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SPECIAL ISSUE

THE *UNIVERSITY OF MIAMI LAW REVIEW CAVEAT*, IN COLLABORATION WITH THE UNIVERSITY OF MIAMI BLACK LAW STUDENTS ASSOCIATION, PRESENTS: PERSPECTIVES ON SYSTEMIC RACIAL INEQUITY IN THE UNITED STATES

ARTICLES

ESSAYS

ARTICLES

Or Does It Explode? White Supremacy, Dominion, and the West Coast on Fire

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The many catastrophes of the year of (y)our Lord 2020 included protests for racial equality and a particularly vicious fire season on the West Coast. This brief Article argues that the two are, in fact, closely connected. In the 1800's, California outlawed indigenous practices the settlers deemed primitive and inferior—including prescribed burns. In doing so, they undid centuries of intentional forest management and created a literal tinderbox of white supremacy that has begun to explode at the same time as other parts of the United States's racist foundations.

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What` happens to a dream deferred?

Does it dry up
like a raisin in the sun?
Or fester like a sore—
And then run?
Does it stink like rotten meat?
Or crust and sugar over—
like a syrupy sweet?

Maybe it just sags
like a heavy load.

Or does it explode?[1]

INTRODUCTION

Since the passage of the Civil War Amendments, reformists of all stripes have attempted to create an equitable society by inserting marginalized peoples into systems created to oppress them.[2] But 2020 screamed the answer to Langston Hughes's famous leading question. We have been watching, in real time, as a dream deferred explodes. The revolution is not only televised, it is livestreamed, live-tweeted—the revolution is nearly impossible to turn off. Whether it be prison abolition catapulting from radical to mainstream,[3] the use of the phrase "qualified immunity" outside of Constitutional Law classes,[4] professional athlete walk-offs,[5] or the

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[1] LANGSTON HUGHES, *Harlem (2)*, *in* LANGSTON HUGHES: POEMS 238, 238 (David Roessel, ed. 1999) (emphasis added).

[2] *See, e.g.*, ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 40–59 (2003) (explaining failure of reform in context of prison abolition).

[3] *E.g.*, Rachelle Hernandez, *Columbia University Receives $5 Million to Develop 'Racial Justice and Abolition Democracy' Curriculum*, COLLEGE FIX (Feb. 26, 2021), https://www.thecollegefix.com/columbia-university-receives-5-million-to-develop-racial-justice-and-abolition-democracy-curriculum/.

[4] *E.g.*, Chauncey Alcorn, *Ben & Jerry's Co-Founders Want to Make It Easier to Sue Cops Who Abuse Their Authority*, CNN BUS. (Jan. 21, 2021, 3:15 PM), https://www.cnn.com/2021/01/27/business/ben-and-jerrys-qualified-immunity/index.html.

energy of the people in the street despite a deadly pandemic,[6] the United States is being forced to deal with the contemporary implications of its racist foundation on an unprecedented level.

As with all civil rights movements,[7] the backlash to this most recent movement from those wishing to maintain the status quo has been fierce. Months of unapologetic falsehoods about election fraud reached their logical conclusion on January 6, 2021.[8] A riotous mob staged an insurrection at the U.S. Capitol in order to prevent the counting of electoral votes.[9] Bad faith arguments over process aside,[10] there is no question that the traitors were motivated by the man for whom they carried a banner.[11] Likewise, there is no question that the then-president of the United States had no qualms about tossing aside perfectly valid votes from places where people of color live.[12] White supremacy is not a bug, it is a feature

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[5] Bryan Armen Graham, *WNBA Players Walk Off Court During National Anthem Before Season Opener*, GUARDIAN (July 25, 2020, 3:20 PM), https://www.theguardian.com/sport/2020/jul/25/liberty-storm-anthem-protest-breonna-taylor.

[6] Larry Buchanan, Quoctrung Bui, & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

[7] Lawrence B. Glickman, *How White Backlash Controls American Progress*, ATLANTIC (May 21, 2020), https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914/.

[8] Toluse Olorunnipa & Michelle Ye Hee Lee, *Trump's Lie That the Election Was Stolen Has Cost $501 Million (And Counting) as Taxpayers Fund Enhanced Security, Legal Fees, Property Repairs and More*, WASH. POST (Feb. 6, 2021), https://www.washingtonpost.com/politics/interactive/2021/cost-trump-election-fraud/.

[9] Lauren Leatherby et al., *How a Presidential Rally Turned Into a Capitol Rampage*, N.Y. TIMES (Jan. 12, 2021), https://www.nytimes.com/interactive/2021/01/12/us/capitol-mob-timeline.html.

[10] *See* Eileen Sullivan, *5 Takeaways from Day One of Trump's Second Impeachment Trial*, N.Y. TIMES (Feb. 12, 2021), https://www.nytimes.com/2021/02/09/us/politics/trump-impeachment-takeaways.html.

[11] Aaron Rupar, *How Trump's Speech Led to the Capitol Riot*, VOX (Jan. 8. 2021, 2:10 PM), https://www.vox.com/22220746/trump-speech-incite-capitol-riot.

[12] Juana Summers, *Trump Push to Invalidate Votes in Heavily Black Cities Alarms Civil Rights Groups*, NPR (Nov. 24, 2020), https://www.npr.org/2020/

in U.S. political life. And yet to this day, the country brags to the world about the legacy of imperfect men who fought a revolution to create a society for themselves.[13] When "all men are created equal" was written, "men" had a narrow definition and Jefferson was never compelled to write a sequel, one that included women—or people of color.[14] Over two centuries later, the systems they and their successors created continue to work as intended, and we are left with three fundamental truths: The country was founded on white male supremacy, the country continues to exist to protect white male supremacy, and white male supremacy is not sustainable.[15]

There are a staggering number of systems that work to marginalize anyone who does not look like Benjamin Franklin,[16] and this would not be a respectable Article if it did not nod to all the issues outside of its scope. Contemporary policing has its origins in slave catching.[17] Congress's plenary authority over immigration is root-

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11/24/938187233/trump-push-to-invalidate-votes-in-heavily-black-cities-alarms-civil-rights-group.

[13] MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 24–25 (2020).

[14] *Id.* at 26–34.

[15] *Id*. at 8–9.

[16] Benjamin Franklin, *Observations Concerning the Increase of Mankind, Peopling of Countries, &c*, *in* OBSERVATIONS ON THE LATE AND PRESENT CONDUCT OF THE FRENCH, WITH REGARD TO THEIR ENCROACHMENTS UPON THE BRITISH COLONIES IN NORTH AMERICA. TOGETHER WITH REMARKS ON THE IMPORTANCE OF THESE COLONIES TO GREAT-BRITAIN. BY WILLIAM CLARKE, M. D. OF BOSTON IN NEW-ENGLAND. TO WHICH IS ADDED, WROTE BY ANOTHER HAND, OBSERVATIONS CONCERNING THE INCREASE OF MANKIND, PEOPLING OF COUNTRIES, &C., 53–54 (1755) ("[T]he Number of purely white People in the World is proportionably very small . . . . I could wish their Numbers were increased. And while we are, as I may call it, Scouring our Planet, by clearing America of Woods, and so making this Side of our Globe reflect a brighter Light to the Eyes of Inhabitants in Mars or Venus, why should we in the Sight of Superior Beings, darken its People? why increase the Sons of Africa, by Planting them in America, where we have so fair an Opportunity, by excluding all Blacks and Tawneys, of increasing the lovely White and Red? But perhaps I am partial to the Complexion of my Country, for such Kind of Partiality is natural to Mankind.").

[17] Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. DISCOURSE 1108, 1113–21 (2020), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1631&context=wlufac.

ed in a need to keep the United States white *so obvious* it did not even need to be written down.[18] The list is as long as it is depressing, and this Article does not purport to be exhaustive.

Instead, this Article looks to the congruence of factors that led the West Coast to literally, rather than figuratively, explode during the fire season of 2020. Climate change is an important part of the narrative that was rightly front and center in most coverage of the devastating fires.[19] But, while this is a necessary part of the story, it is not sufficient to explain why there are unaltered photographs of San Francisco looking like Mars.[20] At their core, the laws that undergird U.S. ownership of land are rooted in the Judeo-Christian idea that those who make productive use of land have a superior claim to it.[21] In this culture, productivity is defined by how many resources can be exploited. And as the colonizers saw it, the "merciless Indian savages"[22] could not hold title to land because said savages did not know how to properly exploit it. By their telling, God gave man dominion over the land and the sea, and it remained man's proper place to exercise that dominion.[23]

This Article argues that is it the culture of the colonizer—rather than some sort of universal human nature—that drives climate change, generally, and the fires in the West, specifically. It uses this example to show that a system of government that was built upon the belief that one of its cultures is superior cannot simply bring other cultures under its umbrella without addressing the rot at the core. This Article is brief, and it will proceed in three Parts. Part I gives a short overview of how white supremacy and the biblical understanding of dominion form the foundation of U.S. prop-

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[18] Hannah Gordon, Note, *Cowboys and Indians: Settler Colonialism and the Dog Whistle in U.S. Immigration Policy*, 74 U. MIA. L. REV. 520, 538–41 (2020).

[19] Rebecca Miller et al., *Climate Change is Central to California's Wildfires*, SCI. AM. (Oct. 29, 2020), scientificamerican.com/article/climate-change-is-central-to-californias-wildfires/.

[20] *See* US *Wildfires: San Francisco Residents React to Orange Skies*, BBC NEWS (Sept. 10, 2020), https://www.bbc.com/news/av/world-us-canada-54109381.

[21] *See infra* Part I.

[22] THE DECLARATION OF INDEPENDENCE para. 27 (U.S. 1776).

[23] *See infra* Part I.

erty law. Part II explains what the colonizers missed: how indigenous peoples developed intricate systems of non-exploitative land cultivation. This Part places special emphasis on the millennia-old practice in what is now California, Oregon, and Washington of prescribed burns to prevent widespread wildfires. Part III argues that it is unsustainable to maintain a system that bases its sovereignty on white supremacy by simply alleging that the system now includes those it was designed to oppress. Rather, we need a full-throated reconciliation with what was done, by whom, to whom, and why. Critically, we need an honest conversation about what systems can be reformed to be inclusive and what systems are rotten to their core and must be reimagined entirely. The consequences of delaying this dream are, as we have seen, explosive.

I. GOD'S PLAN: *JOHNSON V. M'INTOSH*

> And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.[24]

In one of the earliest and most consequential cases property cases not involving a fox, Chief Justice John Marshall placed white supremacy front and center in U.S. land rights. The facts of the case read like the most dreaded of bar exam hypotheticals: Two men claim to own the same piece of land based on two different chains of title.[25] One chain of title began with the British crown, and the other began with an Indian.[26] Marshall rooted his reasoning in one of the most basic principles of property law: A person cannot sell that which he does not own.

> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed

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[24] *Genesis* 1:28 (King James).

[25] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 571–73 (1823).

[26] *Id.*

> and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.[27]

Thus, while the Indians (for the time being) had the right to occupy the land, they did not possess the right to convey title, as they were *too primitive* for such sophisticated European principles. Marshall went so far as to recognize that conquest typically resulted in the integration of the conquered into the conquering society but lamented that the conquered at hand were "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest."[28] Leaving the land to the savages was simply not an option because "[t]o leave them in possession of their country, was to leave the country a wilderness."[29] In short, the United States legitimized its conquest because of its superior understanding of how to tame and use property, and this justification remains in effect to this day.

II. CULTIVATION WITHOUT EXPLOITATION: INDIGENOUS FOREST MANAGEMENT

> Stripping American Indians of the power to shape their environment with fire is tantamount to dismissing their humanity. Our capacity to manipulate fire is a species monopoly, unique to humans but also universal to all humans. Deny someone the right to fire and you deny them of that status.[30]

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[27] *Id.* at 574.

[28] *Id.* at 590.

[29] *Id.*

[30] Stephen J. Pyne, *Vestal Fires and Virgin Lands: A Reburn*, *in* PROCEEDINGS: SYMPOSIUM ON FIRE IN WILDERNESS AND PARK MANAGEMENT, 15, 17 (1996).

One of our many founding myths is that the colonizers found the wildness untouched.[31] In reality, they had stumbled into a complex agricultural system developed over millennia to blend seamlessly into its surroundings.[32] Chief Justice Marshall's assumption that the only way to properly utilize land was to plow it into large farms[33] was not only racist, but it was unscientific. Throughout what now constitutes this country, indigenous peoples had intentionally shaped their environment to be productive.[34] One of the most notable ways they accomplished this was through prescribed burns.[35]

Indigenous peoples throughout the continent used fire for a multitude of reasons. *Inter alia*, they cleared the underbrush to make the land easier to travel, killed poisonous snakes, increased production of berry shrubs, and herded wildlife during hunts.[36] Critically, the practice of high-frequency, low-intensity burns reshaped the ecosystem so that lightening-generated fires did not have enough fodder to get too out of control.[37]

In 1850, the same year California became a state and only twenty-seven years after *Johnson v. M'Intosh*, its new legislature passed the Act for the Government and Protection of Indians.[38] In addition to criminalizing vagrancy[39] and creating a legal avenue

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[31] *Id.* at 15–16; *see also* Nick Estes, *Only Racist Ignorance Lets Rick Santorum Think America Was 'Birthed from Nothing'*, GUARDIAN (Apr. 27, 2021, 8:56 PM), https://www.theguardian.com/commentisfree/2021/apr/27/only-racist-ignorance-lets-rick-santorum-think-america-was-birthed-from-nothing.

[32] Pyne, *supra* note 30, at 16–18.

[33] *See supra* Part I.

[34] Pyne, *supra* note 30, at 16–18.

[35] *Id.*

[36] GERALD W. WILLIAMS, REFERENCES ON THE AMERICAN INDIAN USE OF FIRE IN ECOSYSTEMS 3–4 (2003).

[37] Susie Cagle, *'Fire Is Medicine': The Tribes Burning California Forests to Save Them*, GUARDIAN (Nov. 21, 2019, 6:00 PM), https://www.theguardian.com/us-news/2019/nov/21/wildfire-prescribed-burns-california-native-americans.

[38] An Act for the Government and Protection of Indians April 22, 1850, ch. 133, Statutes of California, April 22, 1850.

[39] *Id.* ¶ 20 (authorizing officials to "make out a warrant under his hand and seal, authorizing and requiring the officer having [a "vagrant" indigenous person] in charge or custody, to hire out such vagrant within twenty-four hours to

for kidnapping,[40] the Act for the Government and *Protection*[41] of Indians outlawed both intentionally setting fires and allowing existing fires to burn.[42] For about a century, the prevailing wisdom was that fire was uncivilized, and the forest would thrive if allowed to grow untouched.[43] Integral to this logic was the commoditization of timber.[44] Therefore, according to the colonizers, the proper use of the wilderness was to grow as much timber as possible, and anything that disrupted that process was not a productive use of the land.

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the highest bidder, by public notice given as he shall direct, for the highest price that can be had, for any term not exceeding four months.").

[40] *Id.* ¶ 3 ("Any [white] person having or hereafter obtaining a minor Indian, male or female, from the parents or relations of such Indian Minor, and wishing to keep it . . . .").

[41] The long history of claiming to protect vulnerable people while actually oppressing them continues to this day. In 2019, the Trump administration instituted the Migrant Protection Protocols, which forced non-Mexican migrants to wait in Mexico while their immigration claims are processed. *Migrant Protection Protocols*, U.S. DEP'T HOMELAND SEC. (Jan 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols. This has resulted in giant refugee camps some 300 feet from the entrance to the United States. *See* Dave Graham et al., *As Mexico's Largest Migrant Camp Empties, New Tents Spring Up Along Border*, REUTERS (Feb. 21, 2021, 12:57 PM), https://www.reuters.com/article/us-usa-immigration-mexico/as-mexicos-largest-migrant-camp-empties-new-tents-spring-up-along-border-idUSKCN2AR0K0. These camps are often controlled by the drug cartels, which are sometimes the same cartels the migrants fled in their home countries. *See* Julian Resendiz, *Border Patrol: Mexican Cartels "Charging Every Person that Comes Across"*, BORDERREPORT (Mar. 26, 2021, 11:15 AM GMT-0600), https://www.borderreport.com/hot-topics/immigration/border-patrol-mexican-cartels-charging-every-person-that-comes-across/. The Author worked with a Central American minor who attempted to seek asylum with her mother, only for the family to be sent to Mexico. Immediately upon arrival, the mother was thrown into a truck by a drug cartel. The minor managed to escape and was let into the United States as an unaccompanied "alien" [*sic*] child. She has not heard from her mother since, and she is presumed dead. For a further explanation of the anti-indigenous racism in U.S. immigration law, see generally Gordon, *supra* note 18.

[42] An Act for the Government and Protection of Indians April 22, 1850 at ¶ 10.

[43] Cagle, *supra* note 37.

[44] *Id.*

By 1968, however, the National Forest Service realized that no new giant sequoias were growing.[45] A century without fire had, indeed, allowed the forest to grow untouched.[46] Consequently, millennia of work to cultivate habitable land was wiped out.[47] The National Park Service began to reintroduce prescribed burns, and the Forest Service did the same a decade later.[48] California is now increasing the use of indigenous prescribed burns,[49] but as the 2020 fire season showed,[50] undoing the damage will not be simple.

III. AMERICA, YOU GREAT UNFINISHED SYMPHONY: TELLING THE TRUTH ABOUT THE PAST TO CHART A NEW FUTURE

To be clear: this Article is in no way claiming that the outlawing of prescribed burns is the *only* reason that the West is on fire. The effects of climate change are open and notorious. But the white supremacist drive to dominate the land belongs in the conversation about climate change broadly, with condescension and disdain for pre-European forest management as one poignant example. This Article argues that it is impossible to create a just society without an honest conversation about the origins of its injustice. A real reckoning will involve more than the sentiment that yes, the United States did bad things, but *now*, we are inclusive of everyone. What we are seeing now is the failed attempt to bring marginalized people into systems created with the explicit goal of their subordination. It may be an inconvenient truth, but these systems are not sustainable.

This Article does not pretend to have a plan for a new form of government. To do so would entirely defeat the point, as the main argument is that a government that is truly accountable to its peo-

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45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 Lauren Sommer, *To Manage Wildfire, California Looks to What Tribes Have Known All Along*, N.P.R. (Aug. 24, 2020, 9:00 AM), https://www.npr.org/2020/08/24/899422710/to-manage-wildfire-california-looks-to-what-tribes-have-known-all-along.

50 *California and Oregon 2020 Wildfires in Maps, Graphics and Images*, BBC (Sept. 18, 2020), https://www.bbc.com/news/world-us-canada-54180049.

ple must take into account the experiences of all of its people. Instead, this Article offers the following starting point: We must ensure that present and future generations learn the true history of what this country is and how it came to be. Rather than protecting the founder's Constitution with religious-like zeal, we need honest conversations about what we expect from our government and what we are willing to sacrifice for its protection.

The white supremacist origin myth is an integral part to maintaining the current power structure. But this country cannot afford to continue deferring the dream of an equitable society. It will only explode.

The "Big Black Man" and Other Stories: George Floyd, Stereotypes, and the Shape of Fear

D. MARVIN JONES*

> Before the wide eyes of the mob is ever the Shape of Fear. Back of the writhing, yelling, cruel-eyed demons who break, destroy, maim and lynch and burn at the stake, is a knot, large or small, of normal human beings, and these human beings at heart are desperately afraid of something. Of what?[1]
>
> W. E. B. Du Bois, *Black Reconstruction in America*

In "The Shape of Fear," an essay in his famous work *Black Reconstruction in America*, W. E. B. Du Bois, analyzes the problem of lynching and rising Klan violence in 1935.[2] Lynching is an extrajudicial execution of Black people without trial, usually conducted in public. It was typically accompanied by torture and the gratuitous infliction of great pain.[3] When Sheriffs and other officers of the law attended, they typically did so as tourists.[4] The law was a winking, tacit presence at these lynchings; these atrocities occurred outside of

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[1] W. E. B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 555 (Henry Louis Gates, Jr., ed., 2007).

[2] *Id*.

[3] EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 48–50 (3d ed. 2017), https://lynchinginamerica.eji.org/report/.

[4] *Id*.

the formal structure of the law but on a stage created by its deliberate indifference.[5]

As officer Derek Chauvin pushed his knee into the neck of George Floyd for 9 minutes and 29 seconds,[6] ignoring George Floyd's anguished pleas, and as other officers stood by armed with badges and guns waving away the incredulous onlookers who tried in in vain to intervene, we witnessed a public execution of a Black man, as if we were looking through a window in time.[7] But now the execution was not committed by Southern farmers draped in bed sheets, but by 21st century policemen in blue.

What compounds the tragedy of George Floyd's death is the overwhelming sense that the atrocity of George Floyd's death is part of a larger systemic pattern. 1,301 Black Americans have been killed by police in the last five years.[8] Black people are more than three times likelier to die at the hands of police than their white counterparts.[9] Equally disturbing is the breathtaking lack of any rational justifications for many of the killings. Eric Garner was killed by policeman who had placed him in a chokehold, maintaining it despite the fact that Garner stated eleven times "I can't breathe."[10] Eleven times. Michael Brown was shot despite the fact he was unarmed and, according to three witnesses, had his hands raised in the air.[11] Oscar

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[5] *Id*.

[6] Eric Levenson, *Former Officer Knelt on George Floyd for 9 Minutes and 29 Seconds -- Not the Infamous 8:46*, CNN (Mar. 30, 2021, 6:27 AM ET), https://www.cnn.com/2021/03/29/us/george-floyd-timing-929-846/index.html.

[7] Jelani Cobb, *The Death of Georg Floyd in Context*, NEW YORKER (May 28, 2020), https://www.newyorker.com/news/daily-comment/the-death-of-george-floyd-in-context.

[8] Niall McCarthy, *U.S. Police Shootings: Blacks Disproportionately Affected*, STATISTICA (July 15, 2020), https://www.statista.com/chart/21857/people-killed-in-police-shootings-in-the-us/.

[9] Gabriel Swartz & Jacquelin Jahn, *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities*, *2013–2017*, PLOS ONE (June 24, 2020), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0229686.

[10] Ashley Southall, "*I Can't Breathe": 5 Years After Eric Garner's Death, an Officer Faces Trial*, N.Y. TIMES (May 12, 2019), https://www.nytimes.com/2019/05/12/nyregion/eric-garner-death-daniel-pantaleo-chokehold.html.

[11] Emanuella Grinberg, *Why "Hands up, Don't Shoot" Resonates Regardless of Evidence*, CNN (Jan. 11, 2015, 9:43 AM), https://www.cnn.com/2015/01/10/us/ferguson-evidence-hands-up/index.html.

Grant was shot while he was lying prone on the ground—the officer said he thought his gun was taser.[12] Flint Farmer, in Chicago, was shot and killed while holding a cell phone that police claimed appeared to be a gun.[13] Tamir Rice was killed while playing in a park with nothing more dangerous than a toy machine gun.[14] Philandro Castile was shot when he put his hand in his pocket to retrieve his driver's license, which a police officer had asked him to produce.[15] Amadou Diallo was shot nineteen times when he reached for his wallet to show officers who had gone to the wrong house he was lawfully on the premises.[16]

What Derek Chauvin did appears to me like virulent racial hate. It is tempting to reduce the killing of hundreds of Black Americans over just the past few years to a product of hate. But, as Du Bois suggested, public racial violence, as a systemic pattern, is more complex—it cannot all be reduced to hate. [17] It is equally tempting to say this is entirely a problem of police. This narrative often, if not generally, relies upon an analogy to the role of police and the "paddy-rollers" of the Antebellum South who policed the movements of slaves whenever they left the plantation.[18] In this era, Black

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[12] *Cop on Train Shooting: I Mistook Gun for Taser*, CBS NEWS (June 25, 2010, 1:09 PM), https://www.cbsnews.com/news/cop-on-train-shooting-i-mistook-gun-for-taser/; *see also* D. MARVIN JONES, *"We Are Oscar Grant!" in* FEAR OF A HIP-HOP PLANET 245, 245–50 (2013).

[13] *Man Fatally Shot by Police Was Holding Cell Phone*, CHI. TRIB. (June 7, 2011), https://www.chicagotribune.com/news/breaking/ct-bn-xpm-2011-06-07-29631581-story.html.

[14] Zola Ray, *This Is the Toy Gun That Got Tamir Rice Killed 3 Years Ago Today,* NEWSWEEK (Nov. 22, 2017, 2:56 PM), https://www.newsweek.com/tamir-rice-police-brutality-toy-gun-720120.

[15] German Lopez, *Philandro Castile Minnesota Police Shooting: Officer Cleared of Manslaughter Charge*, VOX (June 16, 2017, 4:15 PM), https://www.vox.com/2016/7/7/12116288/minnesota-police-shooting-philando-castile-falcon-heights-video.

[16] See D. MARVIN JONES, RACE, SEX, AND SUSPICION: THE MYTH OF THE BLACK MALE 117–23 (2005) for an extensive treatment of the case and see also BRUCE SPRINGSTEEN AND THE E STREET BAND, *American Skin (41 Shots)*, *on* THE ESSENTIAL BRUCE SPRINGSTEEN (Sony BMG 2003).

