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HOWARD LAW JOURNAL

70th Anniversary Edition

Twenty-First Annual
Wiley A. Branton/*Howard Law Journal* Symposium

The 21st Century Social Engineer: Crafting the Future of the Fourteenth Amendment

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About the Wiley A. Branton/ *Howard Law Journal* Symposium

Each year, Howard University School of Law and the *Howard Law Journal* pay tribute to the life and legacy of our former dean, Wiley A. Branton. What began as a scholarship award ceremony for the first-year student who completed the year with the highest grade point average has grown into a day-long program focusing on an area of legal significance inspired by Branton's career as a prominent civil rights activist and exceptional litigator. The Symposium is then memorialized in the *Journal*'s spring issue following the Symposium. The expansive nature of Branton's work has allowed the *Journal* to span a wide range of topics throughout the years, and the *Journal* is honored to present this issue, *The 21st Century Social Engineer: Crafting the Future of the Fourteenth Amendment*, in recognition of the great Wiley A. Branton. Past Symposium issues include:

Unfinished Work of the Civil Rights Act of 1964: Shaping An Agenda for the Next 40 Years

The Value of the Vote: The 1965 Voting Rights Act and Beyond What Is Black?: Perspectives on Coalition Building in the Modern Civil Rights Movement

Katrina and the Rule of Law in the Time of Crisis Thurgood Marshall: His Life, His Work, His Legacy

From Reconstruction to the White House: The Past and Future of Black Lawyers in America

Speaking Truth to Power: A New Age of First Amendment Rights?

Health Equity: Developments & Challenges of the COVID-19 Pandemic

Immigration Equality

Capital Punishment

Letter from the Editor-in-Chief

70 years ago, a milestone in the history of the Howard University School of Law was reached with the publication of its first academic publication, the *Howard Law Journal*. Under the leadership of Dean George M. Johnson, the *Howard Law Journal* was established with two main objectives: "(1) to train students in legal research, analysis, and expression, and, (2) to serve the members of the legal profession and the public."[1] Those dual aims of scholarship and service have been wed to the work of the *Howard Law Journal* since its inception. In sight of those goals, the *Journal* stands as a critical and storied voice in the fight for justice and equality under the law. While that paradigm remains unrealized, the *Journal* must continue to heed the call.

Today, the *Howard Law Journal* continues that tradition by honoring the life and legacy of Wiley A. Branton, our late School of Law Dean and civil rights hero. He was a man who "was there when we needed him."[2] We honor his untiring devotion by hosting the annual Wiley A. Branton Symposium. The Branton Symposium serves as a meeting place for students, scholars, advocates, and community members alike to come together and address the most significant issues facing our country today. From that thoughtful discourse emerges the scholarship which comprises the final Issue of each volume, the Branton Issue.

On October 3, 2024, the Twenty-First Annual Wiley A. Branton Symposium was held at the Howard University School of Law. The theme of this year's Symposium was: *The 21st Century Social Engineer: Crafting the Future of the Fourteenth Amendment*. We used this year's Symposium to challenge participants to use their legal imagination and envision a future that does not yet exist. What are the possibilities of a democracy that embodies the full promise of the Fourteenth Amendment?

Our 70th Anniversary Issue opens with an inspiring article from Sherrilyn A. Ifill, the Vernon E. Jordan, Jr. Esq. Endowed Chair in Civil Rights at Howard University School of Law. Who better is there to begin a discussion on the Fourteenth Amendment? In *Revising the Promise of the 14th Amendment*, Professor Ifill provides a much-needed reminder that the Fourteenth Amendment was a "plan for rebuilding a shattered

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[1] George M. Johnson, *The Law School*, 1 How. L.J. 86, 86 (1955).

[2] *See* Judith Kilpatrick, There When We Needed Him: Wiley Austin Branton, Civil Rights Warrior (2007).

nation." It was a "blueprint for a new America." That plan, as Professor Ifill makes clear, was "thwarted and derailed within thirty years of its ratification." Her examination of the Amendment's Founders, Framers, and cautions make clear that its promise is yet unfulfilled. In the throes of an uncertain future and democracy, Professor Ifill asserts that the Fourteenth Amendment "offers a way forward."

Next, in *Monuments, Law, and Cultural Transformation*, Kenneth B. Nunn, the Dr. Patricia Hilliard-Nunn Memorial Racial Justice Term Professor and Professor of Law Emeritus at the University of Florida Levin College of Law, tells a story about "Old Joe," a confederate statue which stood in Florida for 113 years, a monument of Sankofa bird, and a lynching marker. In his article, Professor Nunn describes these monuments as the result of "a process of myth-making undertaken in service of broader political goals." Monuments and their myths, he argues, are pivotal to shaping consensus and collective memory. Professor Nunn undertakes a thoughtful analysis of the use of myths by lawyers and activists alike to bring about cultural and legal change. He concludes with both a timely reminder and call to action that "[t]o do the work of social engineering," it requires one "to change the narrative."

These articles are followed by Notes from two members of the *Howard Law Journal*. Migueyli Aisha Duran, Executive Notes & Comments Editor, takes a critical look at juvenile incarceration in *Of the Least of These: The Case Against Juvenile Confinement*. She analyzes the racial injustices in the construction of Black childhood and the inadequacy of current legal standards. These deficiencies lead Duran to call for a child's right to "self-actualization" under the Due Process Clause of the Fourteenth Amendment. Broadly, Duran argues that this right is rooted in the "history and tradition" of the United States and enables a child to "grow, mature, and realize their innate potential."

Summer Durant, Executive Solicitations & Submissions Editor, seeks to unravel the intersections of race, property, and social currency in *Whiteness as Property by Proxy: How Affirmative Action's End Marks the Beginning of a Crucial Racial Reckoning*. In her Note, Durant builds on Cheryl Harris's seminal work, *Whiteness as Property*, examining race and property in a new cultural and legal environment. Durant makes a critical analysis of racial triangulation, the inequitable history of the Court's Equal Protection jurisprudence, and the "claims behind the claims." Durant concludes by emphasizing the need for coalition-building and the complete reimagination of one's relationship to race and property.

Last, but certainly not least, this Issue concludes with special guest remarks from the Honorable Eric H. Holder, Jr, the 82nd Attorney General of the United States of America. His remarks were delivered on April 15, 2025, at the Third Annual Charlotte E. Ray Lecture at the Howard University School of Law. While these remarks were not delivered at the Branton Symposium, the *Journal* saw fit to include his powerful words in recognition of the moment in which we find ourselves. Attorney General Holder's remarks are a powerful and stark reminder to "teach the truth," "defend the vulnerable," and to "call injustice by its name." As his remarks make clear, "[w]e cannot afford to look away." This moment demands courage.

As you read the submissions in this Issue, I encourage you to not only think about the present but also to think about the future. Ask yourself what it would mean to live in a society in which the Fourteenth Amendment is as much a part of our daily parlance as the First, Second, or Fifth. The future requires us to think imaginatively — not just about what is, but also about what *can be*.

As my tenure in this position comes to a close, I am left with an overwhelming sense of gratitude. I am deeply indebted to the Volume 68 Executive Board. Summer, Migueyli, Nigel, and Roshard, it was my sincere pleasure to lead alongside each one of you. Thank you for your counsel, support, and fastidiousness. I would also like to thank the entire Editorial Board, our Faculty Advisors, Dean Fairfax, and the law school's administrative staff for their unwavering diligence throughout the school year. Publishing the *Howard Law Journal* is a process that requires the efforts of so many more than those whose names appear on our masthead. I am deeply grateful for every effort, seen and unseen, that has brought the *Journal* to its 70th year.

To have walked in the footsteps of the likes of Jeanus B. Parks, Goler Teal Butcher, and so many others is an honor I shall not soon forget. It has truly been my privilege to serve as the Editor-in-Chief of the *Howard Law Journal*. My parting wisdom to each and every editor is simple: let the mission be your north star. Let it guide your thoughts. Let it guide your actions. Now and always, let it guide *you*.

Simeon M. Spencer
Editor-in-Chief
Volume 68

Reviving the Promise of the 14th Amendment

Sherrilyn Ifill*

I. Introduction

Eric Foner, the foremost historian of the Reconstruction period, describes the Fourteenth Amendment as "the most important amendment added to the Constitution since the Bill of Rights in 1791."[1] The Fourteenth Amendment is the longest Amendment in the Constitution, and it is the most cited provision of our Constitution in litigation.[2] Its provisions offer protection for the rights of citizens, racial minorities, women, immigrants, and corporations, among others, and protect all persons against infringement by states on our core democratic rights. It is the Fourteenth Amendment that embodies the vision of America as a multi-racial democracy. Yet, still most Americans know very little about the Amendment and its seminal place in shaping America's modern national identity.[3]

The absence of academic or advocacy organizations devoted to the study and reach of the Fourteenth Amendment is illustrative of this.[4] The launch of the 14th Amendment Center for Law & Democracy at Howard Law School this year, is designed to create a space and context in which we wrestle with the implications of the

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1. Ted Widmer, *Searching for the Perfect Republic: Eric Foner on the 14th Amendment*, Guardian (Nov. 15, 2023), https://www.theguardian.com/law/2023/nov/15/eric-foner-14th-amendment-trump.

2. Malik Ali, *The 14th Amendment: A "Mini-Constitution"*, Teaching Am. Hist. (June 6, 2023), https://teachingamericanhistory.org/blog/the-14th-amendment-a-mini-constitution/ ("[T]he Fourteenth is the *longest*, most *complex*, and most *litigated* amendment of our Constitution.").

3. *See generally How Well Do Americans Know the Constitution*, Inst. for Citizens & Scholars (Sept. 10, 2019), https://citizensandscholars.org/how-well-do-americans-know-the-constitution.

4. *Id.*

derailed promise of the Fourteenth Amendment, and to engage in collaborative strategies with lawyers, business leaders, artists, and journalists to breathe new life into this most potentially transformative constitutional provision.[5]

II. Why the Fourteenth Amendment?

The Fourteenth Amendment is rightly understood as a "plan for rebuilding a shattered nation" and a blueprint for a new America.[6] It was designed not only to address the exigent circumstances of the moment, but to "*forevermore* secure the safety of the Republic."[7] But its promise, its invitation to reset American democracy was thwarted, derailed within thirty years of its ratification. It took the vision, activism, and lawyering of visionary Black activists and attorneys to revive the Amendment's promise and power in the 20th century.[8] But, as in the 19th century, that revival has faced a decades-long backlash.[9] As our democracy teeters on the brink of existential crisis in the 21st century, the Fourteenth Amendment offers a way forward. The guarantees and protections of the Amendment remind us of the bold vision and intention of our Second Founding.

But the context of the Amendment's creation and ratification, the bold and ambitious nature of the project of re-making our nation after the Civil War also offers us a compelling and instructive guidance as we face profound fracture in our democracy yet again. It is not only war that can divide a nation. And constitutional amendments are not always necessary to set our nation on the path to strengthened democracy. But the lessons of the Fourteenth Amendment—its substantive provisions, and even the history of how its promise was derailed—offer important instruction for contemporary democracy advocates. Moreover, there is still a great deal of life yet in the Fourteenth Amendment, and the project of reinvigorating the Amendment as a framework for our democracy and our national identity remains a worthy and urgent project.

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5. *See, e.g.*, Cedric Mobley, *Howard University Launches the 14th Amendment Center for Law and Democracy*, Dig (Mar. 27, 2025), https://thedig.howard.edu/all-stories/howard-university-launches-14th-amendment-center-law-and-democracy.

6. Cong. Globe, 39th Cong., 1st Sess. 69 (1866) (speech of Rep. Thaddeus Stevens).

7. Cong. Globe, 39th Cong., 1st Sess. 2542 (1866) (statement of Representative John Bingham) (emphasis added).

8. *See* Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 Loy. L.A. L. Rev. 1143, 1156–57 (1992).

9. *Id.*

III. Reviving the Full Force of the Fourteenth Amendment

A. Recovering the History of the 14th Amendments Founders and Framers

The history of the United States's "Second Founding"—a term coined by Eric Foner—under the Fourteenth Amendment has been obscured for most Americans.[10] When asked to name the founders and framers of the Constitution, even highly educated Americans will name Madison, Washington, Hamilton, and Jefferson to the exclusion of figures such as Representative Charles Bingham (R-OH), the principal drafter of the Fourteenth Amendment; or Representative Thaddeus Stevens (R-PA) or Senator Charles Sumner (R-MA), "Radical Republican" members of Congress who were instrumental to the drafting and stewardship of the Amendment's adoption and ratification.[11] And certainly removed from this category of constitutional framers are also key Black and women historical figures such as Frederick Douglas, the formerly enslaved man who escaped and became the most consequential abolitionist and anti-slavery orator, and who intentionally deployed the use of a new, artistic technology—photography—to curate and disseminate images of himself that countered narratives of Black inhumanity.[12] The photographic images of Douglass, his undeniable nobility and dignity, and his status as a formerly enslaved person, were important influences in ongoing discussions about the fitness of Black people for citizenship. Douglass became the most photographed man of the 19th century.[13]

Women played a powerful role in shaping conceptions of equality as well. Black abolitionists like Frances Ellen Watkins Harper, and the influential suffragist Elizabeth Cady Stanton, pushed ongoing debates about the role of women as citizens.[14] Participants in the many Colored Conventions in the decades leading up to the Civil War used the petitioning process to press their demands and ideas to elected officials

10. Widmer, *supra* note 1.

11. *Id.*

12. *See generally* Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit (2021) (explaining how the Fourteenth Amendment can be traced back to abolitionist constitutionalism and the work of abolitionists).

13. *Id.*; *see also Frederick Douglass and the Power of Photography*, Nat'l Park Serv., https://www.nps.gov/articles/000/frederick-douglass-and-the-power-of-photography.htm (last visited Mar. 15, 2025).

14. Sharon Harley, *African American Women and the Nineteenth Amendment*, Nat'l Park Serv., https://www.nps.gov/articles/african-american-women-and-the-nineteenth-amendment.htm (last visited Apr. 8, 2025).

and leaders.[15] And free Black people who fought to negotiate their place in American society, often as small, independent tradesmen or as sailors also contributed to debates about what the elements of freedom would need to be to ensure the ability of Black people to access the benefits of citizenship.[16] Enslaved people were "founders" as well. The consistent, unrelenting efforts of enslaved people to find freedom, to hold together their families, to learn to read, to find pockets of economic autonomy even within the slave system, all powerfully influenced American conceptions of liberty and of the essential components of citizenship in the decades preceding the Civil War.[17]

This expansive view of "founders and framers" is an intentional lens through which students in my Fourteenth Amendment seminars approach the materials for our class. Recognizing the broader and more diverse influences that come to bear on the eventual formalization of rights and democratic protections is critical to the study of how democracies are built and how law is made.

More alarming than the lost history of the "founders" of our post-Civil War republic, has been the "lost text" of the Amendment—the disappearance of Sections 2 and Section 3 from law school instruction and from the recognition of most constitutional lawyers.

In most law schools, students learn principally about only two sections of the Fourteenth Amendment—Section 1 and Section 5, as part of a standard Constitutional Law course. Section 1 of course includes the guarantees of birthright citizenship, equal protection and due process of laws.[18] While the Bill of Rights protects Americans against infringements on liberty by the federal government.[19] The Fourteenth Amendment constitutes an explicit recognition that protection against the action of states is also necessary.[20] The Amendment was designed specifically to ensure the full citizenship of Black people in the United States—both formerly enslaved and free. The first sentence of the Fourteenth, which guarantees birthright citizenship, is the constitutional provision that overturns the Supreme Court's decision in *Dred Scott v. Sandford*. In that case, the Supreme Court, led by

15. *About the Colored Conventions*, Colored Conventions Project, https://coloredconventions.org/about-conventions (last visited Mar. 15, 2025).

16. *The African American Odyssey: A Quest for Full Citizenship*, Libr. Cong., https://www.loc.gov/exhibits/african-american-odyssey/free-blacks-in-the-antebellum-period.html (last visited: Apr. 8, 2025) [hereinafter *African American Odyssey*].

17. *See id.*

18. U.S. Const. amend. XIV, § 1.

19. U.S. Const. amends. I–X.

20. U.S. Const. amend. XIV.

Chief Justice Roger Taney deemed Black people—both enslaved and free—ineligible for citizenship.[21] In this way, the *Dred Scott* decision made Black people stateless persons prior to the Civil War. After the War, the 39th Congress ratified the Thirteenth Amendment outlawing slavery, and passed the Civil Rights Act of 1866, the nation's first civil rights law.[22] The Civil Rights Act purported to confer citizenship on Black people. But when the bill was vetoed by President Andrew Johnson, Congress (even after overriding the veto) recognized the need to anchor Black citizenship in the Constitution, lest future Congress' renege on the promise of Black citizenship.

Section 1 also guarantees protection for the privileges and immunities of citizenship and due process rights.[23] Most significantly, Section 1 includes the guarantee of "equal protection of laws," the constitutional source for what has become the expectation among Americans of equality as a core component of citizenship.[24] It is important to recognize that this conception of citizenship, which seems so rooted in American democracy, is not a product of our pre-Civil War Constitution. Our original Constitution did not include or embrace the concept of equality. Instead, the original Constitution included the provision that required that the enslaved would be counted as three-fifths of a person for congressional representation, and a provision allowing the continuation of the slave trade (delicately referred to as "the importation of persons") until 1808.[25]

In its explicit guarantee of equality before the law, the Fourteenth Amendment reaches back over the shameful compromises of the first constitution to the clear and intentional language of equality in the Declaration of Independence: "we hold these truths to be self-evident that all men[sic] are created equal."[26] In this way, the Fourteenth Amendment is a profoundly unifying statement of national identity,

21. Dred Scott v. Sandford, 60 U.S. 39, 450–53 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

22. Civ. Rights Act of 1866, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.").

23. U.S. Const. amend. XIV, § 1.

24. *Id.*

25. U.S. Const. art. I, § 2; *Essay: Slavery and the Constitution*, Bill Rts. Inst., https://billofrightsinstitute.org/essays/slavery-and-the-constitution (last visited Mar. 15, 2025).

26. The Declaration of Independence para. 2 (U.S. 1776).

finally fully integrating the vision and identity of our nation articulated in America's statement of nationhood into our Constitution.

Section 5 of the Fourteenth Amendment is familiar to most law students. It assigns the power to enforce the protections set forth in the Amendment to Congress.[27] This is critically important of course. The intentional positioning of the federal government as a bulwark between Black people and the states is powerful—not only because of what it says about the Framers grasp of how deeply white supremacist ideology was steeped in southern states. But it is powerful also because it creates a new identity and set of responsibilities for the federal government. The creation of the civil rights statutes like the Ku Klux Klan Acts in 1870 and 1871,[28] enacted to provide a remedy for Black communities facing white mob violence, and the creation of the Department of Justice in 1870 to prosecute under the new civil rights statutes, further solidified this conception of federal responsibility towards protecting the full citizenship of Black Americans.[29]

Given the significance of Sections 1 and 5 of the Fourteenth Amendment, it is understandable that they would be given primacy, and even exclusivity in law school instruction.

B. Heeding The Amendment's Cautions: Insurrection and White Supremacy

But by leaving out attention to Sections 2 and Section 3 of the Amendment, generations of law students and lawyers have been left with little basis for understanding how the framers clear-eyed and pragmatic understanding of challenges that could undermine the guarantees and protections so fulsomely set forth in Section 1.

Understanding Section 2 and 3 of the Fourteenth Amendment requires taking a deep dive into the materials and investigations that informed the work of the 39th and 40th Congresses. This includes the report by Carl Schurz, an emissary appointed by President Andrew Johnson to investigate conditions in the South, and the report of the

27. U.S. Const. amend. XIV, § 5.

28. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. §§ 1983, 1985, 1986).

29. Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Service*, 66 Stan. L. Rev. 121, 122 (2014) ("[T]he DOJ was created to increase the federal government's power in the wake of the Civil War and to enforce civil rights during Reconstruction.").

Joint Committee on Reconstruction.[30] It requires some understanding of the nature of debates among members of Congress about the proposed provisions of the Fourteenth Amendment. For example, it seems odd to us today, but Section 1 of the Fourteenth Amendment garnered relatively little debate and controversy.[31] There were concerns raised by some members over the extension of birthright citizenship to children of Chinese laborers—a matter raised, discussed and settled with the understanding that such children born on U.S. soil would be citizens.[32]

It was Sections 2 and 3 that garnered the most passionate and contentious debates among the members.[33] There were representatives who proposed that those who participated in the insurrection should be barred from voting.[34] Their own experience with former Confederates, a number of whom demanded to be admitted to Congress as representatives of their states even before insurrectionary states had been readmitted to the Union, convinced the congressional committee drafting the Fourteenth Amendment that two stubbornly persistent phenomenon presented an ongoing threat to the potential of a unified multiracial democracy: the deeply-held embrace of insurrection and white supremacist ideology.[35] Frederick Douglass, who demanded that Congress include an affirmative right to vote for Black men in the Fourteenth Amendment contended that this spirit would "pass from sire to son."[36] He predicted "it will not end in a year; it will not end in an age."[37]

Rather than include an affirmative right to vote (which many northern white representatives opposed because of their states restrictions on voting based on property ownership and literacy),[38] the drafters compromised on a punishment regime for states that engaged in voter suppression against Black men. Section 2 provides that any state that bars men over age 21 from voting will have its representation

30. *See* Carl Schurz, Report on the Condition of the South (1865); H.R. Rep. No. 39-30, at VII–XXI.

31. *See generally* H.R. Rep. No. 39–30.

32. Cong. Globe, 39th Cong., 1st Sess. 498 (1866).

33. *See generally* H.R. Rep. No. 39–30.

34. H.R. Rep. No. 39-30, at XI (noting that the United States could not allow "[t]reason, defeated in the field" to prevail in political office).

35. *See id.*

36. Frederick Douglass, What the Black Man Wants, Speech at the Anti-Slavery Society in Boston (April 1865), https://www.loc.gov/resource/rbaapc.23100/?sp=8&st=text.

37. *Id.*

38. *See generally* H.R. Rep. No. 39–30.

in Congress reduced in proportion to the number of voters who are disenfranchised.[39]

To protect against the ongoing spirit of insurrection, the framers drafted Section 3. It forbids those who engaged in insurrection from serving in state or federal office.[40] It is a disability which can only be removed by a 2/3 vote of Congress.[41]

In 2024, the state of Colorado refused to include then former President Trump on the ballot because of Section 3 of the Fourteenth Amendment.[42] The decision was upheld by the Colorado Supreme Court.[43] But the United States Supreme Court decided that Colorado did not have Section Three authority to remove Trump from the 2024 president ballot in Colorado without some affirmative authorizing legislation from Congress.[44] The Court's interpretation was roundly criticized by scholars and commentators across the ideological spectrum.[45]

C. The Power and Promise Subverted, Restored and Diminished Again

Despite the power and promise of the Fourteenth Amendment, by the turn of the 20th century it had been largely rendered powerless to ensure the full citizenship of Black people. Hostile Supreme Court decisions,[46] Congressional inaction,[47] and most alarmingly, and ongoing racist violence,[48] returned many Black people to a condition

39. U.S. Const. amend. XIV, § 2.
40. U.S. Const. amend. XIV, § 3.
41. *Id.*
42. Trump v. Anderson, 601 U.S. 100, 104–08 (2024) (per curiam).
43. *Id.*
44. *Id.* at 115–17.
45. *See, e.g.*, William Baude & Michael Stokes Paulsen, *Sweeping Section Three Under the Rug: A Comment on* Trump v. Anderson*,* 138 Harv. L. Rev. 676 (2025).
46. *See, e.g.*, Slaughter-House Cases, 83 U.S. 36 (1872) (essentially disempowering the privileges & immunities clause); United States v. Cruikshank, 92 U.S. 542 (1875) (weakening the power of the KuKlux Klan Acts to deal with white mob violence against Black communities; The Civil Rights Cases, 109 U.S. 3 (1883) (striking down the Civil Rights Act of 1875); and Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that state compelled racial segregation is consistent with the Fourteenth Amendment).
47. Congress passed no civil rights statutes for the protection of the rights of Black people from 1875 until 1957.
48. Between the 1877 and 1950, there were more than 4,400 lynching of Black people in the U.S. Reconstruction in America: Racial Violence after the Civil War, 1865-1875 7 Equal Just. Initiative (2020), https://eji.org/wp-content/uploads/2005/11/reconstruction-in-america-rev-111521.pdf. Congress failed repeatedly to pass anti-lynching legislation. *Id.* at 99. During that same period, the Tulsa Race Massacre, The Elaine, Arkansas Race Massacre, the Rosewood (FL) Massacre, the Wilmington (NC) Race Riot, the 1919 Race Riots of East St. Louis, are but a few of the incidents of mass violence by white supremacists against Black citizenship. *See* Melissa

of near-servitude by the dawn of the 20th century, and at the very least ensured that all Black people lived as second class citizens in our republic.

It took decades, and dogged determination by ordinary people—civil rights activists and lawyers who revived the Fourteenth Amendment in the middle of the 20th century. Civil rights lawyers successfully worked to overturn the Supreme Court's devastating decision in *Plessy v. Ferguson*, which had endorsed the hardening legal apartheid in half the country.[49] This goal was finally accomplished when the Supreme Court overturned *Plessy* in *Brown v. Board of Education* in 1954.[50] The lawyers who conceived of, strategized, and litigated those cases were trained here at Howard Law School. Their mentor, the Dean of the law school, Charles Hamilton Houston, was the most consequential lawyer of the 20th century. His vision of Black lawyers as "social engineers," and the lawyers he trained—including Thurgood Marshall, Pauli Murray, and Oliver Hill among others—resuscitated the Fourteenth Amendment from the dustbin of American constitutional history.

Brown opened up the democratic imagination of Black people across the country. To have the Supreme Court affirm the first-class citizenship of Black people was powerful and encouraged Black people to believe that the broken promises of Reconstruction might yet be fulfilled. Through the use of boycotts, sit-ins, marches and protests, civil rights activists compelled Congress to act at long last to enact legislation to enforce the rights guaranteed under the Fourteenth Amendment. The passage of the Civil Rights Act of 1957, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968, constituted the high point of Congress's use of its Section 5 enforcement power. Then, for a brief period of twenty years, from 1954 when *Brown v. Board of Education* was decided until 1974 when the Supreme Court began its civil rights retreat, the power of the Fourteenth Amendment was revived.[51] A slow but

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Petruzzello, *List of race massacres in the United States*, Encyc. Britannica, https://www.britannica.com/topic/list-of-race-riots-and-massacres-in-the-United-States (last visited May 8, 2025). And of course, the rise of the Ku Klux Klan and the random violence associated with the organization remained a palpable threat against Black people wishing to exercise full citizenship rights in the United States. *See id.*

49. *See* Plessy v. Ferguson, 163 U.S. 537, 540–64 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

50. *Brown*, 347 U. S. at 494–96.

51. Roger B. Handberg, Jr., *The 1974 Term of the United States Supreme Court*, 29 Western Pol. Q. Rev. 298, 298 (1976) ("In contrast to the dramatic events of the summer of 1974, the Supreme Court returned to its position of relative public invisibility. Although there was some

steady retrenchment began in the late 1970s and took firm hold by the 1980s.[52] But even during that period, Congress remained, by and large, supportive of civil rights, demonstrating bipartisan commitment to the Voting Rights Act, and standing in favor of protections against employment discrimination, and programs supporting Black economic advancement.

Today we are facing the greatest hostility to the Fourteenth Amendment since the post-Reconstruction period. Indeed, we are now in a period of full-blown hostility to the project of multiracial democracy. An anti-civil rights platform has become the platform of one of our two major political parties, and white supremacist ideology has become acceptable political rhetoric and policy. At the same time, the Supreme Court has aggressively narrowed its interpretation of the guarantees of the Fourteenth amendment (except in the context of corporations which, since the 1880s when the Supreme Court began issuing decisions that embraced the concept of corporate "personhood" under the Fourteenth Amendment, have enjoyed ever-expanding Fourteenth Amendment protections).

The concept of "colorblindness"—taken from the dissent of Justice Harlan in *Plessy v. Ferguson*,[53] has become a kind of incantation, a shibboleth, which the Court invokes to either weaken or strikes down efforts designed to overcome the significant and ongoing effects of systemic racism that the Court itself enabled through its decisions in the late 19th and first half of the 20th[54] century. From programs designed to promote long-denied opportunities for minority[55] to voluntary desegregation efforts,[56] to voluntary race conscious college admissions programs, the Supreme Court has once again become the architect of a diminished and enfeebled Fourteenth Amendment.

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continuation of the activism of the late Warren Court, this more conservative court continued its retreat[.]").

52. *See id.* at 306, 307 (explaining decisions in which the Court declined to extend application of the Fourteenth Amendment); Sondra Hemeryck, Cassandra Butts, Laura Jehl, Adrienne Koch & Matthew Sloan, Comment, *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R. & C.L. L. REV. 475, 477 (1990) ("In the 1980's, however, the Court reversed course, and began to chip away at the civil rights statutes.").

53. Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

54. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

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

56. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

D. How Should We Approach the 14th Amendment Today?

Given this rather dire history, some might argue that the lesson of the Fourteenth Amendment is that pursuing a multiracial democracy anchored in equality is a fool's errand. I see it quite differently. No one would suggest that the First Amendment is a dead letter simply because free speech rights are being restricted in a variety of ways. Or that we should not pursue claims of right counsel or an impartial tribunal under the Sixth Amendment simply because injustice in the criminal legal system remains a reality. Why then should Black people relinquish the Fourteenth Amendment as a source of the promise of first class and equal citizenship?

I argue that we must return to the Fourteenth Amendment and work to invigorate an understanding of it—not only by lawyers and judges—by among ordinary Americans. Taken as a whole, the Amendment demonstrates that we can do two things at once. We can speak to America's soaring promises of equality and justice, and also recognize with a pragmatic eye that there are forces, deeply embedded in our national character, that must be guarded against if we are ever able to achieve the goal of a healthy, robust democracy for which we all hope.

It is not a small thing, to bury an aspect of history so central to the integrity and arc of American democracy. This should compel us to ask not only how the story of the Fourteenth Amendment has become such a footnote to our memory, but *why*.

And this compels me to make one other point. The story of the Fourteenth Amendment, its founders, and of the nascent efforts to enforce it, was deliberately buried. In its place, southerners advanced the "Lost Cause" narrative[57]—a story of southern chivalry and gentility, over northern takeover, and of rapacious and unqualified Black people who were unfit for citizenship. That story was advanced through a textbook project, initiated by the United Daughters of the Confederacy, designed to teach public school children a sanitized version of the antebellum south, of slavery, and of Reconstruction[58]—an account that ennobled slaveholders and the Confederacy. It was this movement in the early 1900s that also spearheaded a project to build confederate

57. Henry Louis Gates Jr., *The 'Lost Cause' That Built Jim Crow*, N.Y. Times (Nov. 8, 2019), https://www.nytimes.com/2019/11/08/opinion/sunday/jim-crow-laws.html.

58. *The Connection Between the United Daughters of the Confederacy and the KKK*, Atlanta Hist. Ctr. (Dec. 9, 2022), https://www.atlantahistorycenter.com/blog/the-connection-between-the-united-daughters-of-the-confederacy-and-the-kkk/.

monuments, which until recently were fixtures in cities and towns throughout the country. It took more than 100 years for activists to begin a concerted challenge to the dominance of these monuments in public places. First in Charlottesville in 2017, and then more widely in 2020 after the murder of George Floyd in Minnesota, Black activists fought to remove these exalted venerations of white supremacy from public squares, courthouses, university campuses and other public spaces.[59] More importantly, they opened up a critical interrogation of how decisions are made about the history we celebrate through public monuments. This has become a rigorous area of study and scholarship.

But there was a scholarly element to the narratives that buried the truth about the Fourteenth Amendment and Reconstruction as well. Historian Charles Dunning and his students and mentees at Columbia University, published scholarship that became known as the "Dunning school" of Reconstruction history.[60] Their work was powerfully influential for decades and shaped how most adults in the second half of the 20th and early 21st century came to understand Reconstruction. More rigorous accounts that gave voice, agency, and analysis to the actions taken by and against Black people, like W.E.B. DuBois's *Black Reconstruction*,[61] were read by Black scholars, but did not reach mainstream post-Civil War studies until after the creation of Black studies programs on college campuses in the late 1960s.

This experience reminds us that narrative is important. We ignore it at our peril. "Winning" requires more than court victories and the passage of new laws. We must attend to the story that is told about lawmaking. We must speak not only to courts—and in the current climate of the Supreme Court—perhaps not even principally to the courts. We must educate legislators, educators, business leaders, and ordinary people about the Fourteenth Amendment's promise and history.

I contend that the story of the Fourteenth Amendment, of Reconstruction, and of those who dared to believe that we could make one unified democracy out of our fractured one is a noble story of which Americans should be proud. It is an account from which we should

59. Bonnie Berkowitz & Adrian Blanco, *A record number of Confederate monuments fell in 2020, but hundreds still stand. Here's where*, Wash. Post (Mar. 12, 2021), https://www.washingtonpost.com/graphics/2020/national/confederate-monuments/.

60. Howell Raines, *Here's the Civil War History They Didn't Want You to Know*, Wash. Post. (Dec. 20, 2023), https://www.washingtonpost.com/opinions/2023/12/20/howell-raines-alabama-civil-war-history.

61. *See generally* W.E.B. Du Bois, Black Reconstruction in America (1935).

draw power, to fuel the democratic imagination we need to confront our contemporary challenges.

There are hit plays that celebrate Alexander Hamilton, and television series that elevate John Adams, and no shortage of literary encomiums to George Washington and Thomas Jefferson.[62] That there has never been a motion picture about the life of Frederick Douglass, or of Charles Sumner is telling. The arc of Douglass's life, from his enslavement on the Eastern Shore of Maryland and in the port of Baltimore, his daring escape by train to New York, and his transformation into a renowned orator, writer and public intellectual would seem to present rich cinematic possibilities.[63]

Charles Sumner was beaten nearly to death on the floor of the United States Senate by South Carolina Representative Preston Brooks.[64] The attack was vicious, premeditated and undertaken in retaliation for Sumner's anti-slavery remarks three days earlier, which Brooks believed was targeted in part at a distant relative.[65] The savagery of the attack—when the cane he used to beat Sumner broke during the attack, Brooks continued the beating with the remaining end of the cane—was shocking.[66] Sumner was gravely injured, and was unable to return to the Senate for three years.[67] His empty desk on the Senate floor during that time served as a reminder of the brutality that southerners were prepared to unleash in order maintain slavery. Sumner's vindication came in the 39th Congress with his role as one of the principal leaders and architects of the Reconstruction Congress.[68] Again, the cinematic possibilities of this violent precursor to the Civil War, are rich.

But these powerful stories have not been given the kind of treatment afforded to the lives of the founders and framers of our original Constitution, and thus these figures and their contribution to

62. Jon Youshaei, *Hamilton: How Lin-Manuel Miranda Created a Hit Musical*, Forbes (Nov. 24, 2020), https://www.forbes.com/sites/jonyoushaei/2020/11/24/hamilton-how-lin-manuel-miranda-created-a-hit-musical.

63. Christopher Klein, *How Frederick Douglass Escaped Slavery*, History (Sept. 3, 2013), https://www.history.com/articles/frederick-douglass-escapes-slavery.

64. *The Caning of Senator Charles Sumner*, U.S. Senate, https://www.senate.gov/artandhistory/history/minute/The_Caning_of_Senator_Charles_Sumner.htm (last visited Apr. 8, 2025); *see also* Senate Historical Office, *Senate Stories | Charles Sumner: After the Caning*, U.S. Senate (May 4, 2020) [hereinafter *Sumner: After the Caning*], https://www.senate.gov/artandhistory/senate-stories/charles-sumner-after-the-caning.htm.

65. *Sumner: After the Caning*, *supra* note 64.

66. *Id.*; S. Rep. Com. No. 34–191 at 5 (1856).

67. *Sumner: After the Caning*, *supra* note 64.

68. *Id.*

our nation have not become members of the cast of characters routinely understood to be the "founding fathers" of our nation. For this reason, engagement with art and artists is a critical part of the 14th Amendment seminar I teach, and it is intentionally part of the collaborative network of the 14th Amendment Center.

IV. Conclusion

I am mindful of the great work undertaken by graduates of this law school to breathe new life into the Fourteenth Amendment. Under their care and shaped by their strategic vision, the Fourteenth Amendment took center stage in bringing a measure of true democracy to this country for the first time. Many of us are beneficiaries of that extraordinary work. The principal beneficiary is American democracy which could not rightly be said to exist while half the country was governed by a system of legal apartheid.

Those lawyers and advocates who ultimately "broke the back of Jim Crow" gave our nation the gift of democracy. That they accomplished this at a time when they themselves were not regarded as full first-class citizens of this country tells us that our ability to imagine and work towards fulfilling a vision of democracy is stronger than the reality of oppression. It is my hope that the 14th Amendment Center for Law & Democracy will be a place where we can not only imagine but undertake substantive work that fulfills the promise of this most consequential addition to our Constitution.

Appendix A

Amendment XIV (1868)[69]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing. insurrection or rebellion, shall not be

69. U.S. Const. amend. XIV.

questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Monuments, Law and Cultural Transformation

Kenneth B. Nunn*

Introduction

I want to tell a story about "Old Joe." Old Joe is a statue memorializing the soldiers who fought for the Confederacy during the Civil War.[1] The statue was erected on January 19, 1904, almost forty years after the Civil War, on Robert E. Lee's birthday.[2] It was dedicated by the United Daughters of the Confederacy at a ceremony held on the Alachua County courthouse lawn in Gainesville, Florida.[3] The Gainesville orchestra played and there were speeches by judges, elected officials, and a former Confederate general, Robert Bullock, who also served in the state legislature and in the U.S. Congress.[4] Old Joe stood there for 113 years.[5] It was removed on August 14, 2017, and given back

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1. Andrew Caplan, '*Old Joe' Comes Down*, Gainesville Sun (Aug. 14, 2017, 11:32 PM), https://www.gainesville.com/story/news/2017/08/14/confederate-statue-removed-from-downtown-gainesville/19682483007/.

