year can resume school in the next fall semester and ideally get back on track, however, a student expelled in the fall or winter may not have an easy path back to school.[70] This may be rooted in the idea that states have that students who violate the zero tolerance policies have waived their right to education.[71] However, if the goal of education is rooted in "the very foundation of good citizenship"[72] how can a student waive their right to being a citizen and what does that mean?

Brown asserted that separating children from others of similar age and qualification based solely on their race generates a feeling of

64. Zavala-Garcia, *supra* note 17, at 123.

65. Insley, *supra* note 46, at 1072.

66. *Fifth Freedom*, *supra* note 24, at 69; *see* Levin, *supra* note 23, at 65 ("Over fifty-six per cent of all suspensions in the states that were surveyed for this report were not dangerous.").

67. *Fifth Freedom*, *supra* note 24.

68. Insley, *supra* note 46, at 1066–67; Zavala-Garcia, *supra* note 17, at 117 ("One factor is that very '[f]ew state supreme courts have addressed the nexus between the existence of a fundamental right to education under the state constitution and the level of adequate education to protect that right' in alternative education schools.").

69. Zavala-Garcia, *supra* note 17, at 113.

70. Hanson, *supra* note 14, at 330.

71. Catherine Y. Kim, Daniel J. Losen & Damon T. Hewitt, The School-To-Prison Pipeline: Structuring Legal Reform 1 (N.Y. Univ. Press 2010).

72. Cedric M. Powell, *Schools, Rhetorical Neutrality, and the Failure of the Colorblind Equal Protection Clause*, 10 Rutgers Race & L. Rev. 362, 392 (2008)

inferiority about their place in their community, and that this may affect their hearts and minds in a way unlikely to ever be undone.[73] While this was based on race, it goes to stand that the same inferiority will happen with the victims of the school to prison pipeline. Zero tolerance policies are also called "exclusionary discipline."[74] As with adult convicts, when victims of these polices try to reintegrate into schools, "that student often suffers from emotional trauma, stigma, and embarrassment and may be monitored more closely by school resource officers, school officials, and teachers."[75] Scholars have coined this as "student disenfranchisement."[76] This purposeful exclusion and sense of disenfranchisement is what the court in *Brown* sought to avoid.

b. The School-to-Prison Pipeline

The school-to-prison pipeline describes "the intersection of the K-12 education system and a juvenile justice system."[77] This phenomenon is "the collection of education and public safety policies and practices that push our nation's schoolchildren out of the classroom and into the streets, the juvenile justice system, or the criminal justice system."[78] The pipeline is rooted in public education systems failing to meet the educational and social development needs of the students in their charge.[79] The failure, and inability, to meet the educational needs is precisely why the federal constitutional amendment is needed.

Like an assembly line, there are two ends to the school-to-prison pipeline, but it only moves one way.[80] The failure of many students is cemented at the front of the pipeline which is the denial of "adequate educational services."[81] The end result of the pipeline is that instead of being rehabilitated and theoretically flowing back up the pipeline, the students who enter the pipeline become involved with courts and experience increasingly great difficulty in reentering the mainstream education system.[82]

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73. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); Hanson, *supra* note 14, at 326.
74. Mitchell, *supra* note 12, at 278.
75. *Fifth Freedom*, *supra* note 24, at 66.
76. Mitchell, *supra* note 12, at 284.
77. KIM ET AL., *supra* note 71, at 1.
78. Deborah N. Archer, Article, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867, 868 (2009).
79. KIM ET AL, *supra* note 71, at 1.
80. *See id.* at 3.
81. *Id.* at 1.
82. *Id.* at 3.

Education is the foundation of liberty and without it, a person cannot be expected to succeed in life. However, the home of education has even shifted its appearance. Schools have become mirrors of prisons as seen with the implementation of metal detectors, cameras, and even drug sniffing dogs.[83] Instead of actualizing its goal of educating students and being a place to learn, schools have become visual representations of carceral states. This is unacceptable. By "becom[ing] a pathway to prison" schools fail both the children society as a whole.[84] That is not to say, nor the argument of this Note, that states shouldn't be able to ensure that their schools are safe; nor is that the argument of many scholars.[85] Nonetheless, the problems found in the structure of disciplinary actions that have resulted in the school-to-prison pipeline have to be recognized and addressed. Letting them continue in the current manner not only affects the quality of education students receive, but also effectively deprives them of education itself and instead funnels them into the criminal justice system.[86]

II. Identifying the Features of the School-to-Prison Pipeline

a. Disproportionate Disciplinary Actions

An underlying feature of the school to prison pipelines is the disproportionate effect of the disciplinary actions utilized. Although zero tolerance policies are used in all public schools, there is a very specific disparate impact on students of color and other minority groups.[87] This is evident by Black and minority students being disciplined both more frequently and more severely than their white counterparts. [88] For example, in the 2020–21 school year, although Black girls and boys made up only fifteen percent of the students enrolled in public schools, they accounted for fifty-three percent of the students who received expulsions or out of school suspensions.[89] Although *Brown* created a path for equal protection in the context of education, the undeniable effect of the school-to-prison-pipeline on Black and minority students continues to persist. Part of this is because of the extremely high hurdle one must