[17] DU BOIS, *supra* note 1, at 549.

[18] *See, e.g.*, Kimberlé Williams Crenshaw, *Fear of a Black Uprising*, NEW REPUBLIC (Aug. 13, 2020), https://newrepublic.com/article/158725/fear-black-uprising-confronting-racist-policing.

people saw the law only as the enemy.[19] In the inner-city today, Black Americans are overpoliced and under-protected, and as chronicled in the cases like *Floyd v New York*, police target inner-city areas hyper-aggressively too often, throwing reasonable suspicion away. [20] Against this backdrop of police regularly killing unarmed black men with impunity, many Black Americans continue to see the police—e.g., the law—only as the enemy.[21]

But state-sponsored violence by police against Black Americans is structural. Its roots go deep into the structure of U.S. society itself.[22] The roots of police violence go beyond police as an institution into the policies and laws of the U.S. government—such as drug laws that target inner-city neighborhoods for military style campaigns.[23] In *Wardlow v. Illinois*, the Supreme Court enabled this disparity in drug law enforcement by placing the imprimatur of constitutionality on different Fourth Amendment standards for so called "high crime areas."[24] Of course, these "high crime areas" almost

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[19] *Id*.

[20] Floyd v. City of New York., 959 F. Supp. 2d. 540, 664–67 (S.D.N.Y. 2013).

[21] *See, e.g.*, Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html; Derecka Purnell, *How I Became a Police Abolitionist*, ATLANTIC (July 6, 2020), https://www.theatlantic.com/ideas/archive/2020/07/how-i-became-police-abolitionist/613540/; D. Watkins, *No, Obama, We Do Mean "Defund the Police": It's Not a Snappy Slogan, It's a Demand for Justice*, SALON (Dec. 13, 2020, 1:00 PM), https://www.salon.com/2020/12/13/no-obama-we-do-mean-defund-the-police-its-not-a-snappy-slogan-its-a-demand-for-justice/.

[22] *See* Bryan Stevenson, *Slavery Gave America a Fear of Black People and a Taste for Violent Punishment. Both still Define Our Criminal-Justice System*, N.Y TIMES (Aug 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html (discussing history of structural racial fear and violence in U.S.).

[23] *See* Arezou Rezvani et. al., *MRAPs And Bayonets: What We Know About The Pentagon's 1033 Program*, NPR (Sept. 2, 2014, 6:09 PM), https://www.npr.org/2014/09/02/342494225/mraps-and-bayonets-what-we-know-about-the-pentagons-1033-program (discussing the militarization and federal support of local police departments for the explicit purpose of enforcing drug laws).

[24] *See* Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

always turn out to be Black, urban, and poor.[25] The Court's ruling in *Wardlow*, therefore, creates a kind of constitutional apartheid. This massive targeting of the Black community has led some Americans to call the drug war a war against the Black inner-city poor.[26] It has led as well to an *us v. them* mentality.

The roots of police violence go deeper still. They reach into to the economic structure of society in which Black people are disproportionately poor, disproportionately landlocked in urban spaces where work has disappeared, and where their choices for legitimate means of survival are quite limited.[27] This socio-economic disparity leads many Black Americans in the midst of a desert of opportunity to drugs or violence and other crimes.[28] While most members of these communities are law-abiding, for the dominant society the law-breaking part stands for the whole.[29] Police increasingly see these neighborhoods as war zones or communities of criminals, and this perspective feeds the *us v. them* narrative.[30] This narrative is then further exacerbated by gentrification. Where affluent neighborhoods border inner city areas there is high level of polarization and

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[25] Jack T. Vanderford, *Wardlow Revisited: How Media Coverage of Police Brutality Makes Empirical Data More Relevant Than Ever*, 22 U. PA. J. CONST. L. 1523, 1541–42 (2020).

[26] For an extensive treatment of the racial implications of the drug war, see generally D. MARVIN JONES, DANGEROUS SPACES: BEYOND THE RACIAL PROFILE (2016).

[27] *See* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ (discussing history of redlining and other governmental policies that pushed Black Americans into inner cities and created barriers to Black intergenerational wealth accumulation).

[28] *See* Sogman Kang, *Inequality and Crime Revisited: Effects of Local Inequality and Economic Segregation on Crime*, 45 J. OF 29 POPULAR ECON. 593, 621 (2016) (finding a positive correlation between high concentrations of poverty, such as within inner-cities, and crime).

[29] *See, e.g.*, Jonathan Easley, *Trump Casts Inner Cities as 'War Zones' in Pitch to Minority Voters*, HILL (Aug. 22, 2016, 8:42 PM), https://www.thehill.com/blogs/ballot-box/presidential-races/292283-trump-casts-inner-cities-as-war-zones-in-pitch-to.

[30] *See* ACLU, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 2–7 (2014) (detailing militarization of police SWAT in response to percieved threats of crime in urban neighborhoods).

fear by the affluent newcomers of the predominantly Black inner-city poor.[31]

At bottom, at the root of the *us v them* divide, is a narrative or logic in which Black people are stigmatized as inherently dangerous or inherently criminal. During slavery, Black people were literally and legally characterized as beasts, an image that helped to legitimize slavery.[32] The regime of segregation comes down "in apostolic secession" from slavery relied upon the same racial mythology and images.[33] It is Gramsci who said in the *Prison Notebooks* that, when the state trembled, we discovered the state was "only an outer ditch, behind which there stood a powerful system of fortress and earthworks[;]"[34] therefore, as Du Bois notes, "when men have long been trained to violence and murder, the habit projects itself onto civil life, after peace, an there is crime and disorder and social upheaval . . . ."[35] While slavery and segregation have been formally "overthrown" in the U.S., the ideology—or, in my terms, the mythology—of slavery has survived. This *us v. them* narrative, the prosecution of the war against drugs as a war against the urban poor, and the systemic racism in the criminal justice system all trace back to the ideology of slavery and the mythology of Black people as beasts. Today however the beast image is only implicit, and the metaphor has simply evolved. Yesterday's beast has evolved into two primary stereotypes: the stereotype of "the big black man" and the stereotype of "the urban thug." I will devote the rest of this Article to an exploration of the history and social construction of these two deadly images.

Slavery rested on the premise that the slave was an inferior order of human life. His status in law was explicitly analogized to that of

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[31] Brenden Beck, *The Role of Police in Gentrification*, APPEAL (Aug. 4, 2020), https://theappeal.org/the-role-of-police-igentrification-breonna-taylor/.

[32] N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1321 (2004).

[33] Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

[34] ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 238 (Quintin Hoare et. al. eds., 1st ed., 1971).

[35] DU BOIS, *supra* note 1, at 549.

a beast.[36] Thus, the court in *Neal v Farmer* states, "So that slaves were on the footing of a beast or other chattel."[37] The slave had no rights, no honor, no power to make any decisions for him or herself.[38] Thus, slavery constitutes absolute dominion:

> The slave was a dominated thing, an animated instrument, a body with natural movements, but without its own reason, an existence entirely absorbed in another. The proprietor of this thing, the mover of this instrument, the soul and reason of this body, the source of this life was the master. The master was everything for him, his father, his God, which is to say his authority, his duty . . . thus God, fatherland, family existence . . . .[39]

This condition of absolute dominion was unnatural and could only be maintained through violence. More specifically, to maintain the institution of slavery, it was necessary for slave owners to continually repeat the original violent act of transforming a free man into a slave.[40] Slave owners rationalized the violence of subjugation by the notion that Black people were cursed, "[t]he curse of the Patriarch rests still upon the descendants of Ham." [41]The U.S. rationalized itself into believing the notion that Black Americans were by

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[36] Duru argues this stemmed in part from the early European notion that Africans were "beasts." Duru *supra* note 32, at 1315. Until the middle of the 17th century, French sailors referred to Africa as the land of the "men with tails." *Id*. While this early conception may play a role, I suspect the equivalence was instrumental, something the dominant society did to rationalize slavery. As Montesquieu sarcastically remarked, "We must not allow negroes to be men, lest we ourselves should be suspected of not being Christians." LYDIA MARIA CHILD, AN APPEAL IN FAVOR OF THAT CLASS OF AMERICANS CALLED AFRICANS 148 (1833).

[37] Neal v. Farmer, 9 Ga. 555, 581 (1851).

[38] ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 4 (1982).

[39] *Id*. Patterson here is quoting Henri Wallon on the meaning of slavery in ancient Greece as a point of comparison to slavery in the U.S. *Id.* Patterson notes, generally, the way that such regimes make "the slave . . . powerless in relation to another individual . . . . In his powerlessness the slave [becomes] an extension of his master's power." *Id.*; *see also* D. MARVIN JONES, *The Curse of Ham*, *in* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 256 (1997).

[40] *See Neal,* 9 Ga. at 581–82.

[41] *Id*. at 582.

nature "bestial creatures".[42] For example, in explaining the rationale for a South Carolina law exonerating the casual killing of negroes, the South Carolina legislature stated,

> Negroes and other slaves brought into the people of this Province . . . are barbarous wild savage natures and such as renders them wholly unqualified to be governed by the laws of this province, but that it is absolutely necessary that such other constitutions, laws and orders be enacted . . . as may restrain the disorders, rapines and inhumanity to which they are naturally inclined.[43]

Slave and beast were tacitly intertwined in law. According to Orlando Patterson, this moral hierarchy was ritualized by whipping.[44] Many see whipping as brutality, which it is, but it was primarily a means of expressing the master's honor and slave's dishonor. Patterson quotes historian Kenneth S. Greenberg explaining that,

> "For white southerners, the whip on the back of the slave was a sign of the slave's bad character" . . . . Southerners saw the scars of whipping as permanently marking the slaves as flawed and outside of the community of equals. "The scar, in a sense, spoke for itself—or rather about the man whose body carried it—regardless of the process or the larger set of relations that brought it into existence."[45]

The fact that the master could do this with impunity illustrates that Black people were outside of the law's protection: they were objects of the law's control, not its subjects.[46] Said another way, George P. Rawick notes in his writings on the Antebellum South

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[42] Duru, *supra* note 32, at 1321–25.

[43] STEVE PHILLIPS, BROWN IS THE NEW WHITE : HOW THE DEMOGRAPHIC REVOLUTION HAS CREATED A NEW AMERICAN MAJORITY 49 (2016).

[44] PATTERSON, *supra* note 38, at 3, 12.

[45] ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT 96 (2006).

[46] *Id*. at 102–04.

that "[w]hipping was a conscious device to impress upon the slaves that they were slaves."[47] The normalization of this violence over generations has lasting social implications: The more one is treated as a beast, the more they are seen as and essentialized as beasts.

The myth that Black people were beasts, so instrumental in the perpetuation of slavery, continued long after its abolition. During the Radical Reconstruction period (1867–77), many white writers argued that, without slavery—which supposedly suppressed their animalistic tendencies—Black people were reverting to criminal savagery.[48] This belief that the newly-emancipated Black Americans were a "black peril" continued into the early 1900's.[49] Up until the late nineteenth century, both white and Black Americans were lynched in the South.[50] Many of the white lynching victims were foreigners or belonged to oppressed groups, for example, Mormons, Shakers, and Catholics.[51] But, in the 1880's, the nature of lynching changed and was reoriented toward the most extreme means of enforcing Jim Crow laws and customs.[52] Between 1899 and 1918, over 3,224 people were lynched, most of them "negroes."[53] This violence occurred against the backdrop during the same period of novels, films, and political rhetoric sensationalizing the menace of Black people—and more specifically, the white women's menace, Black men.[54]

For example, in 1900, Clifton Breckinridge, diplomat and U.S. minister to Russia, issued this dire warning to the nation about the

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47 PATTERSON, *supra* note 38, at 3.

48 DAVID PILGRIM, UNDERSTANDING JIM CROW, 53–54 (2015).

49 *Id*.

50 *Id*. at 53.

51 David Pilgrim, *The Brute Caricature*, FERRIS STATE UNIV. (Nov. 2000), https://www.ferris.edu/jimcrow/brute/; *see also* Max Perry Mueller, *The "Negro Problem," the "Mormon Problem," and the Pursuit of "Usefulness" in the White American Republic*, 88 AM. SOC'Y CHURCH HIST. 978, 1000 (2019); Rory Carroll, *America's Dark and Not-Very-Distant History of Hating Catholics*, GUARDIAN (Sept. 12, 2015, 7:00 AM), https://www.theguardian.com/world/2015/sep/12/america-history-of-hating-catholics.

52 PILGRIM, *supra* note 48, at 53.

53 NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918 10 (1919).

54 *See, e.g.*, THOMAS DIXON, THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN 293 (1905); THE BIRTH OF A NATION (David W. Griffith Corp. 1915).

Black race: "When it produces a brute, he is the worst and most insatiate brute that exists in human form."[55] Similarly, in 1901, George T. Winston, at a conference addressing the "Negro Question" stated, "When a knock is heard at the door [a white woman] shudders with nameless horror. The black brute is lurking in the dark, a monstrous beast, crazed with lust. His ferocity is almost demoniacal. A mad bull or tiger could scarcely be more brutal." [56]

In 1905, author Thomas Dixon published his most popular novel, *The Clansman*. In this book, he described Black people as "half child, half animal, the sport of impulse, whim, and conceit . . . a being who, left to his will, roams at night and sleeps in the day, whose speech knows no word of love, whose passions once aroused are as the fury of a tiger."[57] The 1915 film *Birth of Nation*,[58] one of the most popular films of its day, introduces Gus, a Black man (played by a white actor in Black face) as a "monstrous beast in pursuit of Flora, a symbol of white innocence."[59]

During the era of Jim Crow, the narrative of the bestial Black man as a menace to white womanhood was potentially explosive. It could lead not only to lynching of individual Black people, but to attacks on entire Black communities. In Tulsa, Oklahoma, in 1921, for example, a young white woman falsely accused a Black male of sexual assault.[60] While the falsely accused man, Rowland, sat in jail, a mob of hundreds of armed, white Tulsans showed up at the courthouse demanding that the sheriff turn him over to them; inflamed, in part, by an vitriolic article that ran that day in the Tulsa Tribune.[61] In the mob violence that ensued, roughly 300 Black people were killed and more than 9,000 Black people were left homeless after

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[55] GEORGE FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND : THE DEBATE ON AFRICAN AMERICAN CHARACTER AND DESTINY 1817 –1914 (1987)

[56] George T. Winston, *The Relation of Whites to the Negroes*, 18 ANNALS AM. ACAD. POL. SCI. 105, 109 (1901).

[57] DIXON, *supra* note 54, at 293.

[58] THE BIRTH OF A NATION, *supra* note 54.

[59] Charlene Register, *The Cinematic Representation of Race in the Birth of a Nation: A Black Horror Film*, *in* THOMAS DIXON JR. AND THE BIRTH OF MODERN AMERICA (Michael K. Gillespie, Randall L. Hall, eds. 2006).

[60] Maggie Astor, *What to Know About the Tulsa Greenwood Massacre*, N.Y. TIMES (July 17, 2020), https://www.nytimes.com/2020/06/20/us/tulsa-greenwood-massacre.html.

[61] *Id.*

white mobs destroyed the Greenwood community—the Black neighborhood of Tulsa, which had been a hub of Black prosperity in the U.S. prior to the massacre with its business district dubbed the "Black Wall Street."[62]. Regardless of producing evidence or facts, this pattern played out over and over again: white mobs would seize Black defendants or attack Black neighborhoods to seek out revenge for alleged rape crimes. [63] This pattern continued into the 1950's.

A particularly gruesome example of such violence occurred in 1955 in Money, Mississippi when White townspeople kidnapped a fifteen-year-old child, Emmett Till, from the house of his Great Uncle "Mose" Wright.[64] They later brutally tortured him, shot him, killed him, burned his body, and finally threw his body into the river with a millstone around his neck to submerge the evidence of their gruesome crime.[65] Roy Bryant and Big Jim Milam stood trial, and

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[62] *Id.*

[63] *Id.*; *see also* Deneen L. Brown, *Remembering 'Red Summer,' When White Mobs Massacred Blacks From Tulsa to D.C.*, NAT'L GEOGRAPHIC (June 19, 2020), https://www.nationalgeographic.com/history/2020/06/remembering-red-summer-white-mobs-massacred-blacks-tulsa-dc/ (discussing a several mob lynchings during late nineteen-teens and early nineteen-twenties, including Tulsa Massacre and Rosewood, Florida, Massacre, both of which started as a result of rape or sexual assault allegations made by white women against Black men); Fred Grimm, *Memorial Recalls a Broward Mob Killing that Became a Macabre Public Festival*, SUN SENTINEL (May 3, 2018, 4:00 PM), https://www.sun-sentinel.com/opinion/fl-op-column-fred-grimm-lynching-memorial-broward-mob-killing-20180503-story.html (discussing 1935 lynching of Rubin Stacey, a farm worker who was accused of assaulting a white woman in Ft. Lauderdale, Florida); *One Hundred Years Ago, a Lynch Mob Killed Three Men in Minnesota*, SMITHSONIAN MAG. (June 20, 2020), https://www.smithsonianmag.com/history/one-hundred-years-ago-mob-white-rioters-lynched-three-men-minnesota-180975062/ (discussing 1920 lynching of three Black circus workers in Duluth, Minnesota, after they were accused of raping a white woman); EQUAL JUST. INITIATIVE, *supra* note 3, at 51 (discussing history of lynching in America, generally, and specifically noting that "[n]early 25 percent of the lynchings of African Americans in the South were based on charges of sexual assault. The mere accusation of rape, even without an identification by the alleged victim, often aroused a mob and resulted in lynching. In fact, the definition of Black-on-white 'rape' in the South was incredibly broad and required no allegation of force because white institutions, laws, and most white people rejected the idea that a white woman could or would willingly consent to sex with an African American man.").

[64] *See generally* DEVERY S. ANDERSON, EMMETT TILL: THE MURDER THAT SHOCKED THE WORLD AND PROPELLED THE CIVIL RIGHTS MOVEMENT (2015).

[65] TIMOTHY TYSON, THE BLOOD OF EMMET TILL, 62–64 (2017).

at great risk to himself, "Mose" Wright identified each of these men as the ones who came to his house at two o'clock in the morning and kidnapped his nephew, Emmett Till, at gunpoint.[66] It did no good. At trial, Carolyn Bryant claimed the fifteen-year-old Emmett Till had grabbed her by her waist—a physical assault—made vulgar statements, and "wolf whistled" at her before he left.[67] In her memoir, Carolyn Bryant later recounted that she embellished the story she told at the trial, using imagery from the classic Southern racist horror movie of the "Black Beast" rapist.[68] Unsurprisingly, Bryant and Milam were acquitted.[69]

Many people believe these narratives of bestial Black people, and specifically bestial Black men, are merely relics of the Jim Crow era; however, this imagery, operating like a distorting prism, continues to lurk implicitly within the decisions of police, prosecutors and the courts. One classic case is the Central Park Jogger trial.[70] On April 20, 1989, New York police found the unconscious body of Trisha Meili in a shallow ravine near Central Park's 102nd Street transverse.[71] She had been brutally beaten and raped.[72] She remained in a coma, on a respirator, hovering between life and death for almost two weeks.[73] Four Black and one Hispanic youths, aged fourteen to sixteen, were found in the park and subsequently questioned.[74] Among those interrogated were fourteen-year-old Kevin Richardson, fourteen-year-old Raymond Santana, fifteen-year-old Yusef Salaam, fifteen-year-old Antron McCray, and sixteen-year-old Kharey Wise.[75] After interrogations, which lasted as long as

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[66] *Id*. at 144–47.

[67] *Id.* at 54, 166–67.

[68] *Id.* at 6.

[69] *Id*. at 179.

[70] Susan Welsh et al., *"I So Wish the Case Hadn't Been Settled": 1989 Central Park Jogger Believes More Than 1 Person Attacked Her*, ABC NEWS (May 23, 2019, 3:29 PM), https://abcnews.go.com/US/case-settled-1989-central-park-jogger-believes-person/story?id=63077131. For an extensive treatment of this case, see JONES, *supra* note 16, at 41–54.

[71] Chris Smith, *Central Park Revisited*, N.Y. MAG. (Oct. 21, 2002), https://nymag.com/nymetro/news/crimelaw/features/n_7836/index.html.

[72] *Id.*

[73] TIMOTHY JOHN SULLIVAN, UNEQUAL VERDICTS : THE CENTRAL PARK JOGGER TRIALS 19–48 (1992).

[74] *Id*.

[75] *Id.*

twenty-eight hours, each of the youngsters confessed to involvement in the attack and rape of Meili.[76]

The rape ignited the smoldering racial fears in New Yorkers because of the 3,254 other rapes reported that year, most of which were of Black women, this one invoked a narrative of white innocence brutally assaulted: The victim was young, white, middle class, and attractive.[77] For many affluent New Yorkers, this was personal. For example, at the time, Slyvia Asch, a school teacher who regularly jogged near where the attack happened told reporters, "[t]his is our home and I feel like it has just been invaded."[78] Asch went on to say that "[t]here is no punishment that is suitable for them. They are animals, no doubt about it."[79] Headlines echoed the theme of bestiality with one newspaper headline exclaiming, "Teen Wolf-Pack Beat and Rapes Wall Street Exec."[80] Going one better, a columnist for another newspaper objected to merely characterizing the boys as wolves calling them "a bizarre new form of life . . . mutants among us," and concluding that "for now we should stop libeling wolves."[81] Despite this demonization of the youths, there was no evidence tying them to the crime.[82] No hair, no semen at the scene matched that of any of the youths charged; there were no fingerprints, no blood on the clothes of any of the boys, no telltale skin under the fingernails, no footprints in the mud, and no identification by the victim—Meili had no recollection of the attack.[83] The accused youths were

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[76] Alexandra Marsh, *Why Do People Confess to Crimes They Didn't Do?*, CHRISTIAN SCI. MONITOR (Dec. 5, 2002), https://www.csmonitor.com/2002/1205/p02s01-usju.html.

[77] JONES, *supra* note 16, at 45.

[78] John J. Goldman, *Gang Assault on Woman Stuns N.Y.: Investment Banker, Near Death, Victim of Park Rampage*, L.A. TIMES (Apr. 24, 1989), https://www.latimes.com/archives/la-xpm-1989-04-24-mn-1684-story.html.

[79] *Id*.

[80] *See* Joan Didion, *New York*, *Sentimental Journeys*, N.Y. REV. (Jan. 17, 1991), https://www.nybooks.com/articles/1991/01/17/new-york-sentimental-journeys/.

[81] LINDA S. LICHTER ET AL., THE NEW YORK NEWS MEDIA AND THE CENTRAL PARK RAPE 10 (1989).

[82] Patricia J. Williams, *Lessons from the Central Park Five*, NATION (Apr. 17, 2013), https://www.thenation.com/article/archive/lessons-central-park-five/.

[83] *Id*. (noting that "A forensic expert testified that the hair samples were 'more consistent' with Caucasian than African-American hair, but the prosecution successfully argued that this meant they were not inconsistent. ").

convicted anyway.[84] However, in 2001, Mathias Ryes provided a detailed confession to the crime.[85] Based on this confession, the court threw out the convictions of the Exonerated Five, and they received a 41-million-dollar settlement.[86]

The image of the bestial Black male, though rarely invoked explicitly, is still latent within our culture. In October 1989, Charles Stuart claimed that a six-foot Black gunman with a raspy voice jumped into their car in Roxbury and shot both him and his pregnant wife Carol as they were returning from childbirth classes at a nearby hospital.[87] The mainstream media in Boston immediately expressed outrage with clear racial overtones.[88] The Boston police conducted the investigation using indiscriminate stop and frisk techniques and the police, in fact, arrested a Black man named William Bennet based on Charles's description.[89] But, by January, Stuart's brother Matthew identified Charles as the killer.[90]

Several years later, this latent image of the "bestial black man" had evolved into what one writer, Laurence Vogelman, calls "the big black man syndrome."[91] It was 12:30 a.m. on March 3, 1991,

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[84] *Id*.

[85] Alfred Joyner, *Who Is Mathias Reyes? Serial Rapist and Murderer in Central Park Five Series "When They See Us"*, NEWSWEEK (June 4, 2019, 9:18 AM), https://www.newsweek.com/who-matias-reyes-serial-rapist-murderer-central-park-five-series-when-they-see-us-1442045.

[86] Alfred Joyner, *How Much Was the Central Park Five Settlement? "When They See Us" Victims Sued New York City for $41M*, NEWSWEEK (June 19, 2019, 9:00 AM), https://www.newsweek.com/central-park-five-settlement-when-they-see-us-41m-1444765.

[87] Roberto Scalese, *The Charles Stuart Murders and the Racist Branding Boston Just Can't Seem to Shake*, BOSTON.COM (Oct. 22, 2014), https://www.boston.com/news/local-news/2014/10/22/the-charles-stuart-murders-and-the-racist-branding-boston-just-cant-seem-to-shake.

[88] *Id*.

[89] Diane Bernard, "*They Were Treated Like Animals": The Murder and Hoax that Made Boston's Black Community a Target 30 Years Ago*, WASH. POST (July 11, 2020, 7:00 AM), https://www.washingtonpost.com/history/2020/01/04/they-were-treated-like-animals-murder-hoax-that-made-bostons-black-community-target/.