2. *Id.*

3. *Id.*

4. *Confederate Monument—Unveiled in Gainesville—Many Visitors Present—Speeches By General Bullock and Hon W.L. Palmer*, Ocala Evening Star (Jan. 20, 1904), at 1, https://www.newspapers.com/image/76779152/? terms=%22confederate%22.

5. *Id.*

to the United Daughters of the Confederacy, who moved it to a local cemetery.[6]

On June 19, 2023, Juneteenth,[7] Old Joe was replaced by Alachua County's commission.[8] It was replaced with a statue styled after a Sankofa[9] — a bird-like symbol that comes from the Akan people of Ghana, West Africa.[10] The Sankofa statue was dedicated to and erected in honor of my late wife, Dr. Patricia Hilliard-Nunn, who was a professor of African American Studies at the University of Florida.[11] A picture of her is affixed to the base of the statue.[12] I might add, over the years she produced many graduates who went on to study law at Howard University School of Law, including three who are currently Howard law students.

As far as I know, Alachua County's Sankofa statue marks the only case where a Confederate statue was replaced with an African symbol.[13] And — so far as I can tell — it is also the only case where a Confederate statue was replaced with a monument containing the image of a woman of African descent.

The Sankofa symbol stands for the importance of remembering, recovering and preserving your history.[14] Literally, *Sankofa* means "to go back and fetch it" in *Twi*, the Akan language.[15] In Alachua County, the Sankofa symbol was selected to memorialize Dr. Hilliard-Nunn and replace "Old Joe" for two reasons. First, Dr. Hilliard-Nunn introduced

6. *Id*.

7. *See A Proclamation on Juneteenth Day of Observance*, Biden White House Archives (June 18, 2024), https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2024/06/18/a-proclamation-on-juneteenth-day-of-observance-2024/.

8. Glory Reitz, *Sankofa Statue Unveiled to Honor Local Historian*, Main Street Daily News (June 19, 2023, 6:47 PM), https://www.mainstreetdailynews.com/news/sankofa-statue-unveiled-to-honor-local-historian.

9. *Id*.

10. In her chapter entitled "Sankofa and Remix," Kimberly Cleveland explains, "Sankofa is expressed visually through the *adinkra* symbol of a bird with its feet facing forward (suggesting future orientated movement) and its head turned backwards." Kimberly Cleveland, Africanfuturism: African Imaginings of Other Time, Spaces, and Worlds 107 (2024).

11. Reitz, *supra* note 8.

12. The picture of Dr. Patricia Hilliard-Nunn is observable in this photograph posted on the Facebook page of the Historic Haile Homestead at Kanapaha. *Historic Haile Homestead at Kanapaha Plantation*, Facebook (June 19, 2023), https://www.facebook.com/Haile.Plantation/posts/%EF%B8%8F/648491757306580/.

13. Reitz, *supra* note 8.

14. Maxine L. Bryant, *The Savannah-Sierra Leone Sankofa Connection: Going Back to Fetch It*, Savannah Morning News (Dec. 15, 2023, 6:06 AM), https://www.savannahnow.com/story/opinion/columns/2023/12/15/georgia-southern-professor-chronicles-journey-to-sierra-leone/71883007007/ ("The word Sankofa comes from a Ghana language and means 'to retrieve' or 'go back and fetch it.'")

15. *See* Cleveland, *supra* note 10, at 107 (relating the Akan proverb "It is not wrong [taboo] to go back to fetch what you have forgotten").

and popularized the concept of Sankofa in her lectures throughout the county and the region.[16] Secondly, Dr. Hilliard-Nunn actually *performed* Sankofa by bringing the history of racial violence in Alachua County to light through her research and activism.[17]

As a result of her teaching and advocacy, the Alachua County Community Remembrance Project (ACCRP) was organized by a group of concerned citizens.[18] The new organization was led by the then-chair of the county commission and included several of the commissioners.[19] The ACCRP partnered with Bryan Stevenson's Equal Justice Initiative and began erecting memorial markers at the sites of the over 40 lynchings that took place in Alachua County since the end of Reconstruction.[20] There is such a marker about 20 paces from the Sankofa statue to memorialize the 10 African Americans who were lynched within the city of Gainesville.[21]

Over the years, then, the courthouse lawn in Gainesville, Florida has hosted three memorials, all erected as attempts to make meaning out of the history of the region. The Sankofa statue, Old Joe, and the lynching marker would each be considered "commemorative properties" under the criteria for inclusion in the National Register of Historic Places.[22] According to the National Park Service Bulletin explaining that criteria:

> Commemorative properties are designed or constructed after the occurrence of an important historic event or after the life of an important person. They are not directly associated with the event or with the person's productive life, but serve as evidence of a later generation's assessment of the past.[23]

16. *See* Alachua County, *Sankofa Statue Honoring Dr. Hilliard-Nunn Unveiled*, Alachua Cnty (June 14, 2023), https://alachuacounty.us/news/Article/pages/Sankofa-Statue-Honoring-Dr-Nunn-Unveiled.aspx (describing Dr. Hilliard-Nunn as "a teacher, scholar, artist, and community activist who . . . lectured at many venues throughout Alachua County").

17. *See* Christel N. Temple, *The Emergence of Sankofa Practice in the United States: A Modern History*, 41 J. Black Stud. 127, 136–141 (2010) (describing various political and cultural practices organized around the concept of Sankofa).

18. *About ACCRP: Truth and Reconciliation*, Alachua Cnty, https://truth.alachuacounty.us/about (last visited Mar. 15, 2025).

19. *Id*.

20. *Id*.

21. *See Racial Terror Lynching: The History*, Alachua Cnty, https://truth.alachuacounty.us/history/racial-terror, (describing marker) (last visited Mar. 15. 2025).

22. *See* Criteria for Evaluation, 36 C.F.R. § 60.4 (2019).

23. *See* U.S. Dep't of the Interior, Nat'l Park Serv., How to Apply the National Register Criteria for Evaluation 2 (1995), https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf.

In other words, as Professor Byrnes puts it, "[M]onuments do not reliably tell us about the subject being commemorated but only about the mindset of those promoting the commemoration."[24]

Monuments, it is fair to say, are exercises in myth-making. The three monuments on the Alachua County Courthouse lawn detail a process of myth-making undertaken in service of broader political goals. As lawyers also seek to advance political goals through their trials and their advocacy, there is much for lawyers to gain from a careful study of how monuments are used in this way.

In the pages that follow, I will discuss myths and their significance in the creation and maintenance of culture, the role that symbols like monuments play in shaping our myths, and the particular value of monuments as a means to advance racial justice.

I. Myths and the Transformation of Culture

The ability to engage in mythmaking is central to the lawyer's craft. Lawyers rely on mythic narratives to craft arguments that move juries, judges, legislatures, and electorates.[25] An extensive body of scholarship explains how lawyers win cases by using archetypal stories that trace commonly shared motifs within a society.[26] This is true because "[n]arrative patternings of stock stories create the knowledge structures and judgmental heuristics upon which juror judgments are formulated."[27] Rape cases in particular show the central power of myths. Failing to present facts in conformity with the myths that people hold about rape makes an attorney's case less persuasive to a jury.[28]

According to one legal scholar who has examined jury decision-making in rape cases:

> [The] fundamental premises that jurors bring with them to the courtroom are what psychologists call "cognitive structures." While

24. Peter Byrne, *Stone Monuments and Flexible Laws: Removing Confederate Monuments Through Historic Preservation Laws*, 71 Fla. L. Rev. F. 169, 171 (2020).

25. *See* Anthony G. Amsterdam & Jerome Bruner, Minding the Law 135, 177–79 (2000) (describing persuasive power of narratives in legal arguments).

26. *See, e.g.*, Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 Seattle U. L. Rev. 767, 768 (2006) (arguing that "people respond—instinctively and intuitively—to certain recurring story patterns and character archetypes").

27. Phillip N. Meyer, *Desperate for Love III: Rethinking Closing Arguments as Stories*, 50 S.C. L. Rev. 715, 751 (1999).

28. *See* Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. Cal. Rev. L. & Women's Stud. 387, 474–75 (1996) (arguing that the "defendant's tale simply seems more plausible than the woman's precisely because the former matches cultural rape tales).

> cognitive structures allow individuals to learn new information, they tend to perpetuate themselves by screening out information that is inconsistent with what is already believed. Cognitive inflexibility is what prosecutors face in trying to convict rapists when jurors have cognitive structures based on rape myths. Jurors will strive to reach a verdict in a rape case that will not conflict strongly with the rape myth cognitions they hold at the beginning of the trial.[29]

Taslitz believes that attorneys can and should deploy myths (and/or "knowledge structures,"[30] or "narrative structures,"[31] depending on one's terminology) to advance the interest of their clients. Because jurors rarely stray from the cultural themes that structure the facts in a case, he argues that "[s]uccess in a rape trial . . . requires fitting into, or at least analogizing to, general cultural themes."[32]

These findings concerning juror decision-making are not confined to rape cases, and they are not confined to jurors. The argument can be made that all human decision-making and all human communication is organized around narratives and myths.[33] Myths can be understood as the central organizing principle of a shared belief or practice.[34] According to Dwight Greene, "[m]yths are a complex of narratives that dramatize and encapsulate the world visions and historical sense of a people or

29. Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. Davis L. Rev. 1013, 1050 (1991).

30. *See* Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. Cal. L. Rev. 1103, 1126–28 (2004) (describing "knowledge structures").

31. Mark K. Osbeck, *What Is "Good Legal Writing" and Why Does It Matter?*, 4 Drexel L. Rev. 417, 452 (2012) (noting "[a] growing body of literature has discussed the important role these narrative structures play in people's understanding of the world, and in how lawyers and judges interpret legal arguments").

32. Taslitz, *supra* note 28, at 491.

33. *See* F. Carter Phillips, *Greek Myths and the Uses of Myths*, 74 Classical J. 155, 155 (1978–1979) (opining that "[m]yths in general, whether the Greek ones or those of other cultures, can offer an introduction to a significant mode of human thinking that is deeply embedded within the minds of us all."). *See also* Carl Friedrich & Zbigniew Brzezinski, Totalitarian Dictatorship and Autocracy 93–94 (1965) (arguing the creation of myths works "to satisfy the human craving for transrational beliefs in terms of which man's emotions can be organized for action"). For the importance of narrative *see* Hayden White, *The Value of Narrativity in the Representation of Reality*, *in* On Narrative 1, 2 (W.J.T. Mitchell ed., 1981) ("[N]arrative is a metacode, a human universal on the basis of which transcultural messages about the nature of a shared reality can be transmitted."); Peter Brooks, *The Law as Narrative and Rhetoric*, *in* Law's Stories 14, 14 (Peter Brooks & Paul Gewirtz eds., 1996) ("Narrative appears to be one of our large, all-pervasive ways of organizing and speaking the world—the way we make sense of meanings that unfold in and through time."); and Jerome Bruner, Acts of Meaning, at xii (1990) (describing ways in which narratives shape experience and proposing to examine "the nature and cultural shaping of meaning-making, and the central place it plays in human action").

34. *See* Carol Barner-Barry & Cynthia Hody, *Soviet Marxism-Leninism as Mythology*, 15 Pol. Psych. 609, 614 (1994) (arguing that "Because myths are shared, they forge bonds between people and create community.")

culture."[35] As such, myths make up the substance or base out of which a community emerges. Thus, as Professor Greene states, "[one] function of myth is socializing, that is, to enforce a moral order and to shape individuals to the requirements of their social group."[36] Consequently, once established, myths can be manipulated and deployed to advance a set of goals or agendas, be those political, religious, or social.[37]

The process for changing myths is well understood by social constructivists.[38] I find the approach adopted by cultural studies scholars to be particularly useful when it comes to understanding the resilient, but pliable nature of myths. Myths can be understood to be part of what Stuart Hall calls the "consensus."[39] According to Hall, the consensus is "a common system of values, goals and beliefs."[40] The consensus, then, constitutes the prevailing ideology that the public subscribes to. In other words, "[t]he 'consensus' consists of the accepted parameters of social conduct and the established view of the purposes and functions of the institutions of society."[41]

Although the term "consensus" seems to suggest that affirmative consent underlies the conformity to the values, goals, and beliefs that are central to the consensus, the reality is more complicated. One does not simply choose the consensus or the constellation of myths it is composed of.[42] We *live* in the consensus and, for the most part, the consensus is all we know. Moreover, because the consensus is so

35. Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v. Florida*, 67 Tul. L. Rev. 1979, 2016 (1993).

36. *Id*.

37. "The idea that myth can be an agent of institutional change can be traced to the writings of Georges Sorel (1916), who wrote that myths were ideas carried by particular groups seeking social change." John P. Crank, *Watchman and Community: Myth and Institutionalization in Policing*, 28 Law & Soc'y Rev. 325, 332 (1994).

38. *See generally*, Aaron R. Duggan, A Fictive Reality: The Social Construction of Mythologies and the Mythologizing of Social Interactions (May 28, 2014) (Ph.D. dissertation, Pacifica Graduate Institute).

39. Stuart Hall, Chas Critcher, Toney Jefferson, John Clarke & Brian Roberts, Policing the Crisis: Mugging, the State, and Law and Order 212 (2d ed. 2013).

40. *Id*.

41. Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, Am. Crim. L. Rev. 743, 761 [hereinafter *Trial as Text*].

42. The consensus does not come about as the result of choice:

> Unlike social contract theories, Hall's consensus does not arise spontaneously from the formation of the body politic. Consensus, like other significations, is *produced*. The production of consent must be understood as a semiotic process . . . . The parameters of the consensus must be arrived at through the process of articulation, the work of selecting those values which will become part of the consensus and excluding those which will not.

Id. at 762.

essential to the character of a society, it attracts the interest of the State, and the involvement of the State limits the freedom that can be attained through the consensus.[43] The State's engagement with the consensus is not neutral. The state seeks to use the consensus to promote its own ends and the interests of power. "Power relies on the consensus to govern because without consent it cannot govern efficiently."[44] True, the state may also govern through coercion, but coercion has its limits. Afterall, the State cannot station a policeman at every citizen's elbow. It is far better to have a population that complies "willingly" with the dictates of power.[45] To achieve this, the State must work through the consensus, which it must shape to its interests. The consensus, then, "implies domination rather than freedom."[46] Indeed, it is merely "'the complementary face of domination.'"[47]

The consensus exists as a result of a semiotic process, and it is through this semiotic process that the State attempts to assert its control. As I have stated elsewhere:

> The parameters of the consensus must be arrived at through the process of articulation, the work of selecting those values which will become part of the consensus and excluding those which will not. As Hall puts it, "language and symbolization is the means by which meaning is produced." Thus, the consensus is produced or given meaning by the discourse of those who subscribe to the consensus. Clearly, within this discourse, some themes predominate and others fall aside.[48]

The consensus arises out of the multitude of viewpoints and perspectives put forth by those who subscribe to the consensus. But these individuals and groups, who Hall refers to as "definers," do not

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43. *See* STUART HALL ET AL., *supra* note 39, at 212 (discussing how "consensus is . . . important for the modes of operation of the modern state").

44. *Id*.

45. Hall, et al. clarify how the consensus, or the accepted view of reality, operates as an instrument of control by the State. They explain:

> [W]hat the consensus really means is that a particular ruling-class alliance has managed to secure through the state such a total social authority, such decisive cultural and ideological leadership, over the subordinate classes that it shapes the whole direction of social life in its image . . . . But, because this domination has been secured by consent . . . that domination not only seems to be universal (what everybody wants) and legitimate (not won by coercive force), but its basis in exploitation actually disappears from view.

HALL ET AL., *supra* note 39, at 213.

46. *Trial as Text*, *supra* note 41, at 761 (quoting HALL ET AL. *supra* note 39, at 216).

47. *Id*.

48. *Id.* at 762 (quoting HALL ET AL. *supra* note 39, at 67).

all have the same power to shape the consensus.[49] Hall describes those who have the most power to shape the consensus as "primary definers."[50] According to Hall, primary definers are authority figures who occupy high status positions.[51] They are perceived to have greater expertise than the rest of the population and their views are more widely accepted and disseminated.[52] "Secondary definers" are those who reproduce and circulate the definitions promulgated by primary definers.[53] Secondary definers may be media outlets, journalists, social media influencers, educational institutions and the like.[54] There are also "counter-definers." Counter-definers create alternative political and social definitions that oppose those produced by primary definers.[55] However, "[i]t is difficult for most counter-definers to gain access to the media and thereby participate in the defining process."[56] Even when counter-definers can gain access and be heard, their effectiveness is limited because they are constrained by the inherent constraints of the process of articulation. As I have explained:

> Those that can [participate in the defining process], by reason of the fact that they have won some degree of legitimacy from the system (such as law professors or criminal defense attorneys), "must respond in terms pre-established by the primary definers and the privileged definitions, and have a better chance of securing a hearing and influencing the process precisely if they cast their case within the limits of that consensus." Counter-definers who fail to respond in the familiar framework established by the primary definers run the risk of having their opinions de-authenticated and dismissed as "radical" or "extreme."[57]

Nonetheless, this is the important point for activists and attorneys who wish to be social engineers: they can seek to engender change by working through the consensus, consciously articulating new and transformative ideas and viewpoints. Slowly, over time, in ways that are both evolutionary and revolutionary, the mythic order can be transformed.

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49. *Id*. at 766.
50. *Id.*
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id*.
55. *Id*. at 766–67.
56. *Id*. at 767
57. *Id*. (citing HALL ET AL., *supra* note 39, at 64).

II. Symbols and the Shaping of Myths

According to the anthropologist Clyde Kluckhorn, "[c]ulture consists of patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols."[58] To interpretivists, all productions within a culture take on a symbolic meaning. As Timothy Zick explains:

> We live in a culture of symbols. We speak not only through our words but through symbolic gestures—our acts, our religious symbols, and our associations. What we do, what we wear, how we worship, and with whom we associate are all deeply symbolic aspects of our cultural life.[59]

It should go without saying that such a broad definition of cultural symbols includes protests, monuments to historical figures and events, and even the law itself. Each of these is a way of "imagining the real" or an articulation of meaning within the consensus.[60]

Symbols are plastic, yet sticky. Their meaning can change over time, but they tend to retain the meanings they have already acquired.[61] Symbols are thus a medium through which articulation by primary, secondary and counter definers may take place. The give and take, the play and interplay, of sometimes complementary and sometimes opposing definitions makes the meaning of symbols contested. This

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58. Culture and Behavior: Collected Essays of Clyde Kluckhohn 73 (Richard Kluckhohn ed., 1962).

59. Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward A First Amendment Ethnography*, 45 Wm. & Mary L. Rev. 2261, 2263 (2004); *see also* Nina Petraro, *Harmful Speech and True Threats: Virginia v. Black and the First Amendment in an Age of Terrorism*, 20 St. John's J. Legal Comment. 531, 553 (2006) ("Culture is entrenched in symbolism. In fact, culture itself is a system of symbols.").

60. The enduring struggle to make meaning is how culture emerges. The motivation that humans have to make, create, or produce *anything* comes from the meaning that is associated with that thing. Thus, the truth of the following observation:

> Although power seeks to impose its own definition on social practices—to declare that some conduct is valued or inappropriate—individuals and groups struggle to make and establish their own meanings. This struggle over meaning is the essence of culture. It determines how and why people live their lives.

Kenneth B. Nunn, *Illegal Aliens: Extraterrestrials and White Fear*, 48 Fla. L. Rev. 397, 400 (1996).

61. Not only are symbols hard to charge. The consensus itself resists change for the same reason. Both symbols and the culture of which they are part (the consensus) are accretions made up of previous articulations. Consequently:

> [a]lthough articulation—the process of making meaning—presents a great deal of freedom to individuals and groups within a culture, it is a limited freedom. Any new meaning is of necessity constrained by the meanings that have been articulated before. In other words, meaning is constructed from concepts that already exist within the social reservoir of ideas. In order to be understood, even to be conceived of in the first instance, all new ideas must be built upon the ideas of the past.

Id. at 401.

contested character of symbols is the essence of what the social construction of reality is about, as different individuals and communities compete for political power through the manipulation of symbols. We thus can see the truth of the following observation:

> In political and legal culture, symbolic activity similarly permits complex but efficient expressions of the way in which power, authority, and justification coalesce. Symbolic messages, transmitted through political and legal ritual activity, "communicate power relations not just among the political elite, but between the powerful and the powerless as well."[62]

The above passage is another way of saying that change agents work through and with symbols. During the civil rights movement mass protests, religious songs, such as "We Shall Overcome,"[63] and legal victories such as *Brown v. Board of Education*,[64] could be seen as symbols of cultural transformation. They are symbols in the sense that they represent a meaning that is beyond that which is apparent on the surface and that one must decode through shared social conventions or esoteric knowledge.[65]

62. Marie A. Failinger, *Against Idols: The Court as a Symbol-Making or Rhetorical Institution*, 8 U. Pa. J. Const. L. 367, 380 (2006) (quoting David I. Kertzer, Ritual, Politics, & Power 31 (1988)).

63. Pete Seeger, *We Shall Overcome*, *on* The Complete Carnegie Hall Concert: Historic Recording of June 8, 1963 (Columbia, 1989).

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

65. Professor Marlan provides a useful summary of how interpretivists and others define a "symbol." He states:

> While the definition of symbol varies across disciplines, agreement generally is that the *sine qua non* of a symbol is that it contains not just a literal (i.e., denotative) aspect, but also a figurative (i.e., connotative) dimension that is expressed through metaphor. Consider the following prominent examples. Paul Ricoeur, the distinguished philosopher who studied phenomenology—the study of consciousness from the subjective, first-person viewpoint—defined a symbol "as any structure of significance in which a direct, primary, literal meaning designates, in addition, another meaning which is indirect, secondary, and *figurative*, and which can be apprehended only through the first." Carl Jung, the founder of analytical psychology—a field of study premised on understanding the meaning of the unconscious psyche—views the symbol as "a term, a name, or even a picture that may be familiar in daily life, yet that possesses specific *connotations* in addition to its conventional and obvious meaning." Mythologist Joseph Campbell notes that "a symbol, like everything else, shows a double aspect. We must distinguish, therefore between the 'sense' and the 'meaning' of the symbol." In sum, a symbol must present both an objective, visible meaning and a *subjective*, hidden meaning as well.

Dustin Marlan, *Visual Metaphor and Trademark Distinctiveness*, 93 Wash. L. Rev. 767, 789–90 (2018) (citations omitted).

When Charles Hamilton Houston set out to destroy Jim Crow,[66] segregation and white supremacy were an accepted part of the American consensus.[67] Most African Americans lived in extreme poverty, and due to the Great Depression, large numbers of African Americans were unemployed.[68] Schools, transportation, housing and public facilities were segregated throughout the South, and in the North, the best of everything was reserved for whites.[69] Lynching was widespread and racial violence short of being killed was always possible.[70] In such an environment, the subjugation of Black people was total — it was economic, political, and social in character.[71] "Every visit to the doctor, every effort to get a job or buy land, much less register to vote, could result in a further restriction, an additional humiliation arbitrarily imposed."[72] When running for office during the Jim Crow era, many politicians openly declared themselves white supremacists and boldly asserted they were in favor of the separation of the races and keeping the Negro in his place.[73]

Such open displays of racism in the political arena are no longer the case.[74] No matter how negatively a politician may feel about Black people, he or she will not publicly admit to racial prejudice.[75] This is because today there is almost universal agreement among Americans

66. *See generally* Genna Rae McNeil & A. Leon Higginbotham, Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights (1984).

67. *See generally* Isabel Wilkerson, The Warmth of Other Suns: The Epic Story of America's Great Migration (2010).

68. Thomas J. Davis, History of African Americans: Exploring Diverse Roots 157 (2016).

69. *See id*. at 166 ("Blacks faced the color line everywhere—where they lived, where they worked, and even where they played.").

70. Amy Louise Woods, *The Spectacle of Lynching: Rituals of White Supremacy in the Jim Crow South*, 77 Am. J. Econ. & Soc. 757, 760–762 (2018). *See generally* W. Fitzhugh Brundage, Lynching in the New South: Georgia and Virginia, 1880–1930 (1993).

71. George M. Frederickson, White Supremacy: A Comparative Study in American and South African History 239, 249, 251–254 (1981).

72. Remembering Jim Crow: African Americans Talk About Life in the Segregated South 4 (Chafe et al. eds., 2001).

73. *See* Frank Füredi, The Silent War: Imperialism and the Changing Perception of Race 5 (1998) (arguing racism was "part of the self-knowledge of . . . . Anglo-American political elites and . . . passed for commonsense"); Paul Finkelman, *The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination*, 76 La. L. Rev. 181, 223 (2015) (asserting that "race has been a central factor in the politics of South Carolina and the rest of the Deep South," historically, and throughout the 1940s and 1950s).

74. Füredi, *supra* note 73 at 5.

75. *See* Ian F. Haney López, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 Cardozo L. Rev. 807, 813 (2011) (arguing that "[w]ith the moral triumph of the [Civil Rights Movement], [white] anxiety could no longer legitimately be expressed in openly racist terms"); Kenneth B. Nunn, *The "R-Word": A Tribute to Derrick Bell*, 22 U. Fla. J. L. & Pub. Pol'y 431, 438 (2011) [hereinafter Nunn, *The "R-Word"*] (arguing "it is not possible for politicians today to openly adopt racist positions").

that racism is wrong,[76] a very different state of affairs than what Black Americans faced in the 1930s and 40s.[77] This evinces a cultural transformation that owes its existence to the hard effort of the activists who worked in the civil rights movement.[78] The activists of the civil rights movement wrought a profound cultural change across America.[79] They did it by creating new narratives and new myths, reshaping the American consensus on race.[80] Over time the articulations of these counter-definers took hold to such an extent that even now, those who oppose progress for Black people craft their arguments in terms that are borrowed from the civil rights movement.[81]

Civil rights activists consciously shaped their movement along lines matching middle class values and invoking respectability politics.[82]

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76. Of course, this conclusion is mixed. While there is substantial evidence that the majority of Americans accept the principle of nonracialism and reject the manifestation of the most extreme versions of racism, there is also indications that notions of white superiority endure. As Professor Reva Seigel explains, while "many white Americans now view overt racism as socially unacceptable," there is also a "significant difference between the principles that white Americans espouse . . . and their actual attitudes in matters of race." Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136 (1997). Seigel points out that a deeper analysis may reveal that "white Americans who embrace principles of racial equality manifest *unconscious* forms of racial bias." *Id*.

77. *See, e.g.*, DAVID M.P. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA 1–5 (2007) (noting extreme levels of racial prejudice between 1920 and 1960 up to and including violence leveled at African Americans and whites viewed as transgressing racial norms in housing). Freund describes this era as an "era of hidden violence" due to the commonality of white vigilantism. *Id*. at 4.

78. *See* Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 729 (2008) (arguing that "[t]hrough the laudable work of the civil rights movement, society has been transformed to the extent that the nondiscrimination ethic has become relatively well established").

79. *Id*.

80. Raymond M. Brescia, *Dominance and Disintermediation: Subversive Stories and Counter-Narratives of Cooperation*, 27 S. CAL. INTERDISC. L.J. 429, 441 (2018) (suggesting the subversive narratives of the civil rights movement undermined dominant ones); Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 302–03 (2002) (arguing that the civil rights movement by promoting "ideas radically different from the wisdom of the moment," nevertheless, "changed the nation").

81. *See* Nunn, *The "R-Word," supra* note 75 at 436 (observing that the concept of "[c]olorblindness was initially articulated by the civil rights movement, but it was quickly adopted by the right as a means to insulate centers of power and privilege from racial change"). *See, e.g.*, Cass R. Sunstein, *What the Civil Rights Movement Was and Wasn't (with Notes on Martin Luther King, Jr. and Malcolm X*), 1995 U. ILL. L. REV. 191, 203 (1995) ("As we have seen, King's 'I have a dream' speech has been used to give moral weight to the constitutional attack on affirmative action.").

82. Professor Harold McDougall describes "respectability politics" as follows:

> [P]ractitioners of the politics of respectability seek advancement through communion with prevailing majority group structures of political, economic, and social power. They seek upper-middle class status within those structures by approximating white dialect, dress, profession and physical space. "Respectability" practitioners who succeed in these endeavors gain access to mainstream "sociopolitical capital"—the ability to infiltrate "institutions, government and other organizations."

Harold A. McDougall, *Class Contradictions in the Civil Rights Movement: The Politics of Respectability, Disrespect, and Self-Respect*, 1 HOW. HUM. & CIV. RTS. L. REV. 45, 51 (2017).

This was strategically done to counter negative tropes denigrating Black people as backwards, unsophisticated, immoral, and prone to commit crimes.[83] Thus, the civil rights movement was able to produce symbolic images like that of Rosa Parks — the mother of the civil rights movement — prim, proper and matronly, refusing to give up her seat on a bus.[84] Or the image of well-dressed African Americans being set upon by Bull Connor's police dogs,[85] or the Reverend King's exhortation encouraging Americans to judge a person by the content of one's character instead of by the color of one's skin.[86] Or simply the large numbers of Black people and allies that turned out for marches and other mass protests in favor of civil rights[87]

Although respectability politics was the dominant approach of the civil rights movement, it has become disfavored in the eyes of later Black social and political formations. *See id.* (noting "Black militants of the 1960s often perceived middle-class, 'respectable' male civil rights leaders as 'Uncle Toms'"); Frank Rudy Cooper, *Cop Fragility and Blue Lives Matter*, 2020 U. Ill. L. Rev. 621, 631 (2020) (arguing that the Black Lives Matter Movement "gives respectability politics the finger").

83. *See* Danielle L. McGuire, *"It was Like All of Us Had Been Raped": Sexual Violence, Community Mobilization, and the African American Freedom Struggle*, 91 J. Am. Hist. 906, 914 (2004) (asserting respectability politics embraced in protests against white male rapes of Black women as a means to "counter negative stereotypes" of Blacks, sexual and otherwise).

84. The selection of Rosa Parks as the face of the Montgomery bus boycott was not accidental. E. D. Nixon, a key organizer of the boycott, related why others who had been arrested before Parks did not gain support:

> Okay, the case of Louise Smith. I found her daddy in front of his shack, barefoot, drunk. Always drunk. Couldn't use her. In that year's second case, the girl [Claudette Colvin], very brilliant but she'd had an illegitimate baby. Couldn't use her. . . . When Rosa Parks was arrested, I thought "This is it!" Because she's morally clean, she's reliable, nobody had nothing on her, she had the courage of her convictions.

Randall Kennedy, *Lifting as We Climb: A progressive defense of respectability politics*, Harper's Mag., https://harpers.org/archive/2015/10/lifting-as-we-climb/ (last visited Mar. 25, 2025).

85. Civil rights protestors wore their Sunday best to demonstrate respectability and "to elevate the Black community in the eyes of the greater public." Tara Donaldson, *Dress and Protest: Fashion Hasn't Been a Bystander in the Black Civil Rights Movement*, Woman's Wear Daily (Feb. 1, 2021), https://wwd.com/feature/protest-fashion-black-civil-rights-black-panthers-blm-1234715312/. In the words of artist and activist Michaela Angela Davis:

> All of the movements were very savvy around media, that they were creating images that would tell the story, and the horror and the brutality that was illustrated in such a way, like when you are brutally beating a man in a suit, when you're brutally beating a young girl in an A-line skirt . . . the juxtaposition of violence and elegance was very intentional and very powerful.

Id.; *see also* Richard Thompson Ford, *The Dress Codes of Respectability*, Medium (Apr. 22, 2021), https://momentum.medium.com/the-dress-codes-of-respectability-2809efa3659a.

86. Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), *in* A Call to Conscience: The Landmark Speeches of Dr. Martin Luther King, Jr. (Clayborne Carson & Kris Shepard eds., 2001).

87. Simply characterizing the struggle as one for merely civil rights was strategic. *See* Nick Suplina, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 Geo. Wash. L. Rev. 395, 419 (2005) (quoting a New York Times editorial and asserting that "[p]rotests that move down the street have a symbolic power that stationary rallies do not"); Anne D. Lederman, *Free Choice and the First Amendment or Would You Read This If*

These symbolic engagements were successful because they were linked to and positively deployed white mythic notions of fair play and justice.[88] That is, when confronted with the civil rights struggle, whites had to address their own deeply held beliefs of what being an American was all about.[89] Forced to reckon with the gulf between those beliefs and the reality of Black oppression, whites had to adjust and reframe the narrative to preserve their sense of mythic justice. Andrew Taslitz[90] describes this reframing as an attempt to uphold the concept of "honor." He writes:

> [T]he civil rights activists of the early movement in the 1950s and 1960s embraced some very ancient notions of honor. Critically, many shared the willingness to risk their lives and health in defense of liberty. The songs, sermons, freedom schools, and church committees rekindled African Americans' sense of self as political beings, triumphing over fear and asserting self-mastery. Going to jail became a badge of honor. . . Resistance brought self-respect and did so by reminding whites of the American code of honor's commitment to equality. The willingness of movement members to suffer for those beliefs struck a chord in many whites' vision of American honor, swelled the movement's ranks, and made white Americans take notice.[91]

That honor, as an archetype, could be a means of changing the consensus was clear to Taslitz because, as he stated, "[a]gitation from below and leadership from above can sometimes lead elites to work to alter social meanings, appealing to both raw and principled self-interest as a way to lessen the oppression of racial and other minorities."[92] The "principled self-interest" he refers to here is the interest in maintaining a positive self-image of oneself and one's community. Taslitz argued that the desire of white Americans to perceive themselves as principled,

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I Held It in Your Face and Refused to Leave?, 45 Case W. Res. L. Rev. 1287, 1288 (1995) (noting the "symbolic meaning" of the various marches on Washington); *see also* Scott L. Cummings, *Movement Lawyering*, 2017 U. Ill. L. Rev. 1645, 1704 (2017) (listing protests, marches, boycotts, and sit-ins as part of a movement's arsenal of tactics).

88. *See* Sylvia R. Lazos Vargas, *Deconstructing Homo(Geneous) Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 Tul. L. Rev. 1493, 1519 (1998) (arguing an American belief in fairness permeates American law).

89. *See* Jonathan R. Cohen, *Conflicts as Inner Trials: Transitions for Clients, Ideas for Lawyers*, 13 Cardozo J. Conflict Resol. 393, 401 (2012) (arguing that "the [civil rights] movement, among other things, forced whites to confront their own racist attitudes").

90. Professor Taslitz taught at Howard University School of Law between 1989 and 2012.

91. Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 Law & Contemp. Probs. 221, 290 (2003) (citations omitted).

92. *Id*. at 291 n.578.

including a principled commitment to human rights, was an important factor explaining white support for the civil rights movement.[93]

The civil rights movement was not the only social movement where lawyers sought to transform the consensus to advance the goals of the movement.[94] Since then, a generation of public interest lawyers, representing various causes, have emulated and expanded the strategies and tactics of the civil rights pioneers.[95] Taking lessons from the civil rights movement and progressive lawyers from the labor, antideath penalty, immigration, anti-war and other movements, legal scholars and practitioners have identified and embraced modes of representation designed to work especially with groups seeking social change.[96] These forms of practice can be referenced by a number of terms including, "'movement lawyering,' 'liberal movement lawyering,' 'solidarity lawyering,' 'democratic lawyering,' 'demosprudence,' 'community lawyering,' 'cause lawyering,' 'rebellious lawyering,' [and] 'law and organizing.'"[97]

No matter how they are referred to, these lawyers have embraced a style of practice that goes beyond litigation and legislative policy work and consciously seeks to shape public opinion.[98] Working collaboratively with their clients, movement lawyers engage in mobilization strategies, direct action, public education campaigns, trainings for public officials and service providers, and "organizing tactics to 'empower community residents as political actors.'"[99] In this approach, the law itself is viewed

93. *Id*.

94. Christine Cimini & Doug Smith, *An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study*, 35 Geo. Immigr. L.J. 431, 444 (2021) (identifying social movements using law throughout the 20th and 21st centuries).

95. Rachel F. Moran, *The Three Ages of Modern American Lawyering and the Current Crisis in the Legal Profession and Legal Education*, 58 Santa Clara L. Rev. 453, 458 (2018) (tying the rise to cause lawyering to the success of the civil rights movement); Cummings, *supra* note 87, at 1662 (noting current wave of movement lawyering influenced by "models developed before and during the civil rights movement").

96. *See, e.g*., Cimini & Smith, *supra* note 94 at 490–512 (presenting a basic approach to movement lawyering).

97. *Id*. at 437.

98. *See* Cummings, *supra* note 87, at 1695–96 ("lawyers combine modes of advocacy—litigation, policy reform, transactional work, organizing support, media relations, and community education—in order to maximize political pressure and transform public opinion").

99. Cimini and Smith suggest that "lobbying for legislative or administrative changes, electoral strategies, direct action, playing the media, community and labor organizing, social entrepreneurship, or mass social movements" are viable alternatives to litigation that movement lawyers might undertake. Cimini & Smith, *supra* note 94, at 434. Professor Trowbridge argues that public education serves four functions for movement lawyers: (1) to prime a pathway for successful litigation; (2) to control for backlash and countermobilization; (3) to facilitate litigation as a leveraging mechanism; and (4) to support change directly through awareness raising and competency training. David L. Trowbridge, *Engaging Hearts and Minds: How and Why Legal Organizations Use Public Education*, 44 Law & Soc. Inquiry 1196, 1197–98 (2019).

as an "education tool" and not as the primary or most significant means of social change.[100] Scott Cummings envisions this progressive style of practice as "integrated advocacy."[101] According to Cummings:

> [I]ntegrated advocacy . . . reframes the work that movement lawyers do: moving from the narrow lens of technical legal skill (especially litigation) to the broader art of persuasion. Within this framework, advocacy is understood as the process of telling compelling stories to those in positions of decision-making power and the wider public. Such stories exert pressure and build support for political and cultural change.[102]

As we can see, myths and symbols play an important role in shaping and organizing culture and lawyers can deploy them to advance the goals of a client or a cause. At a basic level, a lawyer's litigation strategy can be more effective if the attorney invokes symbols in the lawyer's arguments and presentations to the jury. However, to achieve the ultimate goal of obtaining the objectives of a cause or contributing to social change, more is needed. Social change can be accomplished more effectively when litigation strategy is but one of a panoply of efforts in a campaign to manipulate symbols, affect public opinion, and ultimately transform the consensus.