83. George, *supra* note 34, at 503.
84. Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 How. L.J. 343, 348 n.23 (2011).
85. Zavala-Garcia, *supra* note 17, at 105.
86. Hanson, *supra* note 14, at 340 ("Children who are being pushed out of schools because of criminalization of their behavior under zero tolerance are ending up in prison.").
87. Nance, *supra* note 34, at 924–25.
88. *Id.* at 924.
89. U.S. Department of Education Office for Civil Rights, *supra* note 16 (note that this is for kindergarten through 12th grade).

clear to prove a racial discrimination claim. Disproportionate impact of an action on one race is not enough to garner a discrimination claim.[90] In fact, a party must prove invidious discriminatory intent through historical background, substantive departures, departures from normal procedures, and so on.[91]

Note, these policies were enacted as a response to gun violence in schools, which occurred in predominantly white schools by white perpetrators.[92] However, converse to the goal laid out by the legislation, these policies are extremely visible in predominantly urban communities with adverse effects on Black and other minority students.[93] For example, during the 2015–2016 school year, Black students were three times more likely to be arrested at school than white students.[94] This disparity is also mirrored in suspensions and expulsions based on zero tolerance policies.[95] These numbers are exceedingly problematic as school and education are to be mirrors of life in society. By depriving Black and other minority students of accessing education, these students are effectively being told that they will also be deprived of opportunities later in life.[96]

b. Limitless Discretion of Teachers and School Districts

A major link in the school-to-prison pipeline is the limitless discretion held by its enforcers, specifically the contradictory effects of the discretion left to teachers and police officers in schools. Although zero tolerance policies were birthed from federal statutes, the enforcers of it are the educators and administrators. Ironically, zero-tolerance policies were structured in the predetermined manner to "limit the discretion — and the possibility of abuse of discretion — of educators."[97] Specifically, the policies were to ensure that teachers did not tolerate problematic misconduct.[98] However, the intent of limiting discretion has had the contrary effect. As discussed earlier, teachers are now intolerable of even the most innocuous behavior, utilizing the discretion given by the GFSA to expand zero tolerance to require the suspensions

90. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).
91. *Id.* at 267–68.
92. Henning, *supra* note 1, at 132.
93. *Id.*
94. *Id.*
95. Majd, *supra* note 84, at 365.
96. *Id.* at 362–63.
97. George, *supra* note 34, at 501.
98. *Id.* at 501 n.50.

and expulsions of students for "a myriad of infractions."[99] Students who fall victim to zero tolerance policies are labeled bad apples by educators and the stigma that label carries follows them throughout their time at school and into their future. Instead of preventative measures for behavioral problems like keeping "students focused on learning and intellectually engaged," teachers have decided it is easier if they identify and isolate the "bad apples."[100] This desire to ease the educators' burdens led to the increase of police officers in schools.

Police officers were first introduced to schools to allow students to have positive interactions with police officers.[101] As seen with the story of Niya, it is evident there was a deviation from the positive intent of police officers being placed in schools. A police officer's mission is to protect and serve; in the realm of education, it is to protect the students at the school and serve them as well, whether as a "(1) safety expert and law enforcer, (2) problem solver and liaison to community resources, [or] educator."[102] However, police officers have now been granted the discretion left to educators to handle disciplinary matters.[103] In fact, untrained teachers who are unable to manage classrooms are large contributors to student interaction with these police officers through referrals.[104] This is an echo of why the school-to-prison pipeline has continued, because of schools and states' inability to meet educational needs of students. Specifically, the issue lies in the fact that the officers on these campuses are trained by the local police department, but the training is not tailored to the fact that the officers will be interacting with youth, nor is there transparency about the school policing tactics.[105]

Now take a step back to understand the magnitude of this discretion issue. All fifty states have police officers, or SROs (school resource officers) in their schools.[106] In 1975, around twenty years after officers were first being introduced to schools, only one percent of schools reported having officers on their campus.[107] By the 2017–2018 school year, 36 percent of elementary schools, 67.6 percent of middle schools, and 72 percent of high schools reported not only having police officers

99. Insley, *supra* note 46, at 1050.
100. George, *supra* note 34, at 507.
101. *Id.* at 506.
102. *Id.*
103. *Id.*
104. *Id.* at 509.
105. *Id.* at 508, 510.
106. Henning, *supra* note 1, at 124.
107. *Id.*; George, *supra* note 34, at 505.

on campus, but that the officers also carried firearms routinely.[108] This, however, does not consider the number of officers assigned to campuses from police departments without a formal agreement with the schools or private security guards.[109]