[90] Margaret Carlson, *Presumed Innocent*, TIME (June 24, 2001), http://content.time.com/time/magazine/article/0,9171,153650,00.html.

[91] Laurence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571, 573–574 (1993).

and Rodney King and two friends, Pooh Allen and Freddie Helms, were speeding in a Hyundai Excel barreling West on the Los Angeles freeway.[92] Witnessing the traffic violation, California Highway patrol officers Tim and Melanie Griffin gave chase, reaching speeds of 117 miles per hour.[93] When King finally stopped, the officers ordered the occupants out of the car and ordered them to lie face down on the ground.[94] Instead, according to the officers, King, at six foot-three and two hundred pounds, engaged in bizarre behavior, with one officer noting that "he grabbed his right buttock . . . and he shook it at me."[95] Moments later, King complied, but by then twenty-one Los Angeles police had arrived.[96] America witnessed the gruesome beating that followed, captured on observer George Holliday's gritty black and white eighty-one second video.[97]

While King lay defenseless on the ground, officers wielding batons struck him between fifty-three and fifty-six times.[98] The officers shattered the bones in King's eye socket, broke his leg, broke his cheek bone, and inflicted nine skull fractures.[99] King was also left with a partially paralyzed face.[100] When asked to explain this brutality, the officers stated, "I think he was dusted [under the influence of the drug 'PCP' or 'angel dust']."[101]

After a television station broadcast the beating the next day, author Terry McMillian wrote, "I, like millions of others, watched the tape over and over, feeling more enraged each time. 'They'll go to jail,' is what my friends and I kept saying. 'It's an open-and-shut-

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92 Douglas O. Linder, The *Trials of Los Angeles Police Officers in Connection with the Beating of Rodney King*, FAMOUS TRIALS, https://www.famous-trials.com/lapd/584-home (last visited May 7, 2021).

93 *Id*.; Douglas O. Linder, *Excerpts from the LAPD Officers' Trial*, FAMOUS TRIALS, https://www.famous-trials.com/lapd/581-excerpts (last visited May 7, 2021).

94 Seth Mydans, *Friend Relives Night of Police Beating*, N.Y. TIMES (Mar. 21, 1991), https://www.nytimes.com/1991/03/21/us/friend-relives-night-of-police-beating.html.

95 Linder, *supra* note 92.

96 Houston A. Baker, *Scene . . . Not Heard*, *in* READING RODNEY KING: READING URBAN UPRISING 38, 42 (Robert Gooding-Williams, ed. 1993).

97 *Id*.

98 *Id*.

99 *Id*.

100 *Id.*

101 *Id.*

case. It's in living color.'"[102] But the officers were acquitted and five days of multicultural riots and rebellion followed.[103] What heightened the violence was a vortex of anger pent up until the verdict; the evidence was incontrovertible: The video showed a man being beaten repeatedly, without visible resistance.[104] Black people experienced this acquittal as a blow to the face, that their own eyes had deceived them.[105] How was this transformation of an innocent victim into a predator interpretation achieved?

The lawyers for the officers argued that the body beaten was itself a source of danger and the beaten body of Rodney King bore an intention to injure.[106] In essence, his large size, and particularly the size of his Black body, established for the Simi Valley jury the vulnerability of the police.[107] Later, one juror reported that Rodney King was in total control of the situation.[108] In essence, the police invoked the image or stereotype of the "big black man," as Lawrence Vogelman points out in his article on the case, in order to "obtain an emotional response from the jurors."[109] The "big black man" is a hybrid. He is, first of all, a man of sorts, a Black brute, lurking in the dark. But he is perceived less a man than as a monstrous beast. Vogelman notes, "[King] was portrayed as larger than life, with

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[102] Terry McMillian, *This Is America*, N.Y. TIMES, May 1, 1992, at A35.

[103] Anjuli Sastry, Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2015, 1:21 PM), https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots.

[104] *Id*.

[105] *Id*.

[106] *See* Richard A. Serrano, *2 Views of Rodney King Drawn by Lawyers*, L.A. TIMES (Mar. 6, 1992), https://www.latimes.com/local/california/la-me-views-rodney-king-lawyers-19920306-story.html (noting that defense "focused their arguments to the jury on the high-speed chase before the incident. They emphasized that King's blood-alcohol level was more than twice the legal limit, and that police believed that King was under the influence of PCP, a dangerous drug that can trigger violent behavior.").

[107] *See* Salvatore Arena, *Why the Jurors Acquitted the Cops in the Rodney King Case*, N.Y. DAILY NEWS (May 1, 1992), https://www.nydailynews.com/news/national/jurors-rodney-king-tape-article-1.2201822 (quoting jurors who felt that King "controlled the action" and was "obviously a danger," despite indisputable fact that there were four armed officers against King, who was unarmed).

[108] *Id*.

[109] Vogelman, *supra* note 91, at 573–74.

superhuman strength. It was in this context that jurors, while watching the video of King being brutally beaten, described him as being 'in control.'"[110] He had to be stopped because, as Vogelman pointed out, "the map introduced by the defense so clearly indicated, his 'destination' was Simi Valley."[111]

Du Bois tried to frame the problem of race in terms of a veil between the Black subject and the White world. Ellison tried to frame the problem of racism in terms of the seer and the seen invoking a notion of "invisibility."[112] The stereotypes and images invoked by the lawyers became a prism through which the jury viewed the video, a prism of fear which mediated invisibly between the body being beaten and the video. The prism did not render the body invisible but, instead, distorted its shape, so that it was juxtaposed against and indistinguishable from the nightmare shapes of Black savages, Black beasts, animal-like rapists and killers that pollute our collective unconscious. For the jurors, it no longer mattered whether Rodney King was innocent of trying to assault the officers; what was dispositive was how much they were afraid of him. This reasoning from fear is buttressed by a notion that the big Black man or beast is inherently dangerous, inherently criminal.

The "big Black man stereotype" is still with us. Officer Darren Wilson shot Michael Brown despite the fact he was unarmed and, according to witnesses, had his hands up.[113] As Darren Wilson told the story, Michael Brown's body itself was a lethal weapon, "When

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[110] *Id*. at 574.

[111] *Id*.

[112] *See generally* RALPH ELLISON, INVISIBLE MAN (1952); *see also* Clint Smith, *Ralph Ellison's "Invisible Man" as a Parable of Our Time*, NEW YORKER (Dec. 4, 2016), https://www.newyorker.com/books/page-turner/ralph-ellisons-invisible-man-as-a-parable-of-our-time (discussing theme of invisibility in *Invisible Man*, "'I am invisible, understand, simply because people refuse to see me,' Ellison writes in the prologue. The unnamed black protagonist of the novel, set between the South in the nineteen-twenties and Harlem in the nineteen-thirties, wrestles with the cognitive dissonance of opportunity served up alongside indignity.").

[113] Grinberg, *supra* note 11.

I grabbed him, the only way I could describe it is I felt like a five-year-old holding onto Hulk Hogan."[114]

Our ideas about race trace back to the1950's—a time when white Americans, like southern sheriffs, loosed police dogs on civil rights marchers, or when Klansmen kidnapped Emmett Till for supposedly "wolf whistling" at a white woman.[115] This creates the image of race as a decision whose genesis is in racial animus or hate. But racism at its root originates at the level of culture, within the meaning-making and myth-making processes of our society. These images operate like rules within language, a kind of racial grammar telling us to parse people into different groups. [116] It is not merely about hate, but about how we see or, more specifically, about the racial lenses we collectively see through. It is against this background that we must understand the case of George Floyd and the problem of structural racism in our criminal justice system. This is to say that, in the context of race, our "past is never dead. It's not even past."[117] As James Baldwin eloquently wrote,

> In our image of the Negro breathes the past we deny, not dead but living yet and powerful, the beast in our jungle of statistics. It is this which defeats us, which continues to defeat us, which lends to interracial cocktail parties their rattling, genteel, nervously smiling air: in any drawing room at such a gathering the beast may spring, filling the air with flying things and an unenlightened wailing. Wherever the problem touches there is confusion, there is danger . . . It is a sentimental error, therefore, to believe that the past is

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[114] Heather Digby Parton, *Black Bodies Are Not Weapons: Why White Supremacists Insist Michael Brown Was "Armed*," SALON (Nov. 26, 2014, 7:47 PM), https://www.salon.com/2014/11/26/black_bodies_are_not_weapons_why_white_supremacists_insist_michael_brown_was_armed/.

[115] TYSON, *supra* note 65, at 54; Corky Siemaszko, *Birmingham Erupted into Chaos in 1963 as Battle for Civil Rights Exploded in South*, N.Y. DAILY NEWS (May 3, 2012, 9:26 AM), https://www.nydailynews.com/news/national/birmingham-erupted-chaos-1963-battle-civil-rights-exploded-south-article-1.1071793.

[116] Eduardo Bonilla-Silva, *The Invisible Weight of Whiteness: The Racial Grammar of Everyday Life in Contemporary America*, 35 ETHNIC & RACIAL STUDS. 173, 174 (2012).

[117] WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951).

> dead; it means nothing to say that it is all forgotten, that the Negro himself has forgotten it. It is not a question of memory. Oedipus did not remember the thongs that bound his feet; nevertheless, the marks they left testified to that doom toward which his feet were leading him. The man does not remember the hand that struck him, the darkness that frightened him, as a child; nevertheless, the hand and the darkness remain with him, indivisible from himself forever, part of the passion that drives him wherever he thinks to take flight.[118]

[118] JAMES BALDWIN, *Many Thousands Gone*, *in* NOTES OF A NATIVE SON 28 (1984).

ESSAYS

Challenging Racial Injustice in the Criminalization of Homelessness in the United States: A Human Rights Approach

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LILY FONTENOT[****] & JESSICA SANTOS[*****]

The criminalization of homelessness in the United States perpetuates a cycle of racial injustice and violates fundamental human rights. Longstanding discrimination in housing and law enforcement have resulted in disproportionate homelessness among Black Americans. Thus, laws and policies that criminalize life-sustaining behaviors, such as sleeping, in public further exacerbate racial disparities, punishing people for homelessness rather than addressing root causes. Criminalization results in fines that people cannot pay and criminal records, driving employment and housing out of reach and circulating individuals from the street to the criminal justice system and back. The criminalization of homelessness also directly violates international human

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rights to equality and non-discrimination, freedom from torture and ill-treatment, liberty and security of person, freedom of movement, life, and housing. To rectify these violations, the United States must decriminalize homelessness and take concrete steps to realize a right to housing for all its residents. Otherwise, we evade our responsibilities on the domestic and international stage and remain trapped in a cycle of racial injustice.

INTRODUCTION

In the United States, homelessness is closely intertwined with racism. Black people comprise approximately 13% of the general population in the U.S., but 40% of people experiencing homelessness are Black.[1] This disparity stems from long-standing discriminatory housing and law enforcement policies.[2] International human

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[1] NAT'L L. CTR. ON HOMELESSNESS & POVERTY, RACISM, HOMELESSNESS, AND THE CRIMINAL AND JUVENILE LEGAL SYSTEMS 1 (2020) [hereinafter HOMELESSNESS AND POVERTY], https://Nlchp.Org/Wp-Content/Uploads/2020/08/Racism-Homelessness-And-Criminal-Legal-Systems.pdf.

[2] *See* Dima Williams, *A Look at Housing Inequality and Racism in the U.S.*, FORBES (June 3, 2020), https://www.forbes.com/sites/dimawilliams/2020/06/03/in-light-of-george-floyd-protests-a-look-at-housing-inequality/?sh=5171e80139ef. (explaining that housing inequality and segregation were normal in the twentieth century, both before enactment of Fair Housing Act of 1968 and after it went into effect, through restrictive covenants to keep white neighborhoods white, redlining to sway investors away from Black neighborhoods, and creation of low income public housing projects in inner cities); *see also* Richard A. Oppel, Jr. et al., *Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites*, N.Y. TIMES (June 3, 2020), https://www.nytimes.com/interactive/2020/06/03/us/minneapolis-police-use-of-force.html (establishing that in an

rights standards provide a powerful framework for addressing this injustice.

This Essay takes a human rights approach to address racism inherent in the criminalization of homelessness. Part I discusses how the criminalization of homelessness perpetuates racial injustice. Part II then analyzes how the criminalization of homelessness violates fundamental human rights, notably, the rights to equality and freedom from racial discrimination;[3] freedom from torture and cruel, inhuman, or degrading treatment or punishment ("CIDT");[4] liberty and security of person;[5] freedom of movement;[6] life;[7] and housing.[8] Part III concludes by discussing potential steps the U.S. could take to respect, protect, and fulfill these basic rights.

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examination done after the death of George Floyd, researchers found that while Black people make up 19% of the Minneapolis population, they were reported to be involved in 58% of the city's police use-of-force incidents).

[3] Universal Declaration of Human Rights, art. 7, G.A. Res. 217 (III) A, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]; International Convention on Civil and Political Rights, art. 4(1) and art. 26, ratified June 8, 1992, 1996, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5, ratified Oct. 21, 1994, 660 UNTS 195, 212 [hereinafter ICERD].

[4] UDHR, *supra* note 3, art. 5; ICCPR, *supra* note 3, art. 7; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 16, ratified Oct. 21, 1994, 1465 UNTS 85, 113 [hereinafter CAT].

[5] UDHR, *supra* note 3, art. 3; ICCPR, *supra* note 3, art. 9(1); ICERD, *supra* note 3, art. 5(b).

[6] UDHR, *supra* note 3, art. 13; ICCPR, *supra* note 3, art. 12; ICERD, *supra* note 3, art. 5(d)(i); Convention on the Elimination of All Forms of Discrimination Against Women, art. 14(2)(h), signed July 17, 1980, 1249 U.N.T.S. 13 [hereinafter CEDAW].

[7] UDHR, *supra* note 3, art. 3; ICCPR, *supra* note 3, art. 6.

[8] UDHR, *supra* note 3, art. 25(1); ICERD, *supra* note 3, art. 5(e)(iii); International Covenant on Economic, Social, and Cultural Rights art. 11(1), Oct. 05, 1977, 993 U.N.T.S. 3 [hereinafter ICESCR].

I. THE CRIMINALIZATION OF HOMELESSNESS PERPETUATES RACIAL INJUSTICE

"We cannot talk about this [homelessness] crisis without addressing race." — Va Lecia Adams Kellum, CEO of the St. Joseph Center in Los Angeles.[9]

Long-standing laws and policies that adversely affect Black communities have resulted in disproportionate homelessness on the basis of race.[10] Black people thus experience the criminalization of homelessness particularly severely. This Part examines the ways criminalizing homelessness perpetuates racial injustice through both a national lens, as well as through a local lens focusing on Miami-Dade County ("MDC") as a case study.

Black people are overrepresented among people experiencing homelessness, making up 40% of all people experiencing homelessness in 2019, while only comprising 13% of the U.S. population.[11] This is due to laws and policies that have disparate racial impacts. The legacy of slavery, southern Jim Crow laws, northern redlining, and federal discrimination in mortgages have resulted in decreased access to housing for Black people.[12] Segregated Black neighborhoods are over-policed, resulting in a disproportionate rate of incarceration and imposition of fines and fees, making housing and

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[9] Va Lecia Adams Kellum, *The Intersection of Homelessness, Race, and the COVID-19 Crisis*, NAT'L ALL. TO END HOMELESSNESS (Apr. 7, 2020), https://endhomelessness.org/the-intersection-of-homelessness-race-and-the-covid-19-crisis/.

[10] U.S. DEP'T OF HOUS. & URB. DEV., THE 2019 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (2019), https://www.huduser.gov/portal/sites/default/files/pdf/2019-AHAR-Part-1.pdf.

[11] *Id.* This Essay focuses specifically on racial disparities impacting Black communities, but many other racial disparities exist among populations experiencing homelessness in the U.S.

[12] *See* Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/; *see also* JEFFREY OLIVET ET AL., CTR. FOR SOC. INNOVATION, SUPPORTING PARTNERSHIPS FOR ANTI-RACIST COMMUNITIES: PHASE ONE STUDY FINDINGS 12 (2018), https://center4si.com/wp-content/uploads/2016/08/SPARC-Phase-1-Findings-March-2018.pdf (highlighting that, today, 70% of poor Blacks and 63% of poor Hispanics live in high-poverty communities as compared with only 3 5% of poor whites).

employment more difficult to obtain.[13] Because people of color are policed at greater rates, "fines and fees are imposed on and collected more frequently from them, creating a cycle of debt and incarceration."[14] The Black Lives Matter movement ("BLM"),[15] along with homelessness advocates, have shed light on how the criminal justice system fails to address homelessness and how it disproportionately affects Black people through decades of public divestment in housing, in addition to structural racism in housing access, wealth, and employment.[16]

Despite BLM's call for cities to defund police departments,[17] states have increased law enforcement's authority to criminalize life-sustaining activities among homeless populations, such as sleeping in public. According to a study conducted by the National Law Center on Homelessness and Poverty (now the National Homelessness Law Center, (the "NHLC")), of the 187 city codes of urban and rural U.S. cities in 2019 reviewed, 51% have at least one law

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[13] *See* Coates, *supra* note 12; Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 282, 287 (2011); NAT'L L. CTR. ON HOMELESSNESS & POVERTY AND L.A. COMM. ACTION NETWORK, RACIAL DISCRIMINATION IN HOUSING AND HOMELESSNESS IN THE U.S. 1 (2014), https://nlchp.org/wp-content/uploads/2018/10/CERD_Housing_Report_2014.pdf; *see also* Megan T. Stevenson et al., *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 735 n.17 (2018).

[14] Matthew Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines*, BRENNAN CTR. JUST. 13 (2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines.

[15] John Eligon, *Black Lives Matter Grows as Movement While Facing New Challenges*, N.Y. TIMES (Sept. 3, 2020), https://www.nytimes.com/2020/08/28/us/black-lives-matter-protest.html?name=styln-george-floyd&region=TOP_BANNER&variant=1_Show&block=storyline_menu_recirc&action=click&pgtype=Article&impression_id=535c3610-ea65-11ea-80a5-9962c977d6ec (noting that, most recently, BLM sparked massive protests in response to continued police brutality in wake of George Floyd's murder on May 25, 2020; BLM is at forefront of effort to bring attention to Black people experiencing homelessness).

[16] Coates, *supra* note 12; Sarah Gillespie et. al., *Addressing Chronic Homelessness Through Policing Isn't Working. Housing First Strategies Are a Better Way*, URB. INST. (June 29, 2020), https://www.urban.org/urban-wire/addressing-chronic-homelessness-through-policing-isnt-working-housing-first-strategies-are-better-way.

[17] Eligon, *supra* note 15.

prohibiting sleeping in public.[18] Moreover, since 2006, the NHLC found that criminalization policies have been on the rise, with cities enacting more each year.[19]

However, criminalizing life-sustaining activities exacerbates racial disparities and is counterproductive. For example, a study in Austin, Texas showed that Black individuals experiencing homelessness were ten times more likely than their white counterparts to receive a camping citation.[20] As the United Nations Special Rapporteur on racism noted after visiting the U.S., "the enforcement of minor law enforcement violations . . . take a disproportionately high number of African American homeless persons to the criminal justice system."[21] Moreover, criminalization perpetuates a cycle of homelessness, further impacting Black communities. It shuffles people experiencing homelessness around cities, resulting in many receiving fines they cannot pay or felony records that make it virtually impossible to secure employment and housing.[22] The U.S. Interagency Council on Homelessness ("USICH") has recognized that "criminalization creates a costly revolving door that circulates

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[18] NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 12, 38, 42 (2019), http://nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [hereinafter HOUSING NOT HANDCUFFS] (highlighting that, in same study, of 187 city codes of urban and rural cities around the United States in 2019, 72% also have at least one law restricting camping in public and 55% have at least one law prohibiting sitting and lying in public); *see id.* at 109 (stating that, as of 2019 in Miami-Dade County, prohibited conduct includes: sleeping in public, camping in public, camping in particular public places, sitting/lying in particular public places, lodging, living or sleeping in vehicles, loitering/vagrancy, begging in public places and begging in particular public places).

[19] *See id*. at 11.

[20] HOMELESSNESS AND POVERTY, *supra* note 1 at 3.

[21] Hum. Rts. Council, Rep. of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diene, Mission to the United States of America, ¶ 64, U.N. Doc. A/HRC/11/36/Add.3 (Apr. 28, 2009).

[22] Nicole Weissman & Marina Duane, *Five Problems with Criminal Background checks*, URB. INST. (Mar. 13, 2007), https://www.urban.org/urban-wire/five-problems-criminal-background-checks; *see* Hum. Rts. Council, Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America, ¶ 45, U.N. Doc. A/HRC/38/33/Add.1.

individuals experiencing homelessness from the street to the criminal justice system and back."[23]

With the COVID-19 pandemic, policing of public space has increased greatly, aggravating racial disparities. Local governments across the country instituted stay-at-home orders, particularly impacting Black people experiencing homelessness.[24] The San Francisco Coalition on Homelessness pointed out that these curfews "result in increased surveillance, targeting & criminalization of unhoused" people, who are "disproportionately Black—who have no choice but to sleep on the streets."[25] Although many states and cities had some exemptions, people experiencing homelessness have no way to disclose their housing status to officers arresting for curfew violations.[26] As Congresswoman Alexandria Ocasio-Cortez stated, "without a plan, the homeless will be subject to violence."[27]

The criminalization of homelessness in MDC exemplifies the intersection between race and homelessness. In MDC, Black people account for 56% of all people experiencing homelessness, but only make up 18% of the county's population.[28] Miami has the second-worst income and poverty level in America, and its residents spend the nation's highest share of their income on rent[29] with 60% of employed residents spending more than 30% of their income on housing.[30] This income gap disproportionately impacts the Black

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[23] U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF HOMELESSNESS 7 (2012), https://www.usich.gov/resources/uploads/asset_library/RPT_SoS_March2012.pdf [hereinafter CONSTRUCTIVE ALTERNATIVES].

[24] Kira Lerner, *The Toll That Curfews Have Taken on Homeless Americans*, APPEAL (June 10, 2020), https://theappeal.org/police-brutality-protest-curfews-homeless/.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] FLA. DEPT. HEALTH MIAMI-DADE CNTY., 2019 COMMUNITY HEALTH ASSESSMENT, 170 (2019), https://www.healthymiamidade.org/wp-content/uploads/2019/07/Miami-Dade-County-Community-Health-Assessment-2019.pdf.

[29] Jerry Iannelli, *Five Stories That Show Wages in Miami Are Far Too Low*, MIA. NEW TIMES (Sept. 24, 2017) https://www.miaminewtimes.com/news/five-stories-that-show-miami-wages-are-too-low-9692642.

[30] RICHARD FLORIDA & STEVEN PEDIGO, MIAMI'S HOUSING AFFORDABILITY CRISIS, 4 (2019), https://carta.fiu.edu/mufi/wp-content/uploads/sites/32/2019/03/Miamis_Housing_Affordability_Crisis_FNL.pdf.

population, which, between 2014 and 2018, comprised 26.6% of households below the poverty line in MDC.[31] Florida law essentially outlaws rent control,[32] and MDC provides tenants with few rights.[33] Moreover, Black communities have been pushed out of their neighborhoods by gentrification[34] and zoning laws that have allowed developments to move forward without a public hearing or community participation.[35]

Since Black people account for the majority of people experiencing homelessness in MDC, they are disproportionally affected by laws that criminalize homelessness. MDC criminalizes life-sustaining activities, including sleeping in public[36] and living or sleeping in vehicles.[37] MDC has also recently taken steps to increase

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[31] *See People Living Below Poverty Level*, MIA. MATTERS, http://www.miamidadematters.org/indicators/index/view?indicatorId=347&localeId=414&localeChartIdxs=1|4 (last visited May 7, 2021) (reporting percentage of people living below poverty level in MDC between 2014 and 2018); Ali R. Bustamante, *State of Working Florida 2017*, FLA. INT'L UNIV. CTR. FOR LAB. RSCH. & STUD., https://risep.fiu.edu/state-of-working-florida/state-or-working-florida-2017.pdf.

[32] FLA. STAT. § 125.0103(1)(a)(2020) ("[N]o county, municipality, or other entity of local government can impose price controls upon a local business activity . . . that is not part of a government agency.") This includes home and apartment prices which essentially outlaws any potential local rent control. *See id.*

[33] Ann. M. Piccard, *Residential Evictions in Florida: When the Rent is Due, Where is the Process?* 36 STETSON L. REV. 149, 149–50 (2006).

[34] Tony Roshan Samara & Grace Chang, *Gentrifying Downtown Miami*, 15 RACE, POVERTY & ENV'T 14,15 (2008).
Jesse M Keenan et al., *Climate Gentrification: From Theory to Empiricism in Miami-Dade County, Florida,* 13 ENV'T RSCH. LETTER 1, 2 (2018).

[35] Daniela A. Tagtachian et al., *Building by Right: Social Equity Implications of Transitioning to Form-Based Code*, 28 J. AFFORDABLE HOUSING & CMTY. DEV. L. 71, 84–85 (2019).