III. Monuments and the Quest for Racial Justice

As I suggested at the outset of this essay, a monument is a deliberate attempt to engage in mythmaking.[103] By erecting a monument, a community makes a statement about a person or event and seeks to influence how others will view the person or event going forward.[104] A monument then, is a symbol, invoked as an intervention in the consensus. It is an articulation by a definer in a semiotic process of meaning making. Monuments, then, have significant transformative power. They can be used to change the accepted parameters of what is proper and just. But as monuments shape the meaning of the consensus, the consensus shapes the meaning of monuments as well. Monuments will be interpreted according to what is deemed proper and just through the consensus and by the mythic order of the day. Monuments should

100. *Id*.
101. Cummings, *supra* note 87, at 1703.
102. *Id*.
103. *See supra* notes 22–23 and accompanying text.
104. *See supra* note 21.

be, indeed must be, periodically reevaluated to assess whether, as conscious ideological statements, their meaning is still salient.

The meaning attached to Confederate monuments has changed significantly over time. The first justification for their erection was as simple memorials to the lives the Confederates lost during the Civil War.[105] But even this simple funerary purpose was objected to by Robert E. Lee, who thought it would be divisive and make reconciliation with the North more difficult.[106] Later the drive to establish Confederate war monuments became associated with the "Lost Cause" movement.[107] The Lost Cause movement was an effort by white Southerners to exalt the virtues of the Confederacy and promote the Civil War as a valiant struggle for righteousness.[108] The Lost Cause movement was prominent from the end of Reconstruction through the 1940s.[109] This era of monument building coincided with efforts to "actively repress and diminish efforts of African Americans to gain socio-economic equality."[110]

Although the Lost Cause movement was promoted by wealthy and politically connected elites,[111] African Americans acted as counter-definers

105. Abigail K. Coker, *"Close the Sores of War": Why Georgia Needs New Legislation to Address Its Confederate Monuments*, 38 Ga. St. U. L. Rev. 629, 639 (2022).

106. Lee stated that he thought "it wiser . . . not to keep open the sores of war but to . . . obliterate the marks of civil strife, to commit to oblivion the feelings engendered." *Id*.

107. Jess Phelps & Jessica Owley, *The Afterlife of Confederate Monuments*, 98 Ind. L.J. 371, 380 (2023).

108. Jess Phelps and Jessica Owley give this description of the Lost Cause movement:

> Advocates for the Lost Cause argued: (1) that the South was just and heroic in the conflict; (2) that the South did not lose the war because of poor strategy, but was simply overwhelmed by superior Northern numbers and economic power; (3) that slavery was not the cause of the war but instead the conflict was to protect states' rights; and (4) that slavery was not as evil as portrayed.

Id.

109. *See* Deborah R. Gerhardt, *Law in the Shadows of Confederate Monuments*, 27 Mich. J. Race & L. 1, 13 (2021) (noting that "the majority of Confederate monuments were installed between 1890 and 1940 during the era of lynching, poll taxes, and Jim Crow laws meant to keep Black citizens in inferior positions of power"); *see also* Christopher A. Graham, *The Lost Cause Myth* (May 13, 2020), https://inclusivehistorian.com/lost-cause-myth/ (tracing the Lost Cause movement from the late 1860s); *Whose Heritage? Public Symbols of the Confederacy*, S. Poverty L. Ctr. (Feb. 1, 2019) (showing two periods of Confederate monument dedication: 1865–1945 and 1954–1970), https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy [hereinafter *Whose Heritage?*].

110. William Stoll, *The Problem with Confederate Monuments: State Laws as Barriers for Removal and Methods Available to Localities*, 26 U.C. Davis Soc. Just. L. Rev. 91, 96 (2022).

111. *See* Katherine Elder & Susan Eaton, *Philanthropy's Past Present and Future Roles*, Soc. Just. Funders Opportunity Brief, https://heller.brandeis.edu/sillerman/pdfs/opportunity-briefs/next-generation-commemoration.pdf (last visited on Mar. 25, 2025) (arguing that "a combination of private wealth with government support is responsible for the creation of our commemorative landscape, particularly in the case of Confederate monuments and memorials"); *see also* Graham, *supra* note 109 (arguing that the Lost Cause movement grew out of the efforts of "Ladies

and contested the pro-Confederate narrative. In response to growing white sentiment for the Lost Cause, Frederick Douglass wrote in 1870 that "[t]he South has a past not to be contemplated with pleasure, but with a shudder."[112] "If her past has any lesson," he continued, "it is one of repentance and thorough reformation."[113] Writing in 1931, W.E.B. Dubois opined for his part that the best inscription on a monument to the Confederacy "would be an inscription something like this: 'sacred to the memory of those who fought to Perpetuate Human Slavery.'"[114]

After World War II, the fervor for Confederate memorials died down, as did the Lost Cause movement itself — that is until the civil rights movement reenergized white resistance to social change.[115] From 1954, after the Brown decision, until about 1970, there was a second spike in Civil War monument dedications honoring Southern heroes and soldiers.[116] This renewed attention to monument building was the direct result of white discomfort with the civil rights movement and the Black freedom struggle.[117] The 1960s era monuments were an attempt to double down on racism and white supremacy as a counter to calls for Black empowerment.[118] African Americans and other counter-definers critiqued this reactive spate of Confederate monument building too, often through protest and by advocating for the removal of the monuments.[119]

Memorial Associations," and the United Daughters of the Confederacy (founded in 1894), but that "Confederate veterans, authors, academic historians, politicians, public historians, business leaders, and cultural producers all contributed to its life").

112. David W. Blight, *"For Something Beyond the Battlefield": Frederick Douglass and the Struggle for the Memory of the Civil War*, 75(4) J. Am. Hist. 1156, 1169 (1989).

113. *Id*.

114. *Investigation Finds Millions in Taxpayer Dollars Goes to Confederate Memorials,* Equal Just. Initiative (Jan. 14, 2019), https://eji.org/news/costs-confederacy/.

115. *Whose Heritage?*, *supra* note 109.

116. *Id.*

117. *Id*.

118. *Id*.

119. *See* Karen L. Cox, *Black Protesters Have Been Rallying Against Confederate Statues for Generations*, Smithsonian Mag. (April 12, 2021), https://www.smithsonianmag.com/history/black-protestors-have-been-rallying-against-confederate-statues-generations-180977484/ (discussing attacks on Confederate statues following 1966 death of Tuskegee student); Karen L. Cox, *"The Joker Up There": Meredith Marchers Confronted Unjust Confederate Statues in 1966*, Miss. Free Press (April 13, 2021), https://www.mississippifreepress.org/the-joker-up-there-meredith-marchers-confronted-unjust-confederate-statues-in-1966/ (describing protests against Confederate statues during solidarity march following the shooting of James Meredith); *see generally* Karen L. Cox, No Common Ground: Confederate Memorials and the Ongoing Fight for Racial Justice (2021).

In recent times, many Confederate monuments have been removed following the occurrence of some tragic racially motivated incident.[120] The murder of nine African Americans in a church in Charleston, South Carolina in 2015 by a Confederate sympathizer led to the dismantling of several Confederate memorials.[121] Likewise, many monuments were removed following the deadly Unite the Right rally in Charlottesville, Virginia in 2017.[122] The killing of George Floyd sparked a massive wave of protests across the nation. As part of a widespread racial reckoning throughout the United States, Confederate monument removals surged following Floyd's death.[123] These modern crusades against monuments and other symbols of the Confederacy are not simply the work of counter-definers. The consensus has been sufficiently changed by the political and cultural work of the civil rights movement that many primary and secondary definers have advocated for the removal of Confederate symbols as well.[124] Yet, there is clearly a reservoir of racist sentiment remaining in the United States that views Confederate symbols sympathetically.[125] The reaction of many right leaning

120. *See* Deborah R. Gerhardt, *The Last Breakfast with Aunt Jemima and Its Impact on Trademark Theory*, 45 COLUM. J.L. & ARTS 231, 256–59 (2022) (noting uptick in Confederate statue removals after killing of George Floyd); Kristi W. Arth, *The Art of the Matter: A Linguistic Analysis of Public Art Policy in Confederate Monument Removal Case Law*, 56 GONZ. L. REV. 1, 14 (2021) (asserting that "[a]s certain incidents of racial violence occupied headlines, local governmental entities began to question the wisdom of divisive symbols like Confederate monuments").

121. *See* Deborah R. Gerhardt, *The Last Breakfast with Aunt Jemima*, 14 LANDSLIDE 46, 49 (2022) (recording 11 monuments taken down between 2015 and 2017).

122. *See* Abigail K. Coker, *"Close the Sores of War": Why Georgia Needs New Legislation to Address Its Confederate Monuments*, 38 GA. ST. U. L. REV. 629, 635 (2022) (noting that after the Charlottesville rallies, "dozens of Confederate monuments were removed from public spaces").

123. *See id*. (noting more than 100 monuments removals within one month of Floyd's death).

124. *See* Sage Snider, *Grey State, Blue City: Defending Local Control Against Confederate "Historical Preservation"*, 24 VAND. J. ENT. & TECH. L. 851, 863–64 (2022) (noting governors of Tennessee and Virginia supported removal). *See also* Erik W. Blasic, *Rebels Among Ruins: Policies, Procedures, and Laws Surrounding Confederate Monuments Post-Removal*, 128 PENN ST. L. REV. 667, 675 (2024) (claiming public opinion shifted post-George Floyd and that a majority of Americans support the removal of Confederate monuments). The National Trust for Historic Preservation calls for the removal of Confederate monuments "from our public spaces when they continue to serve the purposes for which many were built—to glorify, promote, and reinforce white supremacy, overtly or implicitly." *National Trust for Historic Preservation Statement on Confederate Monuments*, SAVING PLACES (June 18, 2020), https://savingplaces.org/press-center/media-resources/national-trust-statement-on-confederate-memorials?.

125. Zachary Bray, *From "Wonderful Grandeur" to "Awful Things": What the Antiquities Act and National Monuments Reveal About the Statue Statutes and Confederate Monuments*, 108 KY. L.J. 585, 590 (2020) ("In recent years, polls and surveys have repeatedly shown that retaining monuments to the Confederacy and specific Confederate figures in public spaces still attracts substantial support from Americans across the country."); *see also* Christopher Ingraham, *On Confederate Monuments, the Public Stands with Trump*, WASH. POST (Aug. 17, 2017, 11:01 AM), https://www.washingtonpost.com/news/wonk/wp/2017/08/17/on-confederate-monuments-the-public-stands-with-trump/ (reviewing polls and suggesting most Americans supported then President Trump's opposition to the removal of monuments).

politicians to the movement to remove monuments was to pass new laws making the removal more difficult or illegal altogether.[126]

We can see the social constructivist process in action as the pro-Confederate and anti-Confederate camps sought to sway public opinion in their favor and deployed state power to advance their goals. Lawsuits were undoubtedly filed in pursuit of these goals, but the main work being done here was ideological. What was most important to the success (or failure) of anti-racist goals was the transformation of hearts and minds, and in this effort the deployment and manipulation of monuments as symbols was key. However, success for anti-racists has been mixed. Although many Confederate statues have been removed, there are still hundreds remaining over 150 years after the Civil War.[127]

The struggles over the rightful place of Confederate monuments are part of an ongoing effort to control the narrative of race in America. Many commentators have observed that this conflict is cyclical in nature.[128] Every era that welcomes an advance of rights and opportunities for African Americans, is followed by an era of retrenchment and retreat.[129] Legal scholars Tolu Lawal and Al Brooks describe this cyclical swing as one that repeats the contrast between Reconstruction and the Redemption of the South that followed.[130] They argue that because of this cycle "[s]ubstantial movements for racial progress are choked by White violence in the form of legal and extrajudicial backlash."[131] According to Lawal and Brooks:

> The Reconstruction of 1865 and the 1877 Redemptive backlash repeatedly return throughout America's history: the 1950s and 1960s Civil Rights Era, the 2008 election of Barack Obama, the present-day Black Lives Matter movement, and the innumerable less storied victories for racial equity. Historian Peniel Joseph laments that the country replays an "unfortunate pattern, one that finds [Redeemers], generation after generation, winning the narrative war that defines

126. *See* Snider, *supra* note 124 (observing that "[i]n response to opposition, many southern states have issued so-called 'statue statutes,' which obstruct local efforts to remove or challenge Confederate monuments"); Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate "Statue Statutes,"* 91 TEMP. L. REV. 1, 7 (2018) (discussing laws to restrict monument removal, some long standing, but many recent).

127. *Whose Heritage?*, *supra* note 109.

128. Tolu Lawal & Al Brooks, *Character and Fitness in America's Neo-Redemptive Era*, 27 CUNY L. REV. 143, 148–49 (2024).

129. *Id.*

130. *Id.*

131. *Id.*

> America's tenuous political reality, shapes our professed moral compass, and guides our economic priorities."[132]

Recent history fits this pattern also. The election of a Black president, followed swiftly by the Black Lives Matter movement, and racial reforms following the death of George Floyd, triggered a strong backlash as regressive forces elected a deeply conservative president and Congress and set about rolling back Obama era policies.[133] Racial conservatives launched attacks on diversity, equity, and inclusion (DEI) programs,[134] educational affirmative action policies,[135] African American Studies programs,[136] and critical race theory (CRT).[137] Book

132. *Id*. at 152 (citations omitted).

133. Perry Bacon, Jr., *An Anti-Black Backlash-With No End in Sight*, Wash. Post (Jan. 20, 2022), https://www.washingtonpost.com/opinions/2022/01/20/an-anti-black-backlash-with-no-end-sight/ (arguing "[w]e are in the midst of an aggressive, sustained backlash against recent shows of Black political power"). *See also* Erin Aubry Kaplan, *The "American Whitelash" Is Far From Over*, Politico (July 2, 2023), https://www.politico.com/news/magazine/2023/07/02/wes-lowery-whitelash-violence-00104438 (detailing interview with author Wesley Lowry who asserts that while white backlash is partially motivated by Obama's election and Black Lives Matter, white racial violence has long been part of American culture).

134. Tanya Katerí Hernández, *Can CRT Save DEI?: Workplace Diversity, Equity & Inclusion in the Shadow of Anti-Affirmative Action*, 71 UCLA L. Rev. 282, 285 (2024) (describing how conservative attacks on DEI have raised corporate anxieties and resulted in a wave of dismissals of corporate DEI directors).

135. Carolyn Jones & Mikhail Zinshteyn, *How College Admissions Are Changing After the End of Affirmative Action*, Cal Matters (Nov. 3, 2023), https://calmatters.org/education/higher-education/2023/11/college-admissions/ (discussing changes to college admission plans following *Students for Fair Admission v. Harvard* and *Students for Fair Admission v. University of North Carolina*); Sarah Wood, *What the Supreme Court's Affirmative Action Ban Means for College Admissions*, U.S. News & World Rep. (Aug. 8, 2024) (discussing impact of Students for Fair Admissions cases on higher education), https://www.usnews.com/education/best-colleges/applying/articles/how-does-affirmative-action-affect-college-admissions.

136. *See* Alia Wong, *Black History Is Under Attack Across US From AP African American Studies to "Ruby Bridges,"* USA Today (Aug. 23, 2023), https://www.usatoday.com/story/news/education/2023/08/23/black-history-censorship-getting-worse/70348173007/ (describing bans on high school AP African American Studies and restrictions on curriculum in college African American Studies Programs); Isabella Zou, *Black Studies Is Under Attack, But the Teachings Are For Everyone*, Teen Vogue (May 31, 2023), https://www.teenvogue.com/story/black-studies-under-attack-schools (noting conservative attacks on Black Studies); Ileana Najarro, *How AP African American Studies Came Under Attack: A Timeline*, Educ. Week (Feb. 10, 2023), https://www.edweek.org/teaching-learning/how-ap-african-american-studies-came-under-attack-a-timeline/2023/02(describing effort to restrict College Board's AP African American Studies course).

137. *See* Raquel Muñiz, *Exploring Litigation of Anti-Crt State Action: Considering the Issues, Challenges & Risks in A Time of White Backlash*, 74 Syracuse L. Rev. 1071, 1074 (2024) (discussing "anti-CRT" bans and noting that over 200 such measures were adopted across the federal, state, and local levels).

bans were implemented,[138] and a number of laws were passed restricting the teaching of any subject that caused white students to "feel sad."[139]

These attacks were attempts to change the racial narrative and to recast white citizens as racial victims rather than racial oppressors. The constant drumbeat about the threat posed by CRT or the constant invocation of Black slang terms like "woke" in pejorative ways are clearly efforts to counter the narratives that Black activists injected into the consensus through their anti-racist activism.[140] In particular, attacks on the very methods used to communicate articulations about racial realities, through attacks on education, book bans and the like, were designed to handicap anti-racists and keep them from offering counter-definitions to the racist views that conservative primary and secondary definers were expressing.[141]

One lawyer who understood the importance of law and culture to social transformation is Bryan Stevenson. Stevenson is an anti-death penalty attorney, law professor, and the founder of the Equal Justice Initiative (EJI), a public interest law firm in Montgomery, Alabama.[142] EJI began as a law firm handling capital cases for indigent defendants

138. Elizabeth Harris & Alexandra Alter, *A Fast-Growing Network of Conservative Groups Is Fueling a Surge in Book Bans*, N.Y. Times (Dec. 12, 2022), https://www.nytimes.com/2022/12/12/books/book-bans-libraries.html (reporting that book bans have been "supercharged by a rapidly growing and increasingly influential constellation of conservative groups").

139. *See* Katheryn Russell-Brown, *"The Stop Woke Act": HB 7, Race, and Florida's 21st Century Anti-Literacy Campaign*, 47 N.Y.U. Rev. L. & Soc. Change 338, 365 (2023) (noting that Florida's HB7 law prohibits teaching which causes any person to "feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin or sex").

140. Ángel Díaz, *Online Racialization and the Myth of Colorblind Content Policy*, 103 B.U. L. Rev. 1929, 1955 (2023) (noting that the term "stay woke"—an in-group reminder for Black people to remain vigilant against the pervasive nature of American racism—has increasingly become the latest conservative dog whistle"). Professor Díaz explains how the use of "woke" as a slur furthers a racist ideological project:

> Replacing the word "woke" with "Black" provides insight into the dual nature of this co-opted term, and how it functions as a covert slur. Decrying "wokeness" allows people to express (or leverage) fears, anxieties, pleasures,[128] and prejudices without being labeled a racist. In effect, "woke" functions as a stand-in for racialized understandings of otherness and disruption.

Id. at 1955–56 (citations omitted).

141. Calling anti-CRT legislation "memory laws," Danielle Conway describes how these laws limit the ability of counter-definers to contest dominant understandings. She states that "memory laws are undemocratic, as they are imposed 'to limit public debate on the national past by banning oppositional or minority views, in contrast to the principles of free speech and deliberative democracy.'"; *see also* Morenike Fajana, Katrina Feldkamp, Allison Scharfstein, *The Anti-Truth Movement in Context: Rethinking the Fight for Truth and Inclusive Education*, 16 Drexel L. Rev. 787, 796 (2024) (asserting that "anti-truth advocates and legislators infringe upon the dignity of Black, brown, and queer students and educators and undermine their political power").

142. *Bryan Stevenson*, Equal Just. Initiative, https://eji.org/bryan-stevenson/ (last visited. Mar. 25, 2025).

in the deep South. The firm now has over 80 employees[143] and has won many significant legal victories.[144]

At a recent speech at Georgetown University, Stevenson said he realized that the legal victories he won were not enough to accomplish his desired goal of social change and the end of racial oppression in the United States.[145] He believed that in order to obtain lasting change, he would need to change the narrative around race.[146] Rather than focus solely on winning cases, Stevenson felt it was necessary to change the social environment that gave rise to the cases he litigated.[147] In his speech, Stevenson pointed out that narrative is the key to changing the social environment.[148] The "narratives of fear and anger" that exists today must be challenged, he said.[149] According to Stevenson, there is no damaging narrative greater than the assumptions we have about race and the silence that exists around race.[150]

When Bryan Stevenson is talking about the need to change the narrative, he is talking about the need to change the mythic order or what I would call the "consensus."[151] There is no better way to do that than through the manipulation of symbols, including monuments, memorials, and markers. EJI has done just this at its Montgomery headquarters.

In addition to its law offices, EJI established a museum, a memorial to lynching victims and a monument park. The Legacy Museum has artwork, exhibits, and video presentations all designed to clearly show the truth of America's racist past and motivate viewers to take actions to correct the errors of the past.[152] The National Memorial for Peace and Justice is an outdoor installation that contains plaques listing the names of every lynching victim who was murdered in the United States.[153]

143. *Our Team*, Equal Just. Initiative, https://eji.org/our-team/ (last visited Mar. 28, 2025).
144. *See supra* note 142.
145. Notes from Bryan Stevenson's presentation at the 2024 Moynihan Lecture on Social Science and Public Policy in Washington, DC, at Georgetown University's McCourt School of Public Policy, https://www.aapss.org/bryan-stevenson-delivers-2024-moynihan-lecture/ (on file with author).
146. *Id*.
147. *Id*.
148. *Id*.
149. *Id.*
150. *Id*.
151. *See supra* notes 39–45 and accompanying text.
152. *The Legacy Museum*, Equal Just. Initiative, https://legacysites.eji.org/about/museum/ (last visited Mar. 28, 2025).
153. *The National Memorial for Peace and Justice*, Equal Just. Initiative, https://legacysites.eji.org/ about/memorial/ (last visited Mar. 28, 2025); *see also* Juanita Solis, *A Monumental Undertaking - Tackling Vestiges of the Confederacy in the Florida Landscape*, 8 U. Miami Race & Soc. Just. L. Rev. 109, 139 (2018) ("the memorial . . . hosts 800 suspended columns representing

EJI also created the Freedom Monument Sculpture Park, a 17-acre site in Montgomery that houses statues of people who contributed to the freedom struggle and that honors enslaved people in the United States.[154] These spaces are impressive and are powerful articulations of truth and justice.[155]

As part of its effort to call attention to America's racist past, EJI also created the Community Remembrance Project. The Community Remembrance Project "recognizes community grief and [the] victims of mass violence"[156] through the collection of soil from lynching sites throughout the South.[157] "The soil is then labeled with the date of the lynching and the victim's names (if recorded) and used as part of an exhibit [to] reflect the history of lynching."[158] In collaboration with local remembrance projects organized at the county level, EJI provides historical markers with the details of each act of racial violence for placement at the lynching sites.[159] To date EJI has erected over 80 historical markers.[160]

The complex of monuments erected by EJI are a perfect example of how the consensus can be shaped by counter-definition. Bryan Stevenson and EJI did not simply tear Confederate monuments down. Engaging monuments as symbols, they built new monuments, monuments that honored enslaved people and victims of racial violence. Doing so was a powerful statement, a powerful articulation of values and beliefs that gave new meaning, not only to the subjects of the monuments, but to the very meaning of monuments themselves. A monument can no longer be seen as simply something that the powerful erect to celebrate themselves. Bryan Stevenson and EJI are using the monumental medium to celebrate those who are marginalized and who lack power in the society. Through monuments, Bryan Stevenson and EJI have engaged in the struggle to determine the meaning of the Confederacy,

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the 800 counties across 12 states where lynchings took place, each column inscribed with the names of the murdered").

154. *Freedom Monument Sculpture Park*, Equal Just. Initiative, https://legacysites.eji.org/about/monument/ (last visited Mar. 28, 2025).

155. Blaine Brownell, *One of the Most Significant Memorials on the Planet*, Architect Mag., https://www.architectmagazine.com/design/exhibits-books-etc/one-of-the-most-significant-memorials-on-the-planet_o (calling EJI complex "one of the most significant . . . to be found anywhere on the planet) (last visited Mar. 28, 2025).

156. Solis, *supra* note 153, at 26.

157. *Id.* at 139.

158. *Id*.

159. *Community Remembrance Project*, Equal Just. Initiative, https://eji.org/projects/community-remembrance-project/ (last visited Mar. 28, 2025).

160. *Id*.

slavery, and racial oppression. Arguably, these monuments will make a greater impact on the quest for racial justice than any of the legal cases that EJI has won.

Conclusion

To do the work of social engineering, of articulation, that the civil rights pioneers accomplished, activists and attorneys must work to change the narrative. That is to say, they must explicitly engage in the social construction of reality by articulating new visions of what this country should be and could be. They do not necessarily have to build museums, but they must have a wholistic view of the social justice struggle and its commitments. Lawyers and activists should assuredly use litigation, but that litigation should be designed to exploit the myths and symbols that already exist in the social consciousness and use them to underscore the significance and meaning of the litigation. Even better, lawyers should view litigation as only one of a range of tactics that can be deployed collectively to confront and adjust the consensus. Such methods can include not only litigation, but media, public education, demonstrations, monuments, markers, works of art, movements to change public place names, and other means to change the narrative and reimagine the future.

As it is usually represented, the Sankofa bird has an egg situated on its back.[161] The bird is depicted looking backwards toward the egg and reaching out to touch it or gather it in.[162] Performing Sankofa is the act of recovering the past and making it relevant to the present.[163] The struggle for racial justice in America and the world is a valiant struggle, offering a history that can inspire and uplift the freedom fighters of today. Following the example of the Sankofa bird, the social engineer should reach back to gather the gifts of the past and use them to give birth to the future we want.

161. "The Akan represent Sankofa either in the form of a bird retrieving an egg off of its back or through an adorned heart symbol." Janice B. Fournillier & Erica Edwards, *Liminal Pedagogy at the Graduate Level: Reflections on the Doctoral Advisement Process in a Neoliberal University Context*, 89 J. Negro Educ. 459, 461 (2020).

162. *Id*.

163. *See supra* note 16 and accompanying text.

Of the Least of These: The Case Against Juvenile Confinement in America

Migueyli Aisha Duran*

"Truly I tell you, whatever you did for one of the least of these brothers and sisters of mine, you did for me."

Matthew 25:40

Introduction

The air felt heavy as you drew near the entrance. The colors of the landscape camouflaged with the gray sky. Barbed wires decorated the horizon. The way to Rikers Island was elaborate, almost impenetrable. By design, those confined to its walls were shunned from the world. Their mothers, fathers, friends, all who dared to love them were assigned a cumbersome journey through buses and searches—just to savor a fleeting moment of contact. Past the guards, iron-clad doors, metal detectors, intimidating gaze of correctional officers, deep within the tangle of concrete and anger, stood a series of classrooms. This is where our group, students from Columbia University's undergraduate school and School of Social Work, met our inmate-students. There were six of them. Six bodies, as correctional officers labeled them. Young boys, as we saw them. They hailed from all over New York City—Black boys, all under the age of 17. Their detached expression filled the room with a dark cloud as they walked in. Their heads hung low; shoulders drooped

* J.D. Candidate, 2025; Executive Notes & Comments Editor, Howard Law Journal, Vol. 68; B.A. African-American Studies, Columbia University, 2018. My praise goes to my Lord, my Rock, and my Freedom—Jesus. Thank you Lord, for giving me grace to do exceedingly, abundantly above all I can think to do on my own. To my mentor, Professor Carla Shedd, thank you for lighting my fire. Thank you to my advisor, Professor Ziyad Motala, whose masterful instruction in the Constitution gave me boldness to write this Note. This Note is dedicated to Tony Webb and Elijah "E-Dot Baby" Irvin. You carried pain no child should bear, but you are free now. Here is to making this world more deserving of you. Rest in power.

like withered flowers. Their faces were dim, and eyes were vacant. They didn't have to say a word, for their suffering cried out in their stead. One young man lifted his eyes and met mine. Instantly, I felt a knot in my throat. I had never seen such sadness. Still, I did not want my body language to betray his dignity. These boys were incarcerated, but they were more than spectacles of ruin to be paraded around as cautionary tales. They were kids, with entire lives beyond their chains.

Understanding why a nation incarcerates its children[1] necessitates an interrogation of competing ideals on criminality, the purposes of punishment, and constructions of childhood. At its core, youth incarceration touches on the nation's beliefs about the dignity of an offender and their capacity to rehabilitate. In the United States, that interrogation would be incomplete without addressing how race arranges these perceptions along the colorline.[2] It is well-documented that in the era of mass incarceration, race can be understood as a proxy for criminality.[3] Thus, the expansion of the carceral state in recent decades has little to do with a rise in criminal activity.[4] Rather, commitments to the nation's hegemonic social and political order compel regurgitations of old systems of oppression.[5] It is no surprise then, that the insistence that America is a colorblind nation clashes with the oddity that prisons are filled with Black bodies, although Black

1. For purposes of this Note, the term "child" and its derivatives refer to persons under the age of eighteen. *See* UN Convention on the Rights of the Child art. 1, *adopted* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/736 (1989).

2. *See* W.E.B. DuBois, The Souls Of Black Folk 15 (1903) ("The problem of the twentieth century is the problem of the colorline.").

3. *See* Michelle Alexander, The New Jim Crow 123 (2010); *see also* Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 Fed. Sent'g Rep. 237, 237–38 (2015) (highlighting that criminality also functions as a proxy for race. "Prior criminal history has become a proxy for race."); Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DePaul L. Rev. 1013, 1014 (2004); U.S. Dep't Just. Civ. Rts. Div., Guidance Regarding The Use of Race by Federal Law Enforcement Agencies 5–6 (2003) (prohibiting law enforcement from race-neutral pretexts as an excuse to target persons of certain races and ethnicities. "The prohibition extends to the use of other, facially race-neutral factors as a proxy for overtly targeting persons of a certain race or ethnicity"); *Research Finds Evidence of Racial Bias in Plea Deals*, Equal Justice Initiative (Oct. 26, 2017), https://eji.org/news/research-finds-racial-disparities-in-plea-deals/ (showing significant racial disparities in plea deals suggests prosecutors may be using race as a proxy for criminality).

4. Comm. On Causes & Consequences Of High Rates Of Incarceration, Nat'l Rsch. Council, The Growth Of Incarceration In The United States: Exploring Causes And Consequences 44 (Jeremy Travis et al., eds.) (2014) ("The link between crime and the growth of the penal population is neither immediate nor direct. Incarceration trends do not simply track trends in crime, although trends in crime have clearly been an important part of the context in which incarceration rates have grown.").

5. *See* Alexander, *supra* note 3, at 1–2.

people do not commit crimes any more frequently than people of other races.[6] Youth incarceration lies at the crux of these paradoxes.

Untangling these paradoxes is a larger project than this Note attempts to undertake. While it is crucial to understand *why* a nation incarcerates its children, this Note addresses the question: what happens to a child *after* they have been incarcerated? Specifically, what, if any, constitutional safeguards exist to protect children from conditions of confinement so harsh, their otherwise bright futures are irreparably tainted? It is well-documented that juvenile incarceration is not effective.[7] Juvenile incarceration does not make communities safer nor rehabilitates children.[8] Instead, there is a pattern of abuse in juvenile detention facilities across the nation wherein the conditions under which children are confined levies physical and psychological damage they never recover from.[9] Nevertheless, states continue to render juvenile incarceration as the go-to response to juvenile delinquency.

While the Supreme Court has recognized that children are different, it has not considered whether children's distinctness bears on the analysis on where to draw the constitutional line for permissible

6. *See* Elizabeth Hinton, LeShae Henderson & Cindy Reed, An Unjust Burden: The Disparate Treatment Of Black Americans In The Criminal Justice System 3 (2014) ("Statistics linking [B]lack people and crime have historically overstated the problem of crime in [B]lack communities and produced a skewed depiction of American crime as a whole"). In 2018, the Federal Bureau of Investigation's ("FBI") Uniform Crime Reporting Program reported that Black people were overrepresented among persons arrested for nonfatal violent crimes and serious nonfatal violent crimes. While Black people constitute 12.5% of the population, 33% of arrests for nonfatal violent crimes and 36% of arrests for serious nonfatal violent crimes were of Black individuals. Allen J. Beck, Race And Ethnicity Of Violent Crime Offenders And Arrestees, 2018 1 (Jan. 2021), https://bjs.ojp.gov/content/pub/pdf/revcoa18.pdf. However, the FBI's Uniform Crime Report does not measure criminal justice outcomes beyond the point of arrest. Hinton et al., *supra* note 6, at 3. Thus, the overrepresentation of Black people in arrest rates do not expressly correlate to overrepresentation in the rate in which Black people commit crimes. Not every arrest results in a conviction. Moreover, the over-policing of communities of color is well-documented. *See* S. Rebecca Neusteter, Ram Subramanian, Jennifer Trone, Mawia Khogali & Cindy Reed, Gatekeepers: The Role of Police in Ending Mass Incarceration 4; *see generally* Jill Lepore, *The Invention of the Police*, New Yorker (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police (detailing how police have disproportionately patrolled and surveilled Black neighborhoods from the Progressive Era to modern times).

7. *See generally* Richard Mendel, Why Youth Incarceration Fails: An Updated Review of the Evidence, Sentencing Project (2022) [hereinafter Youth Incarceration Fails] (summarizing evidence documenting serious problems with youth incarceration); *see* Richard Mendel, No Place for Kids: The Case for Reducing Juvenile Incarceration 3 (2011) [hereinafter No Place for Kids] ("We now have overwhelming evidence showing that wholesale incarceration of juvenile offenders is a counterproductive public policy.").

8. Youth Incarceration Fails, *supra* note 7, at 4; *see also* No Kids in Prison, The Facts Report: The Geography of America's Dysfunctional & Racially Disparate Youth Incarceration Complex 10 [hereinafter The Facts Report], https://www.nokidsinprison.org/the-facts (last visited Feb. 20, 2025).

9. The Facts Report, *supra* note 8, at 5–6.

conditions of youth confinement. Necessarily, the Supreme Court's pronouncement that "children are constitutionally different from adults for sentencing purposes" invites the question of whether it follows that children are different from adults for confinement purposes.[10] Children are uniquely vulnerable, immature, and redeemable; thus, determining an appropriate response to the commission of a crime takes a different form when the perpetrator of that crime is a child. If, indeed, children are different from adults and their differences have constitutional import, then a condition of confinement that is constitutionally permissible for an adult may be unconstitutional when applied to a child.[11] However, constitutional standards governing condition of confinement claims do not distinguish between adults and children.

The question remains: what conditions of youth confinement push beyond constitutional bounds? There are disagreements among the lower courts concerning whether the Fourteenth Amendment's protection against punishment without conviction are coextensive with the Eighth Amendment's prohibition on cruel and unusual punishment.[12] Some courts hold that conditions that violate the Eighth Amendment are necessarily offensive to the Fourteenth Amendment.[13] Other courts do not factor the Eighth Amendment in the calculus, positing that the Eighth Amendment only applies to post-conviction claims.[14] Conditions of confinement claims brought under the Fourteenth Amendment are governed by the standard established in *Bell v. Wolfish*, where the Court held that pretrial detainees cannot be punished absent a conviction comporting with the requirements of due process.[15] Under *Bell*, conditions that constitute unconstitutional punishment are those that are not reasonably related and proportional to a legitimate governmental objective.[16] The leading case for Eighth Amendment conditions of confinement claims is *Farmer v. Brennan*, which established that conditions of confinement posing a substantial

10. Miller v. Alabama, 567 U.S. 460, 471 (2012).

11. *See* Cara H. Drinan, *Cruel and Unusual Youth Confinement*, 54 Ariz. St. L.J. 1161, 1205 (2022) [hereinafter Drinan, *Cruel and Unusual*].

12. *See* Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. Pa. L. Rev. 1009, 1025-26 (2013).

13. *See* Blackmon v. Sutton, 734 F.3d 1237, 1241 (10th Cir. 2013) ("Conduct that violates the clearly established rights of convicts necessarily violates the clearly established rights of pretrial detainees.").

14. *See* Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.").

15. Bell v. Wolfish, 441 U.S. 520, 538–39 (1979).

16. *Id.*

risk of serious harm are unconstitutional if the defendant knew of and disregarded the risk.[17] Both of these cases dealt with adult plaintiffs.[18] Necessarily, the Court did not consider how these standards would apply to children in similar predicaments. Moreover, children in juvenile detention facilities are adjudicated delinquent, not convicted of crimes—a distinction that raises special due process concerns for conditions of youth confinement claims. Thus, the holdings in *Bell* and *Farmer*, in tandem, do not provide a clear line for permissible conditions of youth confinement.

Assuming, arguendo, that the *Farmer* and *Bell* standards are workable as applied to children, these standards are subject to a fatal flaw: the *modus operandi* of the judiciary in resolving challenges to conditions of confinement is to grant near plenary deference to state officials in the administration of their detention facilities.[19] Consider the standards articulated in *Bell* and *Farmer*. The *Bell* standard invokes the language of rational basis review, a standard of review so deferential it is seen as "minimal scrutiny in theory and virtually none in fact."[20] The *Farmer* standard contains a subjective component which is "dependent on the prison officials' state of mind," providing a fireproof mechanism for prison officials to escape liability.[21] When weighing incarcerated individuals' liberty interest in being free from oppressive conditions of confinement against the state's interest in public safety, courts tend to hold the state's interest as paramount, often denying the incarcerated individual relief from conditions that inflict irreparable harm.[22]

17. *See* Farmer v. Brennan, 511 U.S. 825, 836–37 (1994).

18. The incident that brought about Farmer occurred when the plaintiff, Dee Farmer, was nineteen years old. *See* Fight4Justice, FIGHT4JUSTICE, https://fight4justice.info/ (last visited Mar. 18, 2025). The detention facility at the center of *Bell* was a federal detention facility that only held adult pretrial detainees. *See, e.g.*, *Bell*, 441 U.S. at 523.

19. David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2037 (2018).

20. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1971).

21. Shapiro & Hogle, *supra* note 19, at 2039-40 ("In the Eighth Amendment context, doctrinal deference to prison administrators generally takes the form of exacting mens rea elements: to make out a claim, a prisoner must produce evidence not only that she suffered objectively inhumane treatment or conditions, but that the prison officials responsible had malign intent or failed to remedy known risks."). *See also* Drinan, *Cruel and Unusual*, *supra* note 11, at 1192 (explaining that the individual actor approach of the *Farmer* test shield prison officials from responsibility).