These numbers serve as an illustration of the increased police presence that students are interacting with daily, mind you this is a surplus of twenty-seven thousand officers.[110] Then add in the discretion issue demonstrated by the fact that officers have military grade weapons on their persons while interacting with these students.[111] The same weapons used in the nineties to fight the "War on Drugs" when zero tolerance policies first began.[112] Now, if the goal of GFSA and zero tolerance policies was to keep guns and weapons out of schools, how do police officers carrying grenade launchers, M16's, and Mine-Resistant Ambush Protected vehicles actualize this goal?[113] It doesn't. Instead, it not only goes against the goal of the GFSA, but it also ignores the goals of schools and education to be a foundation for the next generation of citizens. Further, it promotes disorder and distrust and proliferates the carceral state leading students down the path of criminalization and prison.[114] Despite data that states having increased police presence in schools does the exact opposite of its intended goal, the number of police officers in schools steadily increases.[115]

c. Inadequate Disciplinary Measures

Under the Fourteenth Amendment, states cannot deprive any person within its jurisdiction of life, liberty or property without due process.[116] However, currently for education, this is only fully explored for "students who experience the disparate impact of school policies to which educators have 'full knowledge of the predictable effects of such adherence upon [different races].'"[117] While the Fourteenth Amendment provides avenues for redress due to blatant inequality, the due process aspects of this protection are a bit murky in terms of school

108. Henning, *supra* note 1, at 124.
109. *Id.*
110. *Id.*
111. *Id.*; George, *supra* note 34, at 514.
112. George, *supra* note 34, at 513.
113. Henning, *supra* note 1, at 124; George, *supra* note 34, at 513.
114. George, *supra* note 34, at 508.
115. *Id.* at 505.
116. U.S. Const. amend. XIV.
117. Bernard James, *Restorative Justice Liability: School Discipline Reform and the Right to Safe Schools*, 51 U. Mem. L. Rev. 691, 714 (2021).

discipline. The Court provides a three-prong test when determining if someone should be afforded procedural due process: (1) the private interests that will be affected by official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[118]

In *Goss v. Lopez*, the Supreme Court addressed this in the context of education. There, the nine appellees were suspended for ten days due to "disruptive or disobedient" behavior; however, they were not given a hearing pursuant to the local statute.[119] Even though, as the Court held, Ohio had no obligation to provide for the education of its citizens, because it had chosen to, the students in this case did in fact have a property interest in their education.[120] Because they did have a property interest, the Court held they were to be afforded some notice and some hearing.[121] Although the Court asserted "neither the property interest in educational benefits temporarily denied [. . .] is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary," this was not the sweeping win it purported to be.[122] Despite the Court affirming *Brown*'s characterization of education as "perhaps the most important function of state and local governments,"[123] the Court limited its decision to short suspensions.[124]

This protection only touches students who attend schools in states that offer the right to education.[125] Those states cannot violate a student's liberty interest without due process of law.[126] But education is not just the foundation of good citizenship in certain states, it's the foundation of good citizenship in this country, therefore, any other delegation of protection is the delegation of unequal education. All should have procedural due process because the deprivation of education constitutes a liberty interest being stripped away. Under the school-to-prison pipeline, the private interest being affected is education; the

118. Matthews v. Eldridge, 424 U.S. 319, 335 (1976).
119. Goss v. Lopez, 419 U.S. 565, 568–69 (1975).
120. *Id.* at 574.
121. *Id.* at 579.
122. *Id.* at 576.
123. *Id.*
124. *Id.* at 584 (limiting holding to suspensions that are ten days or less).
125. *Id.* at 576.
126. *Id.*

Court in *Goss* held that education is a property interest in at least one state, therefore, it should be regarded as a property interest everywhere. The government's interest remains school safety, but under a heightened scrutiny, that alone will not suffice.[127]

The risk of erroneous deprivation lies within the continuous run in with the criminal justice system. As stated above, zero tolerance policies introduce children to the adult criminal justice system. In the criminal justice system, the state has the burden to prove "beyond a reasonable doubt" the defendant met all the elements, including here, the child-defendant's intent.[128] However, this is not the case in the school context; punishment that affects a child's education through expulsion or suspension doesn't require the showing of the child's intent.[129] This is also known as "scienter" which is the "mental state in which one has knowledge that one's action, statement, etc., is wrong, deceptive, or illegal."[130] Without scienter, arguably, a school fails to show that their suspension or expulsion of a student is sufficiently related to the goal of school safety.[131] However, because zero tolerance policies do not require this showing that the student knew they were wrong, they violate a student's due process rights.[132]

III. Conceptualizing the Right to Education

a. Relevant Case Law

Brown v. Board of Education

> [E]ducation is perhaps the most important function of state and local governments . . . . It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available on all equal terms.[133]

127. Notes from the author, Balancing Private Interest Against Public Interest (lecture taught by Professor Ziyad Motala at Howard University School of Law on Nov. 1, 2022) (on file with author); *see also* Seal v. Morgan, 229 F.3d 567, 581 (6th Cir. 2000).
128. Hanson, *supra* note 14, at 320.
129. *Id.*
130. Zavala-Garcia, *supra* note 17, at 115 n.85.
131. *Id.* at 115.
132. *Id.*
133. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