[36] MIA., FLA., CODE 2020 § 37-3 ("It shall be unlawful for any person to sleep on any of the streets, sidewalks, public places, or upon the private property of another without the consent of the owner thereof.").

[37] MIA., FLA., Code 2020 § 37-4. In its entirety, section 37-4 reads as follows:

> Other than the area at the Marine Stadium designated for use by self- contained camper trailers, it shall be unlawful for any person within the city to park any vehicle on public rights-of- way, public properties or private parking lots, for the purposes of:
>
> (1) Living;
> (2) Sleeping;
> (3) Cooking;

criminalization and decrease protections for people experiencing homeless. In 2017, Miami Beach hired a special prosecutor for the sole purpose of prosecuting individuals charged with "nuisance" crimes, such as consuming alcohol, urinating in public, jaywalking, and loitering.[38] Two-thirds of defendants from cases brought by this prosecutor identified as someone experiencing homelessness.[39] Furthermore, in February 2019, the City of Miami successfully moved to dissolve the consent decree from *Pottinger v. City of Miami*,[40] which protected people experiencing homelessness from police harassment and arrest for "life sustaining conduct misdemeanors," as well as enabled monitoring of city conduct and accountability for violations.[41] Finally, in June 2020, the City of Miami adopted Ordinance 13907, which criminalizes "large group feedings" at public places in the city, specifically targeting the homeless population.[42] These laws and policies have increased the criminalization of the City's Black homeless population.

II. THE CRIMINALIZATION OF HOMELESSNESS VIOLATES FUNDAMENTAL HUMAN RIGHTS

The criminalization of homelessness violates international human rights standards. This includes the fundamental rights to

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(4) Bathing; or
(5) Housekeeping.

Id.

[38] Joey Flechas, *Tired of Nuisance Crimes Going Unpunished? Miami Beach Is About to Crack Down*, MIA. HERALD (Jan. 3, 2018), https://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article192826269.html.

[39] Joey Flechas, *Tourists Are Rarely Jailed for Breaking Miami Beach Laws. Not So for the Homeless,* MIA. HERALD, (Jan. 5, 2019), https://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article224019710.html.

[40] Pottinger v. City of Miami, 359 F. Supp. 3d 1177, 1201 (S.D. Fla. 2019).

[41] Pottinger v. City of Miami, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992); Order Approving Settlement Agreement at 2, Pottinger v. City of Miami, No. 88-2406-CIV-ATKINS (S.D. Fla. Oct. 1, 1998).

[42] MIA., FLA., Code 2020 § 25-25 (prohibiting the feeding of people experiencing homelessness in large groups in public places without a permit and at non-designated feeding locations, which only leaves five inconvenient feeding locations in City of Miami).

equality and non-discrimination, freedom from torture and CIDT, liberty and security of person, freedom of movement, life, and housing.

This Essay's analysis relies on six key instruments. This includes the founding document of the international human rights system, the Universal Declaration of Human Rights (the "UDHR"),[43] and three core human rights treaties ratified by the U.S., the International Covenant on Civil and Political Rights (the "ICCPR");[44] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "CAT");[45] and the International Convention on the Elimination of All Forms of Racial Discrimination (the "ICERD").[46] Additionally, this Essay draws on the International Convention on Economic, Social, and Cultural Rights (the "ICESCR") [47] and the Convention on the Elimination of All Forms of Discrimination Against Women (the "CEDAW"),[48] which were signed but not yet ratified by the U.S. Although the UDHR is a declaration and not a binding treaty, it has important normative status, and some parts of it are customary law.[49] Moreover, the U.S. played a critical role in its drafting, with Eleanor Roosevelt chairing the Human Rights Commission that developed it, and voted in its favor upon adoption by the U.N. General Assembly in 1948.[50] Having ratified the ICCPR, CAT, and ICERD, the U.S. is legally bound to implement them.[51] Given that the U.S. is only a signatory to ICESCR

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[43] UDHR, *supra* note 3.

[44] ICCPR, *supra* note 3.

[45] CAT, *supra* note 4.

[46] ICERD, *supra* note 3.

[47] ICESCR, *supra* note 8.

[48] CEDAW, *supra* note 6.

[49] Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1996).

[50] *History of the Document,*, UNITED NATIONS, https://www.un.org/en/sections/universal-declaration/history-document/index.html (last visited May 7, 2021); *see* UDHR, *supra* note 3.

[51] RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 (AM. LAW INST. 2018); *What is the Difference Between Signing, Ratification and Accession of UN treaties?*, DAM HAMMARSKJÖLD LIBR. [hereinafter DAM HAMMARSKJÖLD LIBR.], ask.un.org/faq/14594 (last visited May 7, 2021); Stephen P. Mulligan, *International Law and Agreements: Their Effect upon U.S. Law*, CONG. RSCH. SERV., 16 (Sept. 19, 2018), https://fas.org/sgp/

and CEDAW,[52] it has no obligation to implement these conventions, but the U.S. must "avoid actions which could render impossible the entry into force and implementation of the, or defeat [the treaties'] basic purpose[s] . . . ."[53] Moreover, in 2015, MDC passed an ordinance to "locally adopt the spirit underlying the principles of CEDAW," [54] joining the "Cities for CEDAW" movement throughout the U.S.[55]

Racism is embedded within the criminalization of homelessness and violates the right to equality and freedom from racial discrimination under the UDHR, ICCPR, and notably, under ICERD.[56] Black people are much more likely than other groups to experience homelessness in the U.S., and a higher number of Black people are fined or incarcerated for violating laws that prohibit life-sustaining activities.[57] While one must show discriminatory intent or animus to

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crs/misc/RL32528.pdf; *see also* Vienna Convention on the Law of Treaties, art. 14(2), Apr. 24, 1970, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] ("The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification."). Upon ratification of these human rights treaties, however, the U.S. also entered a declaration that they are not self-executing, meaning they do not on their own create a private right of action directly enforceable in U.S. courts. Catherine Powell, *Dialogic Federalism, Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 258–259 (2001); Hum. Rts. Comm., United States of America Initial Report to the Human Rights Committee, para. 8, CCPR/C/81/Add.4 (Aug. 24, 1994).

[52] Marie Wilken, *U.S. Aversion to International Human Rights Treaties*, GLOB. JUS. CTR. BLOG (June 22, 2017), https://globaljusticecenter.net/blog/773-u-s-aversion-to-international-human-rights-treaties.

[53] RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 51 at § 304 cmt. e; DAM HAMMARSKJÖLD LIBR., *supra* note 51; *see also* Vienna Convention, *supra* note 51 at art. 18(a) ("A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty.").

[54] MIA., FLA., Code 2020 § 2-271.

[55] *See About Us: Cities for CEDAW*, WOMEN'S INTERCULTURAL NETWORK, http://citiesforcedaw.org/about-cedaw/ (last visited May 7, 2021).

[56] UDHR, *supra* note 3, art. 7 ("All are equal before the law and are entitled without any discrimination to equal protection under the law."); ICCPR, *supra* note 3, art. 26 ("All are equal before the law and are entitled without any discrimination to equal protection under the law.); ICERD, *supra* note 3, art. 5 (stating that state parties to convention must "prohibit and eliminate racial discrimination in all its forms").

[57] *See* HOMELESSNESS AND POVERTY, *supra* note 1 at 3.

prevail on a discrimination claim under U.S. law,[58] the international human rights law standard is broader and also requires states to address disparate impacts.[59] The Committee on the Elimination of Racial Discrimination ("CERD"), which monitors the implementation of ICERD, called on States to "[r]eview and enact or amend legislation . . . in order to eliminate . . . all forms of racial discrimination against people of African descent" and "eradicate the poverty and marginalization of people of African descent so that they can enjoy their rights in the areas of housing, employment, and health."[60] In criminalizing homelessness, however, U.S. cities are creating racist results and exacerbating Black poverty and marginalization. CERD specifically called on the U.S. to "[a]bolish laws and policies making homelessness a crime" and urged the federal government to provide "financial support to local authorities that implement alternatives to criminalization, and withdraw[] funding from local authorities that criminalize homelessness."[61]

The U.S. is also violating the international prohibition against torture and CIDT under the UDHR, ICCPR, and CAT by criminalizing life-sustaining activities.[62] The Human Rights Committee,

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[58] Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1212 (2018) (stating that "discriminatory intent is a central term in judicial interpretation of constitutional clauses requiring the equal treatment of person without regard to their race, ethnicity, or religion" and one must meet this standard to prevail on multiple types of constitutional claims, such as a violation of equal protection clause under Fourteenth Amendment).

[59] *See* Hum. Rts. Comm., *General Comment No. 18: Non-Discrimination*, ¶¶ 6, 8, 10, U.N. DOC. HRI/GEN/1/Rev.9 (Vol. I) (Nov. 10, 1989) (explaining that right to equality and freedom of racial discrimination outlined in ICCPR should be interpreted broadly, requiring state parties to address disparate impacts of discriminatory conduct on part of either government agencies or private entities in addition to discriminatory intent of actions).

[60] Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 34: Racial Discrimination Against People of African Descen*t, ¶¶ 10, 50–51, U.N. DOC. CERD/C/GC/34 (Oct. 3, 2011).

[61] Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, ¶ 12, U.N. DOC. CERD/C/USA/CO/7–9 (Aug. 29, 2014).

[62] UDHR, *supra* note 3, art. 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); ICCPR, *supra* note 3, art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); CAT, *supra* note 4, art. 16 ("Each State Party shall

which monitors implementation of the ICCPR, noted in 2014 that the criminalization of homelessness in the U.S. "raises concerns of discrimination and cruel, inhuman or degrading treatment."[63] The Committee Against Torture, which monitors implementation of CAT, also expressed concern over increasing incidents of police brutality against people of color in the US.[64] Investing in police as a front-line response to homelessness will continue to exacerbate racially motivated policing practices.[65]

Additionally, U.S. federal courts have found that laws criminalizing homelessness violate the Constitution's analogue to the prohibition against CIDT: the Eighth Amendment's prohibition on "cruel and unusual punishment." The Ninth Circuit "precluded the enforcement" of a camping and disorderly conduct ordinance in Boise, Idaho, for violating the Eighth Amendment.[66] The Southern District of Florida, the federal district court in which the City of Miami is located, held in *Pottinger* that the practice of arresting people experiencing homelessness for inoffensive conduct when they have no place to go is "cruel and unusual and in violation of the Eighth amendment."[67] These courts reasoned that these laws violated the rights of people experiencing homelessness, as their actions were

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undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.").

[63] Hum. Rts. Comm., *Concluding observations on the fourth report of the United States of America*, ¶ 19, U.N. DOC. CCPR/C/USA/CO/4 (2014) (stating that "[t]he Committee notes that such criminalization raises concerns of discrimination and cruel, inhuman or degrading treatment") [hereinafter HRC Concluding Observations] ("The Committee notes that such criminalization raises concerns of discrimination and cruel, inhuman or degrading treatment.").

[64] Comm. Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, *Concluding observations on the combined third and fifth periodic reports of the United States of America*, ¶ 26, U.N. DOC. CAT/C/USA/CO/3-5 (Dec. 19, 2014).

[65] *National Housing Advocates Statement on Policing and Black Communities*, NAT'L LOW INCOME HOUSING COAL. (Jun. 30, 2020), https://nlihc.org/news/national-housing-advocates-statement-policing-and-black-communities.

[66] Martin v. City of Boise, 902 F.3d 1031, 1049 (9th Cir. 2018). *Martin* followed up an earlier ruling in the Ninth Circuit in which the court determined that a municipal code in Los Angeles, California, which banned sleeping in public, violated the Eighth Amendment; however, that case was later vacated pursuant to a settlement agreement with the city. Jones v. City of Los Angeles, 444 F. 3d 1118, 1120 (9th Cir. 2006), *vacated* 505 F.3d 1006 (2007).

[67] Pottinger v. City of Miami, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992).

considered to be involuntary and unavoidable as consequences of being human and without shelter.[68]

Furthermore, the U.S. violates the right to liberty and security of person under the UDHR, ICCPR, and ICERD through the criminalization of homelessness.[69] Ordinances that arrest people for engaging in life-sustaining activities violate the right to liberty and security of person and subject people experiencing homelessness to arbitrary arrests and citations.[70] For instance, in Denver, Colorado, police conduct thousands of "street checks" looking for violations of the city's anti-camping law, which "amounts to use of threats by police to ticket or arrest homeless people unless they dismantle their camps."[71]

Because it arrests people experiencing homelessness for their presence in public places and forces them to relocate, the U.S. violates the right to freedom of movement under the UDHR, ICCPR, ICERD, and CEDAW.[72] For example, cities like New York City have enforced discriminatory "move along" orders that require people experiencing homelessness to move away just for being on the

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[68] *Id.*; *Martin*, 902 F.3d at 1049; *Jones*, 444 F.3d at 1138.

[69] UDHR, *supra* note 3, art. 3 ("Everyone has the right to life, liberty and security of person."); ICCPR, *supra* note 3, art. 9(1) ("Everyone has the right to liberty and security of person [and] [n]o one shall be subjected to arbitrary arrest or detention."); ICERD, *supra* note 3, art. 5(b) ("The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.").

[70] NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2018: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 42 (2018), https://nlchp.org/wp-content/uploads/2018/10/Housing-Not-Handcuffs.pdf.

[71] *Id.* at 11 (noting that, since 2012, 6,789 individuals and families have been forced to dismantle their camps in Denver).

[72] UDHR, *supra* note 3, art. 13 ("Everyone has the right to freedom of movement and residence within the borders of each state."); ICCPR, *supra* note 3, art. 12 ("Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."); ICERD, *supra* note 3, art. 5(d)(i) ("The right to freedom of movement and residence within the border of the State."); CEDAW, *supra* note 6, art. 15(4) ("State [p]arties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.").

street.[73] "Individuals who refuse to follow these 'move along' orders are often told they will be arrested, taken to a psychiatric hospital or that their belongings will be destroyed[,]"[74] violating their right to freedom of movement.

Prohibiting people experiencing homelessness from engaging in life-sustaining activities additionally violates the right to life under the UDHR and ICCPR.[75] These laws negate the right to existence of people experiencing homelessness.[76] The Human Rights Committee mandates that countries address "general conditions in society that . . . prevent individuals from enjoying their right to life with dignity."[77] Thus, states must "ensure access . . . to essential goods and services . . . and other measures designed to promote and facilitate adequate general conditions, such as the bolstering of effective . . . social housing programmes." [78] The City of Miami's Ordinance 13907, which criminalizes food sharing and limits access to food for people experiencing homelessness, directly contravenes this right, disproportionately impacting Miami's Black community.

The aforementioned rights violations are direct consequences of the U.S.'s refusal to recognize an affirmative right to adequate housing under the UDHR, ICESCR, ICERD, and CEDAW.[79] Here, it is

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[73] *See Fighting Illegal "Move Along" Orders*, PICTURE THE HOMELESS, https://www.picturethehomeless.org/fighting-illegal-move-along-orders/ (last visited May 7, 2021).

[74] *Id.*

[75] UDHR, *supra* note 3, art. 3 (stating that "[t]he right to life, liberty, and security of person" while Article 6 of the ICCPR states that "[n]o one shall be arbitrarily deprived of his life") ICCPR, *supra* note 3, art. 6(1).

[76] Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 300 (1991).

[77] Hum. Rts. Comm, *CCPR General Comment No. 36: Art. 6 (Right to Life)*, ¶ 26, U.N. DOC. CCPR/C/GC/36 (2019).

[78] *Id.*

[79] UDHR, *supra* note 3, art. 25(1) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."); ICESCR, *supra* note 8, art.11(1) ("The right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."); ICERD, *supra* note 3, art. 5(e)(iii) ("State [p]arties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law,

important to recognize, as the Committee on Economic, Social and Cultural Rights, which monitors implementation of the ICESCR, clarified that the right to adequate housing is not merely a right to shelter.[80] At the same time, as the Committee explained, the ICESCR does not require that governments provide a house to every person free of charge; instead, it requires that governments take steps to ensure all people are able to house themselves with dignity.[81] This obligation entails protection against forced eviction and the promotion of housing that is affordable, habitable, accessible, well-located, and culturally adequate.[82]

III. STEPS THE U.S. CAN TAKE TO RESPECT, PROTECT, AND FULFILL THESE FUNDAMENTAL HUMAN RIGHTS

International human rights law obligates U.N. member states to respect, protect, and fulfill the human rights of their residents.[83] The respect element requires states to "refrain from interfering with or curtailing the enjoyment of human rights."[84] The "protect" element entails state prevention of third parties from violating human rights.[85] Lastly, the "fulfill" obligation means that "[s]tates must take steps to progressively realize human rights for its residents."[86]

With respect to the criminalization of homelessness, the U.S., including its state and city governments, have failed to fulfill any of these three obligations. To "respect" the fundamental

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notably the enjoyment of the following rights: . . . Economic, social and cultural rights in particular: . . . (iii) The right to housing."); CEDAW, *supra* note 6, art. 14(2)(h) (stating that state parties are required to ensure that "on a basis of equality of men and women, that they participate in and benefit from rural development, and in particular, shall ensure to such women the right: (h) To enjoy adequate living conditions, particularly in relation to housing").

[80] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, ¶ 7, U.N. DOC. E/1992/23 (1991) [hereinafter CESCR General Comment No. 4].

[81] *Id*.

[82] *Id.* at ¶ 8.

[83] *International Human Rights Law*, U.N. HUM. RTS. OFF. HIGH COMM'R, https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx (last visited May 7, 2021).

[84] *Id*.

[85] *Id*.

[86] *Id*.

aforementioned rights, the U.S. can take immediate steps to decriminalize homelessness. To fulfill its obligations to people experiencing homelessness, the U.S., at all levels of government, should invest in alternative policing methods that focus on care rather than punishment. Additionally, the U.S. should work toward recognizing the right to adequate housing and adopting a Housing-First policy. To protect these basic human rights, the U.S. should further regulate third parties, such as landlords, developers, and private equity firms to prevent rights violations resulting in homelessness.

First, the U.S., at all levels of government, should respect the basic human rights of people experiencing homelessness by either repealing or not enforcing statutes that prohibit life-sustaining activities in public when the government cannot offer alternative shelter or services. The Ninth Circuit rulings in *Martin v. City of Boise* and *Jones v. City of Los Angeles*, finding that statutes prohibiting life-sustaining activities violated the cruel and unusual punishment standard under the Eighth Amendment, already point in the right direction.[87] Municipalities should further monitor compliance of officers to ensure they are not harassing people experiencing homelessness and establish mechanisms for accountability.

At the federal level, the U.S. government should utilize its spending power to incentivize local governments to stop criminalizing homelessness. For example, in 2015, the Department of Housing and Urban Development added questions to its annual Continuum of Care ("CoC") Program Notice of Funding Application that gave funding points to CoC's that "implemented specific strategies to prevent criminalization of homelessness within CoC's geographic area."[88] This federal practice should be continued and expanded upon.

Second, the U.S. must take steps to fulfill basic rights by adopting alternative policing methods and a Housing-First approach, as well as recognizing the right to adequate housing. Police are ill-

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[87] Martin v. City of Boise, 902 F.3d 1031, 1049 (9th Cir. 2018); Jones v. City of Los Angeles, 444 F. 3d 1118, 1138 (9th Cir. 2006), *vacated,* 505 F.3d 1006 (2007).

[88] U.S. DEP'T HOUS. URB. DEV., NOTICE OF FUNDING AVAILABILITY FOR THE 2016 CONTINUUM OF CARE COMPETITION 35 (2016), https://www.hudexchange.info/resources/documents/FY-2016-CoC-Program-NOFA.pdf.

equipped to provide psychosocial services needed in a crisis.[89] Crisis response teams need mental health, harm reduction, and psychosocial service expertise.[90] Cities should look to the crisis response team model used by the CAHOOTS (Crisis Assistance Helping Out in the Streets) in Eugene, Oregon, a community-based public safety policing initiative to provide mental health responses first in crises on the streets.[91] At the federal level, USICH itself highlights the importance of law enforcement collaboration with behavioral health and social service providers.[92] The federal government should provide funding incentives for state and municipalities to collaborate with social service providers to serve as first responders in-line with USICH guidelines.

The U.S. government, at all levels, should further invest in Housing-First programs. These programs prioritize providing permanent affordable housing to people experiencing homelessness before addressing issues of unemployment or substance abuse with the goal of improving one's quality of life.[93] These programs are effective because housing provides stability and security, satisfying basic needs and enabling people to then focus on improving other aspects of their lives.[94] Moreover, investing in housing is more cost-effective than criminalization. A study conducted by Creative Housing Solutions noted that diverting public financial resources to law enforcement costs taxpayers substantially more than it would to

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[89] Roge Karma, *We Train Police to Be Warriors — and Then Send Them Out to Be Social Workers*, VOX (July 31, 2020), https://www.vox.com/2020/7/31/21334190/what-police-do-defund-abolish-police-reform-training ("In almost half of police killings of unarmed civilians in the US [in 2015], the person killed was revealed to be or suspected of experiencing either a mental health crisis or narcotic intoxication.").

[90] CONSTRUCTIVE ALTERNATIVES, *supra* note 23 at 24–25.

[91] *What is Cahoots?,* WHITE BIRD CLINIC (June 29, 2020), https://www.whitebirdclinic.org/what-is-cahoots/ (noting that CAHOOTS deploys two-person mobile teams consisting of a medic and a crisis worker who has substantial training and experience in the mental health field. This enables them to deal with a range of mental-health related crises, such as suicide threats and substance abuse, that people experiencing homelessness may be facing through trauma-informed de-escalation and harm reduction techniques).

[92] CONSTRUCTIVE ALTERNATIVES, *supra* note 23 at 24–25.

[93] *Housing First,* NAT'L ALL. TO END HOMELESSNESS (Apr. 20, 2016), https://endhomelessness.org/resource/housing-first/.

[94] *Id.*

provide people experiencing homelessness with affordable housing.[95] Specifically, the study noted that investing in providing people experiencing homelessness with permanent housing would substantially decrease costs taxpayers bear with respect to the arrest, incarceration, medical, and psychiatric emergency room use and inpatient hospitalizations of people experiencing homelessness in any given year.[96]

Additionally, all levels of government should recognize a right to adequate housing. This entails implementing protections against forced evictions and ensuring the availability of housing that is affordable, habitable, culturally adequate, and accessible.[97] As the New York City Bar emphatically stated, "*Homelessness is the most extreme deprivation of the right to adequate housing.*"[98] Rather than criminalization, it is time to tackle the root causes of homelessness. The U.S. must increase its efforts to enforce fair housing through the Fair Housing Act of 1968 to root out discrimination against Black people that leads to homelessness.[99] Governments should consult with communities, particularly Black communities, to adopt policies that best serve their particular needs. This can include social housing, subsidized housing, renters' tax credits, community land trusts, or rent control, as well as incentives for private development of affordable housing through simplified building codes, inclusionary zoning, or the Low-Income Housing Tax Credit. [100]

Finally, the U.S. must uphold its obligation to protect basic rights from third-party violations. In order to protect tenants from exploitation, the U.S. needs to ensure habitable conditions through

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[95] CENT. FLA. COMM'N ON HOMELESSNESS, THE COST OF LONG-TERM HOMELESSNESS IN CENTRAL FLORIDA 34 (2014), https://shnny.org/uploads/Florida-Homelessness-Report-2014.pdf.

[96] *Id.* at 20.

[97] *See* CESCR General Comment No. 4, *supra* note 80 at ¶8.

[98] INT'L HUM. RTS. COMM. N.Y.C. BAR ASS'N, ADVANCING THE RIGHT TO HOUSING IN THE UNITED STATES: USING INTERNATIONAL LAW AS A FOUNDATION 12 (2016) (emphasis added), https://www2.nycbar.org/pdf/report/uploads/20072632-AdvancingtheRighttoHousingIHR2122016final.pdf.

[99] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441–444 (1968).

[100] *See, e.g.*, *Miami Homes for All & the City of Miami*, CONNECT CAP. MIA. (2019), https://drive.google.com/file/d/1Hlq4QfTV2v_Wu7TbCR7HUPLIjgYPDOVX/view. Miami currently has a plan to create and preserve 12,000 affordable homes by 2024. Stakeholders emphasize the importance of transparency in holding the city accountable to this goal's achievement. *Id.*

housing codes and regular inspections. Municipalities should provide legal representation to assist those facing eviction or foreclosure.[101] To prevent a rise in homelessness during the COVID-19 pandemic, the U.S. should place a moratorium on evictions and remove late fees on tardy rental or mortgage payments. Moreover, cities should require public hearings in neighborhoods where new developments are being proposed, and developers should prepare community impact assessments and mitigation plans for displacing vulnerable populations. Lastly, all levels of government should redesign housing, finance, and investment programs, in collaboration with affected communities and financial institutions, to ensure that all community members are able to access adequate housing.[102]

CONCLUSION

The criminalization of homelessness is a catalyst for racial injustice and violates fundamental human rights. Investing in police as a front-line response to homelessness does not address the structural causes of homelessness and only opens the door to more brutality and discrimination. Racial justice is best served by a human rights approach, drawing on international law. This approach calls for the decriminalization of homelessness, a focus on underlying causes, the recognition of a right to adequate housing, and a movement to treat all our country's residents with dignity.