22. Brian Nam-Sonenstein, *Research Roundup: Evidence That a Single Day in Jail Causes Immediate and Long-Lasting Harms*, PRISON POL'Y INITIATIVE (Aug. 6, 2024), https://www.prisonpolicy.org/blog/2024/08/06/short_jail_stays/#:~:text=While%20all%20of%20these%20data,more%20severe%20consequences%20for%20each.&text=This%20growing%20body%20of%20research,destructive%20effects%20on%20people's%20livelihoods ("Under our current system, judges only weigh the government's interest in public safety and court appearance against an individual's constitutional right to liberty and due process. In other words, judges are entirely

Deference to state officials is tantamount to greenlighting abusive practices in the name of judicial restraint.[23] It asks states to define whether their conduct is abusive and trusts that determination over the individual who is subject to the abuse—a clear abdication of the judiciary's role in defining the bright-line for constitutional conduct.[24] When it comes to kids, the least protected class of people in our society, the implications are disastrous.[25]

Several legal scholars have proposed solutions to the law's insufficiency to relieve children confined in oppressive conditions. Professor Cara Drinan proposed modifying the standards along "dimensions of difference" between adult and children bearing on the Court's Eighth Amendment jurisprudence.[26] Another scholar proposed categorical bans on the type of conditions that children can be subjected to.[27] Both proposals are necessary to relieve children from oppressive conditions of confinement. Even still, children remain in chains long after they are released from youth prison. Their chains are invisible—but no less destructive, life-altering, and disfiguring.

This Note proposes a new standard for resolving condition of youth confinement claims; one that seeks to circumvent courts' tendency to grant state officials undue deference in conditions of youth confinement claims and protect the futures of incarcerated children. The new standard proposed is found in another provision of the Fourteenth Amendment—the Substantive Due Process Clause.[28] There is a common thread woven throughout the Supreme Court's jurisprudence on delinquent youth pointing to the Court's concern over practices impairing a child's ability to grow and reach their full potential. Indeed,

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focused on the risks of release and whether they outweigh someone's right to freedom—ignoring detention's serious, immediate risks to individuals and public safety.").

23. *See Bell*, 441 U.S. at 568 (Marshall, J., dissenting).

24. *Id.*

25. *See* Jeffrey Fagan & Aaron Kupchik, *Juvenile Incarceration and the Pains of Imprisonment*, 3 DUKE F. L. & SOC. CHANGE 29, 41 (2011) ("After all, juvenile inmates—those who suffer under noxious juvenile correctional conditions—have less status than just about any other custodial group that one can imagine. They are legally barred from political and civic participation, as they cannot even sign a contract, let alone vote. And they often lack access to counsel or other legal resources that are integral to the culture of state prisons for adults. Nor do juveniles have standing to bring lawsuits to remedy toxic conditions of confinement.").

26. Drinan, *Cruel and Unusual*, *supra* note 11, at 1203.

27. *See generally* Lilah Wolf, *Purgatorio: The Enduring Impact of Juvenile Incarceration and a Proposed Eighth Amendment Solution to Hell on Earth*, 14 STAN. J. C.R. & C.L. 89 (2018) (proposing a litigating strategy calling for categorical rules against certain classes of punishment).

28. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 1.

this concern permeates throughout the history of juvenile justice and has formed the basis for a number of statutory reforms around youth delinquency. Unraveling this thread suggests that there is a "history and tradition"[29] in this nation to protect a child's right to self-actualize—that is the child's right to grow, mature, and realize their innate potential. This Note argues that a child's right to self-actualization is a "liberty" enshrined in the Substantive Due Process Clause of the Fourteenth Amendment and has significant implications for youth confinement.

Recognizing that the Substantive Due Process Clause protects children's right to self-actualize elevates the level of scrutiny courts apply to conditions of youth confinement claims. The question would no longer be whether the challenged condition is incident to a legitimate governmental objective or whether the condition poses a risk of harm. The question becomes whether the challenged condition unduly burdens a child's prospect to rehabilitate and reach their full developmental potential. Courts would have to employ the same methodology the Supreme Court employed in determining that children are different from adults—using developments in adolescent brain science to assess how the law ought to be applied to children. Juvenile detention facilities are inherently traumatic.[30] Trauma indubitably impairs a child's growth.[31] Thus, recognition of children's constitutionally protected right to self-actualization would shift how courts arrange its priorities.

This Note advances this argument in three Parts. Part I surveys the past and present of the juvenile justice system—foregrounding constructions of Black childhood at certain historical benchmarks to highlight how the juvenile justice system pivoted from having rehabilitative aims to punitive aims once it converted to a system of control over Black youth.[32] Part II unravels the convoluted law governing conditions of youth confinement claims by using a recent case in Louisiana as case study and asks: how can courts get conditions of youth confinement claims right? Part III argues that the current framework for examining claims of unconstitutional conditions of confinement is

29. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

30. *See* Thalia Gonzalez, *Juvenile (In)Justice: Youth Incarceration, Health, and Length of Stay*, 45 Fordham Urb. L. J. 45, 64 (2017).

31. *See* Melissa L. Breger, *Juvenile Brain Trauma as the New Frontier in Supreme Court Jurisprudence*, 98 Tul. L. Rev. 259, 293 (2023).

32. Throughout this Note, I substitute the term "juvenile offender" for "young offender" or other permutations of the term "young." This semantic choice serves to highlight that the term "juvenile offenders" does not describe different categories of offenders on par with other categorizations, such as sexual offenders, violent offenders, white crime offenders, and the like. Simply, a juvenile offender is a child who disobeyed the law.

woefully inadequate—contending that children have a fundamental right to self-actualization which is implicated when they are incarcerated under conditions that quell their rehabilitative potential. In recognizing their fundamental right to self-actualization, courts would be required to assess claims of unconstitutional conditions of juvenile confinement under strict scrutiny, requiring states to demonstrate a compelling interest in confining children under the challenged conditions. This Note concludes by re-contextualizing the story of juvenile justice to suggest that recognition of a child's constitutional right to self-actualization has special, redemptive implications for Black children.

Part I: The Least of These—Caged Kids in the Land of the Free

The juvenile justice system had benevolent origins. The modern conception of juvenile justice was born during the child-saving movement of the Progressive Era, a period in the early twentieth century marked by political and social reform.[33] At its inception, the juvenile justice system was designed to provide a rehabilitative, non-punitive alternative to the adult criminal justice system. Advocates maintained that adult penal institutions were inadequate to fashion competent adults out of unsophisticated, delinquent children.[34] Fueling the need for separate institutions was a construction of childhood positing that children are "embryonic citizens"—namely, the uniquely malleable developmental potential of children renders them capable of being "trained or tailored to fit social norms."[35] In the early twentieth century, juvenile courts sprang up around the country, functioning "like a kind and just parent ought to treat his children."[36] The hallmark of this new child-centered judicial system was the "concept of the rehabilitative ideal."[37] Judge Mack's classic statement on the original theory of the juvenile court articulated the founding principle for the opening of the country's first juvenile court in 1899:

> Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles

33. Geoff K. Ward, The Black Child-Savers: Racial Democracy & Juvenile Justice 77 (2012); *see generally The Progressive Era Key Facts*, Encyc. Britannica (Sep. 28, 2020), https://www.britannica.com/summary/The-Progressive-Era-Key-Facts (noting that the Progressive Era spanned from the 1890s to the 1920s).

34. Ward, *supra* note 33, at 78.

35. *Id.* at 20.

36. *Id.* at 78.

37. Wallace J. Mlyniec, *Juvenile Delinquent or Adult Convict–The Prosecutor's Choice*, 14 Am. Crim. L. Rev. 29, 30 (1976).

> his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.[38]

Under the model articulated by Judge Mack, troubled youth were connected with programs and personalized services that rehabilitated youth to ensure their civic development.[39] Proceedings in juvenile courts were designed to be informal, such that a child can "be made to feel that he is the object of its care and solicitude."[40] The rapid growth of the juvenile justice system was fueled by the belief that a "wayward child could be saved" and society had a mandate to save him. Thus, juvenile courts turned to "the social worker, the psychologist and psychiatrist;"[41] juvenile court judges became "instrument[s] of rehabilitation."[42] Probation replaced incarceration.[43] If a child needed to be removed from his home, the child "was placed in an environment conducive to rehabilitation."[44]

In the decades following the child-saving movement of the early twentieth century, the juvenile justice system began to metamorphose. The advent of the retributive zeitgeist that erupted the nation's incarceration rates during the 1970s seeped into the juvenile justice system, eroding the rehabilitative posture of juvenile justice. In the ensuing decades, juvenile justice policy shifted its focus from rehabilitating young offenders to criminalizing youthful conduct.[45] Thus, behaviors typically seen as characteristic of a child's lack of maturity or resulting from dysfunctional home environments were criminalized.[46] Children were incarcerated because they came from dangerous homes;

38. Julian W. Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 107 (1909).
39. Ward, *supra* note 33, at 78.
40. Mack, *supra* note 38, at 120; Mlyniec, *supra* note 37, at 30. *Cf.* In re Gault, 387 U.S. 1, 25 (1967) (observing that the informality of juvenile delinquency proceeding raises due process concerns).
41. Mlyniec, *supra* note 37, at 30.
42. *Id.*
43. *Id.*
44. *Id.*
45. Fagan & Kupchik, *supra* note 25, at 30.
46. *See generally* Mahsa Jafarian & Vidhya Ananthakrishnan, *Just Kids: When Misbehaving is a Crime*, Vera Inst., https://www.vera.org/when-misbehaving-is-a-crime (last visited Apr. 14, 2025) (discussing how the juvenile justice system criminalizes behaviors stemming from normal adolescent development and poses little to no risk to public safety).

because they were homeless; because they were mentally ill; because they were sexually active; because they were not going to school; or because they were expected to commit crimes in the future.[47]

Similarly, the aims of juvenile incarceration shifted from being largely rehabilitative to retributive.[48] Conditions in juvenile detention facilities took on a punitive character, reflecting a growing cynicism about a child's capacity to rehabilitate.[49] States toughened their juvenile delinquency statutes to "deemphasize rehabilitation and focus on punishment, retribution, and incapacitation."[50] As a consequence, youth incarceration today is hardly distinguishable from adult incarceration.[51] Juvenile detention facilities feature most of the trappings of their adult counterparts—restricted movement, monochromatic uniforms, physical restraints, regimented routines, and complete submission to disciplinary authorities who dictate every aspect of their existence.[52] Whereas juvenile detention facilities were historically conceived to serve a rehabilitative function, today, they are "correctional facilities whose primary purpose is to punish."[53]

This punitive shift in juvenile justice raises profound contradictions in how society treats young offenders.[54] Children are conceptualized as innocent beings yet treated as if they were not. Beginning with New York's 1978 Juvenile Offender Law, state legislatures across the country decided that young offenders are more "criminally culpable and more dangerous at younger ages than they were in the past," marking a regression towards using the adult criminal justice system to handle youth crime.[55] While no state has abolished their juvenile court system, all states provide a slew of legal mechanisms to transfer

47. Jeffrey Fagan, *The Contradictions of Juvenile Crime & Punishment*, 139 DAEDALUS 43, 44 (2010) [hereinafter Fagan, *Contradictions*].

48. *Id.*

49. *Id.*

50. *Id.* at 48 ("'Getting tough' in the juvenile system was not an institutional project, but a statutory one.").

51. *See* Fagan & Kupchik, *supra* note 25, at 36 ("Juvenile facilities have the capacity to impose pain and restrict future opportunities, just like their adult analogs.").

52. Fagan, *Contradictions*, *supra* note 47, at 43.

53. *Id.*

54. *Id.* at 44–45 ("What this all adds up to is an institutional landscape that at once fears child criminals and wants to punish them harshly, but at the same time adheres to the transcendent philosophy of child-saving."). We believe deeply in child-saving, yet we are quick to expose violent children to the harshest punishments in service to the same punitive instincts that drive mass incarceration of adults. But even there, we pull our punches. We pull back from the brink of fully embracing punitiveness toward juveniles, reserving it instead for adults. Not only is the philosophy of child-saving an important normative modifier of these instincts, it is also deeply embedded in the institutions of juvenile justice and juvenile corrections.").

55. Fagan & Kupchik, *supra* note 25, at 31.

young offenders to adult courts where the sole goal of imprisonment is punishment. In doing so, states demonstrate a desire to punish, not save, children.[56] Inside juvenile detention facilities, state practices against incarcerated children show a "remarkable dedication to the retribution theory of punishment."[57] Incarcerated children are subject to conditions that cannot be justified by any other motive except to inflict suffering to make them "pay for [their] crimes."[58] For example, in Los Angeles, staff at a juvenile detention facility were indicted for staging "gladiator fights" among the children in their care, with one fight resulting in a child incurring traumatic brain injury.[59] In juvenile detention facilities throughout the country, children sustain trauma they have to carry for the rest of their lives. Demonstrated patterns of state-sanctioned abuse in juvenile detention facilities coupled with stubborn resistance to reform exposes inflexible beliefs about children that commit crimes and the treatment they deserve.[60]

An important distinction is crucial to make at this juncture. Tracking how race interacted with the founding principles of juvenile justice reveals parallel histories.[61] In the first few decades of the juvenile justice system, the system operated with fidelity towards its rehabilitative ideal largely because it exclusively treated white children. An essential premise of the rehabilitative ideal was that children were innocent, inherently good, and worth saving.[62] But innocence was raced white.[63] Positive constructions of childhood were not available to Black children.[64] Thus, Black children (and other non-white children) were categorically excluded from the benevolent promise of the

56. Nell Bernstein, Burning Down the House: The End of Juvenile Prison 75 (2014) [hereinafter Bernstein, Burning Down the House] (explaining that the super-predator myth popularized in the 1990s prompted states to revise their juvenile justice codes to make their intent to punish more explicit).

57. Prateek Shukla, *The Criminal Child and Its Potential for Change: A Presumption in Favor of Rehabilitation in Sentencing Juvenile Offenders*, 38 New Eng. J. on Crim. & Civ. Confinement 379, 391 (2012).

58. Bernstein, Burning Down the House, *supra* note 56, at 225.

59. Associated Press, *California Juvenile Detention Officers Staged 'Gladiator Fights' Between Youth, Indictment Says*, CNN (Mar. 4, 2025, 12:54 PM), https://www.cnn.com/2025/03/04/us/california-juvenile-detention-officers-charged-hnk/index.html.

60. *See* Shukla, *supra* note 57, at 391; No Place for Kids, *supra* note 7, at 5; Megan Shutzer & Rachel Lauren Mueller, *"Dying Inside": Chaos and Cruelty in Louisiana Juvenile Detention*, N.Y. Times (Oct. 30, 2022), https://www.nytimes.com/interactive/2022/10/29/us/juvenile-detention-abuses-louisiana.html.

61. *See* Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679, 680 (2002).

62. Robin Bernstein, Racial Innocence: Performing American Childhood from Slavery to Civil Rights 4 (David Kazanjian et al. eds., 2011) [hereinafter Bernstein, Racial Innocence].

63. *Id.*

64. *See* Nunn, *supra* note 61, at 679, 680.

early child-saving movement—suggesting that the history of juvenile justice splits along racial lines. Once Black children entered the fray, the juvenile justice system ceased to exercise a primary rehabilitative function to a punitive one, comporting with constructions of Black childhood. This Part considers the racial dimensions of the history of juvenile justice to argue that parallel histories began to converge when the juvenile justice system shifted towards a punitive approach to adapt to society's growing phobia toward Black adolescence.

A. A (Black) History of Juvenile Justice

For Black children, the promise of restorative juvenile justice was co-opted to maintain social hierarchies of the pertinent era. Early iterations of juvenile justice reform coexisted with the institution of chattel slavery.[65] While early juvenile justice institutions "prioritized the rehabilitative interventions in the lives of white children and youth," the legal system of many slave-holding states regarded Black children as assets on the same footing as animals.[66] Chattel slavery created an economic incentive by which slave owners and their contemporaries did not appreciate Black childhood as a stage of human development.[67] Antebellum Black children were never expected to become full participants of the American polity, rather they were regarded as "profitable beasts" whose existence was defined in terms of the slaveholder's economic interests.[68] As Thomas Jefferson said, "A [Black] child raised every two years is more of profit than the crop of the best laboring man."[69] From its inception, the juvenile justice system was erected as a citizen-building project at a time where Black Americans' access to the privileges and mandates of citizenship was attenuated.[70] Professor Geoff Ward observes that "enslavement essentially removed Black Americans from the scene of early juvenile justice reform."[71]

In the decades following emancipation, conceptions of childhood began to modernize. As the nation transformed from an agrarian nation to an industrial nation, shifts in the workforce encouraged parents to

65. WARD, *supra* note 33, at 34.
66. *Id.* at 35.
67. *Id.* at 36.
68. *Id.*
69. WILMA KING, STOLEN CHILDHOOD: SLAVE YOUTH IN NINETEENTH CENTURY AMERICA 2 (1995) (quoting Thomas Jefferson).
70. WARD, *supra* note 33, at 79.
71. *Id.* at 34.

invest in their children's education to give them a competitive edge in a modernizing economy.[72] Thus, an understanding of adolescence as a stage of development distinct from adulthood began to take shape—bringing along with it new privileges of extended education, opportunities for self-discovery, and insulation from adult activities.[73] States began passing compulsory education laws, laws banning child labor, and laws establishing social programs to impose middle-class values on children.[74] Democratic ambitions linking juvenile social control with the fate of the nation started to shape juvenile justice.[75] Prior to the emergence of specialize juvenile courts, courts operated under common law diminished child-criminal culpability standard providing that any offender under the age of fourteen enjoyed a presumption of incapacity.[76] Even young persons as old as twenty-one may be exempted from the harshest punishments under common law.[77] Thus, pre-existing presumptions of diminished capacity in youth coupled with the goals of reforming young offenders spurred a need for separate institutions to deal with juvenile delinquency. By 1917, juvenile courts had been established in all but three states.[78]

Yet, these reforms did not apply to Black children. In 1944, South Carolina killed 14-year-old George Stinney, the youngest person in modern America to be executed.[79] Three years later, Louisiana killed 16-year-old Willie Francis in a botched execution.[80] During the time George Stinney and Willie Francis were executed, states were professing a demonstrated commitment to the citizen-building project of juvenile courts. Yet, George Stinney and Willie Francis were erroneously convicted of crimes after proceedings described as "appalling disregard[s] for justice."[81] They were not regarded as children with a diminished capacity to understand the accusations against them.[82] They were not regarded as future citizens whose potential was worth protecting. Instead, as Black youth, they were regarded as "perennial

72. *Id.*
73. *Id.* at 10
74. *Id.*
75. Ward, *supra* note 33, at 31.
76. *Id.* at 6; s*ee also* Craig S. Lerner, *Originalism and the Common Law Infancy Defense*, 67 Am. Univ. L. Rev. 1577, 1586 (2018).
77. Lerner, *supra* note 76, at 1593.
78. Barbara Danzinger Flicker, *Juvenile Justice Standards Project Standards for Juvenile Justice: A Summary and Analysis*, Off. Just. Programs, https://www.ojp.gov/pdffiles1/ojjdp/83565.pdf.
79. *Id.* at 10.
80. *Id.* at 240.
81. *Id.*
82. Kristin Henning, The Rage of Innocence: How America Criminalizes Black Youth 240 (2021).

'lost cause[s]'. . . lacking the physical, moral, and intellectual capacity on which normalization would depend."[83] The reality that faced George Stinney, Willie Francis, and Black youth today, was that Black youth were simply not deemed worthy of rehabilitative efforts.[84] While white delinquent youth were afforded practical training, discipline, and moral guidance in reformatories, Black youth were excluded on the basis that "it would be degrading to the white children to associate them with beings given up to public scorn."[85] By 1945, a year after George Stinney's execution, all states had a separate juvenile court.[86] Despite the universal acceptance of leniency in juvenile justice, Black children were executed, imprisoned, and subjected to the brutality of the convict leasing system—a system regarded as "worse than slavery."[87] Even Black girls as young as six-years-old, such as Mary Gay, were imprisoned for petty crimes such as stealing a hat.[88]

The history of the juvenile justice system teaches that constructions of Black childhood were defined according to the interests of the dominant social order. During chattel slavery, Black childhood was constructed in economic terms—the value of a Black child was measured by their lifetime revenue potential. When slavery metamorphosed into Jim Crow, Black childhood was invisible. Then, political backlash against the victories of the Civil Rights Movement led to increased criminalization of Black youth. Mainstream media perpetuated images placing "the site of the Black body as the location of menace"—demonizing blackness by using the Black body "as a canvas for criminality."[89] "[N]ightmarish, boogieman-like" images of Black youth "titillate[d] deeply held convictions about white goodness and Black menace," a phenomenon which helped usher in the age of mass incarceration.[90] In recent decades, constructions of Black childhood were viewed in light of mass hysteria surrounding the urban, violence-disposed, "super-predator" caricature of the 1990s.[91] An "obsessive

83. WARD, *supra* note 33, at 39.
84. *See* HENNING, *supra* note 82, at 244; WARD, *supra* note 33, at 38.
85. WARD, *supra* note 33, at 52–53.
86. Erin Fitzgerald, *Put the Juveniles Back in Juvenile Court*, 68 VILL. L. REV. 367, 367 (2023).
87. *Id.* at 67–68. In 1868, of the 222 convicts in the Louisiana penitentiary, forty-three were between the ages of ten and twenty. By 1880, at least 25 percent of Mississippi's convicts were under the age of eighteen.
88. *Id.* at 68.
89. Blanche Bong Cook, *Death-Dealing Imaginations: Racial Profiling, Criminality, and Black Innocence*, 63 WAYNE L. REV. 9, 11 (2017).
90. *Id.* at 12; ALEXANDER, *supra* note 3, at 52–53.
91. HENNING, *supra* note 82, at 87–88; *see also* Jessica K. Heldman, *Transforming the Culture of Youth Justice in the Wake of Youth Prison Closures*, 26 LEWIS & CLARK L. REV. 1, 14 (2022)

fear of [B]lack youth and totalizing commitment to their surveillance and control" led to communities over-policing and over-incarcerating Black youth.[92] This fear was so pervasive that efforts to "prevent [B]lack youth from turning to crime and contain those involved with crime with aggressive policing and excessive incarceration became in many respects America's chief domestic objective"[93] towards the latter half of the twentieth century. Mechanisms by which Black children were criminalized expanded.[94] Even schools became gateways to prison.[95]

A consequence of the criminalization of Black youth is the disproportionate rate in which Black youth are incarcerated and the brutal conditions under which they are incarcerated. In 2019, the Office of Juvenile Justice reported that Black youth are 2.4 times more likely to be arrested than white youth.[96] While Black youth only represent 15% of the adolescent population, they are involved in 52% of juvenile arrests for violent crimes and make up 41% of all incarcerated children.[97] Some might argue that racial disproportionality rates in juvenile arrests and incarceration mirror actual trends in the rate Black youth commit crimes in comparison with white youth. However, in a study investigating stereotypic associations on visual studies, researchers found that when police officers were asked directly, "who looks criminal?" officers chose

("An anxious public was inundated with predictions of an impending juvenile crime wave and the portrayal of youth as particularly violent and remorseless–a new breed of 'super-predator'"); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1388 (2020) ("The 1990s, the image of wayward children had been supplanted by frightening depictions of young 'superpredators' prowling inner-city streets in gangs, bent on murder and mayhem. These racialized images suggest a particularly ugly aspect of the attitudes fueling the moral panic surrounding youth crime. The push for punitive reforms was infused with racist assumptions about the identity of the youths threatening society. Research indicated that the public and legal actors perceived youth of color as more mature, threatening, and deserving of harsh punishment than their white counterparts. In this racialized environment, politicians and the public viewed teenagers involved in crime not as children but as criminals, who should be punished as such.").

92. Jonathan Simon, *Is Mass Incarceration History?*, 95 TEX. L. REV. 1077, 1079 (2017).

93. *Id.*

94. *See generally id.* at 1079, 1082, 1101 (detailing how Nixon's "war on crime" promulgated an "obsessive fear of Black youth and totalizing national commitment to their surveillance and control" where law enforcement resolved to "confront, arrest, and punish those Black youth whose potentiality for crime crossed over into criminal behavior"). *See also* HENNING, *supra* note 82, at 48–49, 53, 62–63, 71 (discussing policies that criminalize Black youth culture such as laws prohibiting ski masks, city ordinances prohibiting sagging pants, school dress policies rendering Black hairstyles inappropriate, and prosecutorial tactics that criminalizing hip-hop music).

95. For background on the school-to-prison pipeline, *see* MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS 9–13, 66–71 (2015).

96. Nora Leonard, *Racial and Ethnic Disparities in the Youth Justice System*, COAL. FOR JUV. JUST. (Mar. 2, 2023), https://www.juvjustice.org/blog/1436.

97. *Id.*

Black faces more than white faces.[98] Racial bias in officers' perception of criminality inform arrest rates.[99] While recent decades have seen a decline in juvenile arrests, Black youth arrests are decreasing at a significantly slower pace than White youth.[100]

Youth incarceration is rife with racial disparities and brutal conditions. Black youth in placement are held in punitive corrections programs whereas white youth are more represented in residential programs.[101] In a survey of youth in corrections programs, children "reported sexual victimization, fear of attack, solitary confinement, strip searches, use of restraints, unnecessary use of force, and poor relations with staff."[102] While adult facilities are undoubtedly the worst place for youth, juvenile detention centers are functionally equivalent to adult jails.[103] Some are reportedly *worse*.[104] Thus, the difference between juvenile and adult facilities is often a matter of degree as juvenile facilities can impose pain and restrict future opportunities as much as their adult analogs.[105] Kristin Henning gives an account of one of Kalief Browder's first nights at the juvenile complex in Rikers Island: "Kalief and several other teenagers were lined up against a wall and repeatedly punched in the face, one at a time, by the guards . . . The guards told him, 'We're gonna break you,' and they did."[106] Given the brutality of punitive correction programs, Professor Jeffrey Fagan argues that "any incarceration ought to be used only as a last resort sentencing option."[107]

Nonetheless, states continue to incarcerate kids even though incarceration does not make communities safer.[108] Children experience

98. Jennifer L. Eberhardt, Valarie J. Purdie, Phillip Atiba Goff & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psych. 876, 878 (2004).

99. Cydney Schleiden, Kristy L. Soloski, Kaitlyn Milstead & Abby Rhynehart, *Racial Disparities in Arrests: A Race Specific Model Explaining Arrest Rates Across Black and White Young Adults*, 37 Child & Adolescent Soc. Work J. 1, 12 (2020) ("[This] study sheds light on racial disparities [in youth arrests] that are not accounted for by contextual or behavioral factors, implying there is a need for self-reflection in order to begin to understand that we each hold bias that can perpetuate this cycle of oppression.").

100. *Id.* at 1.

101. Andrea J. Sedlak & Karla S. McPherson, *Conditions of Confinement: Findings from the Survey of Youth in Residential Placement*, Off. Just. Programs, https://www.ojp.gov/pdffiles1/ojjdp/227729.pdf (last visited Mar. 31, 2025).

102. Press Release, Wendy Sawyer, Youth Confinement: The Whole Pie 2019 (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html (summarizing findings in Sedlak & McPherson's *Conditions of Confinement*).

103. *Id.*

104. *Id.*

105. Fagan & Kupchik, *supra* note 25, at 36.

106. Henning, *supra* note 82, at 259.

107. Fagan & Kupchik, *supra* note 25, at 30.

108. The Facts Report, *supra* note 8.

high recidivism rates.[109] In fact, juvenile incarceration substantially increases the likelihood that youth will be incarcerated as adults.[110] Children housed in prisons are often victimized and exposed to violence.[111] Exposing children to violence in adult prisons carries social and fiscal costs; communities may have to pay later in crime and violence upon their release.[112] Thus, implicit in the question of juvenile incarceration is whether confining a child to a punitive environment as punishment for misbehavior necessary?[113] Many Americans believe no—a recent public opinion poll showed that nearly three quarters of the American public believe that teaching young offenders to take responsibility for their actions does not require incarceration.[114]

B. Broken Wings: Pattern of Brutality in America's Youth Prisons

Across the country, children are confined under conditions advocates describe as "government-sanctioned child abuse."[115] A 2010 nationally representative survey of 7,073 children inside the nation's juvenile facilities revealed that childhood trauma was "so pervasive as to be nearly universal."[116] Unbelievably oppressive conditions are not extreme or isolated occurrences. Experts report that instances of extreme abuse in youth prisons follow a "sustained pattern of maltreatment," such that experts consider that "punishment, retribution, and tolerance of harsh conditions of confinement are

109. *Id.* High recidivism rates among incarcerated youth circumvents the argument that incarceration is necessary to the penological goal of incapacitation. *See* Graham v. Florida, 560 U.S. 48, 72 (2010) ("Recidivism is a serious risk to public safety, and so incapacitation is an important goal.").

110. The Facts Report, *supra* note 8.

111. Martin Forst, Jeffrey Fagan & T. Scott Vivona, *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 Juv. & Fam. Ct. J. 1, 1 (1989).

112. *Id.* at 11.

113. Studies show that juvenile violent offenses are rare. Youth crime is predominantly non-violent. In 2020, 8% of all youth arrests were for violent crimes such as aggravated assault, robbery, and murder. Joshua Rovner, *Youth Justice by the Numbers*, Sent'g Project, https://www.sentencingproject.org/app/uploads/2024/08/Youth-Justice-By-The-Numbers.pdf (last visited Mar. 31, 2025).

114. The Facts Report, *supra* note 8. *See generally New Poll Results On Youth Justice Reform*, No Kids In Prison, https://backend.nokidsinprison.org/wp-content/uploads/2021/02/Youth-First-National-Poll-Memo-Feb-2021-Final-4.pdf (describing key findings from a recent survey of 1,000 adults in the U.S. conducted by GBAO on behalf of Youth First Initiative where data shows "Americans overwhelmingly favor a youth justice system that focuses on prevention and rehabilitation (78 percent), while only 22 percent favor focusing on punishment and incarceration.") (last visited Mar. 31, 2025).

115. *Solitary Confinement & Harsh Conditions*, Juv. L. Ctr., https://jlc.org/issues/solitary-confinement-other-conditions (last visited Feb. 20, 2025).

116. Bernstein, Burning Down the House, *supra* note 56, at 153.

the . . . indicia of most juvenile detention facilities."[117] For example, inside the walls of one of Louisiana's largest juvenile detention facilities, children were attempting suicide in droves—some tying linens around their necks, others swallowing hazardous chemicals, and others trying to drown themselves.[118] The conditions driving them to suicide were torturous. Guards would beat them, drug them, and force them to endure sexual abuse in exchange for food.[119] Abuse was an open secret so resisting was futile.[120] Children were driven to despair knowing "that no one is going to rescue them from repeated acts of physical violence, sexual assault and psychological torment."[121] For example, officers in a detention facility stood by while a child attempted suicide, recording the ordeal on their cellphone instead of rushing to save the child.[122] In Texas, the Justice Department uncovered a pattern of abuse wherein detention centers subjected children as young as ten years old to physical and sexual abuse.[123] In Kansas, a 15-year-old boy was beaten by a guard who inflicted a 3-inch laceration to his skull.[124] Luckily, the child survived.[125] In Florida, a 14-year-old boy with sickle-cell trait was killed by guards within two hours of his arrival to the detention facility—guards suffocated him to death for collapsing while running laps, dealing blows even after his body turned limp.[126] In Maryland,

117. No Place for Kids, *supra* note 7, at 5; Michael L. Perlin, *Yonder Stands Your Orphan with His Gun: The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 Tex. Tech. L. Rev. 301, 316 (2013); *see also* Meg Anderson, *Youth Detention Facilities Face Increased Scrutiny Amid a Wave of Abuse Lawsuits*, NPR (May 17, 2024, 4:49 PM), https://www.npr.org/2024/05/17/1251963778/youth-detention-juvenile-crime-sexual-abuse-lawsuits ("Experts say juvenile facilities are inherently dangerous places for children. According to the Sentencing Project, a research and advocacy group, recurring abuse has been documented in state-funded juvenile detention facilities in 29 states and the District of Columbia in recent decades.").

118. Shutzer & Mueller, *supra* note 60.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Bianca Moreno-Paz & Minnah Arshad, *DOJ Finds 5 Texas Juvenile Detention Centers Abused Children*, USA Today (Aug. 1, 2024, 10:27 PM), https://www.usatoday.com/story/news/nation/2024/08/01/doj-abuse-texas-juvenile-detention-centers/74639886007/.

124. *Juvenile Beaten by Guards in Detention Center*, KBZK Bozeman (Aug. 15, 2018, 10:41 PM), https://www.kbzk.com/cnn-regional/2018/08/15/juvenile-beaten-by-guards-in-detention-center/.

125. *Id.*

126. Rosalind Bentley, *The Tragic Death of Martin Lee*, Essence (Jan. 4, 2022), https://www.essence.com/news/the-tragic-death-of-martin-lee/. There have also been instances of children dying at the behest of guards in Florida detention facilities. For example, a guard gave a group of detainees greenlight to attack a 17-year-old child, instructing them to "do what [they] got to do." The detainees went on to kill the child. Carol Marbin Miller, *5 Fired at Miami-Dade Lockup Where Teen Died in Beat-Down*, Miami Herald (Sept. 30, 2015, 10:41 PM), https://www.miamiherald.com/news/special-reports/florida-prisons/article37157142.html.

children were "routinely locked up for 23 hours a day in cells plagued by rodents and regular floods of sewage water."[127] In New Jersey, staff allowed a "'culture of abuse,' in which staff sexually abused boys, endure for decades."[128]

Youth incarceration is all-around painful.[129] The conduct of staff is a discrete piece of a larger ecosystem of trauma in juvenile detention facilities. Simply being surrounded by a specter of "abuse, neglect, [and] stigmatization" in detention facilities exposes children to trauma.[130] From the moment they enter the cold walls of the facility—cut off from their families, denied communication with their support networks, and surrendered to the unqualified authority of unsympathetic guards—they are stamped with stigma. It makes little difference whether the backdrop of a child's confinement is prison, jail, or a detention facility.[131] Oftentimes, the brutality of youth incarceration is minimized through euphemisms such as "youth center" or "juvenile justice center," but the fact remains that "juvenile prisons are indeed prisons that punish and impose pain on convicted (adjudicated) criminals (delinquents)."[132] Thus, regardless of whether the custodial staff wear jeans or police uniforms, the fact of incarceration itself harms children.[133]

Part II: The Legal Labyrinth of Conditions of Juvenile Confinement Claims

In September 2022, the United States District Court for the Middle District of Louisiana allowed the transfer of twenty-five youth in custody, most of whom are Black, to the Louisiana State Penitentiary; otherwise known as Angola—one of the nation's most notorious adult maximum security prisons.[134] The youth subject to the transfer filed

127. Jamiles Lartey, *How the Juvenile System Forces Minors into Unsafe Institutions*, Marshall Project (Apr. 15, 2023, 12:00 PM), https://www.themarshallproject.org/2023/04/15/texas-california-children-juvenile-detention-justice.

128. Mike Catalini, *A New Jersey Youth Detention Center Had 'Culture of Abuse,' New Lawsuit Says*, Associated Press (Jan. 17, 2024, 12:21 PM), https://apnews.com/article/new-jersey-justice-youth-detention-sexual-abuse-75ef0e8bfd0a6f9b82497eb1aee7c9de.

129. Fagan & Kupchik, *supra* note 25, at 59.

130. Comment, *The Supreme Court and Pretrial Detention of Juveniles: A Principled Solution Due to a Due Process Dilemma*, 132 U. Pa. L. Rev. 95, 97 (1983).

131. Fagan & Kupchik, *supra* note 25, at 59.

132. *Id.* at 39, 58 ("Their account demonstrates how juvenile correctional facilities - even those mandated to offer educational and counseling services - are prisons first and therapeutic sites second.").

133. *Id.* at 59.

134. *First Day of Hearing in Angola Prison Case Highlights Abusive Conditions Youth Endure*, ACLU (Aug. 16, 2023), https://www.aclu.org/press-releases/first-day-of-hearing-in-angola-prison-case-highlights-abusive-conditions-youth-endure.

a lawsuit, alleging that the transfer constituted unlawful conditions of confinement and deprivation of due process under 42 U.S.C. § 1983.[135] The Office of Juvenile Justice ("OJJ") implored the court that the transfer was necessary due to the "present formidable security and safety risks" imposed by youth who had destroyed all secure care facilities in the state.[136] OJJ promised to the court that they would provide a "constitutional level of care" so that the conditions of their confinement would not violate their rights.[137] Upon those promises, the district court ruled in favor of the proposed transfer plan, even though it expressed doubts on the propriety of the transfer.[138]

A year later, the district court found that OJJ broke their promises.[139] For almost a year, over seventy children—mostly Black—were "held in solitary confinement, deprived of their education, and separated from their support systems and families."[140] The district court found that the "conditions of confinement of youth incarcerated at Angola constitute[d] cruel and unusual punishment."[141] One child testified that he was held in solitary confinement for nineteen out of thirty days in June, fourteen of which were consecutive.[142] The children were held in Angola's former death row chambers in windowless cells whose temperatures could rise to 133 degrees Fahrenheit.[143] They were deprived of family contact, sprayed with mace, and shackled indiscriminately.[144] Upon these findings, the district court ordered OJJ to move the children from Angola by September 15, 2023.[145] The Fifth

135. Alex A. *ex rel*. Smith v. Edwards [*Edwards I*], No. CIV.A.22-573-SDD-RLB, 2022 WL 4445499, at *18 (M.D. La. Sept. 23, 2022) (order denying Pls.' Mot. for Prelim. Inj.), *opinion vacated, appeal dismissed sub nom.* Smith v. Edwards, 88 F.4th 1119 (5th Cir. 2023).

136. *Id.* at *1.

137. *Id.*

138. *Id.* at *31 (finding that transferring "emotionally vulnerable adolescents" to Angola will likely have "deleterious psychological ramifications" and such choice is "emblematic of grave underlying systemic social issues." Nevertheless, the district court held that the fact that the children will likely suffer irreparable harm due to the transfer was not compelling enough to grant the children relief.).

139. Alex A. *ex rel*. Smith v. Edwards [*Edwards II*], No. CIV.A.22-573-SDD-RLB, 2023 WL 5984280, at *1 (M.D. La. Sept. 14, 2023) (order granting Pls.' 2d Mot. for Prelim. Inj.), *opinion vacated, appeal dismissed sub nom.* Smith v. Edwards, 88 F.4th 1119 (5th Cir. 2023). Hereinafter, *Edwards I*, *supra* note 135, and *Edwards II* will be collectively referred to as the "*Angola Transfer Case*."