The relevant education jurisprudence started in 1954 with *Brown v. Board of Education*. The Court stated that education was too important a concept to allow the doctrine of separate but equal to continue, and that education shouldn't be a place of barriers based on race.[134] However, even after demonstrating how the stigmas and labeling that came with unequal education were unacceptable for the irreparable harm it would cause, the Court still did not deem education a fundamental right.[135]

San Antonio v. Rodriguez

This sentiment rang true in *San Antonio v. Rodriguez* when the Court officially held that there was not a fundamental right to education.[136] The Court's rationale? The Court justified its silence on the premise that it lacked the expertise necessary to evaluate the state's school funding scheme and it would be wrong for them to question the policies regarding education made by the state and local officials.[137] More importantly, the Court's rationale heavily relied on the idea that because the right to education was not explicitly found in the U.S. Constitution, it was not a fundamental right worthy of federal protection.[138] This was difficult to conceptualize for two reasons: (1) the Court had deemed other rights not explicitly stated in the Constitution, such as the right to travel and the right to marriage, as fundamental rights; and (2) this felt like a major retreat from the *Brown* decision.[139] The Court used the Fifth and Fourteenth Amendment to determine that the rights to travel and marriage were fundamental.[140] The Court held that those rights were so ingrained in the into the idea of America, that infringing upon them was unthinkable.[141] If those rights were held as fundamental without being explicitly stated in the Constitution, and were deemed essential to liberty, why is that same logic not extended to education?

Education is the centerpiece of our democracy, and in fact, many have argued that education is fundamental because of other rights that

134. *Id.* at 494; Powell, *supra* note 72, at 392 ("The Court addresses a process failure — unblocking access to education which is 'the very foundation of good citizenship' - yet the Court has no answer for a substantive remedy.").

135. *Brown*, 347 U.S. at 493–94.

136. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

137. Robinson, *supra* note at 29, at 10–11.

138. *Rodriguez*, 411 U.S. at 35.

139. Shapiro v. Thompson, 394 U.S. 618, 630–31 (1969); Loving v. Virginia, 388 U.S. 1, 12 (1967); *Brown*, 347 U.S. at 493.

140. Saenz v. Roe, 526 U.S. 489 (1999); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Boddie v. Connecticut, 401 U.S. 371 (1971); *Shapiro*, 394 U.S. at 623; *Loving*, 388 U.S. at 12.

141. Ziyad Motala, Constitutional Law Cases: Equal Protection and Fundamental Rights 182, 214–17 (2d ed. 2022).

depend on it such as the right to vote.[142] However, in *Rodriguez*, the Court held that while everyone had the right to vote and read, they didn't have the right to understand or read well.[143] In *Rodriguez*, the plaintiffs argued that because the main means of funding schools was property tax, school districts in poorer areas suffered "substantial disparities."[144] Evidence of educational disparities was highlighted by the most affluent school district in San Antonio being able to spend $594 per student whereas the plaintiff's school district only being able to spend $356 per student.[145] Nonetheless, the Court held that the funding disparities were merely a reflection of the state's tax system, and the effects weren't significant enough to show purposeful education inequality.[146]

Tinker v. Des Moines

As affirmed in *Rodriguez*, under the current Constitution, the Court will only deal with education in the Fourteenth Amendment context.[147] That is, "*where* the state has *undertaken* to provide" education, they must provide it equally to all within their borders; and if a state actor, violates another right, such as the First Amendment, the Court will step in.[148] This is illustrated most notably in *Tinker v. Des Moines Independent Community School District*. In *Tinker*, after becoming aware of the plans of students to wear black armbands, the principals of the Des Moines schools created a policy requiring any student wearing an armband to remove it.[149] Three students wore the armbands to school and all three were suspended until they agreed to return to campus without the armband in order to prevent disturbance.[150] The three students were sent home on December 16th and 17th; they did not return until after New Year's Day.[151] The Supreme Court held this suspension of students based on their symbolic conduct was

142. *Fifth Freedom*, *supra* note 24, at 75, 77.
143. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973) ("Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.").
144. *Rodriguez*, 411 U.S. at 5, 10–11.
145. *Id.* at 12–13.
146. *Id.* at 50–51.
147. *Id.* at 59 (Stewart, J., concurring) ("I join the opinion of the Court because I am convinced that any other course would mark and extraordinary departure from principled adjudication under the Equal Protection Clause of the Fourteenth Amendment.").
148. Robinson, *supra* note 29, at 1 (emphasis added); *see generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
149. *Tinker*, 393 U.S. at 504.
150. *Id.*
151. *Id.*

unacceptable.[152] Not because they were deprived of education, but because their First Amendment right to free speech was violated.[153] "Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities."[154]