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[101] *See, e.g.*, Kriston Capps, *New York Guarantees a Lawyer to Every Resident Facing Eviction*, CITY LAB, (Aug. 14, 2017), https://www.citylab.com/equity/2017/08/nyc-ensures-eviction-lawyer-for-every-tenant/536508/.

[102] Hum. Rts. Comm., *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context*, ¶ 75, U.N. DOC. A/HRC/34/51 (2017).

Shifting the Goal Post: Antiracism and the Business of College Sports in a Post-COVID-19 World

JORDAN R. RHODES*

After the killing of Breonna Taylor, Ahmaud Arbery, and George Floyd, we witnessed global protests and calls for

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As a graduate of a South Eastern Conference university located in the South, I am all too familiar with the many uncomfortable attributes of college sports. In college, I cheered on my university's predominantly Black basketball team in a stadium building named after a man who—when serving on the Florida State Supreme Court—voted against integrating that same university's law school. Similarly, I cheered on my university's predominately Black football team in a stadium where crowds repeatedly chanted "fight songs" with racist undertones. Although many people view sports as removed from "political" issues, my research has revealed to me the many flaws and explicit dangers in such a logic.

With regard to my work, I would like to thank Dean Osamudia James for her guidance in this Essay and for her support throughout my law school career. I would also like to thank the many wonderful Black faculty and staff at Miami Law, as well as the countless allies across the campus. Further, I am grateful to my friends and family. I am especially grateful to my mother, La Verne Rhodes; my father, Ronald Rhodes; and my brother, Tyler Rhodes for unconditionally motivating me through every obstacle and hardship. I am also grateful to Touré Strong for supporting me without reservation while always intellectually challenging me. Lastly, I am grateful to the many Black leaders, intellectuals, and activists throughout history, both on and off the field. If not for their scarifies and accomplishments, the opportunities I have received would not be possible.

national racial justice reform. In the aftermath of this response, dozens of companies and institutions published their promises to combat racial inequity and advocate for racial justice reform, including the NCAA and several of its member universities. However, standing to lose millions from cancelling men's football and basketball, the NCAA decided to move forward with a 2020–21 athletics season. In reaching this decision, the NCAA ultimately relied on predominantly Black sports teams to provide revenue during a global health pandemic that has disproportionately impacted Black Americans. When placed in context with the NCAA's historic exploitation of college athletes, the financial motivation for this decision underscores the many flaws with the NCAA's "student-athlete" classification of college athletes. This Essay argues that the COVID-19 pandemic has illuminated the ways in which certain college athletes function more like "essential workers" than they do students. In doing so, this Essay seeks to demonstrate that a true commitment to racial progress on behalf of the NCAA and its member universities requires a reconfiguring of the power structure that currently governs the college athletics business. In other words, a true commitment to racial progress requires a shifting of the goal post.

INTRODUCTION

When the coronavirus infection rates peaked throughout the nation[1] and many jobs and schools moved to online platforms, these individuals were asked to suit up and put their health at risk.[2] They exposed themselves to a deadly virus and many became infected.[3] This description may initially bring to mind images of health care or grocery store workers, and although this description certainly applies to them as well, it also applies to college athletes. This Essay explores the actions taken by the National Collegiate Athletic Association (the "NCAA") and its member universities in response to the COVID-19 pandemic and places these actions in the context of the structural racism that continues to plague college sports.

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[1] Talal Ansari & Sarah Krouse, Ne*w Virus Cases Are Below Summer Peaks as Concerns Rise About Testing Decline*, WALL ST. J. (Sept. 2, 2020, 4:47 PM), https://www.wsj.com/articles/coronavirus-latest-news-09-02-2020-11599034888.

[2] Alan Blinder et al., *College Sports Has Reported at Least 6,629 Virus Cases. There Are Many More.*, N.Y. TIMES (Dec. 11, 2020), https://www.nytimes.com/2020/12/11/sports/coronavirus-college-sports-football.html.

[3] *Id*. (discussing that incomplete data reveals that at least 6,629 college athletes, coaches, and staff members have tested positive for COVID-19 although number would likely be higher if more schools published this data).

Part I of this Essay employs Ibram X. Kendi's understanding of antiracism and antiracist policy to explain how the structure of the NCAA both produces and sustains racial inequity.[4] This Part then discusses how the COVID-19 pandemic has illuminated (and perhaps exacerbated) some of these inequities. Part II discusses the NCAA's creation of the "student-athlete." Specifically, Part II explores how the NCAA and its member universities have used this classification to avoid compensating college athletes and providing them with the protections generally reserved for employees. This Part exposes how college athletes have functioned as "essential workers" for their universities throughout the pandemic, further exposing the myth of the "student-athlete." Part III begins with a brief discussion on how workers' rights advocates have utilized the pandemic to bring forth progressive labor reform and how similar reform efforts may spill over into the NCAA. Part III also suggests actions the NCAA and its member universities can take to fulfill the promises they made to combat racial inequity after the police killing of George Floyd.[5] This Essay concludes by briefly foreshadowing the future of the NCAA and the lasting impact the COVID-19 pandemic will have on college sports.

I. THE STRUCTURE AND THE STORM

A. *The Structural Racism Plaguing College Sports*

On May 25, 2020, George Floyd—an unarmed Black man—was arrested and killed while in the custody of four Minneapolis police

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[4] *See generally* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST (2019).

[5] *See NCAA President Mark Emmert's Message to Membership on Inequality and Justice*, NAT'L COLLEGIATE ATHLETIC ASS'N (May 31, 2020, 6:36 PM) [hereinafter *NCAA Message on Inequality and Justice*], https://www.ncaa.org/about/resources/media-center/news/ncaa-president-mark-emmerts-message-membership-inequality-and-injustice ("Sport historically has been a catalyst for social change and through our leadership and the way we treat one another, each of us can continue to make a difference. We must, therefore, commit ourselves individually and collectively to examining what we can do to make our society more just and equal.").

officers.[6] An eight minute and forty-six second video of the events of that day quickly spread across the Internet, and within two weeks, Black Lives Matter and anti-police brutality protests took place in all fifty U.S. states.[7] In the national discussion that followed, there seemed to be a broadened understanding of the many ways in which racism functions within our society.[8] For example, instead of understanding "racism" *solely* as isolated incidents motivated by malicious intent, there was a distinct focus on *structural racism*, or the idea that systems and structures often utilize procedures or processes that disadvantage particular races.[9] Ibram X. Kendi—a leading antiracism scholar—however, uses the term "racist policy" as a clearer descriptor for what others often simply refer to as "structural racism." Kendi and other scholars focus on the idea of *antiracist* policy (e.g., measures that produce or sustain racial *equity* between racial groups) as the answer for combatting centuries worth of *racist* policy (e.g., measures that produce or sustain racial *inequity* between racial groups).[10] Nevertheless, the broadened understanding of

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[6] Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

[7] Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (March 9, 2021), https://www.nytimes.com/article/george-floyd-protests-timeline.html.

[8] Ron Elving, *Will This Be the Moment of Reckoning on Race that Lasts?*, NPR (June 13, 2020, 7:00 AM), https://www.npr.org/2020/06/13/876442698/will-this-be-the-moment-of-reckoning-on-race-that-lasts.

[9] *See* Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), https://time.com/5851855/systemic-racism-america/ (discussing growing debate around systemic racism after "disturbing video of the murder of George Floyd").

[10] *See* KENDI, *supra* note 4, at 18–19 ("A racist policy is any measure that produces or sustains racial inequity between racial groups. An antiracist policy is any measure that produces or sustains racial equity between racial groups. By policy, I mean written and unwritten laws, rules, procedures, processes, regulations, and guidelines that govern people. There is no such thing as a nonracist or race-neutral policy. Every policy in every institution in every community in every nation is producing or sustaining either racial inequity or equity between racial groups. Racist policies have been described by other terms: 'institutional racism,' 'structural racism,' and 'systemic racism,' for instance. But those are vaguer terms than 'racist policy.' When I use them I find myself having to immediately explain what they mean. 'Racist policy' is more tangible and exacting, and more likely to

racism in the aftermath of the killing of George Floyd caused many to challenge the structures that have existed within our society for years, including the business of college sports.[11]

Racism was embedded in our nation's fabric long before the U.S.'s very first intercollegiate sports competition, a crew match between Harvard and Yale in 1852.[12] Likewise, racist policies were utilized to various degrees throughout the history of college sports.[13] During the 1800s and 1900s, legal segregation and social customs limited Black participation in college sports to historically Black colleges and certain predominantly white colleges in the North.[14] Even in instances where Black athletes were permitted to participate with white athletes, their participation was restricted to track and field and other comparable sports that did not require "intimate physical contact" with white athletes.[15] It was not until the 1970s, more than sixty years after the creation of the NCAA, that colleges across the country began to integrate their sports teams.[16] However,

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be immediately understood by people, including its victims, who may not have the benefit of extensive fluency in racial terms. 'Racist policy' says exactly what the problem is and where the problem is. 'Institutional racism' and 'structural racism' and 'systemic racism' are redundant. Racism itself is institutional, structural, and systemic.").

[11] Alan Blinder & Billy Witz, *College Athletes, Phones in Hand, Force Shift in Protest Movement*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/sports/ncaafootball/george-floyd-protests-college-sports.html.

[12] Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 623 (1995).

[13] *Id*. at 623–36.

[14] *Id*. at 624.

[15] *Id.* at 631–32 (noting that sports such as track and field "were viewed as not involving the type of intimate physical contact required by basketball and swimming.").

[16] *Id*. at 634; *see also* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000); *see also* Richard Lapchick, *Breaking the college color barrier: Studies in courage*, ESPN (Feb. 20, 2008), https://www.espn.com/espn/blackhistory2008/columns/story?columnist=lapchick_richard&id=3254974 (noting that every SEC school had at least one Black college athlete by 1971–72); LANE DEMAS, INTEGRATING THE GRIDIRON 3 (2010) ("As late as 1966, no African American student participated on any sport team in the Southeastern Conference (SEC), which includes Auburn University, the

as with the rest of the nation, integration did not mark the end of racial inequities and racist policies within college athletics.[17] Although many Americans often prefer to view sports as removed from these difficult topics, structural racism is very much intertwined within the current system of college athletics. [18]

As it currently exists, the NCAA is a multi-billion-dollar business[19] that relies on the unpaid labor, commodification, and disposability of young athletes.[20] The majority of the NCAA's revenue comes from the men's basketball championship tournament while Division I college football generates billions of dollars annually.[21]

University of Alabama, the University of Florida, the University of Georgia, Louisiana State University, Mississippi State University, the University of Mississippi, the University of Kentucky, the University of Tennessee, and Vanderbilt University.").

[17] *See* Dave Zirin, *A New Study Exposes Just How Racist College Sports Have Become*, NATION (Sept. 8, 2020), https://www.thenation.com/article/society/ncaa-revenue-racism/.

[18] *See* Emily Sullivan, *Laura Ingraham Told LeBron James to Shut up and Dribble; He Went to the Hoop*, NPR (Feb. 19, 2018, 5:04 PM), https://www.npr.org/sections/thetwo-way/2018/02/19/587097707/laura-ingraham-told-lebron-james-to-shutup-and-dribble-he-went-to-the-hoop (discussing FOX talk show host Laura Ingraham and her comments toward LeBron James to "shut up and dribble" after his discussion of race and politics in an interview); Libby Emmons, *Dear Athletes: Keep Your Politics Out of Sports*, FEDERALIST (July 31, 2020), https://thefederalist.com/2020/07/31/dear-athletes-keep-your-politics-out-of-sports/ (claiming, in a public letter to athletes, that "[f]ans watch sports to enjoy the competitive spirit, to root en masse for their teams, and to be entertained, transported for release. Athletes advertising their political messaging on the field is as disconcerting and jarring for fans as it would be for Natalie Portman to demand that she be allowed to wear her political statement cape while playing Queen Amidala. It's just not what viewers are tuning in for, and they shouldn't be forced to consume players' political statements.").

[19] *Finances of Intercollegiate Athletics*, NAT'L COLLEGIATE ATHLETIC ASS'N [hereinafter *NCAA Finances*], https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics (last visited May 7, 2021) ("The total athletics revenue reported among all NCAA athletics departments in 2019 was $18.9 billion.").

[20] Zirin, *supra* note 17.

[21] *Where Does the Money Go?*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaa.org/about/resources/finances (last visited May 7, 2021); Chris Smith, *College Football's Most Profitable Teams: Texas A&M Jumps to No. 1*, FORBES (Sept. 11, 2018, 9:52 AM), https://www.forbes.com/sites/chrissmith/2018/09/11/college-footballs-most-valuable-teams/?sh=22a8a96d6

Both of these sports are played predominantly by Black men in their late teens and early twenties.[22] While these athletes receive scholarships in exchange for their labor, these scholarships do not often equate to the athletes' financial value—which can range in the hundreds of thousands or even millions of dollars.[23] Despite this explicit reliance on unpaid Black labor, the NCAA has historically failed to adequately care for or directly compensate the students they rely on so heavily.[24] A 2011 study revealed that roughly 85% of "full scholarship" Division I football players lived below the federal poverty line.[25] While these predominantly Black students have historically endured questionable living conditions, their output on the field of play has subsidized the sports programs played predominantly by white athletes.[26] This is a business model that "effectively transfers

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c64 (discussing how college football's twenty-five most valuable teams generate a combined $2.5 billion per year in revenue).

[22] SHAUN HARPER, USC RACE EQUITY CTR., BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUITIES IN NCAA DIVISION I COLLEGE SPORTS 3 (2018), https://abfe.issuelab.org/resources/29858/29858.pdf ("Black men were 2.4% of undergraduate students enrolled at the 65 universities but comprised 55% of football teams and 56% of men's basketball teams on those campuses.").

[23] Craig Garthwaite & Matthew J. Notowidigo*, The COVID-19 Pandemic is Revealing the Regressive Business Model of College Sports*, BROOKINGS (Oct. 16, 2020), https://www.brookings.edu/blog/brown-center-chalkboard/2020/10/16/the-covid-19-pandemic-is-revealing-the-regressive-business-model-of-college-sports/ ("If players in football and men's basketball received a similar share of revenue as NFL and NBA players—roughly 50% of sports-related revenue—then each scholarship football player would earn $360,000 per year and each scholarship basketball player would earn $500,000 per year. If wages by position reflected the relative earnings by position observed in professional sports, the starting quarterbacks would earn $2.4 million per year on average. Even the lowest-paid football players would receive $140,000 per year.").

[24] RAMOGI HUMA & ELLEN J. STAUROWSKY, NAT'L COLL. PLAYERS ASS'N, THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT 19 (2011), https://www.ncpanow.org/research/body/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf.

[25] *Id.*

[26] Denise-Marie Ordway, *Power Five Colleges Spend Football, Basketball Revenue on Money-Losing Sports: Research*, JOURNALISTS RES. (Sept. 10, 2020), https://journalistsresource.org/studies/society/education/college-sports-power-five-revenue/ ("In fact, Power Five institutions, home to the country's wealthiest athletic departments, use most of that revenue to fund less popular sports that tend to lose money and draw students from higher-income families, the analysis

resources away from students who are more likely to be [B]lack and more likely to come from poor neighborhoods towards students who are more likely to be white and come from higher-income neighborhoods."[27]

Further, studies in recent years have also exposed the NCAA's use of racist policies in governing academic requirements (e.g., academic policies that produce racial inequities between Black and white athletes).[28] Other studies have exposed the racial disparities

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shows."); Garthwaite & Notowidigo, *supra* note 23 ("The prevailing model rests on taking the money generated by athletes who are more likely to be Black and come from low-income neighborhoods and transferring it to sports played by athletes who are more likely to be white and from higher-income neighborhoods. The money is also transferred to coaches and used for the construction of lavish (and perhaps overly lavish) athletic facilities. With COVID-19 shutting off the money spigot, schools are being forced to publicly acknowledge that their athletic departments depend on regressively transferring money from athletes who grew up poor to those who grew up in richer households and to wealthy coaches . . . . This difference between revenues and expenditures demonstrates how the funds generated by football and men's basketball players fund all of the remaining intercollegiate sports at each school. We estimate that the money generated by football and men's basketball causes: increased spending on money-losing sports; higher salaries for coaches and administrators; and increased spending on athletic facilities. Today, the average school in a Power Five conference supports 20 sports, but only two sports consistently pay for themselves, and the revenue generated by these two sports supports the seemingly ever-increasing salaries for coaches and athletic department employees."). Garthwaite additionally explained that distributing revenue from predominantly Black male sports to white, and often female, sports may keep universities in compliance with Title IX but "optimal policy must consider that equity is a multifaceted concern that involves not just gender, but also important issues such as race and income." *Id.*

[27] Craig Garthwaite et. al., *Who Profits from Amateurism? Rent-Sharing in Modern College Sports* 36 (Nat'l Bureau Econ. Rsch., Working Paper No. 27734, 2020), https://www.nber.org/system/files/working_papers/w27734/w27734.pdf.

[28] Akuoma C. Nwadike et al., *Institutional Racism in the NCAA and the Racial Implications of the "2.3 or Take a Knee" Legislation*, 26 MARQ. SPORTS L. REV. 523, 539 (2016) ("Though the NCAA has claimed to work tirelessly over the years to undercut the racial undertones of its academic policies, what is likely to occur this fall is out of the NCAA's hands. The new academic standard should statistically affect more incoming African-American males than any other population. By raising the minimum immediate-competition GPA to 2.3, almost half of African-American male student-athletes will struggle with eligibility.").

that exist within the NCAA as well.[29] For example, in 2018, 55.2% of Black male college athletes in the Power Five conferences graduated within six years, compared to 69.3% of college athletes overall and 76.3% of undergraduate students overall.[30] In that same year, only 11.9% of the men's basketball and football head coaches in the Power Five conferences were Black, while only 15.2% of the athletic directors were Black.[31] These disparities and policies reveal the impact of structural racism in college athletics, as they reflect an environment in which unpaid Black labor is significantly relied on, and yet Black people are underserved and underrepresented. Although the legal segregation of athletes no longer exists, and although no single NCAA rule or policy maker is *solely* responsible for these results, the accumulation of these policies and practices has produced racial inequities within college athletics.[32]

B. *COVID-19 Illuminates an Uncomfortable Truth in College Sports*

Over the last several decades, college sports have become exponentially more paramount to higher education institutions in the U.S., both as drivers of revenue and as sources of advertising for recruiting students.[33] In the midst of the ticket sales and tailgates, many have turned a blind eye to the business's more questionable

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[29] HARPER, s*upra* note 22, at 3 (discussing racial disparities in graduation rates of college football and basketball players in Division schools and how only four schools—University of Miami, Georgia Tech, University of Arizona, and Vanderbilt University—graduated Black male student-athletes at rates higher than or equal to student athletes overall.).

[30] *Id.* at 2–3 (this study focuses on sixty-five universities that comprise Power Five conferences, which include Atlantic Coast Conference, Big Ten Conference, Big 12 Conference, Pac 12 Conference, and Southeastern Conference).

[31] *Id.* at 8.

[32] Sean Gregory, *The College Admissions Scandal Is Yet More Evidence of Collegiate Sports' Inequality Problem*, TIME (Mar. 14, 2019) https://time.com/5550994/college-admissions-scandal-sports/.

[33] Sean Silverthorne, *The Flutie Effect: How Athletic Success Boots College Applications*, FORBES (Apr. 29, 2013, 9:48 AM), https://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications.

attributes.[34] However, in the last year, the COVID-19 pandemic has placed an uncomfortable spotlight on the intersection of college sports and race.[35] And this spotlight has illuminated many uncomfortable truths. Primarily, the NCAA has relied on a labor pool of predominantly Black athletes[36] during a global health pandemic in which Black Americans have been more likely to become infected,[37] hospitalized once infected,[38] and die from the virus in comparison to white Americans.[39] As stated in a recent New York Times article, "[s]ending young, unpaid Black athletes to provide football

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[34] *See generally* HUMA & STAUROWSKY, *supra* note 24 (discussing how NCAA's practices exploit college athletes for profit, while majority of NCAA athletes live below federal poverty line).

[35] Anya van Wagtendonk, *Covid-19 Is Exposing Inequalities in College Sports. Now Athletes Are Demanding Change*, VOX (Aug. 2, 2020 5:30 PM), https://www.vox.com/2020/8/2/21351799/college-football-pac-12-coronavirus-demands.

[36] *Id*.

[37] Stephanie Soucheray, *US Blacks 3 Times More Likely Than Whites to Get COVID-19*, CTR. INFECTIOUS DISEASE RSCH. POL'Y (Aug. 14, 2020), https://www.cidrap.umn.edu/news-perspective/2020/08/us-blacks-3-times-more-likely-whites-get-covid-19 ("Black Americans are infected with COVID-19 at nearly three times the rate of white Americans"); Richard Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N. Y. TIMES (July 5, 2020), https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html (discussing how Black American residents of the U.S. have been three times as likely to become infected with COVID-19 in comparison to their white neighbors).

[38] Nicole Chavez & Jacqueline Howard, *Covid-19 Is Sending Black, Latino and Native American People to the Hospital at About 4 Times the Rate of Others*, CNN (Nov. 16, 2020, 9:04 PM), https://www.cnn.com/2020/11/16/health/cdc-black-hispanic-native-american-coronavirus-hospitalizations/index.html ("Black, Hispanic and Native American people infected with Covid-19 are about four times more likely to be hospitalized than others"); *COVIDView Weekly Summary*, CTR. DISEASE CONTROL (Feb. 5, 2021), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html ("When examining age-adjusted hospitalization rates by race and ethnicity, compared with non-Hispanic White persons, hospitalization rates were 3.2 times higher among Hispanic or Latino persons and Non-Hispanic American Indian or Alaska Native persons, and 2.9 times higher among non-Hispanic Black persons.").

[39] Tiffany N. Ford et al., *Race Gaps in COVID-19 Deaths Are Even Bigger Than They Appear*, BROOKINGS (June 16, 2020), https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/ (discussing how death rates among Black and Hispanic/Latino people are higher than for white people in all age categories).

entertainment for wealthy, predominantly white universities that are laden with the virus—and knowing many of the players will return to their vulnerable neighborhoods and possibly spread more infection—is a dubious proposition."[40]

Moreover, during the COVID-19 pandemic, the NCAA took steps toward solidifying its power over college athletes through its proposed draft of name, image, and likeness ("NIL") legislation.[41] Although the legislation would allow certain college athletes (in limited situations) to financially profit off of their NIL,[42] it would

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[40] Kurt Streeter, *A College Football Conference Can Choose Players Over Profits for a Change*, N.Y. TIMES (Sept. 17, 2020) https://www.nytimes.com/2020/09/17/sports/ncaafootball/covid-big-ten-football-pac-12.html?searchResultPosition=1; *see also* Azmatullah Hussaini & Jules Lipoff, *Op-Ed: COVID-19 is Making the NCAA's Exploitation of Student-Athletes Even More Obvious*, L.A. TIMES (June 23, 2020, 3:00 AM), https://www.latimes.com/opinion/story/2020-06-23/ncaa-athletes-coronavirus-colleges-pay (discussing how reliance on unpaid Black labor in high revenue generating college sports is a dynamic that "also evokes America's horrific history of unpaid slave labor" and that it is "hard to ignore the racist undertones when the financial benefit to these institutions is based on the unpaid work of young Black men").

[41] Pat Forde & Ross Dellenger, *NCAA's Name, Image, Likeness Legislation Proposal Revealed in Documents*, SPORTS ILLUSTRATED (Oct. 12, 2020), https://www.si.com/college/2020/10/13/ncaa-proposal-athlete-compensation-name-image-likeness.

[42] Michelle Brutlag Hosick, *DI Council Introduces Name, Image and Likeness Concepts into Legislative Cycle*, NAT'L COLLEGIATE ATHLETIC ASS'N (Oct. 25, 2021), https://www.ncaa.org/about/resources/media-center/news/di-council-introduces-name-image-and-likeness-concepts-legislative-cycle (stating that, if adopted, NCAA legislation would: (1) "[a]llow student-athletes to use their name, image and likeness to promote camps and clinics, private lessons, their own products and services, and commercial products or services;" (2) "[a]llow student-athletes to be paid for their autographs and personal appearances;" (3) "[a]llow student-athletes to crowdfund for nonprofits or charitable organizations, catastrophic events and family hardships, as well as for educational expenses not covered by cost of attendance;" (4) "[a]llow student-athletes the opportunity to use professional advice and marketing assistance regarding name, image and likeness activities, as well as professional representation in contract negotiations related to name, image and likeness activities, with some restrictions;" (5) "[p]rohibit schools from being involved in the development, operation or promotion of a student-athlete's business activity, unless the activity is developed as part of a student's coursework or academic program;" and (6) "[p]rohibit schools from arranging or securing endorsement opportunities for student-athletes.").

avoid legally reclassifying college athletes as employees.[43] Such a structure would likely continue to preclude college athletes from unionizing and, therefore, prevent them from collectively bargaining over their health, safety, and other inalienable rights.[44] More so, despite facing pressure to reform for years,[45] the NCAA's NIL proposal came after five other states passed their own NIL legislation, suggesting the effort was simply an NCAA attempt to reassert its traditionally unfettered regulatory power.[46] The NCAA's strategic course of action illustrates how structural racism functions within the college sports business. Structural racism often centers around power—more clearly, it centers around who has power at the expense of who does not have power.[47] By proposing this legislation, the NCAA is refusing to shift bargaining power to its athletes, power that would allow high revenue-generating, predominantly Black athletes to have influence over their working conditions and safety standards. The COVID-19 pandemic, and its disproportionate impact on the Black community,[48] only underscores the broader need for athletes to share in this bargaining power.