140. Press Release, Wendy Sawyer, *supra* note 102.

141. *Edwards II*, 2023 WL 5984280, at *1.

142. *Id.* at *2.

143. Abe Asher, *Children Held at Former Death Row Prison in 133F Heat with No AC and Limited Water in Louisiana*, INDEP. (July 19, 2023, 2:01 PM), https://www.independent.co.uk/climate-change/angola-prison-children-heat-louisiana-b2377577.html.

144. *Edwards II*, 2023 WL 5984280, at *2.

145. *Id.* at *10.

Circuit issued a temporary stay of the district court order, allowing Louisiana to continue holding youth in Angola.[146] Louisiana appealed the district court's order.[147] However, after over a year of relentless advocacy and public outrage, Louisiana acquiesced to moving the children out of Angola.[148] Shortly after Louisiana moved the children, the injunction reached its expiration date, prompting the Fifth Circuit to render the issue moot and dismiss Louisiana's appeal.[149]

This Part argues that judicial deference to state officials in determining whether a challenged condition is permissible cripple constitutional protections under the Eighth and Fourteenth Amendments, providing states like Louisiana legal sanction to subject children to unbelievable conditions. The *Angola Transfer Case* provides a useful case study on the constitutional remedies available to children seeking relief from problematic conditions of confinement. Advocates vigorously protested the transfer, giving attention to the manifest reprehensibility of transferring Black children to the death row chambers of one of the most notoriously brutal prison facilities in the country. That Angola sits on a former slave plantation where its mostly Black inmates pick cotton "under the watch of white 'freemen' on horseback" adds a stomach-turning symbolic irony to the ordeal.[150] The children challenged their confinement in Angola under the Eighth and Fourteenth Amendments. This Part assesses the sufficiency of these constitutional remedies. The question driving the analysis is how could the district court have gotten it right the first time? To be clear, the district court did not make a mistake; it applied the law with fidelity. Instead, this Part argues that the legal standards governing the conditions of confinement claim before the district court compelled it to betray its instinct to not allow the transfer. Judicial deference to state officials required the district court to believe in Louisiana's promise to

146. *Appeals Court Allows Louisiana to Keep Children in Angola Prison*, ACLU (Sept. 15, 2023), https://www.aclu.org/press-releases/appeals-court-allows-louisiana-to-keep-children-in-angola-prison.

147. *See Court Cases:* Alex A. v. Edwards, ACLU (Sept. 28, 2022), https://www.aclu.org/cases/alex-v-edwards.

148. Press Release, Under Public and Legal Pressure, Louisiana Finally Moves Children Out of Angola Prison, ACLU (Sept. 15, 2023), https://www.aclu.org/press-releases/under-public-and-legal-pressure-louisiana-finally-moves-children-out-of-angola-prison.

149. *Id.* Litigation challenging Louisiana's future use of Angola to house children is on-going as of publication of this Note. *See Court Cases:* Alex A. v. Edwards, *supra* note 147.

150. Hassan Kanu, *US Prisons Rife with Human Rights Abuses, Especially Against Black People, UN Says*, Reuters (Oct. 4, 2023, 12:26 PM), https://www.reuters.com/legal/government/column-us-prisons-rife-with-human-rights-abuses-especially-against-black-people-2023-10-04/.

not abuse the children, despite broad acknowledgement that juvenile detention facilities have a penchant for abuse.[151]

A. Conviction versus Adjudication: Due Process for Kids?

Given the Supreme Court's silence on whether a child's youthfulness bears on the parameters of constitutionally permissible conditions of youth confinement, it is unsurprising that the case law surrounding these claims are chaotic.[152] Since the early nineteenth century, juvenile courts have been the primary venue for handling youth crime. Every state has statutes granting juvenile courts delinquency jurisdiction to adjudicate cases where a young person is accused of an act that would be a crime if committed by an adult.[153] Yet, the Supreme Court did not clarify the extent to which constitutional protections apply to juvenile delinquency proceedings until its landmark decision in *In re Gault.*

In *In re Gault*, the Supreme Court held that the procedural requirements of the Due Process Clause of the Fourteenth Amendment are applicable to juvenile proceedings where the adjudication of delinquency may result in commitment to a detention facility.[154] Considering the constitutional significance of incarceration and its import on a child's liberty, the *Gault* Court was concerned with whether procedures resulting in confinement sufficiently ensured "procedural regularity and exercise of care implied in the phrase 'due process.'"[155] However, the *Gault* Court purposely evaded the task of defining a child's due process rights at other stages of the adjudicatory process.[156]

151. Anderson, *supra* note 117.

152. *See* Martin R. Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791, 793 (1982) ("As a consequence, courts that have addressed the constitutionality of the juvenile justice system since Gault have done so with the understanding that the system reflects a mixture of theoretical underpinnings. Not surprisingly, the courts have had difficulty defining the constitutional rights of juveniles who are thrust into a system that is simultaneously punitive and therapeutic."); *see also* Struve, *supra* note 12, at 1012 ("I will argue that the state of the law in the lower courts is substantively undesirable, and, in a number of instances, chaotic.").

153. *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. STATE LEGISLATURES (Aug. 21, 2024), https://www.ncsl.org/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws. While all states have statutes allowing young offenders to be prosecuted as adults regardless of their age, recent data shows that the vast majority of delinquency cases are adjudicated in juvenile courts. This Note focuses on those cases.

154. In re Gault, 387 U.S. 1, 30–31 (1967).

155. *Id.* at 18–20, 27–28.

156. *Id.* at 13 ("We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile 'delinquents.' For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process.").

Its narrow application left open the question of defining due process at other stages of juvenile proceedings to states.[157] Thus, with states determining whether and to what extent due process applies beyond the adjudicatory phase, *Gault* left a huge gap in the law, resulting in a "legal patchwork among state jurisdictions."[158]

Despite its limited scope, *Gault* changed the legal landscape of children's rights by allowing courts to extend due process protections to various stages of the juvenile justice continuum. The *Gault* Court did not specify whether due process protections extend to post-adjudication matters—which is when challenges to problematic conditions of confinement would arise. However, since adjudication of delinquency is a determination of status rather than conviction of a crime, most courts provide that incarcerated youth are protected by the Due Process Clause—a determination that is in concert with the *Gault* decision.[159] Typically, courts impute children adjudicated as delinquents the same legal status as pretrial detainees for due process purposes.[160]

Under the Due Process Clause, incarcerated children pursuant to their delinquency status cannot be punished because they have not been convicted of a crime.[161] In *Bell v. Wolfish*,[162] the Supreme Court held that the Due Process Clause prohibits the punishment of all detainees prior to adjudication of guilt.[163] Pretrial detainees are presumptively innocent, thus any infliction of punishment violates their due process rights under the Fourteenth Amendment.[164] Under *Bell*, pretrial detainees, and by extension, children in juvenile detention facilities, can bring conditions of confinement claims if they are subject to conditions

157. *Due Process Rights and Children: Fifty Years of In Re Gault–Part One*, On the Civil Side: A UNC School Gov't Blog, https://www.sog.unc.edu/sites/default/files/course_materials/2.%20due-process-rights-and-children-fifty-years-of-in-re-gault.pdf (last visited Mar. 27, 2025).

158. *Id.*

159. *See* Cheryl A. Koris, *Constitutional Law-Rational Basis Test: Appropriate Constitutional Standard for Assessing Conditions of Juvenile Confinement*, 18 Suffolk Univ. L. Rev. 50, 52 (1984). *See also* Comment, *supra* note 130, at 99; *see, e.g.*, United States v. Gonzalez-Cervantes, 668 F.2d 1073, 1076 (9th Cir. 1981).

160. *See Juvenile Detention Explained*, Annie E. Casey Found. (Mar. 26, 2021), https://www.aecf.org/blog/what-is-juvenile-detention#:~:text=Juvenile%20detention%20is%20short%2Dterm,people%20only%20in%20extraordinary%20cases.%E2%80%9D. *See also* Gardner, *supra* note 152, at 791, 828.

161. *See* Bell v. Wolfish, 441 U.S. 520, 539 (1979). *See also* Santana v. Collazo, 714 F.2d 1172 (1st Cir. 1983) (reasoning that the state has no legitimate interest in punishing juveniles).

162. *Bell*, 441 U.S. 520 (1979).

163. *Id.* at 535.

164. Kate Lambroza, *Pretrial Detainees and The Objective Standard After* Kingsley v. Hendrickson, 58 Am. Crim. L. Rev. 429, 441 (2021).

amounting to punishment.[165] For a particular condition to amount to "punishment in the constitutional sense," the *Bell* Court established that courts must determine whether the condition was imposed with an "expressed intent to punish" and was "reasonably related to a legitimate governmental objective."[166] If a condition imposed is arbitrary or purposeless, and thus demonstrably unrelated to a legitimate purpose, courts may infer that the condition constitutes punishment in violation of the Due Process Clause.[167] As applied to children, the central question under *Bell* is whether the conditions under which the child is confined constitutes punishment.[168]

There is confusion among circuits on how to apply *Bell*. This confusion can be attributed to two reasons. First, constitutional protections available to the accused take on different forms as they traverse through the justice system. As defendants move from arrest to conviction, courts are not clear as to when the Fourteenth Amendment's due process protections cease to operate and the Eighth Amendment's post-conviction protections kicks in.[169] Under *Bell*, the Fourteenth Amendment protects pretrial detainees from conditions of confinement that amount to punishment. The Eighth Amendment protects convicted prisoners from conditions of confinement that constitute "cruel and unusual punishment."[170] Some jurisdictions overlay Eighth Amendment considerations over their due process analysis, reasoning that pretrial detainee conditions of confinement claims "implicate[s] Fourteenth Amendment liberty interests" and "the parameters of such an interest are coextensive with those of the Eighth Amendment's

165. *Id.* at 442.

166. *Bell*, 441 U.S. at 538–39.

167. *Id.* at 539.

168. *See id.* at 535 ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against the deprivation of liberty without due process of law, we think that the proper inquiry is whether those condition amount to punishment of the detainee.").

169. *See* Blackmon v. Sutton, 734 F.3d 1237, 1240 (10th Cir. 2013) ("We know that after the Fourth Amendment leaves off and before the Eighth Amendment picks up, the Fourteenth Amendment's due process guarantee offers detainees some protection while they remain in the government's custody awaiting trial. But we do not know where exactly the Fourth Amendment's protections against unreasonable searches and seizures end and the Fourteenth Amendment's due process detainee protections begin. Is it immediately after arrest? Or does the Fourth Amendment continue to apply, say, until arraignment? Neither do we know with certainty whether a single standard of care applies to all pretrial detainees—or whether different standards apply depending where the detainee stands in his progress through the criminal justice system.").

170. *See* U.S. CONST. AMEND. XIII; *see also* Farmer v. Brennan, 511 U.S. 825, 828 (1994) (holding that under the Eighth Amendment, prison officials can be held liable for violating prisoners' rights to humane conditions of confinement if they act with "deliberate indifference" to inmate health or safety).

prohibition against cruel and unusual punishment."[171] These courts consider that pretrial detainees are entitled to at least the same rights as those of convicted prisoners, assimilating pretrial detainees' claims to those of convicted prisoners and applying the Eighth Amendment to both.[172] Other courts posit that pretrial detainees are entitled to *greater* protections than convicted prisoners.[173] These courts tend to distinguish the constitutional standards applicable to pretrial detainees from those applicable to convicted prisoners, analyzing condition of confinement claims under one amendment. In one instance, there was intra-circuit incongruity on whether to apply the Eighth Amendment to a condition of pretrial confinement claim.[174] Since the Fourteenth and Eighth Amendments protect different rights, the standards under which claims are assessed are varied—rendering the state of the law amongst jurisdictions chaotic.[175]

Second, as case law develops, the infeasibility of the *Bell* reasonable-relationship test to govern *all* pretrial detainee claims becomes more apparent.[176] In *Kingsley v. Hendrickson*,[177] the Supreme Court held that police officers cannot employ excessive force against pretrial detainees and the determination for whether the force used was excessive is solely governed by an objective reasonableness standard.[178] *Kingsley* established that pretrial excessive force claims

171. Surprenant v. Rivas, 424 F.3d 5, 18 (1st Cir. 2005).

172. *See* Struve, *supra* note 12, at 1012; s*ee also* United States v. Hinds Cnty. Bd. of Supervisors, 120 F.4th 1246, 1257 (5th Cir. 2024) ("Because pretrial detainees retain at least those constitutional rights that courts have held are enjoyed by convicted prisoners, the Eighth Amendment standard extends to pretrial detainees, such as those at issue here, under the Fourteenth Amendment.").

173. Struve, *supra* note 12, at 1012; *see also* Gibbons v. Cnty. of Washoe, 290 F.3d 1175, 1188 n.9 (9th Cir. 2002) ("It is quite possible, therefore, that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment."). *Cf.* Bistrian v. Levi, 696 F.3d 352, 372 (3d Cir. 2012) ("As such, pretrial detainees have 'federally protected liberty interests that are different in kind from those of sentenced inmates.'").

174. *See Blackmon*, 734 F.3d at 1241–42 ("The district court analyzed his claim under Hudson's demanding Eighth Amendment 'malicious and sadistic' test for cruel and unusual punishments—and, even then, it found that Mr. Blackmon succeeded in stating a triable claim. We don't need to travel so far, however, to reach the same destination. While Hudson forbids a certain class of punishments for convicted prisoners (cruel and unusual ones), *Bell* forbids punishment altogether for pretrial detainees like Mr. Blackmon.").

175. Struve, *supra* note 12, at 1012 ("I will argue that the state of the law in the lower courts is substantively undesirable, and, in a number of instances, chaotic.").

176. *Id.*

177. Kingsley v. Hendrickson, 576 U.S. 389 (2015).

178. *See id.* at 397 ("Several considerations have led us to conclude that the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one."); *see also id.* at 398 ("*Bell*'s focus on 'punishment' does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated. Rather, as *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail by

were not governed by the first prong of the *Bell* test which called for a showing of subjective "intent to punish."[179] By holding that "proof of intent (or motive) to punish" is not required for a pretrial detainee to prevail on a due process claim, *Kingsley* clarified the proper standard for pretrial detainee excessive force claims.[180] But, *Kingsley* did not address whether the objective standard applies to all pretrial detainee claims.[181] Since *Kingsley*, courts are divided on whether to apply the objective reasonableness standard articulated in *Kingsley* to other kinds of pretrial detainee claims, including conditions of pretrial confinement claims.[182]

Confusion on how to apply *Bell* writ-large is exacerbated when it comes to conditions of youth confinement claims. The nature of juvenile proceedings raises the question of whether constitutional standards conceived in the context of the adult criminal system muddies its application towards children. Under *Bell*, "punishment is never constitutionally permissible for presumptively innocent individuals awaiting trial."[183] Yet, incarcerated children are not innocent in the strictest sense—they are adjudicated delinquents because they committed the act which they were accused of. At the same time, adjudication is not a conviction; thus, children adjudicated as delinquent are innocent in a constitutional sense and, therefore, cannot be legally punished. Herein lies a tension.[184] How can states respond to a crime committed by a child without punishing the child? The *Bell* reasonable-relationship test provides an answer: states can punish the child if they can mask their practices behind a legitimate governmental purpose. Courts defer to the state's interpretation of their actions. If a state denies that their actions are punitive, courts will likely agree—never mind the impact of that action on the children in their care. Typically, conditions that states maintain are in the interest of promoting safety

providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.").

179. Bell v. Wolfish, 441 U.S. 520, 538 (1979).

180. *Kingsley*, 576 U.S. at 398 ("*Bell*'s focus on 'punishment' does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated. Rather, as *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.").

181. Lambroza, *supra* note 164, at 441. The district court in the *Angola Transfer Case* expressly denied that the objective deliberate indifference standard established in *Kingsley* applied to the childrens' conditions of confinement claim. *See Edwards I*, 2022 WL 4445499, at *21,

182. *Id.*

183. Blackmon v. Sutton, 734 F.3d 1237, 1241 (10th Cir. 2013).

184. Fagan, *Contradictions*, *supra* note 47, at 49.

pass constitutional muster.[185] Since the law imposes no bright-line rule for practices that constitute punishment, states can push the boundary. In conclusion, the rational basis standard of review implicated in the *Bell* reasonable-relationship test weakens due process protections available to incarcerated children under the Fourteenth Amendment.

B. The Premise and Promise of the Miller Trilogy—The Eighth Amendment Speaks

Since many jurisdictions regard Eighth Amendment standards as coextensive with due process requirements under the Fourteenth Amendment, the Supreme Court's analysis of the constitutional import of childhood under the Eighth Amendment bears significantly on conditions of youth confinement claims. The premise undergirding early juvenile justice efforts was a recognition that "youth is more than a chronological fact."[186] Youth is a transitory period of human development that demands a different scale for assessing culpability than adults. Starting with its decision in *Roper v. Simmons*, dealing with the death penalty, the Supreme Court has adopted this view in their most recent juvenile justice jurisprudence—marking a shift into more lenient penal practices for young offenders that scholars have called nothing short of revolutionary.[187]

In a trio of decisions referred to as the *Miller* trilogy, the Supreme Court imposed categorical limits on the kinds of punishments children might be subjected to.[188] In *Roper v. Simmons*, the Court imposed a categorical ban on the imposition of the death penalty on children who were under the age of eighteen at the time of their capital crime.[189] The Court reasoned that three general differences between children and adults prevent children from being classified among the worst offenders.[190] First, children are less mature and have an underdeveloped sense of responsibility than adults.[191] Second, children are more susceptible to negative influences.[192] Third, a child's character

185. Bistrian v. Levi, 696 F.3d 352, 373 (3d Cir. 2012).
186. Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).
187. Beth Caldwell, *Shifting the Paradigm: An Abolitionist Analysis of the Recent Juvenile Justice "Revolution,"* 23 Nev. L.J. 115, 142 (2022); *see also* Cara H. Drinan, *The* Miller *Revolution*, 101 Iowa L. Rev. 1787, 1789 (2016) [hereinafter Drinan, *The* Miller *Revolution*].
188. The *Miller* trilogy refers to Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 567 U.S. 460 (2012).
189. *Roper*, 543 U.S. at 578.
190. *Id.* at 569.
191. *Id.*
192. *Id.*

is not as well-formed as those of adults.[193] These differences coalesce to form the conclusion that children have an intrinsic diminished moral culpability as compared with adults.[194] A point of emphasis for this Note is the Court's insistence that these differences also weigh against the assumption that heinous crimes are evidence of an "irretrievably depraved character."[195] Children, due to their transitory nature, have infinite potential for rehabilitation. Therefore, states cannot terminate a child's potential to "attain a mature understanding of his own humanity" and make amends for unlawful behavior by ending their life.[196]

In *Graham v. Florida*, the Court considered a categorical ban on a term-of-years sentence for the first time.[197] The *Graham* Court held that sentencing a child who did not commit murder to die in prison is cruel and unusual punishment.[198] Likening a life without parole ("LWOP") sentence to the death penalty, the Court urged that a LWOP sentence "alters the offender's life by a forfeiture that is irrevocable"[199]—namely, the forfeiture of the hope that atoning for their crimes might make them worthy of their freedom. The Court observed that handing a child who did not commit murder a LWOP sentence requires the sentencer to proclaim that that child is incorrigible. However, as the Court notes, "incorrigibility is inconsistent with youth."[200] Thus, the Court concluded that, considering children's innate rehabilitative potential, none of the accepted penological goals—retribution, deterrence, incapacitation, and rehabilitation—were adequate to justify LWOP sentences for young non-homicide offenders.[201]

Then, in *Miller v. Alabama*, the Court expanded *Graham v. Florida* by holding that the Eighth Amendment forbids any sentencing scheme that mandates a LWOP sentence for young offenders.[202] In *Miller*, the Court conjoined its two previous conclusions that the "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on [young] offenders"[203] to forbid states from imposing automatic LWOP sentences on children "as though they were

193. *Id.*
194. *Id.* at 571; *see also* Graham v. Florida, 560 U.S. 48, 69 (2010).
195. *Roper*, 543 U.S. at 570.
196. *Id.* at 574.
197. *Graham*, 560 U.S. at 61.
198. *Id.* at 74.
199. *Id.* at 69.
200. *Id.* at 73 (citing Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968)).
201. *Graham*, 560 U.S. at 74.
202. Miller v. Alabama, 567 U.S. 460, 465 (2012).
203. *Id.* at 472.

not [children]."[204] In *Graham*, the Court mandated sentencers to always consider the young person's childness when deciding whether to impose the second harshest sentence.[205] In *Miller*, the Court took a further step. Not only did the Court mandate that an offender's youth weighs in the sentencing decision, the Court prescribed the direction in which that factor should weigh—even in cases involving murder.[206] The Court advised that "differences [between children and adults] counsel against irrevocably sentencing them to a lifetime in prison."[207] Thus, *Miller* closes the trilogy by making it constitutional dogma that youthfulness carries significant import in Eighth Amendment jurisprudence.

The *Miller* trilogy is revolutionary for its impact and methodology. In this line of decisions, the Supreme Court created a special status for young offenders based on developments in behavioral and neurobiological science that outlined differences between adult brains and young brains.[208] Criminal legal theory has long defined crime as "concurrence of an evil-meaning mind with an evil-doing hand."[209] Proving the commission of a criminal act requires a finding of a culpable mind which, in turn, presupposes the "duty of a normal individual to choose between good and evil,"[210] and a conscious decision to do what that individual understands as evil. A child's cognitive immaturity circumvents the presumption that a child who commits a crime appreciates the implications of their behavior. The question

204. *Id.* at 474.

205. *See Graham*, 560 U.S. at 69.

206. *Miller*, 567 U.S. at 480. In 2016, the Court held that *Miller* applied retroactively—explaining that *Miller* barred LWOP sentences for all but "the rarest of juvenile offenders . . . whose crimes reflect permanent incorrigibility," thus creating a substantive change in the law requiring an attendant procedure to ensure all persons to whom the change applies to can secure its guarantee. Montgomery v. Louisiana, 577 U.S. 190, 209, 210 (2016). Five years later, the Court swung in the opposite direction. In its 2016 decision in *Jones v. Mississippi*, the Court held that sentencing judges do not need to find that a child is "permanently incorrigible" before sentencing them to die in prison. Jones v. Mississippi, 593 U.S. 98, 113 (2021). In other words, after *Jones*, sentencing judges can sentence children to die in prison without first ascertaining whether they are permanently incapable of change—effectively weakening *Miller*. By the time *Jones* was decided, the Court's composition had changed. Caldwell, *supra* note 187, at 154. The 6-3 vote in *Jones* reflects the Court's reconfiguration. *Jones* was a "true mirror image" of *Montgomery*, except on opposite ideological lines. *See* David M. Shapiro & Monet Gonnerman, *To the States: Reflections on Jones v. Mississippi*, 135 Harv. L. Rev. 67, 69 (2021). The decision signaled a swing on the pendulum on the Court's stance on juvenile justice. Caldwell, *supra* note 187, at 154. In light of *Jones*, scholars doubt whether the *Miller* trilogy continues to hold any force in juvenile justice law. Nevertheless, intuiting that this doubt would arise, Justice Sotomayor issued a hopeful remainder that "*Miller* and *Montgomery* are still good law." *Jones*, 593 U.S. at 144 (Sotomayor, J., dissenting).

207. *Miller*, 567 U.S. at 480.

208. Elizabeth S. Scott, *Children are Different: Constitutional Values and Policy*, 11 Ohio St. J. Crim. Law. 71, 72 (2013).

209. Morissette v. United States, 342 U.S. 246, 251 (1952).

210. *Id.* at 250.

becomes: to what extent does culpability attach to criminal behavior perpetrated by a child, if at all? The Court concludes that, when measured against adults, the cognitive differences among youth make children categorically less culpable and, therefore, less deserving of certain punishments than adults. In weighing these considerations, the Court chartered a new frontier in Eighth Amendment jurisprudence by incorporating developmental science into the proportionality analysis—signaling that ignoring developmental differences between children and adults offend constitutional values.[211] Professor Elizabeth S. Scott argues that "the [*Miller* trilogy] decisions embody a set of constitutional values mandating fair treatment of young offenders."[212]

With respect to its methodology, the *Roper*, *Graham*, and *Miller* Courts adapted their approach to accommodate for the special consideration due to children in two consequential ways. Traditionally, the Court assesses the proportionality of a given sentence in one of two approaches: first, challenges to a term-of-years sentence are reviewed on a case-by-case basis, and second, challenges to the death penalty are resolved by considering categorical restrictions.[213] The *Graham* Court departed from its usual approach to consider the unique aspect of the challenge raised by the plaintiff—a categorical challenge to a term-of-years sentence.[214] Here, for the first time, the Court imposed a categorical ban on a term-of-years sentence because "the case dealt with children,"[215] and, as the *Roper* Court noted before, children are constitutionally different. The *Miller* Court expanded the *Graham* decision by requiring lower courts to consider how children are different, predicting that considerations of the offender's youthfulness will render juvenile LWOP sentences uncommon.[216] Second, the Courts in *Roper* and *Graham* considered the global consensus regarding the sentencing practice at issue to support its independent conclusion. In both cases, the Court noted that the United States was an outlier in many respects. In *Graham*, the Court noted that only two countries—the United States and Israel—sentenced children to life without parole in practice.[217] In *Roper*, the Court noted that, at the time the case was decided, the United States was the only country in the world that sanctioned the

211. Scott, *supra* note 208, at 73.
212. *Id.* at 74.
213. Graham v. Florida, 560 U.S. 48, 69 (2010)
214. *Id.* at 61–62.
215. Drinan, *The* Miller *Revolution*, *supra* note 187, at 1802.
216. *Miller*, 567 U.S. at 465.
217. *Graham*, 560 U.S. at 80.

death penalty for children.[218] Both Courts highlighted that the United Nations Convention on the Rights of the Child had been ratified by every country in the world, except two: the United States and Somalia.[219] In summary, the Court's departure from its usual Eighth Amendment methodology demonstrates that childness is an inherent trait with significant constitutional import because it circumvents the culpability finding necessary to justifiably invoke certain punishments.

While advocates applaud the Court for imposing constitutional limits on juvenile sentencing, much is to be said about the implications of the *Miller* trilogy on juvenile confinement. Indeed, "the language, logic, and science" of the *Miller* line of cases invite an expansive reading that reaches other areas of juvenile justice. Professor Drinan is among the first to charter a reading of the *Miller* trilogy onto the arena of juvenile incarceration. In her article, *Cruel and Unusual Youth Confinement*, Professor Drinan draws from the theory of the "states' carceral burden" to argue that rules governing juvenile sentencing "impose affirmative obligations upon the states in terms of how they incarcerate minors."[220] If children are constitutionally different from adults for the purposes of sentencing,[221] it follows that those constitutional differences require states to reconfigure procedural safeguards to ensure children's safety and well-being while incarcerated.[222] Thus, Drinan articulates a standard for assessing whether certain conditions of juvenile confinement violate the Eighth Amendment—modifying the *Farmer* standard along what she calls "dimensions of difference," namely, the differences the Court recognizes make children less amenable to culpability.[223]

The principal case for analyzing claims of unconstitutional prison confinement is *Farmer v. Brennan*.[224] In *Farmer*, the Court acknowledged that prison officials have a constitutional duty to provide

218. Roper v. Simmons, 543 U.S. 551, 578 (2005).

219. *Id.* at 576; *Graham*, 560 U.S. at 81. Somalia ratified the Convention on the Rights of the Child in 2015. *As The Fifth Anniversary of Somalia's Ratification of the Convention on the Rights of the Child Approaches, Protection Violations Against Children Continue to Rise*, UN Somalia (Sept. 21, 2020), https://somalia.un.org/en/91957-fifth-anniversary-somalia%E2%80%99s-ratification-convention-rights-child-approaches-protection#:~:text=Nearly%20five%20years%20 ago%2C%20on,of%20the%20Child%20(CRC). The United States is now the only UN member state to not ratify the Convention. *How Do US States Measure Up on Child Rights?*, Hum. Rts. Watch, https://www.hrw.org/feature/2022/09/13/how-do-states-measure-up-child-rights (last visited Mar. 31, 2025).

220. Drinan, *Cruel and Unusual*, *supra* note 11, at 1166.

221. *See Miller*, 567 U.S. at 465.

222. Drinan, *Cruel and Unusual*, *supra* note 11, at 1166.

223. *Id.* at 1203.

224. *See generally* Farmer v. Brennan, 511 U.S. 825 (1994).

humane conditions under the Eighth Amendment.[225] However, the Court explained that not every injury suffered by a prisoner implicates prison officials' liability.[226] Prison officials are liable for constitutional violations when two criteria are met.[227] First, the deprivation alleged must be "sufficiently serious" in that it results in a "denial of the minimal civilized measure of life's necessities."[228] Second, a prison official must have a "sufficiently culpable state of mind," which is defined as one of "deliberate indifference."[229] The Court further explained that a prison official evidences "deliberate indifference" when an official knows of and disregards a substantial risk of serious harm.[230]

Practically, the *Farmer* test has been an immobilizing hurdle for prisoners seeking to vindicate violations of their constitutional rights.[231] In *Farmer*, the Court detailed an objective and subjective framework for assessing prison-condition claims.[232] The first prong of the test inquires whether the deprivation alleged is *objectively* serious.[233] The second prong of the test conditions liability on the prison officials' *subjective* awareness of a risk of harm.[234] The subjective prong of the test—the "deliberate indifference" standard—is deferential to prison officials' purported knowledge of any risk threatening prisoner well-being. It incentivizes ignorance on the part of prison officials by shielding prison officials from being liable for risks they purport to not, but should have been, aware of.[235] At the same time, the *Farmer* test does not account for the ways in which prisons are systemically barbaric.[236] Thus, in a nation where it is conceivable that a prisoner can be "baked to death,"[237]

225. *Id.* at 832.
226. *Id.* at 834.
227. *Id.*
228. *Id.*
229. *Id.* at 835.
230. *Id.* at 837. The "deliberate indifference" standard comports with the conception of criminal recklessness. *See* Model Penal Code § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.").
231. Drinan, *Cruel and Unusual*, *supra* note 11, at 1189.
232. *Farmer*. 511 U.S. at 846.
233. *Id.* at 834.
234. *Id.* at 829.
235. Drinan, *Cruel and Unusual*, *supra* note 11, at 1195–96; *see also* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. Rev. 881, 946–48 (2009).
236. *Id.* at 945.
237. Martin Garbus, *Op-Ed: Cruel and Usual Punishment in Jails and Prisons*, L.A. Times (Sep. 29, 2014, 5:52 PM), https://www.latimes.com/opinion/op-ed/la-oe-garbus-prison-cruel-and-unusual-20140930-story.html (detailing the story of Jerome Murdough, a homeless, ex-Marine who was sent to Rikers after not being able to afford a $2,500 bail and died of hyperthermia with a body temperature of 103 degrees. An official described Murdough's death as being "basically baked to death.").

federal courts routinely reject prisoners' claims of unconstitutional conditions of confinement under *Farmer*.[238]

As applied to incarcerated youth, the *Farmer* test is a woefully inappropriate standard under which to analyze unconstitutional conditions of youth confinement claims because it does not reckon with how youthfulness adds layers of complexity to the kinds of harm contemplated nor critiques the appropriateness of deferring to state officials who oftentimes do not appreciate the gravity of the harm certain conditions impose on children.[239] Recognizing these inadequacies, Professor Drinan proposes modifying the *Farmer* standard along "dimensions of difference" recognized in the *Miller* trilogy.[240] First, Drinan proposes modifications on the kinds of harms contemplated by the objective prong of the *Farmer* test.[241] Second, Drinan proposes that the "deliberate indifference" culpability standard be exchanged for a modified strict liability standard allowing for causation and contributory negligence analysis.[242] Modifying the *Farmer* standard to account for youth's unique characteristics as recognized in the *Miller* trilogy might be fruitful. However, even with modifications, the *Farmer* standard falls short. The *Angola Transfer Case* illustrates this point very clearly.

C. Angola Transfer Case: A Case Study

While assessing the children's Eighth Amendment claim, the district court applied the *Farmer* test in a manner reminiscent of Drinan's modified approach. The district court was tasked with balancing what it regarded as untenable conditions of confinement with the intolerable threat of harm posed by the youth.[243] In doing so, the district court acknowledged that the "specter of the prison surroundings [at Angola] alone will likely cause psychological trauma and harm [to the children]."[244] At the same time, the district court held that the interest of protecting youth from potential psychological trauma did not outweigh Louisiana's interest in the administration of their juvenile justice system, as long as the constitutionally permissible minimum

238. Drinan, *Cruel and Unusual*, *supra* note 11, at 1193.

239. *See generally* Barney v. City of Greenville, 898 F. Supp. 372 (N.D. Miss. 1995) (dismissing a claim that state officials were liable for the wrongful suicide of a young girl housed in a jail rather than a youth detention center with proper suicide prevention care because, under *Farmer*, state officials did not disregard an obvious risk by placing young girls in jail).

240. Drinan, *Cruel and Unusual*, *supra* note 11, at 1203.

241. *Id.* at 1205.

242. *Id.* at 1208.

243. *Edwards I*, 2022 WL 4445499, at *1.

244. *Id.*

standard of care was met.[245] As the district court sifted through the facts of the case, it was not lost on the court that the plaintiffs were children. Thus, the contours of their analysis were drawn with considerations of the needs of the children. Nonetheless, even after accounting for the plaintiffs' youth, the district court's balancing act concluded that the "untenable must yield to the intolerable."[246] In other words, the fact of the plaintiffs' youth (and all that their childness signifies) was not weighty enough to protect them from the inevitable harm to be incurred by Louisiana's plan to transfer them to Angola.

The district court held that the proposed transfer plan satisfied the objective prong of the *Farmer* test.[247] While the court did not find a serious risk of loss of standard services to confined youth nor a serious risk of excessive or abusive solitary confinement, the court found that there was a serious risk of "psychological harm to juveniles by placing them in facilities that were designed to house adult prisoners."[248] In making this finding, the court relied on expert testimony verifying the harmful psychological impact of placing cognitively underdeveloped children, who were already suffering from trauma, in facilities that "scream prison."[249] The court found this proposition especially persuasive in light of the Supreme Court's recognition of the developmental differences in adults and children in *Roper* and *Montgomery v. Louisiana*.[250] Citing the Supreme Court's opinion in *Roper*, the district court highlighted that youth is a time and condition of life when a person may be most susceptible to psychological damage, such as the damage at risk in the case.[251]

The district court's approach in evaluating whether the proposed plan satisfied the objective prong of the *Farmer* test followed Drinan's modified approach in that the kind of harm at issue here would pass constitutional muster except as applied to children. The harm at issue here was the psychological harm incurred by placing youth in a facility designed for adults—precisely the kind of harm that would not have any constitutional implications but for the plaintiff's youth. Thus, in assessing the objective prong of the *Farmer* test, the district

245. *Id.* at *20.
246. *Id.* at *1.
247. *Id.* at *24.
248. *Id.* at *23.
249. *Id.*
250. *Id.*
251. *Id.*

court evaluated the proposed transfer along the "degrees of difference" explicitly detailed in the *Miller* trilogy.

However, the district court found that the proposed transfer plan did not satisfy the subjective prong because there was "no evidence that OJJ officials subjectively drew the inference that housing youth on the grounds of Angola in the designated facility poses a serious risk of psychological harm."[252] In other words, the court believed that the OJJ was ignorant to the possibility that sending the children to Angola would harm them. In making this finding, the district court relied on the good faith of OJJ staff who purported to be committed to the rehabilitation of the youth in custody.[253] The district court noted that there was no evidence suggesting that officials made a "knee-jerk" decision to move the youth to Angola after they destroyed all care facilities.[254] Instead, the district court gave credence to Louisiana's assertion that sending the youth to Angola was one of the only viable options to address safety concerns.[255] Nowhere in the district court's analysis did it question the legitimacy of Angola as the only viable transfer location nor did it inquire *why* the youth destroyed the other care facilities. Rather, the district court gave customary deference to the state in the administration of its juvenile justice system—holding that sending a group of Black kids to one of the nation's most notorious prisons was constitutionally permissible under *Farmer*.

With respect to the children's Fourteenth Amendment due process claim, the district court held that there was no evidence suggesting OJJ officials had an express intent to punish the children under *Bell*.[256] Moreover, the district court held that placing the children in Angola was rationally related to a legitimate non-punitive governmental purpose of ensuring safety. Despite agreeing that the grounds of Angola were "appallingly inappropriate," the district court deferred to the judgment of OJJ that the transfer plan was "needed to preserve internal order and discipline and to maintain institutional security"[257]—granting judicial deference to the OJJ's determination that the transfer was necessary to maintain safety despite its instinct that it was not the children who they were keeping safe.

252. *Id.* at *24.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at *25.
257. *Id.* at *26.

This confluence of constitutional standards might invite a debate on which constitutional provision is more favorable for children held in deplorable conditions. Examining the judicial posture around challenges to conditions of confinement reveals that seeking redress is not a matter of the severity of the condition or the robustness of the constitutional protection invoked. The *Angola Transfer Case* exposes the fundamental flaw of the applicable constitutional prison conditions standard as applied to children—as a matter of course, courts routinely give states plenary deference in the administration of their penal system. Justice Thomas articulated an axiom that tends to govern judicial review of any challenges to state action regarding inmates: "The Constitution has always demanded less within the prison walls."[258] Challenges to conditions of confinement for children who have *not* been convicted of any crime are principally reviewed under standards invoking the language of rational basis review, a permissive level of review widely regarded as virtually no review at all.[259] Even when problematic conditions of confinement are scrutinized under standards applicable to punishment, the *Farmer* test shields prison officials from liability.

Judicial deference to state officials required by *Bell* and *Farmer* is violently at odds with the constitutionally cognizable differences among children. There is a rather basic, common-sense explanation for the inapplicability of these standards to cases involving children: *Bell* and *Farmer* had to do with adult plaintiffs in adult facilities. The balancing of interests the Court employed in resolving *Bell* and *Farmer* did not consider how those interests change when weighed against a class of persons who are more vulnerable and deemed less culpable than adults. The *Angola Transfer Case* casts this point wide open. The harms at issue in the *Angola Transfer Case* were conceived in light of the children's distinct needs and vulnerabilities as children. Necessarily, the district court could not apply the relevant standards without accounting for their youthfulness because the fact of their youth changed the scope of the constitutional protections involved. As the Supreme Court established, youthfulness is not a mere mitigating

258. *See* Johnson v. California, 543 U.S. 499, 524 (2005) (Thomas, J., dissenting). *See also Edwards I*, 2022 WL 4445499, at *31 ("The Constitution affords juveniles in secure care no constitutionally protected interests that outweigh the Defendants' or the public's interests in the administration of juvenile justice."); *cf.* Turney v. Safley, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country.").

259. Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1629 (2016).

factor under the Eighth Amendment, it is a doctrinal keystone bearing on fundamental questions of fairness and proportionality. Tragically, as the *Angola Transfer Case* demonstrated, when pitted against the state's interest in safety, youthfulness is not enough to protect children from being brutalized by the same institutions purporting to keep them safe.

Part III: Letting Kids Be Kids—The Right to Self-Actualize

The *Miller* trilogy is the Court's most on-point articulation of how conceptions of childhood have profound legal force vis-à-vis adjudication of delinquent behavior. Throughout the *Miller* trilogy, one can trace a conviction to protect a fundamental facet of the human experience: the ability of a child to actualize their potential. This conviction stems from the Court's conception of childhood as a time of innocence and development.[260] In *Roper*, the Court wrote: "When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his *potential to attain a mature understanding of his own humanity*."[261] A major concern for the *Roper* Court's was the finality of death. Death eliminates a child's potential in perpetuity. For the *Roper* Court, permanently disabling a child to grow and actualize their innate potential to develop into a mature, fully cultivated adult was inconceivable. Analogizing the death penalty with LWOP, the *Graham* Court expressed the same concerns, writing: "Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation."[262] The *Graham* Court emphasized that allowing a child to reach maturity was necessary to ensure rehabilitation. In *Miller*, the Court doubled down on this logic to argue that sentencing a child to die in prison equated making an irrevocable judgment that that child is incorrigible—a determination that, in the Court's view, was inconsistent with what it means to be a child.[263] The bottom-line for the Court was that states cannot deny children "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" given a child's intrinsic capacity to change.[264]

260. *See* Chase S. Burton, *Child Savers and Unchildlike Youth: Class, Race, and Juvenile Justice in the Early Twentieth Century*, 44 L. & Soc. Inquiry 1251, 1252 (2019).
261. Roper v. Simmons, 543 U.S. 551, 578 (2005) (emphasis added).
262. Graham v. Florida, 560 U.S. 48, 69 (2010).
263. Miller v. Alabama, 567 U.S. 460, 465 (2012).
264. *See Graham*, 560 U.S. at 75; *Miller*, 567 U.S. at 473.

There is a rather common-sense proposition underlying the Court's conception of children—people grow.[265] Growth, development, and maturity are integral to the human experience.[266] Throughout the history of human thought, philosophers have conceptualized the human experience as possessing a teleological orientation towards the optimal self.[267] The notion of telos, "understood as an innate end whose actualization through a process of development constitutes the 'flourishing' or 'fulfillment' of the entity whose end it is,"[268] is as foundational to our understanding of what it means to be human being as the notion that every human being has a birth. What begins necessarily ends—but the passage of time between those moments compels progression towards a *desired* end. Our ability to define the "ends" we set our progression towards is a product of our agency, how we define those "ends" flows from our personalities or self-identification, and our success in achieving those "ends" is how we become self-realized or self-actualized.[269] From ancient thinkers, such as Aristotle, to modern psychologists, students of mankind have recognized "yearning and striving for self-realization" as a "central force in human development."[270] Even those in the natural sciences, such as humanistic biologists and organismic theorists, have "made a persuasive case for the presence of an innate growth force within the personality for achieving self-actualization."[271] As philosopher David L. Norton explains, "[a]n intrinsically rewarding life results from the integration of distinguishable aspects—faculties, desires, roles, life-shaping choices—and classical teleologists without exception recognized that such integration is a developmental outcome; it is not antecedently given, but must be achieved."[272]

265. Christopher Dankovich, *While My Friends Graduated High School, I Sat Behind Bars*, Prison Journalism Project (July 11, 2023), https://prisonjournalismproject.org/2023/07/11/coming-of-age-prison/ ("Even behind bars, people can grow.").

266. *See* Willard B. Frick, *Conceptual Foundations of Self-Actualization: A Contribution to Motivation Theory*, 22 J. Humanistic Psych. 33, 46 (1982).

267. Whether that orientation is towards positive ends is immaterial here for the individual makes that choice. *See* David L. Norton, *On Recovering the Telos in Teleology, or "Where's the Beef?"*, 75 Monist 3, 10 (1992) ("The ultimate case for autonomy is that individuals can by moral development become the best judges of which, among objectively valuable courses of life, is the right life for them. The reason that this is so is provided by the telos: each person possesses an inner criterion of right and wrong choice to which he or she has first-person privileged access.").

268. *Id.* at 3.

269. *See* Frick, *supra* note 266, at 46.

270. *Id.* at 34.

271. *Id.* at 33.

272. Norton, *supra* note 267, at 7 (emphasis omitted).

The *Miller* trilogy invokes a teleological conception of childhood that posits childhood as a time during which the "end" of an individual's developmental progression has not yet materialized but underway. For the Court, insofar as the child carries an inherent potential to transcend their current state once he is self-actualized, he ought to be allowed to grow. The Court's conception of childhood comports with dominant scientific conceptions of childhood positing that children develop "through a series of stages which may be scientifically mapped."[273] Jean-Jacques Rousseau, whose ideas shaped the Enlightenment ideals that influenced the American Revolution, was one of the earliest proponents of a developmental model of childhood—proposing that children travel through developmental stages as they reach adulthood.[274] Many developmental models of childhood categorize stages according to "universal and obvious"[275] biological milestones in a child's growth. Various social,[276] psychological,[277] legal,[278] and moral[279] meanings are imputed to these stages—principal of which is the notion that adolescence is crucial for formation of one's self-identity.[280] Adolescence, the latter stage of childhood, represents an exploratory stage where children begin to develop their sense of self, personalities, and untapped potential—all of which are crucial to self-actualization.[281] Thus, the relationship between self-actualization and child development is symbiotic—self-actualization represents the desired end towards

273. Adriana S. Benzaquen, *Childhood, History, and the Sciences of Childhood*, *in* MULTIPLE LENSES, MULTIPLE IMAGES 14, 14 (Hillel Goelman et al. eds., 2004). *See generally* Brief for American Psychological Ass'n et al. as Amici Curiae Supporting Petitioners, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) (discussing how research in developmental psychology shows children are more vulnerable, immature, and malleable than adults); *Graham*, 560 U.S. at 68 (citing to the Brief for American Psychological Ass'n as Amici Curiae).

274. *See* JONATHAN HERRING, LAW THROUGH THE LIFE COURSE 74 (2021).

275. Arlene Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 L. & CONTEMP. PROBS. 38, 43 (1975).

276. *See* Shweta Sundram, *Social Development in Children: An Analysis*, 2 INT'L J. ADVANCED ACAD. STUD. 82, 83 (2020).

277. *See* Alicia Nortje, *Piaget's Stages: 4 Stages of Cognitive Development & Theory*, POSITIVE PSYCH. (Nov. 10, 2024), https://positivepsychology.com/piaget-stages-theory/#:~:text=Sensorimotor%20stage%20(0%E2%80%932%20years,11%20years%20old%20through%20adulthood).

278. *See Age Matrix*, INTERSTATE COMM'N FOR JUVS. (Feb. 3, 2025), https://juvenilecompact.org/age-matrix. Many states set the age of criminal responsibility at age eighteen. Kansas sets it as young as ten years old. West Virginia has no minimum.

279. *See* Kendra Cherry, *Kohlberg's Theory of Moral Development: How We Learn to Tell Right From Wrong*, VERYWELL MIND (Jan. 29, 2025), https://www.verywellmind.com/kohlbergs-theory-of-moral-development-2795071.

280. *See* HERRING, *supra* note 274, at 80; Norton, *supra* note 267, at 6.

281. *See* Shazia Inayat Ali, Anjum Bano Kazimi & Rozina Ruknuddin Sewani, *Exploring the Path to Self-Actualization: A Study on Youth Development and Well-Being*, 6 RSCH J. FOR SOCIETAL ISSUES 293, 295 (2024).

which the trajectory of a child's development is pointed, and a child's development determines what will render them self-actualized.[282]

A. Defining Children's Right to Self-Actualize

The concept of self-actualization is a "widely recognized fundamental principle" in social and natural sciences.[283] Abraham Maslow, largely credited for advancing our understanding of self-actualization as an essential motivating human force, defines self-actualization as "people's desire for self-fulfillment, namely, the tendency for them to become actualized in what they are potentially."[284] Maslow theorized that self-actualization lies at the pinnacle of human needs, observing that:

> Even if all these [physiological, safety, and social] needs are satisfied, we may still often (if not always) expect that a new discontent and restlessness will soon develop, unless the individual is doing what he is fitted for. A musician must make music, an artist must paint, a poet must write, if he is to be ultimately happy. What a man *can* be, he *must* be. This need we may call self-actualization.[285]

For Maslow and other prominent psychologists of the twentieth century, the drive towards self-actualization explains the "innate tendency or striving within us to achieve wholeness, perfection, or some form and expression of self-realization."[286] There is an intrinsic link between our innate drive towards self-actualization and development of our personalities. Our personalities determine the metric upon which we measure the degree to which we are self-actualized. Determining whether writing poetry makes one self-actualized flows from whether their personality is that of a poet. According to leading theorists, progression towards self-actualization is driven by development of one's personality, "talents, capacities, creative tendencies, and constitutional potentialities."[287]

As applied to children, self-actualization refers to the child's progression toward "becoming fully human, everything the [child] can become."[288] Self-actualization represents the desired end towards

282. *See id.* at 294.
283. *Id.* at 295.
284. A. H. Maslow, Motivation and Personality 46 (3d ed. 1987).
285. A. H. Maslow, *A Theory of Human Motivation*, 50 Psych. Rev. 370, 382 (1943).
286. Frick, *supra* note 266, at 34.
287. *Id.* at 36 (quoting Maslow); s*ee also id.* at 35 ("The idea of an actualizing tendency as a powerful internal force within the personality was developed by Carl Jung in his concept of *individuation* to refer to a developmental process directed toward achieving wholeness.").
288. *Id.* at 36 (quoting Maslow).

which the trajectory of a child's development is pointed. Necessarily, development of the child's personality and potentialities are indispensable for a child to reach the end of his development and become self-actualized. Thus, the developmental importance of childhood is that it is a time where the child begins to form an understanding of who he is, who he can be, and who he wants to be—discoveries which are indelible to the pursuit of his self-actualization.[289]

These observations carry tremendous legal force. Policymakers and judicial bodies ground their decisions regarding children on their conceptions of childhood—ideas of what children need and which concerns are most relevant to children considering social, psychological, and physiological realities.[290] Children are conceptualized as vulnerable,[291] immature beings without autonomy.[292] But this state is temporary; eventually, the child will shed his childness and transform into an adult. Who the child becomes as an adult is intrinsically connected to the quality of their development. Thus, childhood is conceptualized by the law as a consequential stage of human development that requires protection.[293] Necessarily, the right of children to self-actualize—that is, the right of children to materialize their full developmental potential, to grow, to uncover who they are, who they want to be, to pursue it, and become the human beings they are capable of becoming—underpins many laws concerning children.[294]

B. Children's Right to Self-Actualize as a "Liberty" Interest Under the Substantive Due Process Clause

The Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property, without due process of law."[295] This constitutional provision, known as the Due Process Clause, has two

289. Norton, *supra* note 267, at 7 ("Adolescent exploration serves the developmental purpose of making sound life-shaping choices, i.e., choices that harmoniously combine to constitute an intrinsically rewarding adult life. And the ultimate argument for a full-bodied teleological conception of persons is that implementation of it will maximally actualize potential human values. This is because persons who experience their productive lives (work, family, avocations, friendships, place of residence, religious and civic responsibilities) as intrinsically rewarding are thereby led to identify with them and invest the best of themselves in them.").

290. Skolnick, *supra* note 275, at 38.

291. *See* Herring, *supra* note 274, at 85.

292. *See id.* at 88.

293. *See* Emily Buss, *Constitutional Fidelity through Children's Rights*, 2004 Sup. Ct. Rev. 355, 362 (2004).

294. *See* Skolnick, *supra* note 275, at 38 (discussing how the legal system reflects and codifies a conception of children as "incomplete beings").

295. U.S. Const. amend. XIV.

functions: "substantive" due process and "procedural" due process.[296] Substantive due process asks whether the government has a sufficiently substantial reason for infringing upon a fundamental liberty interest protected by the Due Process Clause. When the contested governmental action implicates a fundamental liberty interest, courts subject that action to scrutiny.[297] Yet, defining fundamental liberty interests remains a highly controversial area of the law.[298] While the Supreme Court has never defined substantive due process with exactitude,[299] in dicta, the Supreme Court has interpreted the word "liberty" to encompass "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[300] In *Loving v. Virginia*,[301] the Court reiterated the same language, explaining that fundamental freedoms are those long recognized as "vital personal rights essential to the orderly pursuit of happiness by free men."[302] Broad interpretations of the term "liberty" invited challenges on how to define the scope of substantive due process rights. In attempt to guide and "restrain" the courts, the Supreme Court in *Washington v. Glucksberg*[303] established that the concept of liberty should be interpreted as only protecting those rights that are "deeply rooted in this nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[304]

The right of children to self-actualize is a fundamental freedom enshrined in the word "liberty" under the Due Process Clause of the Fourteenth Amendment. Children cannot experience liberty if they are not allowed to grow. The Declaration of Independence famously declared that among our inalienable rights is the "pursuit of [h] appiness."[305] Time and time again, the Supreme Court has consecrated this hallowed American value in its exposition of fundamental liberties enshrined in the Constitution. If pursuing one's happiness means achieving a state of internal fulfillment indicative of a well-lived, successful life, of materializing our innate potential, of being able to

296. Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 Loy. L.A. L. Rev. 1143, 1149 (1992) [hereinafter Chemerinsky, *Unfulfilled Promise*].
297. *Id.* at 1153–54.
298. Erwin Chemerinsky, *Substantive Due Process*, 15 Touro L. Rev. 1501, 1501 (1999).
299. *Id.*
300. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
301. Loving v. Virginia, 388 U.S. 1 (1967).
302. *Id.* at 12.
303. Washington v. Glucksberg, 521 U.S. 702 (1997).
304. *Id.* at 720–21 (internal quotations omitted); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); Chemerinsky, *Substantive Due Process*, *supra* note 298, at 1520.
305. The Declaration of Independence para. 2 (U.S. 1776).

chart the course of our futures and seek after it, then the principle of self-actualization has been deeply rooted in our tradition of freedom since our nation's birth.[306] At its core, self-actualization is the aim of one's exercise of liberty.[307]

In *Obergefell v. Hodges*,[308] the Court reminded the nation that "[t]he Constitution promises liberty to all within its reach . . . to define and express their identity."[309] As it pertains to children, self-actualization is the mechanism by which children come to learn, define, and express who they are. It is both an enabling force and "critical outcome" of healthy child development.[310] As they develop, their personalities evolve towards "increasing complexity and wholeness."[311] They begin to form an ideal self-image by exploring possibilities within themselves and their environments.[312] Internal elements, such as "cognitive processes, emotional regulation, and personality attributes," and external elements, such as their culture, family structures, and education, informs how children perceive and pursue their self-actualization.[313] Thus, self-actualization is a function of the child's growing autonomy and sense of self—a natural consequence of a child exercising his liberty to be a child.[314]

Legal and social histories concerning children reveals a tradition of protecting a child's right to self-actualize. Throughout this nation's history, "[t]he core principle and goal of the legal regulation of children is the promotion of child wellbeing."[315] Self-actualization is widely

306. In a book examining what the "pursuit of happiness" meant to the Founding Father, Jeffrey Rosen explains that for the Founding Fathers, the "pursuit of happiness" signified "a quest for being good, not feeling good—the pursuit of lifelong virtue, not short-term pleasure. Among those virtues were the habits of industry, temperance, moderation, and sincerity, which the Founders viewed as part of a daily struggle for self-improvement, character development, and calm self-mastery." Jeffrey Rosen, *"The Pursuit of Happiness: How Classical Writers on Virtue Inspired the Lives of the Founders and Defined America*," Nat'l Const. Ctr., https://constitutioncenter.org/go/the-pursuit-of-happiness (last visited Mar. 10, 2025).

307. Norton, *supra* note 267, at 10 ("Self-directedness or autonomy . . . is the central necessary feature of human flourishing . . . It is not external to the essence of human flourishing, but is the very form, the only form, in which a life in accordance with virtue (human flourishing) can be lived. In other words, if I am not the author of the activity, that activity is not good or right for me even if it should nonetheless be true that if I were the author of that activity it would be good or right for me."). *See also* Maslow, *supra* note 285, at 382 ("A musician must make music, an artist must paint, a poet must write, if he is to be ultimately happy. What a man *can* be, he *must* be. This need we may call self-actualization.").

308. Kingsley v. Hendrickson, 576 U.S. 644 (2015).

309. *Id.* at 651–52.

310. Ali et al., *supra* note 281, at 295.

311. Frick, *supra* note 266, at 47.

312. *Id.* at 45.

313. Ali et al., *supra* note 281, at 297.

314. Frick, *supra* note 266, at 46.

315. Huntington & Scott, *supra* note 91, at 1375.

accepted as a necessary component of one's general wellbeing.[316] While the Supreme Court denied that the Due Process Clause protects a right to education, every state has compulsory education laws with the first law established in 1642—indicating an ancient, universally-accepted dedication to promoting self-actualized children.[317] Predictably, trends in laws concerning children show reliance on "psychological and biological research on child and adolescent development," demonstrating a commitment to healthy child development.[318] The Supreme Court itself relied on adolescent brain science in its *Miller* trilogy holdings.[319] Being persuaded by developmental science, the Court considered that justice would not be served if children are not allowed to self-actualize—if they are not allowed to fully mature.

C. Applying the Right to Self-Actualize: The Case Against Juvenile Confinement

Let us pause here to engage in a thought experiment. Imagine yourself at fourteen years old. Recall the way you used to wear your hair, how excited you were when you learned the latest dance craze of that summer, the silly jokes that made you erupt in laughter, the mischievous things you would do to seek a thrill of excitement. Now, place yourself in a courtroom. You look up towards the stern face of the judge presiding over your case and a familiar, yet bitter, sensation rushes from your cheeks to your stomach. It is the kind of shame you felt when your parents scolded you. But this particular shame feels hefty. It presses down on your head. Suddenly, you cannot bear to catch glimpses of the strange faces circling around you. So, you keep your head down—a feeble attempt to make yourself smaller than an atom.

Now, imagine yourself entering through a series of barricaded doors. You catch a heavy stench beyond the door. At first, you cannot ascertain what is amiss. A moment later, you sense it again—an omnipresent sense of fear hanging over the place like a thick fog.[320] Your body turns rigid. You begin to experience your movements with such hyperawareness, you can isolate the feeling of blood rushing to

316. Ali et al., *supra* note 281, at 299.
317. Michael S. Katz, *A History of Compulsory Education Laws*, ERIC, https://eric.ed.gov/?id=ED119389 (last visited Mar. 25, 2025).
318. Huntington & Scott, *supra* note 91, at 1375.
319. Drinan, *The Miller Revolution*, *supra* note 187, at 1796.
320. Bernstein, Burning Down the House, *supra* note 56, at 23.

your chest. The initial sense of dread settles into anguish. Before you start to dissociate, you seek a glimmer of relief. Suddenly, you fix your attention to the looming figure guiding you through the maze. You look up at the guard, clad in a menacing uniform, searching earnestly for a sympathetic face. A face that might remind you of the tenderness of your mom. Perhaps, offer a modicum of refuge in this strange place. The guard returns your glare. Instantly, your heart sinks with terror. There was a threat lurking behind his stare, deviously hiding behind feigned warmth. You shrug it off, pretending not to notice, hoping that foreboding feeling is simply your anxiousness conjuring up hazards like a ghost.

At night, you try to sleep. The cot in your cell is hard and uninviting. Your eyes start to swell, so you lay down and race to sleep before tears begin cascading down your cheeks. Right as you begin to doze off, an ominous figure inches towards you in the cover of the night. They come almost unperceived, except that the sound of the door creaking as they passed through ushered you out of your sleep like a gentle breeze. Initially, you cannot make out the figure that's approaching you. As the distance closes, you spot the sinister stare from earlier piercing through the darkness. Panic sets in. Suddenly, you feel the heat of their body pressed upon yours. You react. You do not remember what happened after that moment. All you can recall are limbs flailing about. Screams at the top of your lungs. Several blows. The first one expelled you out of your body. The other ones made dying seem like not such a scary thing. When you come back to yourself, you find yourself in a fetal position on the floor, trying to make yourself feel smaller than an atom again. The adrenaline subsides and pain washes over you all at once. It hurts everywhere, but you feel it most intensely in your heart; so, for the rest of the night, you sob uncontrollably. Something broke inside of you. You did not know that setting a toilet paper roll on fire would be such a bad thing.[321] You did not mean any harm. Now there is a stain you will have to carry for the rest of your life.

Hundreds of thousands of children experience this acute sense of anguish every day in our youth prisons. For many children, these nightmarish experiences become memories that are forever etched into their brains—permanently altering how they perceive themselves, form relationships, and navigate the world.[322] Youth incarceration

321. *See* Shutzer & Mueller, *supra* note 60.

322. *See* Breger, *supra* note 31, at 293. Childhood trauma is detrimental to brain development and a child's ability to develop healthy attachment styles. *Id.* When children are abused while their

infringes on a child's right to self-actualize because it subjects children to "disfiguring psychological trauma" that hinders their development.[323] The trauma incarcerated children incur impairs their rehabilitative potential, damages their educational prospects, causes life-long health defects, and circumvents their life outcomes.[324] For instance, the sense of isolation and fear children experience in juvenile detention facilities "create a cascading effect that shape long-term trajectories often marked by diminished opportunities for positive development and an increase in adverse outcomes."[325] These adverse outcomes include psychological consequences such as low self-esteem, mental illness, and relational issues.[326] Incarcerated children are also exposed to trauma that leads to physical illness in adulthood such as heart disease, diabetes, and obesity.[327] Juvenile detention facilities are catastrophic for children with pre-existing mental health issues and histories of abuse at home.[328] It is no surprise that the consensus among the scientific community is that youth incarceration does not treat children.[329]

The crux of the harm tends to be issues of perception. Children need to develop a healthy sense of self-esteem to self-actualize. But incarcerated children are perceived in terms similar to adult prisoners—unfit for society.[330] When society believes the worst in them, they begin believing the worst about themselves too. Thus, incarcerated children internalize negative perceptions of self that, in turn, sours their

neurobiology is "primed for attachment," their brains adapt to maladaptive connections impacting their stress-coping mechanisms and emotional regulation. *Id.*

323. *See* Fagan & Kupchik, *supra* note 25, at 59; *Solitary Confinement & Harsh Conditions*, *supra* note 115.

324. *Solitary Confinement & Harsh Conditions*, *supra* note 115; Wolf, *supra* note 27, at 98 ("Incarceration conditions for juveniles are not only deplorable, but they also have lasting and often permanent impact on the juveniles who endure them, undermining any potential prospect of rehabilitation."). Research shows that juvenile incarceration has deleterious effects on the employability of youth who have been incarcerated. *See* Robert Apel & Gary Sweeten, *The Impact of Incarceration on Employment during the Transition to Adulthood*, 57 Soc. Probs. 448, 472 (2010) ("[I]ncarceration promotes detachment from the labor market, which erodes human capital and thereby jeopardizes wage mobility over time, as ex-inmates become increasingly less attractive as potential employees because of their lack of steady work experience.").

325. E. Ackerman, J. Magram, & T.D. Kennedy, *Systematic Review: Impact of Juvenile Incarceration*, 3 Child Prot. & Prac. 1 (2024), https://www.sciencedirect.com/science/article/pii/S2950193824000834?via%3Dihub.

326. *See* Wolf, *supra* note 27, at 97.

327. *See id.*

328. *See* Gonzalez, supra note 30, at 55–56.

329. *See* Comment, *supra* note 130, at 96.

330. Fagan & Kupchik, *supra* note 25, at 41; *see also* Amy Kroska, James Daniel Lee & Nicole T. Carr, *Juvenile Delinquency and Self-Sentiments: Exploring a Labeling Theory Proposition*, 98 Soc. Sci. Q. 73, 75 (2017) ("[T]he link between an official designation as a delinquent and the development of deviant self-meanings is clear in labeling theory").

perception of the world and their place in it.[331] Children are dejected, "left with post-traumatic stress, hypervigilance and a 'diminished sense of self-worth'" at a time when their identities are still developing.[332] The labeling theory explains this phenomenon. Under the labeling theory, when a child commits an act, if institutions labels their behavior as "bad," the child "may come to define it and eventually himself as 'bad.'"[333] Since "[t]here is a persistent demand for consistency in character," a child labeled as delinquent "is defined as bad and is not believed if he is good."[334] This label is permanently etched in the child's psyche as "the labeled person rarely returns to non-deviant status."[335] Concurrently, custodial staff perceive their facilities as punitive, corrective environments responding to "bad" children—"increas[ing] the likelihood of staff either abusing prisoners or permitting abuse to go on under their watch" for the purposes of keeping order.[336] Thus, youth incarceration impairs a child's ability to self-actualize because it disfigures the psychological processes that produce a fully optimal self.

When government action implicates a fundamental right, it automatically triggers courts to review the challenged action under a high level of scrutiny. Recognition of a child's fundamental right to self-actualize under the Due Process Clause would require courts to review youth confinement claims under strict scrutiny because youth incarceration imposes a tremendous burden on a child's ability to self-actualize. To pass constitutional muster, the government would have to show that the conditions are narrowly tailored to a compelling interest—transforming court's state-centered deferential approach

331. According to the "looking-glass self" principle, "self-evaluations are formed from the reflected appraisals of others," so children labeled as "deviant" may show "low self-esteem because of negative societal reactions toward them" if they internalize those labels. Laurie Chassin & Susan F. Stager, *Determinants of Self-Esteem Among Incarcerated Delinquents*, 47 Soc. Psych. Q. 382, 382 (1984). Children that develop a low self-esteem because of the social stigma attached to these labels may be "expected to attain relatively low levels of achievement and social position." *Id. See also* Wolf, *supra* note 27, at 96, 97 n.65.

332. Keri Blakinger & Maurice Chammah, *How Juvenile Lockups Set Kids on a Path to Commit More Violence*, Slate (Feb. 1, 2022, 6:00 AM), https://slate.com/news-and-politics/2022/02/how-juvenile-detention-centers-perpetuate-violence.html. *See* Shukla, *supra* note 65, at 382 ("Because a child's identity is still developing, however, there exists a greater chance of excising the criminal element from their self-concept.")

333. Anne Rankin Mahoney, *The Effect of Labeling Upon Youth in the Juvenile Justice System: A Review of the Evidence*, 8 L. & Soc'y Rev. 583, 585 (1974). The term "labeling theory" is frequently used by juvenile justice practitioners and refers to the way in which the stigma attached to the juvenile justice system produces a label exerting powerful influence on the child's self-perception. *See id*. at 584–85 (detailing a simplified version of labeling theory).

334. *Id.* at 585.

335. *Id.* at 586.

336. Shapiro & Hogle, *supra* note 19, at 2025.

to a child-centered approach by focusing the inquiry on whether the child may enjoy her right to self-actualize notwithstanding the challenged condition. In effect, recognizing the right to self-actualize would make *Bell* and *Farmer* inapplicable in conditions of confinement claims involving children. The new standard would ask courts to assess whether, in light of the special considerations pertaining to childhood and concerns for healthy child development, the challenged condition of confinement unduly burdens the child's right to self-actualize—namely, can the child develop a healthy sense of self, fulfill their rehabilitative potential, and reach maturity notwithstanding the challenged condition. In their analysis, courts would use available scientific information bearing on the question, much like the Court did in the *Miller* trilogy.

Consider how recognition of a child's right to self-actualization might have resulted in a different outcome in the *Angola Transfer Case*. The district court acknowledged that the conditions in Angola would have disastrous effects on the children's development.[337] However, the district court weighed Louisiana's interest in keeping the public safe from the children more heavily than the children's interest in not incurring lasting psychological harm. Recognizing that children have a fundamental right to self-actualize under the Due Process Clause would turn the inquiry on its head. The effects of confinement on the children would have taken priority over Louisiana's purported interest in safety because under a substantive due process analysis, the question becomes whether Louisiana had a sufficiently compelling reason to subject the children to conditions that were "untenable."[338] Even if the district court would have found that Louisiana's interest in safety was sufficiently compelling, the district court would have had to consider an additional question it did not originally consider: were there any other viable alternatives to sending the children to Angola?[339] Given the ultimate outcome of the case, it seems as though Louisiana had other options.[340]

One may take recognition of a child's right to self-actualize as far as suggesting that the right to self-actualize renders *any* youth

337. *See infra* Part II.C.

338. *Edwards I*, 2023 WL 5984280, at *9.

339. In cases where courts apply strict scrutiny, courts assess whether the challenged action was the least restrictive means for achieving the government's purpose. The "least restrictive means" test considers whether there are viable alternatives to the government's action that would impose a lesser restriction on the fundamental right at issue. *See* Noah Marks, *"Least Restrictive Means":* Burwell v. Hobby Lobby, 9 HARV. L. & POL'Y REV. ONLINE 19, 21 (2015).

340. The children were ultimately removed from Angola and transferred to another facility. *See* Press Release, *supra* note 148.

incarceration presumptively unconstitutional. It is widely established that youth incarceration has deleterious effects on a child's future, infringing on their right to self-actualize. Youth incarceration would be constitutionally permissible only in circumstances where the young person has been accused of intentional, premeditated murder or other crimes of similar gravity, such that the state can justly demonstrate a compelling interest in confining the young person. However, youth incarceration in response to non-violent crimes and status offenses would be suspect. In those cases, courts may presume that youth incarceration imposes an undue burden on the child's ability to self-actualize because incarceration is not necessary to reform criminal behavior flowing from a child's youthfulness. Children can be mischievous and unruly, but they can course correct if allowed to develop healthily, improve themselves, and become self-actualized. Ancillary questions in a court's analysis may include whether the state has furbished requisite resources for the child to self-actualize despite confinement, i.e. provide a non-punitive, therapeutic environment, adequate schooling, recreational opportunities, plenty contact with loved ones, and short confinement terms. The practical effect of such reform is that youth incarceration would cease to exist as it has in recent decades and return to its rehabilitative origins.

Conclusion: Redemptive Implications on Black Youth

When it comes to children, how courts balance the public's interest in safety with children's interest in liberty exposes presumptions of a child's predilection to criminality and the supposed danger the child poses to the community if released. Herein lies the tragedy of juvenile justice. If children are conceptualized by courts as children, namely, beings that are inherently innocent and in need of guidance, any condition of confinement treating the child as though he was not can hardly be conceived as a legitimate governmental objective.[341] Moreover, the risk that the child would be irreparably harmed by oppressive conditions of confinement would be readily observable irrespective of the responsible official's point of view. Yet, society treats delinquent children, not as inherently innocent, but as inherently

341. *See* Bernstein, Racial Innocence, *supra* note 62, at 4 ("By the mid-nineteenth century, sentimental culture had woven childhood and innocence together wholly. Childhood was then understood not as innocent but as innocence itself; not as a symbol of innocence but as its embodiment. The doctrine of original sin receded, replaced by a doctrine of original innocence.").

dangerous, menacing, and culpable.[342] When society perceives children as inherently dangerous, the interest to ensure their safety against them becomes grave. In turn, it tolerates legal standards that fail to account for the distinct needs pertaining to children and are deferential to state officials who demonstrate a propensity for abuse.

However, if society views children as though they were children and treats them with a level of sympathy becoming of a society that understands that a child's behavior during their infancy does not forecast their behavior as adults, the urgency to protect itself becomes less salient. Perhaps, children would not be viewed as dangerous. Instead, they would be viewed as they are: immature, misguided, angry, hurting, frustrated, mischievous, in need of love and care. Perhaps, society will see that children ought not to be thrown out of society for behavior flowing from their youthfulness. Perhaps, youth incarceration would become obsolete.[343]

Analyzing whether children are subject to conditions of confinement infringing on their right to self-actualize require courts to reconfigure the weight they accord to the public's interest in safety—and how they perceive children's threat against their safety. Historically, there has been a racial undertone in how courts, and society, perceives youth danger. Thus, recognizing the right to self-actualization has profound redemptive implications for Black youth who are perceived to be less innocent, in a dual psychosocial and legal sense of the word. Recognition of the right to self-actualize is recognition that Black children, in particular, deserve a chance to grow even when they make a mistake. As all humans, Black children ought to have an opportunity to learn from their mistakes, make amends, and become more than the worst thing they have ever done.[344] In essence, recognition of the right to self-actualize operationalizes grace in juvenile justice law. It stands for the proposition that the law ought to, not just want the best but,

342. *See generally* Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psych. 526 (2014) (discussing the ways in which Black children are dehumanized and the consequences of dehumanization).

343. Many advocates have advanced proposals to abolish the youth prison system and replace it with community-based services that achieve better outcomes at lower costs. *See* Patrick McCarthy, Vincent Schiraldi, & Miriam Shark, The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model 21 (2016), https://www.ojp.gov/pdffiles1/nij/250142.pdf. In 1972, Jerome Miller closed all juvenile corrections facilities in Massachusetts and replaced them with a diversified network of community-based programs. The state saw no increase in delinquency. *See* Jeffrey Fagan, *Social and Legal Policy Dimensions of Violent Juvenile Crime*, 17 Crim. Just. & Behavior 93, 101 (1990); Fagan & Kupchik, *supra* note 25, at 40.

344. Bryan Stevenson, Just Mercy 290 (2014).

believe in the best of our children by protecting a child's ability to grow and become what society, and that child, hopes it can become someday. In a society where Black children are often criminalized for being children, recognizing their right to self-actualize allows Black children, as all children, to just be—be Black and be kids.

Whiteness as Property by Proxy: How Affirmative Action's End Marks the Beginning of a Crucial Racial Reckoning

Summer Durant*

"The possessive investment in whiteness can't be rectified by learning 'how to be more antiracist.' It requires a radical divestment in the project of whiteness . . . It requires abolition . . . What is required is a remaking of the social order, and nothing short of that is going to make a difference."

—Saidiya Hartman[1]

* Summer Durant, Senior Solicitations & Submissions Editor for Vol. 68 of the *Howard Law Journal* and Class of 2025. As I reflect on this, my first publication, I want to extend thanks to: my community here at the Howard University School of Law; to my entire family who have encouraged me to publish with courage about this (a topic that is very close to my heart as a Black and Indian womxn) particularly right now; and to my late grandmother, Johnnie Mae Cann Durant, for reminding me that it is okay to engage in the difficult conversations, but that I should always aim toward understanding and never reject my own experiences in the process. Most notably, I want to extend special thanks to: my twin sister, Shauna Durant, Esq.; my classmates and professors; my fellow Executive Editors for Vol. 68 of the *Howard Law Journal*; and all of the *Howard Law Journal* Editors for their substantive and technical edits. Any errors are my own.

1. Interview with Saidiya Hartman, Author and University Professor at Columbia University, in New York City, NY (July 14, 2020) (tape on file, *Artforum*), https://www.artforum.com/interviews/saidiya-hartman-83579.

SUMMARY: WHITENESS AS PROPERTY BY PROXY

"I will live hostile to hostility" —June Jordan[2]

Thirty years after the publishing of Cheryl Harris's Whiteness as Property, we find ourselves in a situation where the project and principles of white supremacy are being legitimized and upheld through the overturning of crucial legal precedent aimed at counterbalancing more than two-hundred years of slavery. There have been calculated attempts to obscure the reality that the one-hundred and sixty years since slavery's abolition have continued to bear racist, xenophobic, white-supremacist consequences. Those who seek to bury the past would like to sell the idea that in order to stop discriminating on the basis of race, you have to stop discriminating on the basis of race, under the fiction of a post-racial and colorblind society that ignores the reality that discrimination is already deeply imbedded in American society. In 2023, the Supreme Court of the United States legitimized this fiction in the context of higher education, cementing it as legal precedent in Students for Fair Admissions (SFFA) v. President & Fellows of Harvard College. But how did we arrive at this point?

This paper explores that question by addressing: how the concept and institution of whiteness has been shaped in the United States, how SFFA's 2023 equal protection claims are in fact rooted in this shaping in both covert and overt ways, how these concepts intersect with property and social currency, and which legal claims more sincerely undergird these underlying motivations if we were to name the quiet parts aloud. Importantly, this paper also addresses the danger of weaponized misappropriation of anti-racist concepts toward the goals of white supremacy. It does so by analyzing how case law that does not go far enough may lend itself to harmful, racist outcomes. Prompted throughout by poetic reflections and through the lens of the author's own perspective as a Black and Indian womxn, this paper endeavors to grapple with the many racial realities that have evolved over time to preserve and protect the property interest in whiteness—not for the purpose of shame, but to reconcile some difficult truths that will hopefully facilitate more earnest coalition-building among BIPOC moving forward.

2. June Jordan, *Resolution #1,003*, POETRY FOUND., https://www.poetryfoundation.org/poetrymagazine/poems/161358/resolution-1003 (last visited May 5, 2025).