Plyler v. Doe

The Court continued this jurisprudence in *Plyler v. Doe*. In *Plyler*, to punish and target illegal immigrants residing in Texas, the state refused to let the children of illegal immigrants attend the public schools.[155] *Plyler* was a seminal case that prohibited states using their power out of animus or spite for an unpopular political group.[156] The Court held that education was an important right that couldn't be withheld from specific demographics, especially "the children who are plaintiffs in these cases [whom] can affect neither their parents' conduct nor their own status."[157] They also held that it was an abuse of political power for states to withhold education from an unpopular group based purely on spite.[158] However, in neither *Plyler* nor *Tinker* was the deprivation of education addressed as a focal point. That deprivation is where the problem lies.

b. Possible Language of the Twenty-Eighth Amendment

The Southern Education Foundation (hereinafter "SEF") has proposed various models for the federal amendment.[159] The models that best suit the amendment eliminating the deprivation of education through zero-tolerance policies thus attacking mass incarceration are: (1) the adequacy model, (2) the equitable finance model, (3) the international human rights model, and (4) the civil rights model.[160]

i. The Adequacy Model

According to the SEF, an adequacy amendment "could vest within the federal government the obligation to ensure that Americans have

152. *Id.* at 514.
153. *Id.*
154. *Id.* at 507.
155. Plyler v. Doe, 457 U.S. 202, 205 (1982).
156. Notes from the author, "Plyler v. Doe" (lecture taught by Professor Ziyad Motala at Howard University School of Law on Sept. 15, 2022) (on file with author) [hereinafter Plyler Notes].
157. Imoukhuede, *supra* note 53, at 60–61; *Plyler*, 457 U.S. at 219.
158. Plyler Notes, *supra* note 156.
159. Southern Education Foundation, *No Time to Lose: Why the United States Needs an Education Amendment to the US Constitution*, *in* A Federal Right to Education: Fundamental Questions for Our Democracy, 208, 227 (Kimberly Jenkins Robinson ed., 2019) [hereinafter SEF].
160. *Id.* at 227–28.

access to education of a specified type of quality."[161] This is commonly found in state constitutions that provide for the right to education.[162] Take the state of Kentucky for example. Kentucky's constitution provides that the state will provide, "protect[,] and advance" an adequate education.[163] This is measured by Kentucky's seven capacities, which includes "sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market."[164]

This model most aligns with that of a positive right, which is helpful when seeking the goal of preventing the deprivation of education access and educational quality, however, it will likely receive the most pushback.

ii. The Equitable Finance Model

Additionally, under an equitable finance amendment, by requiring federal funds and resources, the quality of education received will "help ameliorate disparities within and between states."[165] This model is exceedingly helpful because as stated above, issues exist both intrastate and interstate, although the disparities are greatly seen intrastate. Thus, an amendment based on this model will help level the playing field.

iii. The International Human Rights Model

An amendment based on the international human rights model "could declare that all Americans have an equal right to education of a particular type or quality without regard to location, class, or economic status."[166] This model has the most precedent to support it due to the United States' current commitment to international treaties.[167] Specifically, as a party to these treaties, the United States has affirmed that public education should be afforded "international recognition and state protection" because "education [is] a human necessity that ought not be denied."[168] By being a party to various international treaties proclaiming that education is an obligation of the federal government, it reminds the United States of its voluntary commitment in the

161. *Id.* at 227.
162. *Id.*
163. Zavala-Garcia, *supra* note 17, at 111.
164. *Id.* at 111–12.
165. SEF, *supra* note 159, at 227–28.
166. *Id.* at 228.
167. *See Fifth Freedom*, *supra* note 24, at 66.
168. *Id.*

amendment such that the United States will be estopped from allowing the deprivation of public education to continue.[169]

iv. The Civil Rights Model

Finally, an amendment under the civil rights model could "prohibit the states from relying on particular forms of education finance and resource allocation or require provision of a right to education of equally high quality."[170] As discussed, zero-tolerance policies proliferated because federal funding was conditioned on their implementation. An amendment under this framework would in essence eliminate zero-tolerance policies, stop the deprivation of public education caused by zero tolerance policies, and ensure a quality education is received.

Proposed Language for the Twenty-Eighth Amendment

Education is a human necessity. As such, all school aged children have the right to free, high quality public education. Neither the United States nor any state shall deprive any student of a quality education, nor shall the quality of education rely on any resource allocation. Further, any unreasonable disciplinary policies and practices that undermine the quality of education is unconstitutional. Any aggrieved party can seek redress.

IV. Using a Constitutional Amendment to Effectively Disrupt the School to Prison Pipeline

In determining the best resolution, the answer revolves around creating a standard of quality education that shines a light on equity, but specifically vertical equity. Vertical equity is achieved through remedial efforts to mitigate natural and social disadvantages by allocating greater resources to the neediest students.[171] These are most often implemented minimally though weighted student funding formulas.[172] Through these more equitable inputs, vertical equity measures attempt to achieve more equitable outputs.[173] The ideal of equality of educational opportunity

169. *See* Areto A. Imoukhuede, *Enforcing the Right to Public Education*, 72 Ark. L. Rev. 443, 446 (2019) [hereinafter Enforcing the Right].