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[43] Marc Edelman, *NCAA Bill Would Kill College Athletes' Rights and Their Trust in the U.S. Political Process*, FORBES (July 31, 2020, 9:55 PM), https://www.forbes.com/sites/marcedelman/2020/07/31/if-ncaa-bill-is-passed-it-would-kill-college-athletes-rights-as-well-their-trust-in-the-us-political-process/ ("Section 4 of the NCAA's proposed bill seeks to legislate that 'an amateur intercollegiate athlete shall not be considered an employee of a university or college based on participation in amateur intercollegiate athletic competition'").

[44] *Id*. (noting that part of purpose of section 4 is "to prevent college athletes from unionizing, even in an era when college undergraduate research assistants and teaching assistants have recently become allowed to form unions.").

[45] *See* Ivan Maisel, *The NCAA must again put athletes first, this time around the NIL debate*, ESPN (Apr. 23, 2020), https://www.espn.com/college-sports/story/_/id/29083196/the-ncaa-again-put-athletes-first-nil-debate.

[46] *See* Gregg E. Clifton & Iciss Rose Tillis, *NCAA Takes Additional Steps Toward Ratification of Name, Image, and Likeness Legislation*, NAT'L L. REV. (Oct. 14, 2020, 3:05 PM), https://www.natlawreview.com/article/ncaa-takes-additional-steps-toward-ratification-name-image-and-likeness-legislation.

[47] *See* KENDI, *supra* note 4, at 18 ("When someone discriminates against a person in a racial group, they are carrying out a policy or taking advantage of the lack of a protective policy. We all have the power to discriminate. Only an exclusive few have the power to make policy.").

[48] Streeter, *supra* note 40.

II. HIDING BEHIND THE "STUDENT-ATHLETE"

A. *The Invention of the "Student-Athlete"*

How does the NCAA—an entity founded in the very early 1900s for the specific purpose of protecting college football players' health and safety[49]—justify its treatment of college athletes? To answer this question, many critics look back to 1955 when a Fort Lewis A&M football player and scholarship athlete named Ray Dennison suffered a fatal injury during a game.[50] When Dennison's young widow filed for workers' compensation benefits, arguing that his scholarship made the fatal collision a "work-related" accident, then NCAA executive director, Walter Byers, devised a legal strategy to avoid paying out the claim.[51] Byers manufactured the "student-athlete" label to ensure that college athletes would not be legally categorized as employees, ultimately shielding the NCAA from liability and duties.[52] Dennison's widow lost her case,[53] and despite multiple lawsuits contesting this interpretation of "amateurism," the NCAA has used the "student-athlete" classification to avoid affording

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[49] *See* Christopher Klein, *How Teddy Roosevelt Saved Football*, HISTORY (July 21, 2019), https://www.history.com/news/how-teddy-roosevelt-saved-football (explaining President Theodore Roosevelt's efforts to create greater regulation and oversight over college football after 19 deaths and 137 serious injuries in 1905 alone). It should be noted that the intercollegiate conference that implemented these reforms was the forerunner of the NCAA. *Id.*

[50] Ta-Nehisi Coates, *The Shame of the NCAA*, ATLANTIC (Oct. 17, 2011), https://www.theatlantic.com/entertainment/archive/2011/10/the-shame-of-the-ncaa/246775/.

[51] *Id.*

[52] *Id.*; *see also* Chuck Slothower, *Fort Lewis' First 'Student-Athlete*,' DURANGO HERALD (Sept. 25, 2014, 4:04 PM), https://durangoherald.com/articles/79431; Karen Given, *Walter Byers: The Man Who Built The NCAA, Then Tried to Tear It Down*, WBUR (Oct. 13, 2017), https://www.wbur.org/onlyagame/2017/10/13/walter-byers-ncaa ("Feeling like the entire amateur system would crumble if schools were forced to pay workers' comp claims for athletes, NCAA executive director Walter Byers met with his legal team and came up with a strategy to make sure no one would mistake a college athlete for an employee entitled to benefits. Schools were told to refer to players as 'student-athletes.' They were to speak of 'college teams,' not 'clubs,' which was a term used by the pros. They included an amateurism pledge with every scholarship offer. It worked. Dennison's widow lost her suit, and the term stuck.").

[53] Coates, *supra* note 50.

athletes rights and compensation ever since.[54] As college sports further developed into a business, however, even Bryers took issue with the system he helped create.[55] In 1984, he stated that campus athletic programs had adopted a "neoplantation mentality" where "the coach owns the athlete's feet" and "the college owns the athlete's body."[56] This particular verbiage is especially poignant when considering the increased profitability of college sports since Bryers first coined the term "student-athlete,"[57] the NCAA's continuing reliance on unpaid Black labor,[58] and the infamous history of slavery and Black physical commodification in the United States.[59]

B. *How COVID-19 Exposed the Myth of the "Student-Athlete"*

"Social distancing," "new normal," and "super-spreader" are just a few of the terms introduced to us throughout the COVID-19 pandemic.[60] No phrase, however, is more relevant in the context of college athletics than "essential worker."[61] The proliferation of the term "essential worker" and our reliance on minimally paid grocery store and gig workers (e.g., delivery drivers and other independent

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[54] Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look into the Alt-Labor Future*, 95 CHI.-KENT L. REV. 187–88 (2020); *see also NCAA Sports Contracts and Amateurism*, US LEGAL, https://sportslaw.uslegal.com/sports-agents-and-contracts/ncaa-sports-contracts-and-amateurism/ (last visited May 7, 2021).

[55] Given, *supra* note 52.

[56] *Id*.

[57] *See NCAA Finances*, *supra* note 19 ("The total athletics revenue reported among all NCAA athletics departments in 2019 was $18.9 billion.").

[58] Zirin, *supra* note 17.

[59] *See generally* Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation*, N.Y. TIMES (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html (discussing roots of brutal and exploitative American capitalism as inextricably connected to history of a business practices rooted in slavery).

[60] *See, e.g.*, *Coronavirus and the New Words We Added to the Dictionary in March 2020*, MERRIAM-WEBSTER, https://www.merriam-webster.com/words-at-play/new-dictionary-words-coronavirus-covid-19 (last visited May 7, 2021) (discussing new word Merriam-Webster added to their dictionary in response to the COVID-19 pandemic).

[61] Jessie Mitchell, *Call Them What They Are: "Student-Athletes" Are Essential Workers*, MICH. DAILY (Oct. 29, 2020, 3:06 PM), https://www.michigandaily.com/section/columns/call-them-what-they-are-"student-athletes"-are-essential-workers.

contractors) throughout the pandemic has sparked conversation around fair wages and working conditions.[62] Unsurprisingly, these conversations have seeped into college athletics.[63] Regardless of whether college athletes are legally categorized as employees, NCAA and university action in response to the pandemic show that, when it comes down to it, "student-athletes" function more like "essential workers" than they do students who also happen to play sports.[64]

The COVID-19 pandemic revealed that college men's football and basketball athletes function as "essential workers" because they are financially indispensable to their institutions. During a time when universities across the nation were struggling financially[65] and the NCAA took out a line of credit after canceling March Madness in 2020,[66] the 2020–21 college football and basketball seasons

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[62] *See* Abigail Abrams, *The Challenges Posed By COVID-19 Pushed Many Workers to Strike. Will the Labor Movement See Sustained Interest?*, TIME (Jan. 25, 2021, 12:46 PM), https://time.com/5928528/frontline-workers-strikes-labor/ (discussing rise in worker strikes and union activity since COVID-19 pandemic); Sharon Block & Benjamin Sachs, *Why the Pandemic Paves the Way for Labor Reform*, PUB. SEMINAR (May 21, 2020), https://publicseminar.org/essays/why-the-pandemic-paves-the-way-for-labor-reform/ (discussing importance of empowering essential workers and providing better workplace conditions amid COVID-19 pandemic).

[63] Mitchell, *supra* note 61; *see also* Daron K. Roberts, *The Essential Workers of College Athletics Are Exerting Their Power*, UNIV. TEX. NEWS (June 18, 2020), https://news.utexas.edu/2020/06/18/the-essential-workers-of-college-athletics-are-exerting-their-power/; Streeter *supra* note 40.

[64] *See* Mitchell, *supra* note 61.

[65] Sam Briger, *As Campuses Become COVID-19 Hot Spots, Colleges Strain Under Financial Pressures*, NPR (Sept. 16, 2020 1:06 PM), https://www.npr.org/2020/09/16/913500758/as-campuses-become-covid-hotspots-colleges-strain-under-financial-pressures (discussing financial challenges COVID-19 pandemic exerted on universities across U.S.)

[66] *NCAA Financial FAQs*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaa.org/about/resources/finances/2020-ncaa-financial-faqs (last visited May 7, 2021) (explaining that NCAA will rely on a line of credit to make up for lost revenue since COVID-19 pandemic); *see also* Pat Forde, *First Coronavirus Financial Ripple Effects Felt in NCAA with Revenue Distribution Slashing*, SPORTS ILLUSTRATED (Mar. 26, 2020), https://www.si.com/college/2020/03/26/ncaa-revenue-losses-march-madness-schools.

became their financial lifeline.[67] Canceling college football alone would have led to an estimated $4 billion in lost revenue[68] and could have potentially devastated athletic programs across the country.[69] Further, in many instances, the financial stakes were *so* high that college athletes returned to campus when: (1) the general student population was prohibited from returning; (2) a majority or all of classes were held online; and (3) mandated stay-at-home orders or curfews were still in effect.[70] This decision to bring college athletes

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[67] *See* Nancy Zimpher & Jonathan Mariner, *Opinion: As Big Ten and Pac-12 Cancel Their Football Seasons Because of COVID-19, College Sports Programs Are Facing a Financial Apocalypse*, MARKETWATCH (Aug. 11, 2020 10:08 AM), https://www.marketwatch.com/story/big-college-sports-programs-face-a-financial-apocalypse-if-the-football-season-is-cancelled-its-time-for-new-priorities-focused-on-the-athletes-11597154899.

[68] Roberts, *supra* note 63.

[69] Mark Schlabach & Paula Lavigne, *Financial Toll of Coronavirus Could Cost College Football at Least $4 billion*, ESPN (May 21, 2020), https://www.espn.com/college-sports/story/_/id/29198526/college-football-return-key-athletic-departments-deal-financial-wreckage-due-coronavirus-pandemic (referencing statements made by Oregon State's Athletic Director, in which he said, "[a]nywhere from 75 up to almost 85% of all revenues to our departments are derived directly or indirectly from football . . . [i]ndirectly, I mean sponsorship dollars, multimedia rights, and then you've got your gate, your donations and whatnot. The impact of not playing a season is devastating. It would rock the foundation of intercollegiate athletics the way we know it. Frankly, I'm not trying to solve for that because it would be such a devastating circumstance that we'd almost have to get a whiteboard out and start over.").

[70] Michael Rosenberg, *It Took a Pandemic to See the Distorted State of College Sports*, SPORTS ILLUSTRATED (Dec. 29, 2020), https://www.si.com/college/2020/12/29/global-pandemic-exposed-ncaa-inc ("In August, three prominent schools in the University of North Carolina system—UNC, NC State and East Carolina—sent students home after one week on campus. All three schools continued to play sports. UCLA decided to conduct 'about 8% of fall-term courses in person or using a hybrid, with the remaining vast majority delivered remotely.' Sports continued there as well."); *see also* N.Y. Times Editorial Board, *College Football Is Not Essential*, N.Y. TIMES (Aug. 29, 2020), https://www.nytimes.com/2020/08/29/opinion/sunday/college-football-covid.html (discussing inaccuracy of tern "student-athlete" in context of COVID-19 pandemic, as the Big 12, ACC and SEC moved forward with a football season despite many campuses sending nonathlete students home for their safety); Mitchell *supra* note 61 ("If there was any doubt before the pandemic that the term 'student-athlete' was oxymoronic, there isn't any longer. My inbox in the week leading up to the Michigan football game against Minnesota included both guidelines from the University of

back to campus for an athletic season predictably attributed to rampant infections among college teams: a risk universities did not ask their wider student bodies to take on.[71] For example, at Clemson University, 37 of their 120 college football players were infected shortly upon their return to campus in June 2020,[72] even though, at that time, the wider student body was still not allowed to return to its dormitories and could only take classes online.[73] Granted, the NCAA did eventually give college athletes the choice to opt out of the season[74] and many expressed a strong desire to play.[75] Their "choice,"[76] however, does not negate the fact that college athletes

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Michigan about how to follow the Washtenaw County emergency order and emails from the Michigan Athletic Department reminding me about game day. The email on Oct. 20 from University President Mark Schlissel announcing the stay-in-place order didn't mention the term 'essential workers,' but the exception for University's athletes (nearly all of whom are undergraduates) made it clear that is what the University has deemed them.").

[71] Rosenberg, *supra* note 70.

[72] Michael David Smith, *37 Clemson Football Players Have Tested Positive*, NBC SPORTS (June 26, 2020, 6:28 PM), https://profootballtalk.nbcsports.com/2020/06/26/37-clemson-football-players-have-tested-positive/.

[73] *See* Zoe Nicholson, *Clemson University Begins Reopening on Monday. Here's What to Know*, GREENVILLE NEWS (May 28, 2020 5:53 AM), https://www.greenvilleonline.com/story/news/2020/05/29/clemson-university-reopening-plan-look-like-june-1-phase-one/5273200002/ (discussing Clemson's reopening plan as of May 2020, which did not consider bringing back students until late summer at earliest).

[74] Stacey Osburn, *Board Directs Each Division to Safeguard Student-Athlete Well-Being, Scholarships and Eligibility*, NAT'L COLLEGIATE ATHLETIC ASS'N (Aug. 5, 2020 11:44 AM), https://www.ncaa.org/about/resources/media-center/news/board-directs-each-division-safeguard-student-athlete-well-being-scholarships-and-eligibility ("All student-athletes must be allowed to opt out of participation due to concerns about contracting COVID-19. If a college athlete chooses to opt out, that individual's athletics scholarship commitment must be honored by the college or university.").

[75] Dennis Dodd, *Players Want College Football to Go on This Fall, but They Have to Consider All the Risks*, CBS SPORTS (Aug. 10, 2020, 11:09 AM), https://www.cbssports.com/college-football/news/players-want-college-football-to-go-on-this-fall-but-they-have-to-consider-all-the-risks/.

[76] Kurt Streeter, *Virus Cases in College Sports Prove Athletes Are Workers*, N.Y. TIMES (Dec. 12, 2020), https://www.nytimes.com/2020/12/12/sports/ncaafootball/coronavirus-college-sports-athlete-pay.html ("What about the belief that we shouldn't really care because the N.C.A.A. set up special pandemic rules allowing players to opt out and return next season without losing eligibility?

were asked to expose themselves for the financial profit of institutions in ways that general students were not. The decision ultimately led to thousands of infections of a virus with unknown long-term health effects.[77]

Other university action distinguishing college athletes from the general student population further highlights how college athletes have functioned as "essential workers" for their universities. For example, in many cases, universities tested athletes more frequently and consistently than their non-athlete counterparts.[78] This testing distinction, by itself, is not necessarily an issue as those most exposed and most at-risk should take priority (although one could question the ethics of diverting tests from other high-risk communities to allow for a college sports season). But what will occur when universities begin distributing the vaccine? Will college athletes also take priority then? Or will they then be treated like their non-athlete counterparts? The NCAA's prioritization of athletes as it relates to COVID-19 testing, while also insisting that these athletes are akin

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Anyone who says that doesn't understand the pressure athletes feel to keep going, no matter the cost, in college sports."); *see also* Uma M. Jayakumar & Eddie Comeaux, *The Cultural Cover-Up of College Athletics: How Organizational Culture Perpetuates an Unrealistic and Idealized Balancing Act*, 87 J. OF HIGHER EDU. 489 (2016) (discussing a qualitive study of Division I college athletes that exposes the ways in which underlying messages and structures often pressure college athletes to prioritize athletics above other aspects of their lives, such as their academics).

[77] Blinder, *supra* note 2; *see also* Rosenberg, *supra* note 70. ("We will likely not know for many years how this virus affects people long-term. We do know, however, that there were outbreaks in college sports—Houston men's basketball coach Kelvin Sampson, for one, said his entire team had COVID-19—and that, while some coaches and schools took protocols extremely seriously, others portrayed them as an annoyance."); *Long Term Effects of COVID-19*, CTR. DISEASE CONTROL, https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html (last visited May 7, 2021); Paula Lavigne & Mark Schlabach, *Heart Condition Linked with COVID-19 Fuels Power 5 Concern About Season's Viability*, ESPN (Aug. 10, 2020), https://www.espn.com/college-football/story/_/id/29633697/heart-condition-linked-covid-19-fuels-power-5-concern-season-viability (discussing potential link between long term heart complications and COVID-19 infection among college athletes).

[78] Laine Higgins, *The Surest Way to Get a Coronavirus Test in College: Play Football,* WALL ST. J. (Sept. 10, 2020, 10:40 AM), https://www.wsj.com/articles/the-surest-way-to-get-a-coronavirus-test-in-college-play-football-11599748810.

to their non-athlete counterparts, highlights the NCAA's hypocritical classification of "student-athletes." If the NCAA can recognize situations where these athletes deserve to be prioritized, particularly when that prioritization allows the NCAA and its member universities to receive financial revenue, then the NCAA can also recognize that these athletes deserve other protections as well.

III. IF NOT "STUDENT-ATHLETES," THEN WHAT?

A. *Using Essential Workers for Progressive Labor Reform*

Advocates across the country have utilized the COVID-19 pandemic to bring forth progressive legislation focused on improving essential workers' working conditions.[79] For example, in May of 2020, the mayor of Philadelphia signed into effect the Essential Worker Bill of Rights, which protects workers who speak out against unsafe workplace conditions during the COVID-19 pandemic.[80] With the attention afforded to college sports conditions since the pandemic, it is unsurprising that similar efforts have been made to advocate for college athletes at the federal level as well.[81] For example, in December, Senator Cory Booker proposed a bill entitled the College Athletes Bill of Rights.[82] The bill includes sweeping reforms to the current NCAA structure.[83] Specifically, the bill would: (1) afford athletes in revenue-generating sports a share of profits, (2) provide lifetime scholarships, (3) ensure government oversight of health and safety standards, (4) require public reporting of booster donations, (5) allow for unrestricted transferability, and (6) create a commission with subpoena power to ensure

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[79] *See, e.g.*, Conor J. Hafertepe & David J. Woolf, *New Philadelphia Ordinance Protects Employees Who Blow the Whistle on Unsafe Workplaces During COVID-19*, NAT'L L. REV. (June 30, 2020), https://www.natlawreview.com/article/new-philadelphia-ordinance-protects-employees-who-blow-whistle-unsafe-workplaces.

[80] *Id.*; PHILADELPHIA, PENN., CODE § 9-5001–09.

[81] Billy Witz, *Bill Offers New College Sports Model: Give Athletes a Cut of the Profits,* N.Y. TIMES (Dec. 19, 2020), https://www.nytimes.com/2020/12/17/sports/ncaafootball/college-athlete-bill-of-rights.html.

[82] *Id*.

[83] *Id.*

compliance.[84] Although this effort would drastically change the business of college sports, its outcome remains uncertain. Both versions of these worker bill of rights illustrate how advocates in a range of areas have utilized the pandemic as a springboard for progressive labor reform; however, questions still remain with regard to the NCAA. Are those with power ready and willing to allow for actual reform? If reform does occur, what aspects of the current NCAA structure should change? What steps can be taken toward achieving antiracist policies and practices within college athletics?

B. *The COVID-19 Pandemic Reveals the Need for Independent Representation and a Power Shift in the NCAA*

As the pandemic continues, the many justifications for a legal reclassification of "student-athletes" and overall restructuring of college sports become more evident. However, it is worth noting that solely reclassifying "student-athletes" as employees or allowing them to receive financial compensation in limited ways, will not solve all of the issues in college athletics. Further, while allowing college athletes to financially benefit from their NIL in regulated instances may be a step in the right direction, such an adjustment will not necessarily benefit every player and it does not represent a structural change to an increasingly flawed system.[85] Decisions around reforming athlete classification and revenue sharing must be made through a power analysis lens. More specifically, for legislation to serve as antiracist reform to the college athletics business, universities and the NCAA must shift some of the power they exclusively hold to the college athletes. By allowing college athletes to collectively bargain over their health, safety, and other rights through the establishment of an independent representative body, the NCAA could shift some of its power to the athletes: ultimately

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[84] *Id.*

[85] *See* Mark Emmert, *If College Athletes Could Profit off Their Marketability, How Much Would They Be Worth? In Some Cases, Millions*, USA TODAY (Oct. 10, 2019, 9:16 AM), https://www.usatoday.com/story/sports/college/2019/10/09/college-athletes-with-name-image-likeness-control-could-make-millions/3909807002/ (discussing that ability of a player to profit from name, image, and likeness legislation depends on a number of factors such as marketability of player and location and market of university).

allowing college athletes to have an unprecedented level of influence over the management of the college sports business.[86]

Focusing on the importance of collective bargaining is not to suggest that college athletes on high revenue generating teams should not also receive compensation. Financial power and the ability to build generational wealth, in any capacity, is also an important component of combatting racial inequities. However, *independent representative* power and the ability to *influence* NCAA policy and structure is often overlooked in conversations around NCAA reform. Further, this form of power is especially important when considering the NCAA's history of structural racism.[87] Those with authoritative power in the NCAA system (e.g., the NCAA decision-makers, university presidents, athletic directors, and coaches) are overwhelmingly white, while those that provide the labor—but do not share in that power—are disproportionally Black.[88] Collective bargaining would shift who maintains the authority and power within the business, a move that could reach beyond just college athletics.[89]

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[86] Rohan Nadkarni, *College Football Players Need a Union Now More Than Ever*, SPORTS ILLUSTRATED (July 2, 2020), https://www.si.com/college/2020/07/02/college-football-needs-a-union-now-more-than-ever ("To understand the importance of unions in the context of the COVID-19 pandemic, one simply has to look at the professional sports world. While the ethics of the NBA returning in late July are up for debate, that return comes only after robust discussions between the league and its players association, whose president, Chris Paul, dealt personally with commissioner Adam Silver. Inside that union there has been dissent about a comeback, and some concern that basketball might distract from the ongoing protests against police brutality—but those voices have been *heard* and, if players return, they will have made the NBA engage in discussions regarding social justice. In baseball, players used their bargaining power to prevent MLB owners from skirting an initial agreement to pay prorated salaries based on the number of games played. In the end, they could not be unilaterally forced to play under conditions they deemed unworthy of the risk. College football players do not have the same protections, yet they're being called back to campus, and those who choose *not* to play do so without any NCAA plan to ensure their scholarships are preserved.").

[87] *See generally* Nwadike, *supra* note 28.

[88] Harper, *supra* note 22 at 2–9; *see also* Jake New, *Report: Sports Leadership 'Dominated' by White Men*, INSIDE HIGHER ED (Nov. 22, 2016), https://www.insidehighered.com/quicktakes/2016/11/22/report-sports-leadership-dominated-white-men.

[89] Nadkarni, *supra* note 86.

For example, after the police killing of George Floyd, there was a resurgence in athlete activism at the collegiate and professional levels.[90] During the corresponding racial justice protests of the summer of 2020, several college athletes took to social media to express their desire for progress.[91] Some challenged their states' governors[92] and others their coaches and universities.[93] Should these athletes gain the ability to collectively bargain, not only could they—like their professional counterparts—advocate for better working conditions,[94] but they could also attempt to hold their universities accountable for the promises and commitments their universities made

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[90] Jori Epstein et al., *Fear, Despair, Outrage, Hope: Athletes Open up on Why They Joined Protests*, USA TODAY (June 6, 2020, 9:56 AM), https://www.usatoday.com/story/sports/nfl/2020/06/06/athletes-protests-george-floyd-death/3147154001/.

[91] Corbin McGuire, *College Athletes Using Platforms to Speak Out on Social Justice Issues*, NAT'L COLLEGIATE ATHLETIC ASS'N (Aug. 18, 2020, 11:00 AM), https://www.ncaa.org/about/resources/media-center/feature/college-athletes-using-platforms-speak-out-social-justice-issues.