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I. Introduction

"[T]he reputation of belonging to the dominant race . . . is property, in the same sense that a right of action or inheritance is property."[3] This was one argument advanced by Homer Plessy, the plaintiff in the infamous case *Plessy v. Ferguson* where the Supreme Court of the United States decided that a Louisiana law requiring separate railway cars for Black and white passengers did not violate the

3. Plessy v. Ferguson, 163 U.S. 537, 549 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

Fourteenth Amendment's Equal Protection Clause because separate facilities did not inherently imply inferior facilities.[4] Though Plessy's property argument was largely overlooked in the final judgment of the *Plessy* case, which instead focused on Plessy's equal protection claim, it is precisely the concept of whiteness as property that underlies much of the purportedly "color-blind" legislation of the 21st century and, perhaps most recently, the overturning of affirmative action in the 2023 *Students for Fair Admissions* (*SFFA*) decisions.[5]

In the *SFFA* cases, *SFFA v. Harvard* and *SFFA v. University of North Carolina*, the Supreme Court of the United States overturned decades of precedent by ruling that race-conscious college admissions programs violate the Fourteenth Amendment's Equal Protection Clause.[6] The Supreme Court's decision that both Harvard's and UNC's race-conscious admissions policies "lack[ed] sufficiently focused and measurable objectives warranting the use of race, unavoidably employ[ed] race in a negative manner, involve[d] racial stereotyping, and lack[ed] meaningful endpoints" effectively overturned affirmative action as it was previously known.[7] In investigating the *SFFA* Court's strategic omissions of important racial history and analogizing the case language to white supremacist precedent from an ostensibly "bygone" racist past, this Note endeavors to uncover the reality that, though the *SFFA* decisions claim to turn on equal protection, they instead function as ongoing judicial protection for the value of whiteness as social currency.

More than 30 years ago, in her article entitled *Whiteness as Property*, Professor Cheryl Harris compellingly articulated the deeply interrelated concepts of whiteness and property.[8] In her article, Professor Harris describes the many facets in which whiteness can function as a form of social currency to the extent of being a property interest in and of itself.[9] She even goes further to describe the many avenues in which this form of "property" has been seemingly innocuously fortified through years of jurisprudence.[10] While Professor Harris is not the first to have made this connection between whiteness and property, let alone between race

4. *See generally Plessy*, 163 U.S. at 537.

5. *Id.*; *see also* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) [hereinafter *Students for Fair Admissions*]; *see generally* Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709 (1993); *see generally* Isabel Wilkerson, Caste: The Origins of Our Discontents (2020).

6. *Students for Fair Admissions*, 600 U.S. at 230.

7. *Id.*

8. Harris, *supra* note 5, at 1777.

9. *Id.*

10. *Id*. at 1778.

and property, her article is one of few that so clearly and resolutely underscores and analyzes this connection through a legal historical lens.

Importantly, one of the topics addressed in Harris's *Whiteness as Property* is affirmative action and how the legal arguments asserted in the progeny of cases establishing affirmative action alluded to and underscored the notion of whiteness as a protected interest.[11] In the time that has elapsed between the publication of Harris's *Whiteness as Property* and the writing of this Note, both the legal and cultural landscape have significantly shifted. Whereas in 1993, when Harris published *Whiteness as Property*, the most public-facing critics of affirmative action largely appeared to be white male plaintiffs, today that demographic has shifted to include some Black, Indigenous, and People of Color (BIPOC), namely Asian Americans, who were ultimately instrumental in the successful overturning of affirmative action in 2023.[12] In order to understand why BIPOC who benefit from affirmative action would shift against it in this way, it is crucial to investigate the concept of whiteness as property and the mistaken belief that the social currency of whiteness can be acquired by proximity.

In unpacking the inter-BIPOC dilemma of co-opting whiteness as property, this Note analyzes several key legal arguments and definitions addressing whiteness as a property interest, as well as the text of the Fourteenth Amendment, and the evolution of racialized identities in United States culture. The final aim of this Note is to revisit some of the concepts from Cheryl Harris's *Whiteness as Property* in a post-*SFFA* world. Those concepts reveal that the overturning of affirmative action was more sincerely motivated by protecting the property interest in whiteness as a social currency, despite being guised in the language of "equal protection." Broken down into four parts, this undertaking will proceed as follows.

Part II will outline and frame the reader's understanding of the legal constructions of whiteness, property, and whiteness as property. Part III will shift to address the narrower analysis of how the property interest in whiteness is a core motivation underlying the *SFFA* cases; it will also build upon the foundation of Part II to investigate what kind of

11. *Id.* at 1766–81.

12. *See* Harris *supra* note 5 at 1766–67; s*ee also BIPOC*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/BIPOC (last visited Sept. 22, 2023) (explaining that BIPOC indicates Black, Indigenous, and People of Color which is a term meant to encompass all people of color including Asian Americans, but with an emphasis on Black and Indigenous persons); Kali Holloway, *Key Inside the Cynical Campaign to Claim That Affirmative Action Hurts Asian Americans*, Nation (Aug. 9, 2023), https://www.thenation.com/article/society/affirmative-action-asian-americans.

claims might more sincerely be at the heart of the *SFFA* cases, including: the Fifth Amendment Takings Clause, the Fourteenth Amendment Due Process Clause, and Section Four of the Fourteenth Amendment dealing with public debt. Finally, Part IV will consider and weigh the logical differences between what it means to protect oppressed groups as opposed to further entrenching the power of oppressive groups while also reimagining possibilities for the future.

II. Background

To understand how the property interest in whiteness serves as an unspoken driving force behind core precedents used to reinforce its value, it is crucial to first unpack several key questions. Namely, what is whiteness? What is property? And what is whiteness as property? It is only after answering each of these questions that one is equipped with the tools to read between the lines of the *SFFA* decision. These tools allow one to not only read beyond the facial claims of "inequality" and but also read into the deeper discriminatory disdain that colors so much of the United States's jurisprudence.

A. What is Whiteness?

"*What are you without whiteness? What are you when the bees disperse?*"
—Summer Durant

Though there is no one definition of whiteness that has stood the test of time, the power of whiteness and its rolling definitions is pervasive and complex as a propagandistic tool that wields long-lasting psychological holds.[13] Throughout the history of the United States, the

13. *See generally* Va. Code Ann. § 20-54 (1960 Repl. Vol.); *see also* Loving v. Virginia, 388 U.S. 1, 5 n.4 (1967). In her article, Cheryl Harris quotes Corpus Juris's definition of a white person as constituting,

> a very indefinite description of a class of persons, where none can be said to be literally white; and it has been said that a construction of the term to mean Europeans and persons of European descent is ambiguous. "White person" has been held to include an Armenian born in Asiatic Turkey, a person of but one-sixteenth Indian blood, and a Syrian, but not to include Afghans, American Indians, Chinese, Filipinos, Hawaiians, Hindus, Japanese, Koreans, negroes; nor does white person include a person having one fourth of African blood, a person in whom Malay blood predominates, a person whose father was a German and whose mother was a Japanese, a person whose father was a white Canadian and whose mother was an Indian woman, or a person whose mother was a Chinese and whose father was the son of a Portuguese father and a Chinese mother.

Harris, *supra* note 5 at 1744 n.162 (quoting 68 C.J. White 258 (1934)).

definition of whiteness has shifted in tandem with societal conventions, legal rationales, and cultural norms. However, throughout this history, the United States's legal precedents have continuously legitimized fallacious biological distinctions across racial lines, often embracing popular theories of race as "biological fact" and facilitating "seemingly precise definitions of racial group membership."[14] In the legal system's acceptance and affirmation of race as a form of "natural" rather than "human-made" law, courts have been able to operate from a purportedly scientific perspective, imbuing their rationales with a firmer sense of authenticity and establishing the definition of whiteness as "not merely race, but race plus privilege."[15] In relying on eugenicist and craniological rationales, which were later proven to be pseudoscientific, courts faced many difficulties when trying to distinguish between races, particularly along the Black-white binary that was established in—and remains in the aftermath of—the United States's institution of slavery.[16]

For example, in 1866, in *People v. Dean*, the Supreme Court of Michigan adjudicated a case concerning an indictment for illegal voting when defendant Dean was prosecuted because he did not fall within the state of Michigan's constitutional provisions regulating voter qualifications.[17] The case decided two core issues within the constitutional voting requirements: first, whether a "person of less than one-half of African blood was [constitutionally] white" and second, whether "one of not more than one-sixteenth of African blood was [constitutionally] white."[18] After a thorough analysis of Michigan's well-established history of intentionally disenfranchising Black people from the voting populace, Michigan's Supreme Court found that the second inquiry was likely dispositive of the first and ruled against the defendant on both points.[19] Ultimately, the *Dean* court decided that white persons, within the meaning of the state constitution, were those "in whom white blood so far preponderates that they have less than one-fourth of African blood; and that no other persons of African descent can be so regarded."[20] In coming to its decision, the *Dean* court made several crucial inquiries such as "[i]f a man is not made white by

14. Harris, *supra* note 5, at 1737 n.5 (quoting Robert J. Cottrol, *The Historical Definition of Race Law*, 21 L. & Soc'y Rev. 865, 865 (1988)); *see also* United States v. Bhagat Singh Thind, 261 U.S. 204, 207–11 (1923); Ozawa v. United States, 260 U.S. 178, 198 (1922).
15. Harris, *supra* note 5, at 1737–39.
16. *Id.*
17. People v. Dean, 14 Mich. 406, 422–23 (1866).
18. *Id.* at 414.
19. *Id.*
20. *Id.* at 425.

a mere predominance of white blood, then the question arises, where is the line to be drawn, and how is the distinction to be ascertained?"[21] In attempting to resolve this inquiry, the *Dean* court further noted that "persons of precisely the same blood must be treated alike, although they may differ in their complexions. There are white men as dark as mulattoes, and there are pure blooded albino Africans as white as the whitest Saxons."[22]

Nearly a century later, in 1938, the Louisiana Supreme Court also attempted to parse out the biological and phenotypical requirements of race, coming to a much different conclusion than the *Dean* court.[23] In *Sunseri v. Cassagne*, Cyril P. Sunseri brought a suit against his wife, Verna Cassagne, to annul their marriage on the grounds that she was a person of color because she had "traceable" amounts of negro blood.[24] Sunseri alleged that "his wife's great-great-grandmother was a "fullblooded negress" and, because some of Cassagne's official records designated her and certain of her relatives as "colored," the court concluded that the marriage was interracial.[25] The *Sunseri* court made this decision, finding that there was sufficient evidence to annul Cassagne's marriage as violative of a Louisiana law prohibiting the marriage of "white persons and persons of color" even though Cassagne had been regarded as white in the community and "she and her mother had been christened in a white church, had attended white schools, were registered as white voters, were accepted as white in public facilities, and had exclusively associated with whites."[26] The *Sunseri* case poses an intriguing confrontation between the Black-white binary as its expansion beyond the *Dean* precedent to exclude even those who "had exclusively associated with whites" but who also had traceable amounts of negro blood, directly demonstrates the interest in dispossessing whiteness's power from Black people who were able to usurp the established norms by "passing."[27] This case thereby demonstrates the distinct desire of those who wield whiteness as a social privilege to maintain the "purity" of whiteness as a property interest that should not be allowed to benefit or fall into the hands of Black people, in particular.

21. *Id.* at 422.
22. *Id.* at 422–23 (maintaining that, at that time, there was not a court in the United States which held that "a 'colored person,' in the popular acceptation, although lighter than a mulatto, can be called 'white' without doing violence to language").
23. Sunseri v. Cassagne, 185 So. 1, 1 (1938).
24. *Id.*
25. *Id.* at 2.
26. Harris, *supra* note 5, at 1739–40 n.140; *see also Sunseri*, 185 So. at 4–5.
27. Harris, *supra* note 5, at 1739–40 n.140; *see also Sunseri*, 185 So. at 4–5.

Interestingly, both *Dean* and *Sunseri* seem to hinge on balancing skin color and blood composition, with a clear motivation to protect white racial purity in particular and, in the case of *Sunseri*, with the added desire to protect whiteness as property by severing the "negress" descendant from any property interests she obtained through marrying a white man.[28] However, this already complicated racial balancing becomes even more complicated as racial identities outside of the Black-white binary are introduced.[29] Moreover, as the population and complexity of mixed-race individuals increased, despite attempts to outlaw racial mixing through anti-miscegenation statutes, even the definitions of other races have shifted to reconcile the prevailing societal norms of the given time period.[30] For example, in 1923, in *United States v. Bhagat Singh Thind*, a case this Note will later discuss in more detail, the Supreme Court contradicted its own ruling from just one year prior in *Ozawa v. United States*. The Court maintained the exclusionary right of whiteness as a property interest, declaring that whiteness is not defined by what is literally and traceably Caucasian so much as by what is "popularly known" as such.[31] These contradictory cases—*Dean* and *Sunseri*, *Thind* and *Ozawa*—mark only a few of the dozens of cases spanning from the late nineteenth century to the mid-twentieth century that expressly excluded various BIPOC from being folded into the definition of whiteness.[32]

Still, while the definitions of different races within the United States, including whiteness, have changed over time, the desire to preserve the value and social currency of whiteness has never wavered. Often guising itself in standards of human neutrality and setting the default definition of personhood as white personhood, those who seek to reinforce and protect the value of whiteness have been able to veil these protective acts as "innocuously" upholding humanity at-large, while functionally excluding BIPOC through dehumanizing tactics.[33] In this way, whiteness has evolved into a property interest that silently undergirds certain socio-political rationales in order protect

28. *Sunseri*, 185 So. at 1.

29. *See generally* Vinay Harpalani, *Racial Triangulation, Interest-Convergence, and the Double-Consciousness of Asian Americans*, 37 Ga. St. U.L. Rev. 1361 (2021).

30. Harris, *supra* note 5, at 1791. *See also* United States v. Thind, 261 U.S. 204, 207 (1923); Ozawa v. United States, 260 U.S. 178, 198 (1922).

31. *Thind*, 261 U.S. at 207. *See also Ozawa*, 260 U.S. at 198 (establishing that white people are synonymous with the Caucasian race).

32. *See generally* In re Ah Yup, 1 F. Cas. 223 (C.C.D. Cal. 1878); In re Kanaka Nian, 6 Utah 259 (1889); In re Halladjian, 174 F. 834 (C.C.D. Mass. 1909); Wadia v. United States, 101 F.2d 7 (2d Cir. 1939); Ex parte Mohriez, 54 F. Supp. 941 (D. Mass. 1944). *See also Thind*, 261 U.S. at 204; *Ozawa*, 260 U.S. at 178.

33. Harris, *supra* note 5, at 1778–80.

and preserve white supremacy that, no matter how far its definition is stretched, will always be juxtaposed to BIPOC, and particularly to Blackness within the United States's Black-white binary.[34]

B. What is Property?

"*What name would you call yourself if you had never been owned before? Property named properly. Properly named property.*"

—Summer Durant

Historically, the definition of "property" has fallen under one of two prevailing approaches: the Blackstonian approach and the bundle of rights approach.[35] Whereas the Blackstonian approach describes property in terms of "sole dominion," emphasizing the right to exclude, the bundle of rights approach refers to a more expansive understanding of property that is contingent upon social conventions, allowing rights within a given bundle to shift and change ownership.[36] Importantly, each of these approaches has had an integral role in shaping societal conceptions of ownership and property rights over both the tangible and the intangible. In outlining each prevailing approach, the concept of racialized property interests becomes more apparent, particularly when overlayed with the unique history of race-based slavery in the United States.[37]

1. Blackstonian Approach

Under the Blackstonian approach, the right to exclude is dispositive in establishing something as "property" and is sometimes sufficient as the sole defining factor.[38] Perhaps the oldest approach to defining property, the Blackstonian approach is a form of essentialism that searches for the "critical element or elements that make up the irreducible core of property in all its manifestations."[39] Known as the patron saint of property essentialism, William Blackstone noted:

> [t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the

34. *Id.* at 1737–76.
35. *See generally* Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730 (1998).
36. *Id.* at 734–37.
37. Harris, *supra* note 5, at 1721.
38. *See* Merrill, *supra* note 35, at 730–31, 734.
39. *Id.* at 734.

> external things of the world, in total exclusion of the right of any other individual in the universe.[40]

In this way, the Blackstonian approach emphasizes that the key interest in property is not the physical tangibility of a given object, but rather the ability of those who have an ownership claim over it to exclude others from its use or value.[41] It is this right to reap and wield the value of the property that defines property in itself, under the Blackstonian approach.

2. The Bundle of Rights Approach

Comparatively, though the bundle of rights approach also seems to include the concept of exclusion, it focuses more on the social and aspects of property interests.[42] The bundle of rights "has no fixed core or constituent elements. It is susceptible of an infinite number of variations, as different 'sticks' or 'strands' are . . . added to or removed from the bundle altogether."[43] In this way, the bundle of rights approach describes "the universe of things called property" as "purely a matter of social convention" and "socially-contingent entitlements."[44] This emphasis on societal shaping of property interests and rights, in conjunction with the Blackstonian emphasis on the right to exclude, forms the basis of how property interests are viewed and protected within the larger legal framework that enforces property rights in the United States.

Importantly, in both the Blackstonian and bundle of rights approaches that frame the overall "institution of property," the concern is not primarily with the "scarce resources themselves ('things'), but rather with the rights of persons with respect to such resources."[45] In this way, the right to dominion and control over given objects includes "the rights of persons with respect to both tangible and intangible resources" and goes beyond "mere possession," instead referring to the person's ability to wield control.[46] In analyzing the property protections outlined in the United States Constitution, statutes, and case law, these concepts of property are crucial to understanding what exactly is meant by the term "property" that each of these legal enforcements protects.

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40. *Id.*
41. *Id.*
42. *Id.* at 737–38.
43. Merrill, *supra* note 35, at 737–38.
44. *Id.*
45. *Id.* at 732 ("A copy of Tom Wolfe's latest novel sitting in a bookshop is a scarce resource. But considered solely as an object, it is not property. The book can be characterized as property only by invoking certain rights that persons have with respect to it.").
46. *Id.* at 731–32.

C. Whiteness as Property (by Proxy)

"*The assumption that whiteness is a property interest entitled to protection is an idea born of systematic white supremacy . . . .*"

—Professor Cheryl I. Harris[47]

Make no mistake, the design of this Note is not to endorse the notion of whiteness as a vested property interest, but rather to address the reality of the United States's longstanding and ongoing history of protecting it as one.[48] Insofar as the reality of the property interest in whiteness remains, so too should the acknowledgment of it, alongside active efforts to reimagine and reshape it.

In beginning this conversation, it is crucial to understand what is meant by the word "property," both generally and in the context of this Note. In the above sections, definitions of property were noted as falling somewhere within the frameworks of either the Blackstonian approach or the bundle of rights approach, with the former emphasizing the right to exclude and the latter emphasizing societal influence.[49] However, within the context of chattel slavery and the racial conversations that have followed, the word "property" has long been used to describe the commodification of Black bodies, referring to Black people as "chattel," meaning movable goods.[50] In this way, the trans-Atlantic slave trade had the effect of relegating Black people to both the means of production as well as products themselves, creating a certain understanding within racial discourse of "property" as often referencing the descendants of slaves.[51] This understanding was reinforced by the cultural and political protections afforded to white slave owners over their "property."[52] For example, because the ratification of the United States Constitution predates the abolition of slavery by more than seventy years, the property protections initially provided in the Constitution protected slaveowner's rights to be secure in their human chattel property holdings, until the holding of such property was later outlawed by the Thirteenth Amendment.[53]

47. Harris, *supra* note 5, at 1766.
48. *See generally* Harris, *supra* note 5.
49. *See generally* Merrill, *supra* note 35.
50. 63C Am. Jur. 2d Property § 22.
51. Harris, *supra* note 5, at 1720 n.39 (explaining that Virginia classified slaves as real property by 1705 and Massachusetts and South Carolina identified slaves as chattel).
52. *See* Harris, *supra* note 5, at 1720–21; *see also* U.S. CONST. AMEND. V.
53. U.S. CONST. AMEND. V.

Informed by that background, it is important to acknowledge that this Note outlines a related but distinct concept of racialized property, namely the property interest in whiteness that resulted from the juxtaposition of whiteness to Blackness, setting whiteness as the default currency by which human value is measured.[54] As illustrated in the above cases above answering the question "what is whiteness?", this notion of whiteness as a form of currency (e.g., whiteness as a means of freedom, access, deservedness) developed alongside and in tandem with the denigration and dehumanization of Black and BIPOC folks.[55] Each attempt to further demarcate the boundaries of whiteness's definition was centered around maintaining the ability to exclude BIPOC from rights and privileges that are now held to belong to all people, betraying the unspoken reality that whiteness itself held a social value that those with dominion over it did not want tainted.[56] In this way, the legal construction of whiteness in the United States defined "critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and, of property (what legal entitlements arise from that status)."[57]

The ongoing consequences of these legal constructions entail that "whiteness at various times signifies and is deployed as identity, status, and property, sometimes singularly, sometimes in tandem."[58] Today, in many ways, these same aims continue, albeit more covertly couched in the language of neutrality and sometimes even subverting language espoused in express contradiction of white supremacy.[59] Similarly, the desire to buy into the property interest of whiteness has also continued, contributing to the successful overturning of affirmative action in 2023.[60]

1. Whiteness as White People's Property

Whiteness is "an aspect . . . of personhood" that takes many forms. Whiteness functions "as self-identity in the domain of the intrinsic, personal, and psychological; as reputation in the interstices between internal and external identity; and, as property in the extrinsic, public,

54. *See* Harris, *supra* note 5, at 1718–19.
55. *Id.*
56. *See generally* People v. Dean, 14 Mich. 406 (1866); Sunseri v. Cassagne, 185 So. 1 (1938).
57. Harris, *supra* note 5, at 1725.
58. *Id.*
59. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007); *see also* Harris, *supra* note 5, at 1768–69 (explaining "[t]his idea of race recasts privileges attendant to whiteness as legitimate race identity under "neutral" colorblind principles.").
60. *See generally Students for Fair Admissions*, 600 U.S. 181 (2023).

and legal realms." Property is a concept that centers many complex societal notions of control and the ability to exclude.[61] In reconciling these two nuanced and labyrinthine concepts to one another by "[a]ccording whiteness actual legal status," the United States "converted an aspect of identity into an external object of property, moving whiteness from privileged identity to a vested interest."[62] This accordance of property interests and protections to whiteness derives from white supremacy and has been nurtured by the laws of slavery and "Jim Crow."[63]

One clear example demonstrating how the United States legal system has historically recognized and upheld whiteness as a property interest can be found in anti-miscegenation laws, which were used to prevent interracial mixing through marriage, sexual relationships, etc.[64] Noticeably, though these laws could theoretically be applied to interracial mixing between any races, in practice they were almost always written and enforced to prevent interracial mixing between white people and BIPOC.[65] For instance, even as recently as 1967 in the Supreme Court's landmark decision, *Loving v. Virginia*, the rationale and arguments set forth by Virginia betrayed a primary concern for the preservation of whiteness.[66]

The *Loving* case concerned a couple from Virginia (a white man and a Black woman) seeking to be married despite the Virginia Code's prohibition against "any white person intermarry[ing] with a colored person, or any colored person intermarry[ing] with a white person."[67] The state of Virginia reasoned that "[a]lmighty God created the races white, black, yellow, malay and red, and he placed them on separate continents," never intending for them to mix and that the regulation of marriage fell firmly within the state's Tenth Amendment police power, citing *Naim v. Naim*.[68] However, as the Supreme Court noted, the state's police power was not without limitation, and "[t]he fact that Virginia prohibits only interracial marriages involving white persons" clearly demonstrated that the Virginia Code was, in fact, "designed to maintain White Supremacy."[69] In this way, the focused and narrowed prohibition

61. Harris, *supra* note 5, at 1725.
62. *Id.*
63. *Id.*
64. *Id.* at 1732 n.105. *See also* Va. Code Ann. § 20-54 (1960 Repl. Vol.); *Loving*, 388 U.S. at 4–5 n.4.
65. Va. Code Ann. § 20-54 (1960 Repl. Vol.); *Loving*, 388 U.S. at 6–7.
66. *See Loving*, 388 U.S. at 1.
67. *Id.* at 4.
68. *Id.* at 3, 7. *See also* Naim v. Naim, 197 Va. 80, 87 (1955).
69. *Loving*, 388 U.S. at 11.

of the Virginia anti-miscegenation statute, outlawing only intermixing between white and BIPOC people, harkened back to its origins as an "incident to slavery" and the Supreme Court could not reconcile such a rationale with the Fourteenth Amendment equal protection clause.[70] Still, while the *Loving* case ultimately had a favorable outcome for interracial couples, resulting in the Supreme Court's holding that anti-miscegenation laws are unconstitutional, it did not come without great trial and hardship as the state of Virginia was highly motivated to "preserve the racial integrity of its citizens."[71] Though the property interest in whiteness was never explicitly articulated, it is readily apparent in the arguments set forth by Virginia that the state's aim to prevent "the corruption of blood" was not born from a desire "to preserve the racial integrity of [all] its citizens," only the white ones.[72]

Despite being the last case of its kind, *Loving v. Virginia* was by no means unique, as instances of miscegenation, both consensual and nonconsensual, have been prevalent from the onset of slavery.[73] And, though these cases are not the only examples of legal precedent protecting whiteness as a property interest, they are certainly foundational. Interracial mixing affected many legal rights, threatening to dilute the strength of whiteness as a property interest.[74] Concerns around interracial mixing led to cases like *Plessy v. Ferguson* and *People v. Dean*, in which white-passing mixed-race people sought to benefit from whiteness, forcing courts to define what constitutes a white person in order to preserve the property interest in it.[75] Such challenges to the definition of whiteness highlighted its vulnerabilities and left it exposed to claims from non-passing BIPOC as well. Armed with this crucial context, an investigation of whiteness as an inequitable and disenfranchising system of racial hierarchy can be used to read between the lines of further legal arguments to understand why protection is sought for the property interest in whiteness, not only by those who fit within its definition but also by those who hope to wield its power *by proxy*.

70. *Loving*, 388 U.S. at 6 ("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.").

71. *Loving*, 388 U.S. at 7; *see also Naim*, 197 Va. at 90.

72. *See id.*

73. *See Loving*, 388 U.S. at 6.

74. *Loving*, 388 U.S. at 7; *see also Naim*, 197 Va. at 90.

75. *See generally* Plessy v. Ferguson, 163 U.S. 537, 549 (1896); People v. Dean, 14 Mich. 406, 431–35 (1866).

2. Racial Triangulation and the Fallacy of Whiteness as Property by Proxy

The theory of racial triangulation was created to help explain the many ways in which non-Black people of color have had trouble grappling with the United States's Black-white binary, which historically categorizes individuals as either white or non-white.[76] Most often used to describe the Asian community in the United States, racial triangulation precipitates within American society through two contradictory stereotypes: the aspirational model minority and the unassimilable, alien "other."[77] The first stereotype, the model minority, serves to reinforce whiteness by leaning on colorism, classism, and capitalism to underscore the "hard work ethic" and "material successes" of non-white Americans as opposed to Black people, separating non-Black people of color from Blackness and rendering them closer to whiteness.[78] The second stereotype, the unassimilable alien, holds non-Black people of color as unassimilable and un-American by default by ahistorically setting them outside of the fabric of American history, disenfranchising them from the genesis of the United States as a country.[79]

As showcased in *People v. Dean*, the enticements of whiteness as a property interest resulted in attempts to have courts either fold certain white-passing BIPOC into the definition of whiteness or at least grant them the benefits of whiteness by virtue of their passing, *by proxy*. What has yet to be fully addressed is the similar pursuits of non-white-passing BIPOC to either be accepted into the fold of whiteness or to wield an interest in it by proxy. However, there is a well-established history of BIPOC seeking alignment with whiteness as a property interest only to discover that "joining" whiteness does not effectively "beat" it.[80] One notable BIPOC demographic that has historically pursued such alignment is Asian Americans. In 1923, for instance, Indian immigrant Bhagat Singh Thind applied for American citizenship on the basis of being a "Caucasian" and descendant of the "Aryan race" only for the Supreme Court to deny him, directly conflicting with its own logic from their prior ruling in *Ozawa v. United States*.[81]

76. Harpalani, *supra* note 29, at 1364–68.

77. *The Black, Asian, and White Racial Triangulation*, Contemp. & (Sept. 24, 2018), https://contemporaryand.com/magazines/the-black-asian-and-white-racial-triangulation/.

78. *Id.*

79. *Id.*

80. United States v. Thind, 261 U.S. 204, 207 (1923); Ozawa v. United States, 260 U.S. 178, 198 (1922) (establishing that white people are synonymous with the Caucasian race).

81. *See Thind*, 261 U.S. at 207–08; *Ozawa*, 260 U.S. at 198.

One year after the *Ozawa* case, the *Thind* court ruled that the words "white person" were only meant to indicate a person belonging to what is "popularly known as the Caucasian race."[82] The *Ozawa* case specifically dealt with a Japanese immigrant who sought to become naturalized under the Naturalization Act of 1906 but was denied because only "free white persons" and "persons of African nativity or persons of African descent" were allowed to naturalize under the Act.[83] This case underscores the building tension of "racial triangulation" as it pertains to the history of Asian people in the United States which ultimately led Ozawa to argue that Japanese people should be properly classified as "free white persons."[84] Unfortunately for Ozawa, the Court decided that Japanese persons did not fall under the definition, instead limiting the definition of "free white persons" to those that fall under the "Caucasian race."[85]

While Thind attempted to use the Ozawa ruling to ally Indianness with whiteness due to their shared Caucasian ancestry, the Supreme Court denied this logic by reinforcing that whiteness is not defined by what is literally and traceably Caucasian, but by what is "popularly known" as such.[86] Seldomly remembered in history, Thind's case foreshadowed a dangerous dynamic in which certain BIPOC, such as Asians, have sought to align themselves with whiteness at the expense of other BIPOC, often without realizing that such alignment is ultimately detrimental to them as well.[87] These attempts by Asians to reconcile their race with a Black-white binary have come to be called "racial triangulation."[88]

As both *Thind* and *Ozawa* demonstrate, the initial failure of American law to address race beyond a Black-white binary resulted in complicated case law rife with logical fallacies and contradiction. In attempting to reconcile with this stark binary, Asian Americans have played an integral role in forcing courts to articulate the contours of what is deemed "popularly white," despite never actually gaining admission into whiteness's fold.[89] Combatting notions of race rooted in colorism,

82. *See Ozawa*, 260 U.S. at 197.
83. Rev.St. § 2169, 8 U.S.C.A. § 359.
84. Harpalani, *supra* note 29, at 1371–75; *Ozawa*, 260 U.S. at 192.
85. *Ozawa*, 260 U.S. at 197–98.
86. *Thind*, 261 U.S. at 207; *Ozawa*, 260 U.S. at 197.
87. *Thind*, 261 U.S. at 204; *Ozawa*, 260 U.S. at 178; Harpalani, *supra* note 29, at 1361.
88. Harpalani, *supra* note 29, at 1361; *see also* Cybelle Fox & Irene Bloemraad, *Beyond "White by Law": Explaining the Gulf in Citizenship Acquisition between Mexican and European Immigrants, 1930*, 94 Soc. Forces 181, 181–182 (2015).
89. *Thind*, 261 U.S. at 207; *see also Ozawa*, 260 U.S. at 197.

sanguinity, and ethnography, East and South Asians alike—although often separately—were historically deemed ineligible for naturalization.[90] This refusal to allow Asian immigrants to become naturalized was often rooted in dehumanizing and monolithic ideas of Asian people in contrast to whiteness as an "un-raced" standard for what it means to be human.[91] Eventually, the desire of BIPOC to be accepted under the umbrella of whiteness, combined with the desire of whiteness's stakeholders to maintain the story that whiteness bears no advantages compared to other races, culminated in "pull yourself up by your bootstraps" meritocratic rationales, purporting to wipe the slate of racial oppression clean and starting from a place of vastly inequitable "equality."[92] Recently, the chillingly profound consequences of this ahistorical fiction, that whiteness and non-whiteness are on equal footing, have taken a severe form in the overturning of affirmative action. Still, despite its absence from the Court's decision, the property interest in whiteness remains a core motivation behind affirmative action's overturning.[93]

III. Legal Analysis

One of the main contentions held by the opponents of affirmative action is their belief that "[i]n according 'preferences' for Blacks and other oppressed groups, affirmative action is . . . 'reverse discrimination' against whites, depriving them of their right to equal protection of the laws."[94] Though these same opponents usually concede that BIPOC were oppressed "by slavery and by legalized race segregation and its aftermath," they also maintain that any attempts to mitigate that past by favoring BIPOC people are unfair and unjust toward white people.[95] Either intentionally or unintentionally, this emphasis on highlighting attempts to allegedly "favor" BIPOC in mitigation for past harms while simultaneously

90. *See id.*
91. *See generally* Harris, *supra* note 5.
92. Fox, *supra* note 86, at 182.
93. *See generally* Harris, *supra* note 5. *See also Students for Fair Admissions*, 600 U.S. at 230.
94. Harris, *supra* note 5, at 1767.
95. *Id.* at 1742. Toni Morrison's study of the Africanist presence in U.S. literature described the construction of "American" identity as follows:

> It is no accident and no mistake that immigrant populations (and much immigrant literature) understood their Americaness as an opposition to the resident black population. Race in fact now functions as a metaphor so necessary to the construction of Americaness that it rivals the old pseudo-scientific and class-informed racisms whose dynamics we are more used to deciphering . . . Deep within the word "American" is its association with race.

TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION 46–47 (1992).

disregarding the favoritism toward white people and whiteness that is already embedded in the larger society of the United States is at least a remarkable oversight if not a time-tested sleight of hand.[96]

A. The Law Does Specially Favor Some, Just Not the "Special Favorite of the Laws"

"*[T]he Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter.*"

—Justice Sotomayor, joined by Justices Kagan and Jackson[97]

In 1883, the Supreme Court of the United States consolidated five separate cases—*United States v. Stanley*, *United States v. Ryan*, *United States v. Nichols*, *United States v. Singleton*, and *Robinson v. Memphis & Charleston Railroad*—brought by Black plaintiffs suing different public-facing businesses for refusing them full or partial entry.[98] In adjudicating these 1883 Civil Rights Cases, the Supreme Court ruled that the Thirteenth and Fourteenth Amendments did not grant Congress the power to pass laws protecting Black people from private discrimination, effectively holding the Civil Rights Act of 1875 unconstitutional and setting the stage for widespread discrimination and segregation that would not end until the Civil Rights Act of 1964.[99] Writing for the majority, Justice Joseph P. Bradley, wrote "[w]hen a man has emerged from slavery . . . there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws."[100]

In 2023, 140 years after Justice Bradley's devastating decision, the Supreme Court of the United States consolidated two cases—*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina, et al*—in which plaintiffs, Students for Fair Admissions, Inc., argued that Harvard's and the University of North Carolina's (UNC's) race-based admissions programs "violated, respectively, Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment."[101] The Supreme Court agreed, holding both Harvard

96. Harris, *supra* note 5, at 1767.
97. *Students for Fair Admissions*, 600 U.S. at 318 (Sotomayor, J., dissenting).
98. *See The Civil Rights Cases*, 109 U.S. 3, 10 (1883).
99. *Id. See also* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d et seq. (2006)).
100. *The Civil Rights Cases*, 109 U.S. at 25.
101. *Students for Fair Admissions*, 600 U.S. 181, 198 (2023).

and UNC's race-conscious admissions policies unconstitutional because they "lack[ed] sufficiently focused and measurable objectives warranting the use of race, unavoidably employ[ed] race in a negative manner, involve[d] racial stereotyping, and lack[ed] meaningful end points."[102] Writing for the majority, Chief Justice Roberts proactively addresses the dissent as "wrench[ing]" case law "from its context" while ironically doing just that.[103] Describing the dissent as "ignor[ing] the parts of that law it does not like" to defend "a judiciary that picks winners and losers based on the color of their skin" is particularly confounding within an opinion that misappropriates the language of Fourteenth Amendment precedent, wrenching it from its context to "contravene the vision of equality embodied in the Fourteenth Amendment."[104] The Fourteenth Amendment was explicitly designed to "proscribe" and consider "discriminations against the Negro race," said *Brown*.[105] There is nothing *meaningful* to that *end*, says the majority.

1. Inequitable but Equal

Contrary to the assertions made in the majority opinion, the Supreme Court's decision in the *SFFA* cases does not put an end to education systems that pick "the right races to benefit."[106] In fact, by overturning affirmative action, the Court has "further entrench[ed] racial inequality in education," effectively picking whiteness once again by removing measures that allowed BIPOC more access to exclusive systems of higher education.[107] In an analysis focused on ending affirmative action and largely untethered from the deeper context of its historical origins, the Supreme Court has effectively turned back the clock, firmly establishing inequitable inequality as the starting point for educational access.

The text of the Fourteenth Amendment reads:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[108]

102. *Id.* at 230.
103. *Id.* at 229.
104. *Id.* at 319 (Sotomayor, J., dissenting).
105. Brown v. Bd. of Educ., 347 U. S. 294, 490 (1954).
106. *Students for Fair Admissions*, 600 U.S. at 229.
107. *Id.* at 318 (Sotomayor, J., dissenting).
108. U.S. CONST. AMEND. XIV, § 1.

Grounding their complaint against UNC in the Fourteenth Amendment's Equal Protection Clause, Students for Fair Admissions, Inc. asserted that UNC's race-conscious admissions policies violated equal protection of the laws without overcoming the strict scrutiny standard.[109] Moreover, Title VI of the Civil Rights Act of 1964 reads "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[110] In their suit against Harvard, Students for Fair Admissions staked their claim in Title VI and the Supreme Court consolidated the two cases, emphasizing that "Title VI is coextensive with the Equal Protection Clause."[111]

Under the Equal Protection Clause, discrimination based on race is only allowed if it meets strict scrutiny, requiring the government to show that its racial considerations serve a "compelling government interest" that is narrowly tailored to achieve that interest.[112] In past precedent, the Supreme Court ruled that a compelling interest in diversity and a diverse student body met the standard of strict scrutiny, affording schools the ability to use race-conscious measures toward that end.[113] However, in *SFFA*, the Supreme Court sharply diverged from precedent, with Justice Thomas's concurrence even employing the term "race conscious" to refer to the Jim Crow era, deciding that Harvard's and UNC's race-conscious admissions policies aimed at fostering student-body diversity encompassed "social and aesthetic goals far afield from the education-based interest discussed in Grutter."[114] Though the Court addressed that diversity is important as a social goal while emphasizing that skin color alone is not determinative of diversity, what their finding failed to reconcile is *Brown*'s consideration of "those qualities which are incapable of objective measurement" and how race factors into such qualities.[115] For example, the Court's blatant overlooking of crucial context like Justice Thurgood Marshall's recounting in *Bakke* that "[i]t was unlawful to teach [Black people] to read" when weighing the consideration of why and how skin color informs diversity

109. *Students for Fair Admissions*, 600 U.S. at 228–30.
110. 42 U.S.C. § 2000d et seq.
111. *See* Gratz v. Bollinger, 539 U.S. 244, 276, n.23 (2003).
112. *Students for Fair Admissions*, 600 U.S. at 255; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 471 (1989).
113. Grutter v. Bollinger, 539 U.S. 306, 307 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 266 (1978).
114. *Students for Fair Admissions*, 600 U.S. at 259 (Thomas, J., concurring).
115. Sweatt v. Painter, 339 U.S. 629, 634 (1950).

considerations in race-conscious admissions policies is telling.[116] Such blatant disregard for the history behind the application unfairly erases the reality that whereas skin color was sufficient enough a consideration when contributing to generations of non-access to education, it is now insufficient to aid in the undoing of those longstanding harms.