170. SEF, *supra* note 159, at 228.

171. Joshua E. Weishart, *Protecting a Federal Right to Educational Equality and Adequacy*, *in* A Federal Right to Education: Fundamental Questions for Our Democracy 303, 307 (Kimberly Jenkins Robinson ed., 2019).

172. *Id.*

173. *Id.*

emerging from legislative and judicial incorporations of vertical equity principles is that, "all students should have an equal chance to succeed, with actual observed success dependent on certain personal characteristics, such as motivation, desire, effort, and to some extent ability [and not] on circumstances outside the control of the child, such as the financial position of the family geographic location, ethnic or racial identity, gender, and disability."[174]

a. Why Federal Constitutional Amendment as Solution

It is undisputed that all states have language concerning the right to education in their constitution.[175] But the issue is that the language itself and the interpretation of that language varies.[176] Only a handful of states explicitly use the words "right to education" in their constitutions.[177] For example, only sixteen states explicitly hold that the right to education is indeed fundamental under their state constitution, whereas seven states have held the exact opposite.[178] As discussed earlier, the protection of students when it comes to the school to prison pipeline rests in the protection afforded to them by their state. However, by creating a federal standard for public education, states will be forced to afford the necessary protection to students as students will be able to turn to the courts for redress when states fail to do so. To create the reform necessary to rectify the wrongs of the school-to-prison pipeline, the United States Constitution must be amended. As of this writing, in terms of securing the right to public education, federal statutes have failed. In fact, the current issue is because of a federal statute.

In 2000, President Bush enacted the "No Child Left Behind Act of 2001" to combat dropout rates by incentivizing federal funding for compliance with the attempt at national school reform.[179] This enactment led to Congress repealing the Gun Free Schools Act of 1994.[180] Unfortunately, children were left behind as No Child Left

174. *Id.*

175. Kristin Bowman, *The Inadequate Right to Education: A Case Study of Obstacles to State Protection*, *in* A Federal Right to Education: Fundamental Questions for Our Democracy 65, 66 (Kimberly Jenkins Robinson ed., 2019).

176. *Id.*; Enforcing the Right, *supra* note 169, at 459.

177. Emily J. Zackin, Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights 68 (Princeton Univ. Press 2013).

178. Zavala-Garcia, *supra* note 17, at 110.

179. Robert Keiner, *Dropout Rate*, *in* Urban Issues: Selections from CQ Researcher 1, 10 (CQ Press 2014).

180. Hanson, *supra* note 14, at 305.

Behind re-enacted the Gun-Free School Act as 20 U.S.C. § 7151.[181] This reenactment gave teeth to the issues with the school-to-prison pipeline that we see today as it broadened the scope of expulsions; no longer did schools have to prove the student intentionally brought the weapon to school, just that it was in their possession.[182] The problem of this wide scope is visible in the case of *Seal v. Morgan*. In that case, a student, Seal, was expelled after a knife was found in his car.[183] However, the knife was not his, it belonged to his friend who, unbeknownst to Seal, left it in his car.[184] Despite the fact Seal did not intentionally bringing a weapon to school, the school board still chose to expel him.[185] The United States Court of Appeals held, "the decision to expel a student from a school is a weighty one, carrying with it serious consequences for the student."[186] Ultimately, it held that while school safety was important, it was not so important that it could expel a student without at least knowing whether the student intentionally brought the knife to school.[187]

Because constitutional rights receive the utmost protection, the right to public education should be a federal constitutional right, not just a statutory right. The Court in *Goss* labeled education as a statutory right.[188] Statutory rights only require the lowest level of scrutiny. When looking at the effects of the school-to-prison pipeline with the understanding that education is only afforded the lowest level of scrutiny, the current landscape of public education makes sense. Even though the state shows that school violence is declining, under rational basis, the state asserting their "legitimate" interest in keeping schools safe is enough to keep the perpetuation of the school-to-prison pipeline going.[189] However, when discussing the exclusion of a student from school, and by extension their deprivation of education, that decision cannot be made lightly. The Supreme Court admitted this in *Goss*, when it held, "education is perhaps the most important function of state and local governments, and the total exclusion from the educational process

181. *Id.* at 305, 348.
182. *Id*. at 305.
183. *See generally* Seal v. Morgan 229 F.3d 567 (6th Cir. 2000); *see also* Ending Zero Tolerance, *supra* note 38, at 137.
184. *Seal*, 229 F.3d at 571.
185. *Id.* at 572–73.
186. *Id.* at 581.
187. *Id.* ("Nevertheless, the Board may not absolve itself of its obligation, legal and moral, to determine whether students intentionally committed the acts for which their expulsions are sought by hiding behind a Zero Tolerance Policy that purports to make the students' knowledge a non-issue.").
188. Ending Zero Tolerance, *supra* note 38, at 165.
189. Zavala-Garcia, *supra* note 17, at 123.

for more than a trivial period…is a serious event in the life of the suspended child."[190] The Court has continuously stated that they only adjudicate the rights prescribed by Congress, thus it is time for Congress to prescribe the right to education.