[92] Bomani Jones, *College Football Players Are Unpaid Stars on the Field—And Have No Power off It*, VANITY FAIR (Aug. 27, 2020), https://www.vanityfair.com/culture/2020/08/college-football-unpaid-stars-with-no-power ("On June 22, Mississippi State running back Kylin Hill retweeted the governor, Tate Reeves, who had stated that adopting a second state flag was not an option. Mississippi would have one flag, whatever that flag would be. With remarkable bravery, Hill said he would no longer represent his home state if the flag didn't change. His tweet closed with 'I'm tired,' a telling statement from someone so young. Hill's act of defiance amplified the discussion nationally. On June 28, both houses of the state legislature passed a bill to change the flag.").

[93] Nadkarni *supra* note 86; Tommy Beer, *FSU Football Star Threatens Boycott, Claims Coach Lied About George Floyd Discussion*, FORBES (June 4, 2020, 2:35 PM), https://www.forbes.com/sites/tommybeer/2020/06/04/fsu-football-star-threatens-boycott-claims-coach-lied-about-george-floyd-discussion/?sh=81ac11c35672 (discussing FSU football-led protest that took place after FSU players accused their coach of lying about personal conversations with players after killing of George Floyd).

[94] *See* Nick Shook, *NFL, NFLPA Reach Agreement on COVID-19 Adjustments to CBA*, AROUND NFL (July 24, 2020, 6:03 PM), https://www.nfl.com/news/nfl-nflpa-reach-agreement-on-covid-19-adjustments-to-cba; Tim Reynolds, *NBA and Players Union Stiffen Coronavirus Protocols*, CHI. SUN TIMES (Jan 12, 2021, 2:55 PM), https://chicago.suntimes.com/2021/1/12/22227596/nba-players-union-stiffen-coronavirus-covid-19-protocols.

in the wake of the George Floyd protests.[95] In all, independent representation through collective bargaining would afford athletes greater protections should they continue to speak out against their coaches or universities, while also providing a lasting seat at the table and an ability to ensure persistent reform.[96]

CONCLUSION

As of January 27, 2021, the COVID-19 death toll in the U.S. was 423,519 and the number of total cases reached 25,301,166.[97] Meanwhile, issues with vaccine distribution and availability have propelled new doubts on the likelihood of a full "return to normal" in 2021.[98] However, on that same day in January, the SEC announced their 2021–22 football schedule, which included a return of nonconference games.[99] This schedule means that players will face even more teams than they did in the 2020–21 season and thus increase their potential exposure to the virus. Now, more than ever, some sort of change within college athletics must be implemented. If the NCAA and its member universities are truly committed to

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[95] *See, e.g.*, Marc J. Spears, *'Black Lives Matter, People': How the NBA's Social Justice Efforts Dominated the Season*, UNDEFEATED (Oct. 12, 2020), https://theundefeated.com/features/how-the-nba-social-justice-efforts-dominated-the-season/ (discussing success NBA players and their union were able to achieve in pushing larger organization through player-led activism following George Floyd protests).

[96] *See supra* Nadkarni note 86.

[97] *Brief-U.S. CDC Reports Total Deaths of 423,519 Due to Coronavirus as of Yesterday*, REUTERS (Jan. 27, 2021 3:38 PM), https://www.reuters.com/article/brief-us-cdc-reports-total-deaths-of-423/brief-u-s-cdc-reports-total-deaths-of-423519-due-to-coronavirus-as-of-yesterday-idUSL4N2K24BO.

[98] *See* Matthew Conlen et al., *Why Vaccines Alone Will Not End the Pandemic*, N.Y. TIMES (Jan. 24, 2021), https://www.nytimes.com/interactive/2021/01/24/us/covid-vaccine-rollout.html.

[99] *See* Alex Scarborough, *SEC Football Schedule Release Features Return of Nonconference Games, Three Power 5 Matchups on Sept. 4*, ESPN (Jan. 27, 2021), https://www.espn.com/college-football/story/_/id/30789318/sec-football-schedule-release-features-return-nonconference-games-3-power-5-matchups-sept-4; *see also* Paul Myerberg, *Big Ten Football Reduces Season Schedule to Only Conference Games, Maybe Setting Stage for Others to Follow*, USA TODAY (July 9, 2020), https://www.usatoday.com/story/sports/college/2020/07/09/big-ten-football-reduces-season-schedule-only-conference-games/5408329002/.

combatting *structural* racism,[100] they should start by making *structural* changes to a system that has enabled the exploitation of Black athletes for decades.

[100] *See NCAA Message on Inequality and Justice*, *supra* note 5.

Critical Theory: A Transactional Skills Argument

MICHAEL BAILEY*

The politicization of critical race theory distorts the legitimate legal skill-building capacity produced by one of the legal profession's most valuable intellectual contributions to social justice.[1] Due, in part, to this politicization, the public and even some legal professionals misunderstand the value of critical race theory to society and private markets alike.[2] At a time when society is recognizing how systemic racial injustice is, law schools should be

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[1] For this Essay, I use "critical race theory" and "critical legal theory" interchangeably while acknowledging that some scholars view critical race theory as arising out of critical legal studies. *See* Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value,* 3 COLUM. J. RACE & L. 23, 26 (2013). In this Essay, I use critical race theory to describe an analytical framework that does not accept institutional decision-making as "colorblind" and analyzes "how race and racial hierarchies are constructed and represented in legal culture and society." Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187, 189 (2013).

[2] *See, e.g.*, Victor Ray, *Trump Calls Critical Race Theory 'Un-American.' Let's Review*, WASH. POST (Oct. 2, 2020), https://www.washingtonpost.com/nation/2020/10/02/critical-race-theory-101/ (discussing President Trump's antipathy towards critical race theory and noting that, "Ironically, Trump's most recent executive order banning racial sensitivity training confirms critical race theory's central point: Racism is embedded in the law."); Lindsey Burke & Mike Gonzalez, *To Tackle Critical Theory in the K–12 Classroom, Start With Colleges of Education*, NAT'L REV. (Oct. 5, 2020), https://www.nationalreview.com/2020/10/higher-education-critical-theory-attacks-americas-norms-traditions/ (evincing a profound misunderstanding of critical race theory by labelling it "an unremitting attack on all of America's norms and traditions.").

aiming to produce lawyers who can adequately diagnose, address, and reform racial inequity wherever it may occur. The value of diagnosing institutional racism and structural inequity goes beyond public interest law because the effects of racialy discriminatory policies and behaviors are evident across the societal spectrum.

It follows that, to present as competent counsel, transactional lawyers, and specifically "startup lawyers," must be trained to identify structural barriers to the equitable distribution of capital and resources.[3] Identifying and diagnosing structural bias is vital to promoting social justice and achieving racial equity. Furthermore, market participants[4] within the startup ecosystem will expect their attorneys to possess the skills needed to advise firm leaders on eradicating structural bias from their organizations, products, and decisions.[5] Despite the clear social benefits of a legal community empowered to address racial inequity, the discussions of the influence race has on our current cultural, political and legal infrastructures, and the national reckoning with race and injustice in the wake of the murder of George Floyd, some social commentators view critical race theory as an unproductive use of time during lawyers' formative years.[6] As society seeks to, once again, recognize the influence institutional racism has on nearly every

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[3] While some scholars define "startup lawyers" strictly as strictly those lawyers who represent early-stage technology companies capable of rapid growth, I include those lawyers who participate in the startup ecosystem in any capacity in my definition, including those representing venture capital firms, accelerators, and other ecosystem support organizations. *See generally* John F. Coyle & Joseph M. Green, *Startup Lawyering 2.0*, 95 N.C. L. REV. 1403 (2017).

[4] BRAD FELD & IAN HATHAWAY, THE STARTUP COMMUNITY WAY: EVOLVING AN ENTREPRENEURIAL ECOSYSTEM 41–48 (2020) (noting that startup ecosystem participants include entrepreneurs, startups and their employees, business coaches, investors, professional service providers, entrepreneurial support organizations, universities, large corporations, research groups, and municipal governments).

[5] *See* Robert Ambrogi, *Toward Increasing Diversity in Legal Tech*, ABOVE THE L. (Jun. 8, 2020), https://abovethelaw.com/2020/06/toward-increasing-diversity-in-legal-tech/?rf=1.

[6] *See, e.g.*, Daniel Subotnik, *What's Wrong with Critical Race Theory: Reopening the Case for Middle Class Values*, 7 CORNELL J.L. & PUB. POL'Y 681, 756 (1998) ("Spreading a range of unbaked antiblack conspiracy theories, trying to transform social pathologies into new cultural paradigms, and disseminating despair at every turn-actions that are taken for clinical symptoms—[critical race theorists], I am suggesting, are in the way . . . .").

aspect of our lives, those scholars and professionals who argue that critical race theory has no place in legal training and professional development are out of touch with the market's demands of the legal community. In this Essay, I will briefly discuss how subjective decision-making processes based on pattern matching produce racially inequitable outcomes within the startup ecosystem and how critical race theory doctrine and training will enhance the value of the transactional lawyer who finds herself as a counselor to venture capitalists ("VCs") and startup founders in tomorrow's innovation economy.[7]

In the wake of the killings of George Floyd, Breonna Taylor, and Ahmaud Arbery, the venture capitalist community has decided to make a concerted effort to invest in Black founders.[8] To increase investment in Black founders, some VCs have established separate "diversity" funds that specifically fund Black-owned startups.[9] VCs

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[7] Innovation economies, like startup ecosystems, are widely recognized as an economic development strategy driven by entrepreneurship in scientific, technological, and telecommunications fields. *See* Lynnise E. Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS U. L.J. 419, 424 (2018); *see also* DARRELL WEST, TECHNOLOGY AND THE INNOVATION ECONOMY 1 (2016), https://www.brookings.edu/wp-content/uploads/2016/06/1019_technology_innovation_west.pdf.

[8] In the wake of George Floyd's murder, investors opened their calendars, took to social media to invite Black founders to reach out to them and reviewed pitch decks; however, their efforts were met with skepticism and the outcomes of these efforts are still largely unknown. Natasha Mascarenhas & Jonathan Shieber, *Venture Firms Rush to Find Ways to Support Black Founders and Investors,* TECHCRUNCH (June 2, 2020), https://techcrunch.com/2020/06/02/diverse-startups-and-investors-matter/. Al least some of this skepticism comes from the lack of diversity in venture capital firms themselves; according to ecosystem support organization, BLCKVC, 80% of venture capital firms do not have a single black investor. Gené Teare, *The Conversation and the Data: A Look at Funding to Black Founders,* CRUNCHBASE NEWS (June 5, 2020), https://news.crunchbase.com/news/the-conversation-and-the-data-a-look-at-funding-to-black-founders/.

[9] *See, e.g.*, Delane Parnell, *The SB Opportunity Fund Is a $100 Million Venture Fund Dedicated to Supporting and Building a Community of Outstanding Black, Latinx and Native American Founders*, SOFTBANK (Oct. 29, 2020), https://theopportunityfund.com/; *Meet the Recipients: Black Founder's Fund*, GOOGLE FOR STARTUPS https://startup.google.com/blackfoundersfund/ (last visited May 7, 2021) (highlighting that Google's "Black Founders Fund" is a $5 million fund providing non-dilutive cash awards to Black led startups that participate in Google programs); *Introducing the Talent x Opportunity Fund*,

have, additionally, hired more fund managers from underrepresented backgrounds and designed accelerator programs dedicated to helping Black founders develop and showcase their startups.[10] The stated goals of these programs and efforts are to reverse the inequitable distributions of capital.[11] Lawmakers and advocates, however, distrust venture capital's capacity and willingness to self-regulate. These lawmakers would prefer if venture capital firms were forced to change through regulation or more drastic replacement of the capitalist infrastructure underlying the innovation economy.[12] Proponents of these ideas believe that venture capital excludes women and founders of color by design and that regulation is the only way to reconcile the inequity created by

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ANDREESSEN HOROWITZ (June 3, 2020) [hereinafter *Talent x Opportunity Fund*], https://a16z.com/2020/06/03/talent-x-opportunity/ (stating that Andreessen Horowitz "Talent x Opportunity Fund" is a fund comprised of $2.2 million in donations from firm partners as well as donations from outside donors).

[10] *Talent x Opportunity Fund, supra* note 9; Nitasha Tiku, *Black Tech Founders Say Venture Capital Needs to Move Past 'Diversity Theater*,*'* WASH. POST (June 10, 2020), https://www.washingtonpost.com/technology/2020/06/10/racial-gap-vc-firms/. Sara Kunst, a black investor, told reporters that "[Softbank's Opportunity Fund] is not a lot, but it's also more than anyone has ever done." *Id.* In the same article investor Elliot Robinson critiqued venture capital's response to calls for more diversity as "diversity theatre," citing the "inflation" of black investor's titles at certain firms and at these investors were not granted decision-making authority. *Id.*

[11] *See, e.g.*, *Talent x Opportunity Fund, supra* note 9 ("Being equal before the law, but unequal before law enforcement, is atrocious. It is wrong. It is against our firm's values . . . . If your skin is dark, you're born a suspect. If you do not have the education, the mobility, the network, the social proof, the mentors, the business knowledge, then the Venture Capital world cannot see you."). For background on inequity in startup ecosystems, see generally Patin, *supra* note 7.

[12] *See, e.g.*, Andy Rosen, *Mass. Lawmakers Want to Extend Antidiscrimination Laws to Venture Capitalists,* BOS. GLOBE, (Feb. 8, 2019) https://www.bostonglobe.com/business/2019/02/08/lawmakers-want-extend-antidiscrimination-laws-venture-capitalists/RNgNaaOm6Q2U9IyzBAeKgM/story.html?s_campaign=bostonglobe%3Asocialflow%3Afacebook&fbclid=IwAR2IPBpPVkzOFf687E2WwB-sH7rwfQyTN_OUAr-7DXNvuQ5Abrlwtu HQxKw#comments. *See generally* WENDY LIU, ABOLISH SILICON VALLEY: HOW TO LIBERATE TECHNOLOGY FROM CAPITALISM 213 (John E. Turner & Rhian E. Jones eds., 2020). Liu argues that the capitalist incentives create negative externalities in the startup ecosystem, including exclusionary investment practices and wealth inequity. LIU, *supra* note 12, at 213. In response, Liu argues that technological innovation should be disconnected from capitalist incentives and innovation should be reduced to those technologies that serve a public good. *Id.*

these exclusionary practices.[13] To accomplish their regulatory goals, some lawmakers believe that antidiscrimination rights afforded to employees in employee-employer relationships should apply to founder-investor relationships even before the existence of a contractual relationship between the parties.[14] These laws would force venture capital firms to develop anti-discriminatory compliance programs and checks around their investment decisions to demonstrate that each founder and investment decision is treated equitably based on their race or gender identity.[15] VCs would likely look to their lawyers to advise and assist their firm's development of these compliance programs, which must operationalize societal expectations of equity in the way the firms decide to distribute capital. [16] It would make sense then, for the legal community surrounding these VCs to preempt anti-discriminatory regulation by immediately assessing their firm's practices and policies against societal and regulatory expectations of equity. Although these regulations have not yet emerged, this regulatory role is well within the startup lawyer's scope of responsibility.[17]

Nevertheless, new regulation is not without limitation. In 2020, the Supreme Court weakened antidiscrimination laws by increasing

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[13] *See, e.g.*, LIU, *supra* note 12 at 188–205 (proposing a number of fixes to the Silicon Valley ecosystem, many of which include significant regulation and government oversight).

[14] *See* Rosen, *supra* note 12.

[15] *See, e.g.*, Mass. S. 939, 191st Cong. § 4 (2019). This bill, introduced in Massachusetts, would prohibit "any person whose business includes sponsoring, guaranteeing or granting funds or engaging in investment transactions to discriminate against any person in the sponsoring, guaranteeing or granting of funds or making available such funds, because of race, color, religion, sex, gender identity, sexual orientation." *Id.*

[16] *See* Reed Albergotti, *Black Start-Up Founders Say Venture Capitalists Are Racist, but the Law Protects Them*, WASH. POST (July 22, 2020), https://www.washingtonpost.com/technology/2020/07/22/black-entrepreneurs-venture-capital/ (noting that, in response to proposals for new civil rights laws with harsher enforcement mechanisms, Kristin Johnson, a professor at Tulane University Law School says, "The legal obligations would prompt an organization to develop essentially a compliance framework.").

[17] To use an example within the contemporary regulatory landscape as a parallel, in California, investor-founder interactions are covered by similar laws prohibiting sexual harassment in these encounters, however, the law does not cover race-based discrimination. CAL. CIV. CODE § 51.9(a)(1)(B) (West 2019).

plaintiffs' burden at the pleading stage.[18] Moreover, given the already existing wealth disparity that makes entry into the innovation economy harder for Black people,[19] maintaining cash reserves for anti-discrimination litigation against VCs is not only antithetical to "lean startup" pedagogy, but also unrealistic for founders who are trying to operate a startup organization on shoestring budgets.[20] Not to mention the scarlet letter that would likely attach to any founder who decided to use their cause of action against a venture capital firm, which is supported by an industry wholly dependent on reputation and warm introductions.[21] For these reasons, anti-discriminatory legislation in this space may do more harm than good to Black founders as these laws will only give VCs an excuse to be discriminatory with little threat of being litigated against. Regardless of whether such legislation is introduced, however, startup lawyers will likely have to become comfortable with identifying, diagnosing, and correcting policies, behaviors and practices that produce inequitable results.

Among all parties involved, the startup lawyer is the best situated actor in the ecosystem to have this type of influence on the industry's norms.[22] Given the inequities that the tech and innovation

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[18] *See* Comcast Corp. v. Nat'l. Assoc. of African-American-Owned Media, 140 S. Ct. 1009, 1013 (2020) (noting that district court dismissed National Association of African American-Owned Media's claim on grounds that 1981 Act, which guarantees the right to contractor to Black people, requires that plaintiffs establish "but for" causation at the pleading stage). While the Ninth Circuit reversed, the Supreme Court remanded the case claiming that the Ninth Circuit had wrongly assessed the claim under a "different and mistaken test.". *Id.* at 1019.

[19] Pantin, *supra* note 7, at 421–22.

[20] *See* Steve Blank, *Why the Lean Start-Up Changes Everything*, HARV. BUS. REV. (May 2013) (discussing 'Lean Startup' methodology, which discourages startups from wasting resources on operations unrelated to product and market development).

[21] *See* Albergotti, *supra* note 16, ("Legal hurdles aside, the black entrepreneurs said complaining about race discrimination, let alone hiring a lawyer and taking action, would amount to a career death sentence. In fact, lawyers said they weren't aware of a black entrepreneur ever bringing a discrimination lawsuit against a venture capital firm over an investment decision.").

[22] Venture Capital literature repeats the importance of the lawyer in the overall health of the ecosystem. *See* SCOTT KUPOR, SECRETS OF SAND HILL ROAD:

community claim they want to address, law schools situated within tech hubs have a responsibility to educate startup lawyers who can identify, diagnose, and eliminate policies, practices, and behaviors that create and continue racial inequity, even in the absence of antidiscrimination legislation. The label "startup lawyer" is somewhat novel and purposefully abstract. According to some practicing attorneys, almost any "type" of lawyer can be a startup lawyer because startups need advice on a range of legal domains.[23] In this view, employment lawyers can be startup lawyers, commercial litigators can be startup lawyers, intellectual property lawyers can be startup lawyers, public interest lawyers can be startup lawyers, regulatory compliance attorneys (e.g., those attorneys working for the SEC, FTC, or other regulatory body) can, certainly, be startup lawyers. While startup law may not be a legal discipline, legal scholars agree that the term "startup lawyer" specifically refers to those attorneys who specialize in finding ways

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VENTURE CAPITAL AND HOW TO GET IT 125 (2019) ("Law firms also tend to be important avenues into venture firms. . . . [L]awyers are often upstream of the VCs and in a position to see opportunities at their most nascent state."); BRAD FELD & JASON MENDELSON, VENTURE DEALS: BE SMARTER THAN YOUR LAWYER AND VENTURE CAPITALIST 206 (4th ed. 2019) ("[Y]our lawyer is a reflection on you, and if you choose a lawyer who is inexperienced, is ineffective, or behaves inconsistently, it will reflect poorly on you and decrease your negotiating credibility."); Coyle Green, *Startup Lawyering 2.0*, 95 N.C. L. REV. 1403, 1417 (2017) (citing to a previous study on startup lawyering in silicon valley that stated that startup lawyers serve as reputational intermediaries by declining to take entrepreneurs as clients that "challenge the community's taken for granted assumptions or that threaten the community's social cohesion."); FELD & HATHAWAY, *supra* note 4, at 269 (recounting, as an accomplished VC, how he built his network of entrepreneurs in Boulder, Colorado, by first asking a lawyer and a banker for access to their networks).

[23] *See* Sean Burke et al., *So You Want to Be a Startup Lawyer?,* CHAMBERS ASSOC., https://www.chambers-associate.com/career-moves/so-you-want-to-be-a-startup-lawyer (last visited May 7, 2021). As the authors note,

> While there are aspects of the practice that are highly specialized (such as understanding VC deal terms and startup market conventions), being a startup lawyer requires at least some working knowledge across a broad array of legal domains, including tax, employment law, compensation, intellectual property, commercial law, corporate law and securities regulation.

Id.

to reduce transaction costs, ensure regulatory compliance, and counsel early-stage hypergrowth companies.[24]

Arguably, the most important role of a startup lawyer is to serve as a reputational intermediary between the investor and entrepreneur.[25] In terms of increasing equity in the ecosystem's outcomes, startup lawyers are a proven gateway for the overlooked and underrepresented trying to get their ideas in front of investors.[26] As a result, startup lawyers can be pivotal in helping the investor earn the entrepreneur's trust, so establishing durable relationships is a key part of a start-up lawyer's role.[27] By facilitating trusting relationships between investor and founder, startup lawyers instantly add value in a marketplace where being "founder-friendly" is table stakes for a venture capital firm's ability to attract limited partners and hypergrowth companies.[28] Startup lawyers are

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[24] Coyle & Green, *supra* note 3, at 1404.

[25] *Id*. at 1419. ("In their capacity as reputational intermediaries, startup lawyers regularly introduce their clients to potential investors.").

[26] *See, e.g.*, ARLAN HAMILTON, IT'S ABOUT DAMN TIME: HOW TO TURN BEING UNDERESTIMATED INTO YOUR GREATEST ADVANTAGE 23–25 (2020). When Arlan Hamilton set out to become a venture capitalist, Sam Altman the president of the flagship accelerator Y-Combinator, put Arlan in contact with a lawyer who Arlan described as one of the biggest fund formation lawyers there is who worked with her for free and "taught [her] so much" that she felt "confident enough to start approaching investors, angels, and managers, and private family offices." *Id.* Prior to starting her venture capital firm, Backstage Capital, Arlan, a Black lesbian woman, was a production coordinator of live music industry and experienced homelessness on her journey to becoming an investor. *Id.*

[27] *Report of the Task Force on Defining Key Competencies for Business Lawyers, Business Law Education Committee, ABA Business Law Section*, 72 BUS. LAW. 101, 144 (2016) [hereinafter ABA Core Competencies]. The ABA Business Law Section views attorneys' abilities to help their clients form "durable relationship[s] that will result in trust and communication throughout the life of the commercial relationship" as a core competency of transactional attorneys. *Id.* In the startup context, there is generally no relationship more important throughout the life cycle of a startup than the relationship between a founder and their venture capitalist. *Id.*

[28] Charles Duhigg, *How Venture Capitalists Are Deforming Capitalism*, NEW YORKER (Nov. 30, 2020), https://www.newyorker.com/magazine/2020/11/30/how-venture-capitalists-are-deforming-capitalism. According to Harvard Business School professor, Josh Lerner, "[P]roclaiming founder loyalty is kind of expected now." *Id.* This expectation forces VCs to compete on being complicit to a founder's demands. This most often manifests in relationships where the

expected to have relationships with VCs that help facilitate and close deals between investors and entrepreneurs.[29] These lawyers, further, conduct diligence on investment targets, advise founders on investor expectations with respect to legal entity formation, capitalization table management, and intellectual property protection.[30] Essentially, these lawyers help the innovation marketplace participants set expectations, allowing the two sides, investor and founder, to close deals quickly with minimal costs. These expectations and norms are codified by startup lawyers through the proliferation of standard documents and agreements as the ecosystem's common language is expressed in its term sheet terms, non-disclosure agreements, confidentiality agreements, and employment policies.[31] Through their gatekeeper function and ability to set norms and express values through contract, the startup

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founder expects investors not to interfere too much and to support their "audacious visions" with more cash even when the venture is lagging in standard business metrics. This type of support has become industry standard, and any sense that that investors have deviated from this norm with respect to Black founders in their portfolio could create litigation risks for the firm. *Id.*

[29] Coyle & Green, *supra* note 3, at 1420 ("Outside the venture capital context, it is rare for a corporate attorney to introduce clients to potential investors; it is a role more typically performed by investment bankers. Within the venture capital context, however, such introductions occur frequently."). Commenting specifically on the role of a startup lawyer as a reputational intermediary, one New York lawyer stated that "we'll make introductions when it makes sense for both parties. We have clients on both sides of the table and try to add value where we can with the relationships we have."). *Id.* at 1420.

[30] ABA Core Competencies, *supra* note 27 at 104, 115, 121.