2. Dissecting the Myth of Merit

The myth of colorblind merit rears its head quite often in the majority opinion of the *SFFA* case. By describing race-consciousness as demeaning "the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities," the *SFFA* Court conflates recognition of a tested ancestry with complete replacement of merit considerations.[117] However, what the Court should recognize is that merit is not only arbitrarily determined, but it is often also weighed within a context that is heavily influenced by history and ancestry.

As Professor Harris describes "the assertion that race is color and color does not matter is, of course, essential to the norm of colorblindness," however "[t]o define race reductively as simply color, and therefore meaningless . . . is as subordinating as defining race to be scientifically determinative of inherent deficiency."[118] While the deficiency definition renders some races inferior, the reductive definition "denies the real linkage between race and oppression under systematic white supremacy."[119] In other words, modern pushes to abandon race-consciousness and define race as "disconnected from social identity" effectively undercut the aims of race-conscious remediation in order to deny "the historical context of white domination and Black subordination" and prevent acknowledgement and rebalancing of the Black-white binary's hierarchical racial power dynamics.[120] Where this push for abandonment of race-conscious considerations shifted from languid to lethal in the overturning of affirmative action seems to be when racial triangulation led some of the Asian population to believe that affirmative action was disadvantageous to them as well.[121] In coming to believe that affirmative action's historical considerations contributed to their rejections from top-tier schools, many Asian applicants were so

116. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 387–88 (1978).
117. Rice v. Cayetano, 528 U.S. 495, 517 (2000).
118. Harris, *supra* note 5, at 1768.
119. *Id.*
120. *Id.*
121. *Id.*; Harpalani, *supra* note 29.

outraged by the prospect of a rebalanced admissions social order that they failed to recognize they were already operating at a disadvantage to begin with.[122] Rather than recognizing the entrenched and reinforced power of whiteness as a property interest within the educational system, affirmative action became a target for Asians who felt comfortable gambling that they could eventually achieve a property interest in whiteness so long as whiteness as property remained protected. Likely at least in part, this shift in the public-facing plaintiff demographics from largely white plaintiffs at the time of Professor Harris's 1993 article, to both white and Asian plaintiffs contributed to the successful overturning of affirmative action in 2023.[123]

In this way, the *SFFA* cases put on full display the Court's "chronic refusal to dismantle the institutional protection of benefits for whites that have been based on white supremacy and maintained at the expense of Blacks."[124] This decision showcases that it is not the failure to consider each individual's merit that the Court worries about in race-conscious admissions criteria, but rather the Court has decided that in order to preserve dominion over whiteness as a property interest within the educational system, then the equitable consideration of each individual's holistic and historically-informed circumstances should bear no merit on admissions.[125]

B. Remembering the Context: The Claims Behind the Claims

"*Simply put, the race-blind admissions stance the Court mandates from this day forward is unmoored from critical real-life circumstances.*"
—Justice Jackson, joined by Justices Sotomayor and Kagan[126]

The United States's legal system provides several avenues to protect the property interests of its citizens, namely through the Due Process Clauses of the Fifth and Fourteenth Amendments, and through the Takings Clause of the Fifth Amendment.[127] Under the Fifth

122. Harpalani, *supra* note 29, at 1375–77.

123. *See generally* Harris, *supra* note 5; Harpalani, *supra* note 29. *See also* Holloway, *supra* note 12 (explaining how some legal strategists sought after BIPOC plaintiffs to help the plaintiff's argument appear more principled and to provide cover from racial animosity that was likely also underlying and commingling).

124. Harris, *supra* note 5, at 1750.

125. *Id. But see* Antonin Scalia, *The Disease as Cure*, 1979 WASH. U. L.Q. 147, 153–54 (1979) ("[Affirmative action] is based upon concepts of racial indebtedness and racial entitlement rather than individual worth and individual need; [thus it] is racist.")

126. *Students for Fair Admissions*, 600 U.S. 181, 410 (2023) (Jackson, J., dissenting).

127. U.S. CONST. AMEND. XIV, § 1; U.S. CONST. AMEND. V.

Amendment, Procedural Due Process protects citizens from being "deprived of life, liberty, or property, without due process of law."[128] The Fifth Amendment's Takings Clause prevents the government from taking private property for public use without providing "just compensation" to the property owner.[129] Relatedly, Section Four of Fourteenth Amendment also specifically concerns public debts, cementing that debt incurred "for services in suppressing insurrection or rebellion, shall not be questioned" and disavowing any claims for losses incurred by the "emancipation of any slave."[130]

In analyzing the *SFFA* cases through the lens of whiteness as property, the plaintiffs asserted equal protection claims seem to be more sincerely addressing their perceived loss of whiteness as property and curtailment of their ability to potentially accrue some of its property interest by proxy. Originally filed in 2014, the *SFFA* cases dragged on for almost a decade with the sole aim of overturning years of precedent to end the use of race as a factor in college admissions processes.[131] Motivated by this desire for "colorblindness," the plaintiffs in *SFFA* accomplished their goal when the Supreme Court held that "diversity" is no longer a sufficiently compelling interest to overcome facial discrimination under the Equal Protection Clause.[132] Understanding now the historical implications of "colorblindness" as "a form of race subordination in that it denies the historical context of white domination and Black subordination," the *SFFA* cases' emphasis on removing race-conscious measures to return to "colorblindness" betrays an unspoken motivation to reinforce the hierarchical racial structure that race-conscious measures sought to displace.[133] Taking as true the presumption that whiteness is, in fact, a property interest—and that maintaining this interest was the *SFFA* plaintiffs' primary motive—below are several theoretical analyses of the legal arguments that would more accurately address preservation of the property interest in whiteness, but which likely would not have led to the favorable outcome the *SFFA* plaintiffs ultimately received: the overturning of affirmative action.

128. U.S. Const. amend. V; *see also* Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 Const. Comment. 339, 340 (1987).
129. U.S. Const. amend. V.
130. U.S. Const. amend. XIV, § 4.
131. *See Students for Fair Admissions*, 600 U.S. 181, 190 (2023).
132. *Id.* at 226–27.
133. *Id.*

1. Property Under the Fifth Amendment

Despite being decided in the late nineteenth century and subsequently overturned by the landmark *Brown v. Board of Education* decision in 1954, *Plessy v. Ferguson* is a case that is both illuminating and ongoingly influential in American racial perceptions. In fact, many of the rationales used to justify the infamous decision remain widely held, tacitly appearing in modern discussions on race, both inside and outside of the courtroom.[134] In 1896, the United States Supreme Court upheld the constitutionality of Louisiana's state law that provided for separate railways cars on the basis of race under the Fourteenth Amendment.[135] The defendant, Plessy, was seven-eighths Caucasian and one-eight African American but, due to such widely held principles as the "one drop rule," was still considered African American under Louisiana law.[136] After deciding to defy the law by sitting in a Caucasian railway car, Plessy was asked by the conductor to move to the African American car.[137] Upon Plessy's refusal, he was forcibly removed and subsequently imprisoned.[138]

In its analysis of this case, the Supreme Court rejected Plessy's equal protection claim, arguing that legalized separation on the basis of race does not "stamp the colored race with a badge of inferiority," because "the colored race chooses" this construction.[139] Importantly, Plessy's claims, however, did not stop at this assertion of equal protection, which the Court found unpersuasive. Plessy also claimed that he had a property interest in being seated in the white passenger car because the "reputation [of being white] … has an actual pecuniary value" to which Plessy asserted he was entitled and could not constitutionally be deprived of without due process of law guaranteed by the United States Constitution.[140] Plessy based his due process claim on the fact that his appearance was phenotypically white and "barring him from the railway car reserved for whites severely impaired or deprived him of the reputation of being regarded as white."[141] Moreover, this public

134. *See* Harris, *supra* note 5, at 1714; Harpalani, *supra* note 29, at 1362, 1368 (explaining that the socialization and understanding of different racial groups have been related through valorization and ostracization with white Americans as the most exalted).
135. *See* Plessy v. Ferguson, 163 U.S. 537, 540–64 (1896).
136. *Id.* at 541.
137. *Id.* at 542.
138. *Id.*
139. *Id.* at 551; *see also* Brief for Plaintiff in Error at 8, Plessy (No. 210) [hereinafter Brief for Homer Plessy].
140. Brief for Homer Plessy, *supra* note 139, at 8.
141. Harris, *supra* note 5, at 1747.

prohibition might also cause him to be "regarded as or be suspected of being not white and therefore not entitled to any of the public and private benefits attendant to white status."[142] Plessy's brief went on to assert that allowing the train conductor to arbitrarily deprive Plessy of these rights attendant to his perceived white status constituted a due process violation because "the reputation of belonging to the dominant race . . . is property, in the same sense that a right of action or inheritance is property."[143]

In response to these assertions, the Court managed to successfully evade establishing a clear definition of whiteness or the property interest in it by dismissing the due process issue, claiming that Plessy could simply pursue damages later.[144] More specifically, the Court said "[i]f he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called property."[145] The Court then added that "[on] the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man."[146] In this way, in its attempt at entirely sidestepping the issue, the Court's stated rationale actually functioned to support the contention that racial delineation does hold certain power by reputation that—when harmed—can be compensated through legal damages.[147] Thus, although the Court officially declined to define racial categorization at the federal level, the *Plessy* decision's undergirding rationale served to bolster the legitimacy of Plessy's argument that racial reputation is compensable through legal damages as a sort of property interest.[148] Similar to Plessy, in the instant case, though the *SFFA* plaintiffs claimed a violation of the Fourteenth Amendment Equal Protection Clause, their underlying motivation to protect whiteness as a property interest also raises Due Process concerns.

a. Procedural Due Process

Though the Fifth Amendment does not explicitly protect a property interest in whiteness, the history behind it shows that at the time it was written, whiteness was very much a highly coveted and protected

142. *Id.*
143. *Id.*
144. *Id.* at 1749.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*

social currency. In the centuries to follow, such covetousness and protective measures have continued, albeit more covertly to comport with shifting societal views. The text of the Fifth Amendment states "[no person shall] be deprived of life, liberty or property without due process of law." Importantly, the context of this amendment is crucial to its meaning and interpretation.[149] In 1791, at the time of the Fifth Amendment's ratification, slavery was still legal in the United States, and it was predicated on the notion that whiteness was the prototype of personhood while Blackness was entirely separate.[150] Understood in this context, the "person" to which the Fifth Amendment refers cannot have been intended to encompass a Black person at that time.[151] Moreover, because Black persons were still considered chattel at the time of the Fifth Amendment's ratification, they were also covered under the "property" protections afforded by its due process clause.[152] Nearly a century later, when the Fourteenth Amendment was ratified in 1868, due process was finally understood to encompass "all persons," including the formerly enslaved, but the case law that followed quickly demonstrated that even this "equalizing" Fourteenth Amendment was ratified with a reluctance toward fully franchising the formerly enslaved.[153]

Because due process under the Fourteenth Amendment deals with substantive due process, which protects citizens from having the government encroach on their fundamental rights, it does not apply here, as the property interest in whiteness is not a fundamental right.[154] However, understanding whiteness as a property interest—the full use of which can be curtailed—there could be an argument for procedural due process under the Fifth Amendment. However, this is only true if those who hold ownership in whiteness as property were not afforded the procedural due process afforded to them by the Constitution.[155] Here, if the *SFFA* plaintiffs had said "the quiet part aloud" in trying to protect whiteness as property, they likely would not have succeeded because they

149. *See generally* Cong. Rsch. Serv., R45153, Statutory Interpretation: Theories, Tools, And Trends (Apr. 5, 2018), https://crsreports.congress.gov/product/pdf/R/R45153/2.

150. *See* David Livingstone Smith, Less Than Human: Why We Demean, Enslave, And Exterminate Others 26 (2011). *See also* Nour Kteily, Emile Bruneau, Adam Waytz & Sarah Cotterill, *The Ascent of Man: Theoretical and Empirical Evidence for Blatant Dehumanization*, J. Personality & Soc. Psych. 3–4 (2015).

151. *See* U.S. Const. amend. V.

152. Dred Scott v. Sandford, 60 U.S. 393, 395 (1857), *superseded* by constitutional amendment, U.S. Const. amend. XIV.

153. *See generally* U.S. Const. amend. XIV.

154. *Id.*

155. *See generally* U.S. Const. amend. V.

would have had to first show that the implementation of race-conscious admissions policies effectively deprived them of their property interest in whiteness.[156] Then, upon that first showing, they would also have to show that these policies denied them some guaranteed constitutional procedure like adequate notice or an opportunity to be heard.[157] While the plaintiffs might be able to show that their property interest in whiteness entitled them to admissions to top-tier universities before race-conscious procedures effectively displaced them, this would be a difficult argument to make because it would require them to blatantly defend whiteness as "superior."[158] Though white supremacy is largely preserved in many aspects of society, the covertness of its preservation has become crucial over the years as society shifted away from open acceptance of whiteness as somehow superior. Therefore, while the plaintiffs could try to make the argument that their property interest in whiteness entitled them to priority admissions, such an argument would require naming aloud principles of white supremacy that are no longer openly accepted, even if they are surreptitiously upheld, rendering the argument a difficult one to make. Without being able to compellingly make this first argument—that whiteness is a property interest that *should* be recognized and upheld—plaintiffs would not be able to make the second one: that they were deprived of adequate due process in preservation of their property interest.

In these ways, though the interest in whiteness as property continues to be very real, it has become more difficult to explicitly assert as certain laws have opened to protect BIPOC as persons. However, instead of this increased difficulty resulting in the eradication of whiteness as a property interest, it has instead led to some absurd conclusions.[159] One example being the recent *SFFA* cases in which anti-racist precedent aimed at rectifying centuries of educational disenfranchisement was contradictorily employed in the furtherance of cementing white supremacy.[160]

b. Takings

The text of the Fifth Amendment also provides that no private property shall be "taken for public use, without just compensation."[161]

156. *See generally* Harris, *supra* note 5.
157. *Id.*
158. *Id.*
159. *See generally Students for Fair Admissions*, 600 U.S. at 190.
160. *Id.*
161. U.S. CONST. AMEND. V.

Importantly, certain considerations allow for the devaluation of private property if it furthers public welfare.[162] Like the above argument, any takings claims regarding whiteness as property would also likely fail because they would also require naming aloud whiteness as holding superiority over other racial identities and interests. Despite the fact that whiteness lends itself to superior outcomes in most, if not all, facets of life, the notion that it should is no longer accepted and would not likely be compelling to a modern court if blatantly acknowledged.[163] However, if the *SFFA* plaintiffs could first show that the implementation of race-conscious admissions policies effectively deprived them of their property interest in whiteness by "taking" their rightful admittances and giving them to BIPOC without just compensation, then they could potentially receive relief from the government.[164] Still, this argument could be met with a number of counter arguments that could effectively undermine its claims. For example, race-conscious policies can be argued to serve the public welfare, allowing merit to be considered more holistically.[165] Moreover, an argument could be made that just compensation was already provided through the centuries of exploitation that provided for an ongoing landscape of racial hierarchy.[166]

Ultimately, what these "alternative" arguments are meant to showcase is that, but-for the legal fiction of ahistorical colorblindness and its erasure of past context, the *SFFA* plaintiffs would never have succeeded in overturning affirmative action.[167] This is because "diversity" continues to serve a compelling government interest. Still, some may argue that diversity is too far-reaching to be narrowly tailored in addressing the pervasive effects of whiteness as a legally and societally protected property interest. However, when given the full historical context, it becomes clear that the protection of whiteness as property is equally, if not more far-reaching and, therefore, requires equally widespread measures to mitigate the effects of historically entrenching whiteness as a property interest.[168] Therefore, because affirmative

162. Larry M. Wertheim, Regulatory takings, Minn. Prac. Series § 10:38 (2023–2024 ed.)

163. *See generally* Juliana Menasce Horowitz, Anna Brown & Kiana Cox, *The role of race and ethnicity in Americans' personal lives*, Pew Rsch. Ctr. (Apr. 9, 2019), https://www.pewresearch.org/social-trends/2019/04/09/the-role-of-race-and-ethnicity-in-americans-personal-lives; *see also* Nambi Ndugga, Latoya Hil & Samantha Artiga, *Key Data on Health and Health Care by Race and Ethnicity*, KFF (June 11, 2024), https://www.kff.org/key-data-on-health-and-health-care-by-race-and-ethnicity/?entry=executive-summary-introduction.

164. *See generally* U.S. Const. amend. V.

165. *Students for Fair Admissions*, 600 U.S. 181, 410 (2023) (Jackson, J., dissenting).

166. Harris, *supra* note 5, at 1781.

167. *Id.*

168. *See* Harris, supra note 5, at 1791.

action highlights the reality that whiteness as property explicitly undercuts the rights of BIPOC, any claims brought forth to explicitly protect whiteness as property would not likely have succeeded. Still, this Note will pose one more analysis for consideration.

2. Public Debt Under Section Four of the Fourteenth Amendment

The text of Section Four of the Fourteenth Amendment states:

> The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.[169]

In performing a close reading of the second sentence in this text, and having explored how slavery is deeply embedded into the history of the United States, this Note tentatively posits that pushback against affirmative action could fall within the purview of this section. Though the first forms of affirmative action were instituted almost a century after slavery ended, the motivation behind affirmative action reforms is rooted in "demands for justice pressed by Black constituencies."[170] These affirmative action reforms were aimed at ensuring "applicants are treated equally without regard to race, color, religion, sex or national origin."[171] Moreover, the historical context around these reforms demonstrates that they were born from a desire to redress the legacies of slavery that persisted in the United States such as employment discrimination and educational disenfranchisement.[172]

In this way, affirmative action measures build upon emancipation from slavery by attempting to address the lasting effects of slavery's legacy. Therefore, if emancipation can be articulated as the antecedent to affirmative action, then it follows that Section Four of the Fourteenth Amendment would also void any claims for loss related to affirmative

169. U.S. CONST. AMEND. XIV.
170. *See* Harris, supra note 5, at 1787.
171. *Affirmative Action Policies Throughout History*, AM. ASS'N FOR ACCESS, EQUITY & DIVERSITY, https://www.aaaed.org/aaaed/history_of_affirmative_action.asp (last visited Apr. 15, 2025).
172. *See generally Grutter v. Bollinger*, 539 U.S. 306, 315 (2003).

action.[173] This argument is only difficult to make if emancipation from slavery was only meant to address physical bondage and not the psychosocial hold that was also imperative to the operation of slavery.[174]

This final theoretical analysis again demonstrates that on its own merit whiteness as a property interest flies in the face of the United States Constitution as it is modernly understood.[175] Yet, due to this country's racist past and the desire to preserve the benefits accrued from whiteness, it continues to be reinforced as a property interest through erasure of the very history that exposes it as such.[176] And while it is unlikely that those who wield whiteness as property will ever explicitly name it in the present as they did in the past, it can still be identified through careful historical analysis and hopefully one day redressed as well.

C. How Affirmative Action is Not Reverse Racism

"*Ignorance, allied with power, is the most ferocious enemy justice can have*." —James Baldwin[177]

"Black privilege is being so unique that not even God will look like you." —Crystal Valentine[178]

In engaging with the underlying motivations of colorblindness as a tool in the preservation of whiteness as property and considering potential efforts toward repair, it is important to consider and reject arguments that attempt to articulate balancing measures like affirmative action as "reverse racist." Professor Harris confronts the contention that "affirmative action amounts to the illegitimate establishment of a property interest in Blackness" by explaining that "[a]ffirmative action does not embody a conception of Blackness that is the functional opposite of whiteness, because Black identity, unlike whiteness, is not derived from racial subordination."[179] Instead, Harris emphasizes that—unlike the powers embedded in whiteness—affirmative action functions to

173. U.S. Const. amend. XIV § 4.

174. *See generally* Soyica Diggs Colbert, Rober J. Patterson & Aida Levy-Hussen, The Psychic Hold of Slavery: Legacies in American Expressive Culture (2016).

175. *Id.*

176. *See generally* Harris, *supra* note 5.

177. Lia Howard, *Listening to the Disenfranchised*, Stavros Niarchos Found. Paideia Program at Univ. Pa. (June 1, 2020), https://snfpaideia.upenn.edu/listening-to-the-disenfranchised.

178. Button Poetry, *Crystal Valentine - Black Privilege*, YouTube (June 2, 2015), https://www.youtube.com/watch?v=7rYL83kHQ8Y.

179. Harris, *supra* note 5, at 1780.

mitigate historical harms and transgressions not to "reify expectations of continued race-based privilege, for it does not implement a permanent system of unfair advantage that is then naturalized."[180] Importantly, this same argument can still be asserted even with the added consideration of racial triangulation, which contributed to the demographic shift of the plaintiffs in the *SFFA* cases from mostly white to white and Asian. The United States's framework of race within the Black-white binary set and enshrined white personhood as the neutral default definition of all personhood and continued to uphold that understanding in the foundational documents and doctrines establishing this country.[181] Therefore, modern complications of that definition through measures like affirmative action that legitimize and take into consideration BIPOC perspectives do not pose the same threat or wield the same social power against whiteness as whiteness does against BIPOC.

Moreover, affirmative action should not solely be understood as its opponents often frame it as a means of "corrective justice" that demonizes the innocent descendants of guilty white ancestry.[182] Rather, affirmative action is also a tool of distributive justice that goes beyond the assignment of guilt and blame to concretely address the material inequity of the historical conditions that have informed the present.[183] In this way, affirmative action aims toward distributive justice entails that "individuals or groups may not claim positions, advantages, or benefits that they would not have been awarded under fair conditions" and "refocus[es] the question of affirmative action on what would have been the proper allocation in the absence of the distortion of racial oppression."[184] In other words, affirmative action brings to the forefront the reality that white individuals "who would not have won for themselves a benefit in a racially fair world . . . are not entitled to claim those benefits by using putatively more objective measures of merit."[185] In so doing, affirmative action forces confrontation with the reality that often, the "merit" claimed by individuals that benefit from a racist history is "in fact a false merit because it is based on unfair competition," showcasing that the ostensible discrimination derived from being disadvantaged through affirmative action is neither unfair nor even discrimination, but simply a result of historically-informed

180. *Id.* at 1780–81.
181. *Id.* at 1780.
182. *Id.* at 1781.
183. *Id.*
184. *Id.* at 1784.
185. *Id.*

redistribution. Despite the fact that some BIPOC, seeking acceptance and hoping to benefit by proxy or proximity from whiteness as property, have supported the fiction of this ahistorical and severely inequitable meritocracy, the truth still remains.

IV. Conclusion: Coalition Building and Decentering Whiteness Through a Multiracial, Distributive Justice Framework

"I was not born of division. Partition and segregation are in my history, but my body is not repeating itself. The Indian and Black women inside of me are not whittling my bones hollow . . . . I am neither bird bones nor pendulum, nor spectacle, nor object. I am as whole as I will ever be."
—Summer Durant

One of the first questions posed by this Note is about self-definition. More specifically, racial definitions of BIPOC beyond direct juxtaposition to whiteness: "*what name would you call yourself if you had never been owned before? Property named properly. Properly named property.*" Now that the foundation of whiteness as a property interest from which BIPOC have been intentionally excluded has been established, this paper aims to challenge its readers to think beyond the proximal pull towards whiteness and the potential benefits of accruing its power whether by definition or by proxy. In attempting this endeavor, the adoption of a multi-minority multiracial lens might afford a dual-staked interest in reconciling racial triangulation with the Black-white binary.

The way to go about donning a multiple-minority lens is to consider and hold psychological space for the intersection between two BIPOC groups, anchored in the understanding that each BIPOC group is intentionally being excluded from the property interest in whiteness to the ongoing detriment of both. The aim of applying such a multiple-minority lens is to facilitate coalition-building between Asianness and Blackness while uncovering the power whiteness wields over each.[186] The hope is that this approach will help to directly address the effect of racial triangulation, particularly as it facilitated a desire for non-Black people of color to misguidedly pursue whiteness's property power by proxy, and in so doing it might reduce the likelihood of continued outcomes like the recent *SFFA* cases.[187] Perhaps an appeal to this

186. Harpalani, *supra* note 27, at 1403.
187. *See id.*

otherwise overlooked demographic could have precluded the Supreme Court's recent *SFFA* decision by centering multiracial coalition as part of the project of affirmative action and illustrating that it is not a tool for entrenching further racism but rather a form of "distributive justice as a matter of equal protection requir[ing] that individuals receive that share of the benefits they would have secured in the absence of racism."[188]

Therefore, the final task of this Note is an imaginative one. In fact, it makes a psychological request of the reader. Hopefully, by this point, this Note has laid a solid framework for understanding the nuanced, race-based motivations that have resulted in the *SFFA* decision, not as an "equalizing" measure but as a tool for reinforcing the longstanding racial hierarchy that whiteness sits atop. Following this framework, the task of the reader is now to imagine themself standing at the intersection of two non-white races, one more proximal to whiteness and one more distal. Consider which end you may gravitate towards. Consider whether, given the option, you would choose the individual power of whiteness by proxy over the collective betterment of overturning years of BIPOC dehumanization. Allow yourself to sit with this choice. Now, recognize that for some there is no walking away, no argument for "passing," or asserting a stake in whiteness as property. And recall too that for many of those who attempt to assert such a stake, and are deemed or discovered to be non-white, they are often met with exclusion from the property interest in whiteness. Recognize that, for those people, abandoning the collective in favor of proximal power in whiteness is to abandon—in different ways—parts of themself. Now, imagine it was you who held this reality of having no claim to the property interest in whiteness. Finally, in holding close your newly imagined reality, ask yourself, once more, the first question posed by this Note and consider whether your answer has changed or perhaps has even arrived to you now, for the first time: "*What name would you call yourself if you had never been owned before?*"

188. Harris, *supra* note 4, at 1783.

Remarks of The Honorable Eric H. Holder, Jr. 82nd Attorney General of the United States Howard University School of Law Third Annual Charlotte E. Ray Lecture April 15, 2025 Washington, DC

Eric H. Holder, Jr.*

Thank you, Dean Fairfax, for that kind introduction—and thank you all for welcoming me back to Howard University School of Law.

It's a pleasure, as always, to return to this beautiful, historic campus.

And it's a special privilege to join you all in honoring this lecture's namesake, Charlotte E. Ray—who was not only a distinguished alumna of this University, and a pioneer of the legal profession, but a trailblazer[1] One whose story carries vital lessons that speak urgently to THIS *moment*: about resilience in a time of exclusion, truth in the face of erasure, and the power of principled action when the law is both a barrier and a battleground.

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* Eric H. Holder, Jr., former Attorney General of the United States. AG Holder was nominated to be Attorney General of the United States by President Barack Obama on January 20, 2009. He was confirmed by the Senate on February 2, 2009, and became the nation's first African American Attorney General. He served as Attorney General until 2015, becoming the third longest serving Attorney General in U.S. history. As Attorney General, he made civil rights a top priority at the Justice Department, including enforcement of the Voting Rights Act of 1965.

1. *DC's Civil Rights Champions: Charlotte E. Ray*, DC Bar Found. (Feb. 22, 2023), https://www.dcbarfoundation.org/post/dc-s-civil-rights-champions-charlotte-e-ray].

Before most women could even vote, Charlotte E. Ray was practicing law.[2]

In 1872, she became the first Black woman in the United States to graduate from law school and be admitted to the bar.[3]

A century and a half ago, during the heart of Reconstruction, she opened a legal practice not far from where we gather this afternoon, arguing complex cases and standing firm in courtrooms where few wanted her to speak—let alone win.[4]

She was brilliant. Fearless. Impossibly ahead of her time.

Charlotte Ray didn't just break barriers—she shattered what was possible. She graduated from Howard University School of Law, with honors, at a time when both her race and her gender were supposed to count against her.[5]

Some say she applied using her initials—C. E. Ray—to conceal the fact that she was a woman.[6] Which may or may not be true, since Howard was proudly admitting women at the time.[7]

But even once admitted, she knew she'd have to be *twice* as good to be seen as *half* as capable.

And she was.

By every account, she was a gifted legal thinker, a fierce and persuasive advocate, a quiet force of nature.

But, tragically, the world was not ready for Charlotte Ray.

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2. *Black History Month: Celebrating Charlotte E. Ray*, Off. Att'y Gen. for D.C. (Feb. 26, 2019), https://oag.dc.gov/blog/black-history-month-celebrating-charlotte-e-ray [hereinafter *Celebrating Charlotte E. Ray*].
3. *Id.*
4. *Id.*
5. *Id.*
6. *DC's Civil Rights Champions*, *supra* note 1.
7. Bayan Atari, *Mary Ann Shadd Cary, Howard University's First Black Female Law Student,* Dig (Mar. 30, 2023), https://thedig.howard.edu/all-stories/mary-ann-shadd-cary-howard-universitys-first-black-female-law-student-0.

Too many potential clients refused to trust a lawyer who was a woman. Too many fellow legal practitioners declined to take her seriously because of the color of her skin.

The racism and misogyny she faced were not abstract; as a real and direct result of both, despite all that she achieved—and despite doing everything right, beating the odds at every step along the way—her legal practice did not survive for long, and she was forced to change professions.

Not because she lacked brilliance. Because America, at the time, lacked justice.

A society that was terrified of her power did everything it could to pretend that she, and people like her, didn't exist.

That was the America she lived in.

And there are some, today, who would like us to return to it.

We've all seen the disturbing headlines that trace the progress of a deeply un-American movement—strategic, deliberate, and cloaked in ostensibly neutral language—that aims to strip stories like Charlotte Ray's from our schools, from our institutions, from our nation's collective memory.

They would rather our children learn a comfortable, oftentimes wrong mythology rather than an accurate, sometimes troubling history.

They want any hint of discomfort to be erased . . . and with it, the truth.

But we are not here to be silent.

We are here to speak Charlotte E. Ray's name, and to celebrate her legacy, not because *she* needs our validation, but because *we* badly need her example.

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In 2009, during the first of my six years as our nation's Attorney General, I gave a speech marking Black History Month . . . in which I noted that:

"One cannot truly understand America without understanding the historical experience of Black people in this nation. Simply put, to get to the heart of this country one must examine its racial soul."[8]

I went on to say:

"Though this nation has proudly thought of itself as an ethnic melting pot, in things racial we have always been and continue to be, in too many ways, essentially a nation of cowards."[9]

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Today, a little over 16 years later, I'm afraid I must amend that statement.

Because cowardice implies fear.

Yes . . . it remains true that this country has never been comfortable talking about race. What we are witnessing now is, in part, simply the latest manifestation of that discomfort—and one of the most pernicious. But let's not pretend it's new. Quite the opposite: this is a very old story repeating itself—albeit this time with more cynical actors and the full machinery of government behind it.

What's now driving this effort, though, is *more than fear*—it's *intent*.

It is a deliberate effort to erase American history. To tear down the rule of law. To discourage and even criminalize dissent. To arrest and deport *at will*, with no regard for due process or basic humanity. To silence educators, intimidate civil servants, punish the truth wherever it's spoken too plainly.

My friends: we are living through a moment that demands clarity.

8. Eric H. Holder, Jr., Att'y Gen., U.S. Dep't Just., *Remarks at the Department of Justice African American History Month Program* (Feb. 18, 2009), https://www.justice.gov/archives/opa/speech/attorney-general-eric-holder-department-justice-african-american-history-month-program.

9. *Id.*

This is not just about history textbooks. It's not just about the erasure of Charlotte Ray—or Jackie Robinson, or Dorie Miller, or Colin Powell, or the countless others whose stories have been stripped from federal government websites or slapped with an absurd and offensive "DEI warning label."

No, this is about power—about who gets to speak, and who gets silenced.

About law firms being blacklisted for simply representing their clients. Universities getting punished not for anything they've done or failed to do, but for a perspective they've *dared* to include.

The message is clear: teach the truth, defend the vulnerable, call injustice by its name—and in response, with the full might and power of the federal government, these zealots will come for your funding, attack your reputation, threaten your very existence.

All around us, we are watching, in real time, as the tools—and the very openness—that once strengthened and supported our democracy are being weaponized against it.

And this attempted rewriting of history is not a side effect—it is a strategy.

Behind the banning of books, behind the censorship of curricula, there is a deeper project underway: the consolidation of control. The narrowing of thought. The rise of a sinister new strain in American politics that cloaks itself in false patriotism . . . while dismantling the very freedoms and values it claims to protect.

We cannot afford to look away. Because the further we drift from fact and truth . . . the more liable we become to repeat the worst parts of our past. To deny injustice. To normalize repression. To mistake silence for peace.

Fortunately . . . there are those of us who know better.

And we will not go quietly.

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After all, as we are already seeing, this doesn't stop with books and classrooms.

What begins as an attack on America's national memory paves the way for an assault on our most cherished institutions: indiscriminate mass firings across the federal workforce . . . illegal agency closures . . . the unwise abdication of American leadership and influence on the global stage . . . all in service of the whims of those with a nihilistic, partisan agenda.

Nowhere is this clearer than at the Department of Justice, an institution I know well, served for decades, and have seen from every level—as a line attorney prosecuting corruption, in the Public Integrity Section; as Deputy Attorney General; as the 82nd Attorney General of the United States; and, from 1993 to 1997, as the Unites States Attorney for the District of Columbia.

As a result, like many of the DOJ veterans and former U.S. Attorneys who are in the audience or on the program today, I know how that office is supposed to function.

I know the caliber of professionals who have served there, under both Democratic and Republican administrations: dedicated, hardworking, and *rigorously apolitical* public servants who believe deeply in the rule of law.

That's why it both pains and outrages me to watch the current *interim* occupant of that office someone whose mandate is to serve the cause of justice and the people of this city—betray and make a mockery of those values, the office he leads, and the professionals who serve there every day.

Nakedly political firings . . . inappropriate threats against elected officials and universities . . . attempts to investigate political enemies . . . dismissing charges against his own client's . . . acts of blatant retaliation and grievance: these things are wildly inconsistent with the traditions of *any* U.S. Attorney's office, under both Republican and Democratic administrations, going back decades.

That's not leadership. It's incompetence, malevolence and a flagrant abuse of power. It is not the basis for a Senate confirmation.

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So let me state my case plainly—in these halls that Charlotte Ray once occupied, as she blazed a trail that few in power, at the time, thought a Black woman would ever walk:

You are not mere observers in this moment.

And I am not here, addressing a gathering that brings together so many of our nation's leading legal minds—on a campus that's educating the next generation of leaders—to ask you to *speculate* about the uncertain future that lies ahead of us.

I am here because *you have the power to shape it*.

You know what's at stake, because—in one context or another—many of you are already feeling it. The pressure to stay quiet on certain subjects. The backlash that comes from speaking out on others. The scrutiny that now follows when you represent the marginalized, challenge the status quo, or simply take a client who's not shy about speaking truth to power.

Your unique skills and responsibilities, as stewards of our nation's legal system, means you are also uniquely positioned to push back—through the courts, in the law school classroom, in boardrooms . . . and, if necessary, on the streets of this beautiful city.

You are heirs to a legacy that demands more than resilience—it demands *resistance*.

Because the war that's being waged against truth, speech, and equal protection—not unlike the forces that Charlotte Ray once faced—is not abstract. It's targeted. It's strategic. And our law school campuses . . . our law firms . . . our entire profession has found itself once again on the front lines.

The good news is that, as advocates for justice—as protectors of the rule of law—that's *exactly where you belong*, and I know there's no place you'd rather be.

You carry the legacy of Charlotte Ray—not just her pioneering spirit, but her defiance of what others consigned her to. Her refusal to shrink. Her insistence on achieving mastery over a system that was designed to shut her down and keep her out.

That is the standard this moment demands.

Not comfort. Not caution. But *courage*.

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We know what that looks like in someone as extraordinary as Charlotte E. Ray.

But what does it mean for the rest of us—at THIS time? How can *we* rise to *our* moment, as she redefined hers?

Today, *true courage* means choosing the law as a tool—a strong, deft instrument—for achieving justice. Not simply a career path or means to a paycheck.

It's the public defender standing between the full, overwhelming power of the state . . . and a defendant nobody else will fight for.

It's the civil rights lawyer relentlessly taking on longshot causes, and tough cases against the powerful and the special interests that might not win friends . . . but *will* change lives for the better.

It's the law student or professor who refuses to stay silent when the curriculum gets sanitized or attempts at controlling academic discourse are made.

It's the career public servant who just keeps doing her hard, thankless job. The AUSA who enforces the law without fear or favor, quietly but insistently making his country and community a better place.

It's *any* attorney who knows that acquiescence in the face of malevolent pressure and clear corruption is not professional courtesy—it's complicity.

And that's not a matter of opinion. It's a matter of oath, of ethics, and of obligation.

So, above all: keep the faith.

Keep doing that which is right: seeking justice . . . following the facts and the law . . . standing up against unjust, unethical, or unlawful orders.

In case any current public servants are watching this:

If those in power try to sideline or silence you—don't comply, don't roll over, don't resign.

Make them fire you.

Because resignation can be perceived as acquiescence and because silence is no longer neutral. This is not a time for caution.

This moment demands that we use our voices, our votes, our shared vocation to protect the fragile promise of justice—for *everyone*, not just for the powerful.

Understand this: there no longer exist accepted norms. We are in unprecedented times.

Which means the entire bench and bar must speak with clarity . . . act with conviction . . . and stand *unapologetically* on the side of free speech, due process, and the rule of law—even when it's inconvenient.

Even when it's unpopular. Even when it's fiscally risky.

And especially when it's difficult or dangerous.

The legacy of Charlotte E. Ray lives in that kind of courage. And in our time we must find our way back to that spirit, that conviction, that sense of cause that animated her life.

We can do this. We can do ALL of this.

Thank you all.