The idea of a Constitutional amendment surrounding public education is not a new one. In the late nineteenth century, Senator Joseph Brown asserted that "if Congress has the power to protect the vote in the free exercise of the use of the ballot, it must have power to aid in preparing him for intelligent use."[191] Although the U.S. Constitution currently does not contain an education clause, each State does.[192] It stands to reason that if every state has created a commitment to public education, the federal constitution should also have a commitment. Despite the vast options of language based on state constitutions and highlighting the issues the amendment seeks to resolve, there are still difficulties in drafting the language of the Twenty-Eighth Amendment.

Specifically, the difficulty lies in making sure the language is as specific as possible so as not to allow a repeat of history, but vague enough to ensure that states cannot easily propose loopholes to evade the heightened commitment. This was the exact issue that led to the status of the school-to-prison pipeline.[193] For example, the purpose of this amendment is to create a federal standard of education to correct disparities found in the current Constitution's silence on education. At the heart of this amendment, it is imperative to ensure that the quality of education is explicitly stated. However, there must be room to explain the standard being set. This section of the Note will discuss what the federal standard for public education should look like, especially in the areas of funding and discipline.

b. Possible Issues in Creating the Amendment

There are two major roadblocks barring this constitutional amendment: the nation's marriage to negative rights and federalism.

Federalism is an important part of American democracy.[194] There are two major federalism arguments when discussing creating a fundamental right to public education.[195] The most encompassing

190. Goss v. Lopez, 419 U.S. 565, 576 (1975).
191. SEF, *supra* note 159, at 213.
192. Zavala-Garcia, *supra* note 17, at 110.
193. *Id.* at 279 (noting school districts interpreted the Gun-Free Schools Act more broadly than intended which led to zero-tolerance going past its intended goal).
194. *Fifth Freedom*, supra note 24, at 69.
195. *Id.* at 69–70.

argument is that a federal standard will diminish States' rights.[196] At the outset, this argument is weak specifically because this federal standard will not differ from any other standard that the federal government sets to create duties for states to meet or exceed. However, this federalism argument may pose difficulties based on the departure from *Lochner*.[197] The *Lochner* era was defined by the Court expanding on individual, economic rights.[198] However, the Court departed from *Lochner* in *Carolene Products* and stated that the economic rights not only harmed individuals, but specifically insular and discrete minorities.[199]

This departure strengthens the argument against creating a fundamental right to public education because the paramount case in the realm of education was to protect the rights of insular and discrete minorities.[200] While the hope of this amendment is to prevent deprivation of education to all, it is undisputed that education deprivation, especially deprivation through the school-to-prison pipeline disproportionately affects minorities. But the saving grace is the importance the Court and the history of this nation have placed on education. For example, in *Rodriguez*, the Court held there was nothing in its decision barring the fundamental right to education from being created in the future; Congress just had to act before they could hold anything different.[201] Alternatively, the second federalism argument is that the federal government is too distant to understand the intricacies of education.[202]

However, the federal standard acts as a safeguard against the issues created by the inability of states to address prime issues in public education. America's marriage to negative rights creates another hurdle for creating a fundamental right to education.

Negative rights are best described as privacy rights, in which the recipient of the rights is being left alone, whereas with positive rights the recipient is asking the government to provide something for them.[203] Notably, negative rights center civil liberties; these liberties restrict governments from using their power to infringe on protected conduct.[204] Specifically, positive rights are commitments of the government to

196. *Id.* at 69.
197. *Id.* at 56–57.
198. *Id.* at 55.
199. *Id.* at 57; United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).
200. *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954).
201. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58–59 (1973).
202. *Fifth Freedom*, *supra* note 24, at 70.
203. Enforcing the Right, *supra* note 169, at 445.
204. *Fifth Freedom*, *supra* note 24, at 49.

provide something for the people, whereas negative rights are limits on the power of the government.[205] The issue lies in the fact that the right to public education is normally classified as a positive right because that would involve the government providing something for individuals. However, scholars posit that granting the right to public education delves into both positive and negative rights. Joshua E. Weishart argues that a federal right to education would serve as a unifier of negative and positive rights because "it implicates the federal constitution guarantees of substantive due process and equal protection."[206] He states that juncture is where the ability "to protect children from the harm of educational disparities and deprivations" resides.[207]

These arguments are not unfounded; however, they do have their weaknesses and are outweighed by the benefits of creating this amendment.

c. Benefits of Creating the Twenty-Eighth Amendment to the United States Constitution

While the overarching benefit of amending the United States Constitution is to ensure equal, quality education for all, understandably that may not be convincing. Particularly when it comes to the push away from positive rights, which requires the government to get involved usually financially. However, continuing the current path has tremendous costs on the government and society. There are two main costs inherent to the school-to-prison pipeline: first, the costs on society to support the education deprived victims of the school to prison pipeline; and second the costs to maintain the pipeline, through zero-tolerance policies.[208] In 1998, Professor Mark A. Cohen of Vanderbilt University performed calculations on what societal costs to society are for a person who drops out of high school and has encounters with the criminal justice system.[209] Today, Cohen's calculations show that the costs to society for a person who drops out of school and has encounters with the criminal justice system is between $1.7 million and $2.3 million.[210] A 2016 study estimates that in total, incarcerated, high school drop

205. *Id.* at 57–58.
206. Weishart, *supra* note 171, at 304.
207. *Id.*
208. Hanson, *supra* note 14, at 338.
209. *Id.*
210. *Id.*

outs costs society $3.3 billion annually based on their loss of income.[211] Additionally, the cost of detaining a juvenile per year is $148,767 but the long term-costs can amount to $7.9 billion to $21.47 billion a year.[212] For example, in Louisiana during the 2012–2013 school year, the state spent $23,455 per prisoner but only $10,701 per student which was reflected in the arrests of 16,582 students that school year.[213] These numbers do not even touch the amount the federal government spends to keep the pipeline going. But the root of the issue starts with the federal funding that caused the current issue.

Zero-tolerance policies have always been tied to federal funding; when the GFSA passed in 1994, only schools that implemented the zero tolerance policies were granted those federal funds.[214] The mandated implementation by the federal government being tied to funding becomes problematic because states and schools that are struggling financially are more likely to implement these policies to receive the funding which leads to underprivileged low-income and minority students having more run-ins with law enforcement.[215] After the GFSA was passed, the Department of Justice created the Community-Oriented Policing Servicing Program ("COPS").[216] This program has "awarded an excess of $750 million in grants to more than [three thousand] law enforcement agencies, resulting in more than [sixty-three hundred] newly hired SROs."[217] After the Sandy Hook shooting, this program was granted another $45 million.[218] In 2017, the budget request for this program was a total of $97 million and this is solely to provide funding to hire more police officers to patrol schools.[219]

Conversely, by creating this fundamental right to education, the costs to society are not only alleviated but so too can national economic growth occur.[220] Two scholars from the National Institute of Economic and Social provided the following formula after observing the long-term effects of education on the economy: "*In GDP per Capita = 0.35*

211. Michael McLaughlin, Carrie Pettus-Davis, Derek Brown, Chris Veeh & Tanya Renn, *The Economic Burden of Incarceration in the United States* 7 (Institute for Justice Research and Development, No. IJRD-072016, 2016), https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication_pdfs/Economic_Burden_of_Incarceration_IJRD072016_0_0.pdf.
212. *Fifth Freedom*, *supra* note 24, at 77.
213. George, *supra* note 34, at 517.
214. Insley, *supra* note 46, at 1046.
215. Mitchell, *supra* note 12, at 282; SEF, *supra* note 159, at 325–26.
216. Barbara A. Fedders, *The End of School Policing*, 109 Cal. L. Rev. 1443, 1472 (2021).
217. George, *supra* note 34, at 514.
218. *Id.*
219. *Id.* at 515.
220. *Fifth Freedom*, *supra* note 24, at 74.

in enrollment rate + 5.23."[221] "This formula suggests that a one percent increase in the enrollment rate raises GDP by 0.35 percent,"[222] which shows that increased enrollment in schools and investments in education and less on policing in schools has positive effects on the national economy.[223]

Conclusion

The United States was founded to be the land of the free, where the citizens could choose their destinies and live productive lives. The founding fathers knew that to make this dream a reality and ensure the longevity of the nation, education was vital. However, despite their intuition, for over 200 years, the United States has failed to make the steps necessary to ensure public education is protected and equally afforded to all children in the United States. This failure has eats at the heart of the founder's intention of founding this country—creating productive citizens to keep the country running. Instead of carrying out the nation's primary ideals, the United States Constitution remains silent on the right to education. This silence feeds a large issue in the United States—mass incarceration.

By not federally protecting the right to public education, the United States prevents schools from being the springboard necessary to birth responsible citizens, and instead, allows them to become petri dishes for mass incarceration. Zero tolerance policies have shifted from their original intent of keeping schools safe and now demonize everyday behaviors. This redirection creates the unfortunate phenomena known as the school-to-prison pipeline. Instead of producing the next generation's great minds, schools now churn out the next set of inmates. Under the current Constitution, there is nothing that can be done to stop this cycle. However, the cycle can be broken by amending the current Constitution.

It is imperative that the Constitution is amended to provide equal, quality education to every child in the United States. By providing and protecting the right to public education, the Constitution will be able to live up to the goals envisioned by this nation's founders.

221. *Id.*
222. *Id.*
223. *Id.*