[31] *See Model Legal Documents*, NVCA, https://nvca.org/model-legal-documents/ (last visited May 7, 2021). The National Venture Capital Association (the "NVCA") helps set industry standards by providing model legal documents for VCs to use. *Id.* The NVCA hopes that,

> "[b]y providing an industry-embraced set of model documents that can be used in venture capital financings[,] the time and cost of financings are greatly reduced and therefore principals time is freed from reviewing hundreds of pages of unfamiliar documents, thereby allowing parties to focus on high-level issues trade-offs of the deal at hand."

Id. These "form" documents have been codified over many years by looking at the work of transactional, startup lawyers throughout the startup ecosystem).

lawyers' influence on the innovation ecosystem is significant and permanent.[32]

As trusted intermediaries, startup lawyers are in a prime position to eliminate those norms and policies that perpetuate racial inequity within the current venture capital ecosystem. To be clear, an ecosystem or community that relies on policies and practices that produce racial inequity is racist.[33] Under this definition, therefore, venture capital is widely understood to be a racist ecosystem.[34] The venture capital ecosystem thrives on systems and decision-making frameworks that aid investors with analyzing and deciding on hundreds of investment opportunities in a year and thousands over the life of a fund.[35] These systems and procedures rely on investors' "pattern matching" against certain known quantities.[36] Investors look for patterns in the company's financial data, market size, operational efficiencies, and regulatory barriers (among a host of other seemingly objective, metric-driven data points) to make an

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[32] VCs often articulate an expectation that entrepreneurs are selective in their choice for legal representation because a lawyer "is an integral partner who will guide a company through its corporate lifecycle . . . and act as a trusted adviser and connector to investors and other resources." FELD & MENDELSON, *supra* note 22, at 17. Moreover, VCs "highly recommend [finding] a lawyer with whom you have a personal connection [because] you deserve an attorney whom you trust completely and with whom you enjoy working." *Id.* at 18.

[33] IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 19 (2019) (defining a racist as "one who is supporting a racist policy through their actions or inactions or expressing a racist idea.").

[34] Albergotti, *supra* note 16.

[35] JEFFREY BUSSGANG, MASTERING THE VC GAME: A VENTURE CAPITAL INSIDER REVEALS HOW TO GET FROM START-UP TO IPO ON YOUR TERMS 77–78 (2011) (noting that VCs invest in roughly one in every three hundred pitches they receive).

[36] *Id*. at 94 ("[D]ifferent VC firms have different policies when to comes to making the final decision whether or not to invest. Some firms . . . explicitly vote on deals and score them across a number of dimensions (e.g., quality of team, size of market, nature of technology and competition, attractiveness of deal terms.)"); *see* Pantin, *supra* note 7, at 447 ("Even if the business has high-growth potential and high sales, the reality is that investors tend to bring founders into their portfolio that look like themselves, have the same status, and have the same levels of education").

educated guess on the firm's likelihood of success based on how closely the data reflects previously successful companies.[37]

While this seems like an objective decision-making process on the surface, most investors and founders will agree that that investors give significant, if not dispositive, weight to data points that are personal to the founders themselves.[38] This is where the pattern matching technique, as it exists now, produces racial inequity. In analyzing investment worthiness, VCs will give preference to founders who went to the same elite colleges and universities as the investors, had previous entrepreneurial experience, or are networked with other founders and investors who meet the same criteria.[39] Investors will also give preference to founders who obtained a "warm introduction" to the investment team.[40] Here, investors admit that, as a rule, VCs do not take meetings with founders who are not from the investor's insider network.[41] Founders who are not connected to someone within the investors' Ivy League or upper-class network are viewed as

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[37] BUSSGANG, *supra* note 35, at 94*; see also* FELD & MENDELSON, *supra* note 22, at 36 (describing details that VCs analyze at an early stage: "during this phase, a venture capitalist will ask for a lot of things, such as presentations, projections, customer pipeline or targets, development plan, competitive analysis, and team bios.").

[38] *See, e.g.*, Lydia Belanger, *You're More Likely to Get Startup Funding If You Went to One of These Schools*, ENTREPRENEUR (Sept. 9, 2016), https://www.entrepreneur.com/article/282168; Andrew Vasylyk, *Why VCs "Almost Blindly" Invest in Founders with Previous Exits*, MEDIUM (Aug. 28, 2018), https://medium.com/startupsoft/why-vcs-almost-blindly-invest-in-founders-with-previous-exits-23824334a260.

[39] Belanger, *supra* note 38; Vasylyk *supra* note 38.

[40] BUSSGANG, *supra* note 35, at 85. ("Of the nearly fifty companies that we at Flybridge Capital have invested in over the past eight-year history, not one of them came in cold."); *see also* Del Johnson, *Ban Warm Introductions!*, NOTEWORTHY (Aug. 6, 2019), https://blog.usejournal.com/ban-warm-introductions-1e69169d57ba ("Venture Capital funds must abandon their warm introduction requirements not just because they are anti-meritocratic, but because they are damaging to financial returns.").

[41] BUSSGANG, *supra* note 35, at 85; Paul Gompers et al., *How Venture Capitalists Make Decisions*, HARV. BUS. R., https://hbr.org/2021/03/how-venture-capitalists-make-decisions (last visited May 7, 2021) (finding, in a survey conducted by the *Harvard Business Review*, that 30% of deals come from a VC's former colleagues or "work acquaintances" while only 10% came from "cold" emails).

"outsiders" who are unlikely to be successful entrepreneurs based on their inability to break into an insider's network.[42] Nevertheless, research has shown that, for all their prestige and academic pedigree, schools like Stanford, MIT, and Harvard systemically suffer from low racial and socioeconomic diversity.[43] Moreover research has shown that this self-selection methodology actually leads to lower financial returns.[44] Therefore, evaluating founders on the basis of school or school-based connection is, by design, exclusionary and will, by default, result in fewer Black founders having the opportunity to become proven entrepreneurs—a metric that also proves vital in the investment decision-making process.[45] This pattern matching investment technique that dominates venture capital decision-making disproportionately favors Ivy League white men with access to enough personal capital to sustain their livelihoods in high-cost-of-living cities like San Francisco, New York, or Boston.

This decision-making process stands in stark contrast to the startup ecosystem's meritocratic ethos.[46] Moreover, this

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[42] BUSSGANG, *supra* note 35, at 42 ("One of the common factors that ties members of the VC club to each other is that a large number of them emerge from . . . Harvard and Stanford . . . a handful of other Ivy League schools and MIT."); *see also id*. at 86 ("[W]hen an entrepreneur makes a cold approach[, as opposed to a warm introduction by another member of the VC's network,] to a VC, it marks him as an outsider. The guy doesn't know anybody?").

[43] Gregor Aisch et al., *Some Colleges Have More Students from the Top 1 Percent Than the Bottom 60. Find Yours*, N.Y. TIMES (Jan. 18, 2017), https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html; Howard Gold, *The Harsh Truth About Black Enrollment at America's Elite Colleges*, MARKETWATCH (June 25, 2020), https://www.marketwatch.com/story/the-harsh-truth-about-black-enrollment-at-americas-elite-colleges-2020-06-25.

[44] *See* Sarah Lyons-Padilla et al., *Race Influences Professional Investors' Financial Judgments*, 116 PROCEEDINGS NAT'L ACAD. SCI. 17225, 17229 (2019); Johnson, *supra* note 40. Del Johnson, a VC and Columbia law school graduate, argues that warm introductions support an exclusionary startup ecosystem and that the practice of warm introductions is antithetical to a meritocratic system and results in lower returns for investors. Johnson, *supra* note 40.

[45] Vasylyk, *supra* note 38.

[46] Johnson, *supra* note 40; Allyson Kapin, *Tech Aspires to Be a Meritocracy. But It's Only a 'Mirror-tocracy'*, AM. BANKER (Oct. 17, 2017), https://www.americanbanker.com/opinion/tech-aspires-to-be-a-meritocracy-but-its-only-a-mirror-tocracy.

exclusionary pattern matching also disadvantages successful Black entrepreneurs by underwriting investor's individual conscious and unconscious bias that disproportionately influence investment decisions.[47] Ultimately, when a Black founder, without a warm introduction, steps in front of a panel of white VCs, she will likely fail the pattern match and will be at a disadvantage throughout her pitch regardless of her product or strategy.[48] In these scenarios, diverse founders who fail to match the investor's patterns will likely hear "it's just too early for me" instead of a reasoned decision based on inclusive criteria that gives weight to the founder's strengths or the founder's proposal to fix a socioeconomic problem that would develop a market outside of the investor's pattern data.[49] In an industry built on risk-taking and being first in line to profit from picking big winners early, this sudden aversion to risk-taking when it comes to Black entrepreneurs echoes the racist and exclusionary rationales that lenders conjured in refusing to accept VA loans from Black soldiers returning from World War II.[50] To be sure, economic theorists have attributed today's racial wealth gap to these redlining practices and denial of capital.[51] Legal scholars have drawn a direct line from this denial of capital to Black people to the inequity that we see in the innovation economy today.[52] As a result of the venture

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[47] *See* Albergotti, *supra* note 16; Lyons-Padilla et al., *supra* note 44, at 17229.

[48] Johnson, *supra* note 40.

[49] James Norman, *A VC's Guide to Investing in Black Founders*, HARV. BUS. REV. (June 19, 2020), https://hbr.org/2020/06/a-vcs-guide-to-investing-in-black-founders.

[50] RICHARD ROTHSTEIN, THE COLOR OF LAW 70 (2017). After World War II the Veteran's Administration, adopted FHA policies and *Underwriting Manual* where Black home buyers were considered risky debtors undeserving of a mortgage guarantee in many cities. *Id.* The VA also made FHA-type deals with home developers that required mass-developed homes to be all white communities for home buyers to use FHA and VA benefits within those neighborhoods. *Id.*

[51] *Id.* at 185 (attributing disparity between current white household wealth and current Black household wealth to the denial of participation in the home "equity-accumulating boom" of the 1950s and 1960s); Pantin, *supra* note 7, 429–434 (discussing how discriminatory administration of federal legislation such as the G.I. Bill, National Labor Relations Act, and National Housing Act produced in an irreversible racial wealth gap that prevents aspiring entrepreneurs of color from capitalizing venture ideas).

[52] Pantin, *supra* note 7, at 438–441.

capital industry's pattern matching practices, in 2019, out of 9,300 venture capital-backed companies, only 227 had a Black founder.[53]

Business and transactional lawyers are expected to advise their clients on a range of legal, ethical, and business issues.[54] Startup lawyers help founders and investors make deals, mitigate regulatory risks, and establish the norms of the ecosystem.[55] To properly perform these duties, these attorneys measure themselves against a few core competencies.[56] Business lawyers are urged to provide their service in accordance with a set of core skills, values, and behaviors that make them "indispensable to the client."[57] One such value is to strive to promote fairness and justice.[58] Here, the business lawyer is expected to enhance the capacity of professional institutions to do justice.[59] It follows, then, that startup lawyers have a professional responsibility to correct the injustice of inequitable access to capital in the innovation ecosystem, which systematically excludes Black entrepreneurs and produces lower returns to venture capital firms.[60]

One such institution that could support the resolution of this inequity is the law school, where transactional law students form their opinions about future clients, economic injustice, and the transactional lawyer's role in resolving societal injustices and inequities.[61] To better support these students, law school transactional programs should heed the call of the American Bar Association's Commission on the Future of Legal Education and

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[53] Teare, *supra* note 8.

[54] *See generally* ABA Core Competencies, *supra* note 27.

[55] *See generally* Coyle & Green, *supra* note 3; ABA Core Competencies, *supra* note 27.

[56] *See generally* ABA Core Competencies, *supra* note 27.

[57] *Id*. at 148.

[58] *Id*. at 141–42.

[59] *Id*.

[60] Lyons-Padilla et al., *supra* note 44, at 17229.

[61] *See* Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice,* 4 CLINICAL L. REV. 195, 214–15 (1997) (detailing story of a second-year law student in the George Washington University Small Business Clinic who, based on clients the student served, "was challenged with his biases and assumptions about who can and should be a small business owner.") As this story demonstrates, such experiences can have a dramatic impact on changing a law student's frameworks and biases.

"design educational experiences focused on contemporary and anticipated needs."[62] Law schools must acknowledge that all legal problems exist in a broader context and future lawyers must develop multi-disciplinary communication skills to overcome both routine and structural barriers to justice and equity.[63] Given the clear evidence of racial inequity and disparity within the current startup ecosystem, law schools must include critical race theory as part of their curriculum for training young transactional lawyers.

It seems clear that a startup lawyer relying solely on formal education on contracts, property, business associations, intellectual property, and the promising "startup law" is less effective in resolving the friction points of tomorrow's innovation ecosystem. Including critical race theory in the transactional curriculum exposes business-minded law students to a broader scope of discussion, a broader range of voices, and teaches students to recognize the "explicit assumption that racism is still deeply rooted in our society."[64] Arising out of the 1960s civil rights movement, critical race theory recognizes that subjectivity and racist legacies within our institutions constrains the ability of these institutions to deliver racial equity.[65] Over time, techniques and methodologies to analyze institutional bias have emerged, and central to critical race theory, is an emphasis on interdisciplinary study "to challenge and expand the sense of what counts as specifically legal discourse, as well as the need to create and promote new modes of discourse."[66]

This malleability of critical race theory can provide examples for transactional law students to consider and potentially apply to add value to their client engagements as a member of a clinic or private bar. For example, Professor Victor Quintanilla conducted an empirical study of dismissal rates of civil rights claims following *Ashcroft v. Iqbal*[67] because "implicit bias may operate where courts make highly subjective decisions based on malleable criteria."[68] The

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[62] AM. BAR. ASS'N. COMM'N, ON THE FUTURE OF LEGAL ED., PRINCIPLES OF LEGAL EDUCATION AND LICENSURE IN THE 21ST CENTURY 7 (2020).

[63] *Id*. at 6.

[64] Zalesne, *supra* note 1, at 28.

[65] *Id*. at 28–29; *see also* Pantin, *supra* note 7, at 438–41.

[66] *See* Zalesne, *supra* note 1, at 29.

[67] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[68] Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187, 195 (2013).

objective of the study was to understand how federal district courts have adjudicated Black plaintiff's claims of race-based employment discrimination at the pleading stage before and after "plausibility pleading" became law.[69] While the content of a judge's decision on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss involves a different input than an investor receiving a pitch, the observable metric—the occurrence of bias in an inherently subjective decision—is the same.

A transactional law student who is exposed to Professor Quintanilla's empirical analysis of bias in subjective decision-making is able to identify the flaws inherent in a "color blind" decision-making process that, because of implicit biases, results in racially disparate outcomes. A transactional lawyer, armed with a critical race theory lens, can then add value to an investor's firm by explaining what procedures and processes must be in place to even track this type of data. For example, transactional counsel may suggest that their clients draft the investment decision memos for each company they review that include the basis for the decision to invest or not invest and the pitching companies' demographic data. Transactional counsel could then regularly review these memos with their clients to determine whether implicit bias is factoring into the client's decision-making processes. Such an exercise will also support the development of the transactional lawyer's business acumen, in so far as she produces a framework and program that allows equitable decision-making to become a regularly tracked metric. The same metrics-driven framework could also be applied to later stages of the investor-founder relationship to track implicit bias throughout the life of the investment. Likewise, transactional attorneys exposed to Professor Zalesne's evidence of racial bias in contract and the assumptions made about Black plaintiffs by jurists in contract disputes are better informed to help an investor at a firm

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[69] Under *Ashcroft v. Iqbal* allegations in a plaintiff's complaint must allege sufficient facts for a judge to conclude that, if taken as true, the wrongdoing is plausible. *Iqbal*, 556 U.S at 678. In anti-discrimination context, this means the plaintiff's allegations must plausibly support the conclusion that the defendant acted with anti-discriminatory intent. Quintanilla argues that *Iqbal's* requirement that judges rely on "judicial experience and commonsense," creates subjective and malleable criteria and "judges, like all other people, use heuristics and . . . systematic biases when making social judgments." Quintanilla, *supra* note 68, at 195.

that wants to hold themselves accountable to pricing startups fairly and negotiating equitably by reducing power and information imbalances that disproportionately impact founders and entrepreneurs of color.[70]

Transactional programs and professors geographically situated in established or growing tech hubs that fail to include critical race theory in their curriculum are either out of touch with the market or believe that the benefits of the status quo outweigh the costs. As tech ecosystems sprout up across the country in places like Atlanta,[71] Detroit,[72] Cincinnati,[73] and Miami,[74] VCs will begin to spend more money in these communities and will have to decide how they can add value and include entrepreneurs from these majority-minority communities. While it makes economic sense for local governments to recruit these VCs and startups to their municipalities, a sudden influx of capital, startups, and out-of-state talent will challenge these governments to retain newcomers while ensuring that the entire community benefits from the bargains these officials make with tech and venture capital leaders.[75] If, as newcomers to these communities, venture capital firms or other startup ecosystem

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[70] Zalesne, *supra* note 1, at 30. Zalesne's scholarship also supports a transparent documentation approach to improving data collection and analysis on issues of bias. *See id.* In that article, she states that the invisibility of Black Americans in mainstream commercial contracts is underpinned by the tendency for judges to omit from their opinions identifying specific characteristics of the parties involved in the contractual dispute. *Id.*

[71] Mary Ann Azevedo, *From the Shadows of the Fortune 500, Atlanta Emerges as a Tech Hub,* CRUNCHBASE NEWS (Oct. 2, 2019), https://news.crunchbase.com/news/from-the-shadows-of-the-fortune-500-atlanta-emerges-as-a-tech-hub/.

[72] Matt Burns, *5 VCs on the Future of Michigan's Startup Ecosystem,* TECHCRUNCH (Aug. 6, 2020), https://techcrunch.com/2020/08/06/7-vcs-on-the-future-of-michigans-startup-ecosystem/.

[73] Dana Givens, *This Cincinnati-Based Venture Capital Fund Wants to Invest $50M on Midwest BIPOC Businesses,* BLACK ENTER. (July 8, 2020), https://www.blackenterprise.com/this-cincinnati-based-venture-capital-fund-wants-to-invest-50m-on-midwest-bipoc-businesses/.

[74] Sophia Kunthara, *Why Miami is the Next Hot Tech Hub: 'This is not a Retirement Decision'*, CRUNCHBASE NEWS (Jan. 5, 2021), https://news.crunchbase.com/news/why-miami-is-the-next-hot-tech-hub/.

[75] *See, e.g.*, Leigh-Ann Buchanan, *We Are Not 'Silicon' Anything. We are #Miamitech — of, By and for This Community*, MIA.MI HERALD (Jan. 1, 2021), https://www.miamiherald.com/opinion/op-ed/article248220415.html.

leaders want to build racially equitable ecosystems, they will seek out startup lawyers who are comfortable analyzing and dissecting formal and informal policies and practices to determine their impact on racial inequity.

In the very near future transactional lawyering opportunities in upstart tech ecosystems like Miami and Atlanta will likely increase. Law schools that include professors who teach students how to critique racially inequitable institutions in transactional programs will provide their students with a competitive advantage in the innovation ecosystem of tomorrow. Good transactional counsel has sufficient legal and social acumen to prevent conflict and ease friction between parties.[76] Given the history of exclusionary practices in innovation ecosystems, the sudden influx of relationships between white investors and Black and Brown founders will give rise to additional friction as parties learn how to build successful businesses together. For example, if an investor has made good on the promise to invest in Black founders, the decision to advise a Black-led company to pivot the company's product or change a strategy should be handled with full knowledge of the interests at stake. A founder could resist such a pivot on grounds that the technology in the wrong hands could have a disproportionate impact on communities of color. An investor, on the other hand, with an obligation to limited partners, may argue that the best interest of the company is to widen the customer base for the technology. A lawyer without some understanding of how this dispute fits in the larger context of racial bias and institutionalized racism is ill-suited to resolve the conflict, thereby increasing transactional and litigation costs for both the company and the investment firm, souring the reputations of everyone involved, with the startup founder likely left with little to no recourse for any perceived discrimination. Lawyers who understand and can accurately diagnose bias in an investment firm's relationships with portfolio companies can intervene before an investor's advice turns into an allegation or a formal complaint. Those lawyers will be in high demand for both parties to a term sheet.

Our law schools are responsible for shaping the social engineers of tomorrow. The rise of transactional law clinics demonstrates that

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[76] ABA Core Competencies, *supra* note 27, at 134–35.

transactional attorneys are not an exception to this rule. The inability for Black communities to build, preserve, and bequeath wealth is directly linked to the historically exclusionary practices carried about by governmental, quasi-governmental, and market leading institutions.[77] The status quo practices of the venture capital industry are no different from these other institutions. Therefore, to break the back of economic racial inequity, startup lawyers must also show up with the tools needed to identify, articulate, and resolve obvious and non-obvious policies and practices that produce racial inequity systematically. To prepare these lawyers, law schools—especially those within emerging technology ecosystems—must make critical race theory a mandatory component of any organized transactional law curriculum or program.

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[77] *See* ROTHSTEIN, *supra* note 50, at 70.

A Human Rights Framework to Address Racial Inequalities Undermining Health in the U.S.

NICOLLETTE LEVI*

"I've never experienced anything in my life where my social media timeline looks like an obituary," said Tara Liberty Smith from Detroit, Michigan, in April 2020. "You cannot scroll [through social media] . . . [without] knowing someone who has been attacked by the virus or who has experienced death from the virus."[1] Smith's account, although horrific, is not unique; people across the United States, especially those of people living in Black communities, have been living through similar experiences. Michigan recorded nearly 5,500 deaths by the end of May 2020.[2] Metrics reflect that Detroit, where nearly 80% of the population is Black,[3] suffered the highest impact.[4]

As of August 18, 2020, COVID-19 deaths among Black, non-Hispanic persons are 2.8 times higher than white, non-Hispanic

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[1] Gus Burns, *Michigan's Black Communities Devastated by the Coronavirus,* GOV'T TECH. (Apr. 29, 2020), https://www.govtech.com/em/safety/Michigans-Black-Communities-Devastated-by-the-Coronavirus.html.

[2] Craig Mauger, *New Michigan COVID-19 Deaths in May Less Than Half April Total*, DETROIT NEWS (May 31, 2020), https://www.detroitnews.com/story/news/local/michigan/2020/05/31/new-michigan-covid-19-deaths-may-less-than-half-april-total/5300588002/.

[3] *Quick Facts: Detroit City, Michigan; United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/detroitcitymichigan,US/PST045219 (last visited May 7, 2021).

[4] Mauger, *supra* note 2.

persons.[5] The data is clear: the pandemic kills more Black Americans than white Americans. However, this disproportionate effect on Black Americans is not because of the virus; rather, the disparity in deaths is due to the systemic inequality in the U.S.'s healthcare system. This includes both inequalities in health services, as well as inequalities in the underlying determinants of health, such as access to adequate housing, food, and decent work conditions. International human rights law provides a powerful normative framework for addressing the current severe racial impacts of the COVID-19 pandemic in the U.S. This framework requires the U.S. to ensure a right to health that includes both providing access to health services and addressing the underlying determinants of health. Additionally, such a framework requires the U.S. to adopt a more robust right to equality that challenges disproportionate impacts based on race.

This paper relies on several core international human rights instruments, which provide both a legal and normative framework for protecting human rights: the Universal Declaration of Human Rights (the "UDHR");[6] International Covenant on Civil and Political Rights (the "ICCPR");[7] International Covenant on Economic, Social and Cultural Rights (the "ICESCR");[8] and International Convention on the Elimination of All Forms of Racial Discrimination (the "ICERD").[9] While the U.S. has a complicated relationship with international human rights law, the U.S. has played an important role in international human rights law's development. The

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[5] *COVID-19 Hospitalization and Death by Race/Ethnicity*, CTR. FOR DISEASE CONTROL, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html (last updated Nov. 30, 2020).

[6] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

[7] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (ratified by the U.S. June 8, 1992).

[8] International Covenant Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (signed Oct. 5, 1977).

[9] International Covenant on the Elimination of All Forms of Racial Discrimination, *opened for signature* March 7, 1966, 660 U.N.T.S. 211 [hereinafter ICERD] (ratified by U.S. Oct. 21, 1994).

UDHR is the foundational document of the U.N. human rights system, and the U.S. chaired the commission that drafted it under First Lady Eleanor Roosevelt's leadership.[10] Although the UDHR is a declaration rather than a legally binding treaty, it has as important normative authority and at least parts of it have, arguably, attained the status of international customary law.[11] In fact, courts in the U.S. have discussed the UDHR more frequently than in any other country.[12] The U.S. ratified the ICCPR on June 8, 1992, and the ICERD on October 21, 1994, and is bound by their provisions. However, the U.S. has declared these treaties "not self-executing," meaning that, unless Congress passes implementing legislation, those treaties alone cannot serve as a cause of action in domestic courts.[13] Nevertheless, these treaties are binding[14] and can be used in court as an interpretive aid or in advocacy with other branches of government. In addition, the U.S. has not yet ratified, but signed, the ICESCR on October 5, 1977. While the U.S. is not legally bound by provisions in this treaty and need not take positive steps to realize them, in signing, the U.S. has indicated its "consent to be bound" and, therefore, carries the obligation per the terms of the ICESCR to "avoid actions which could render impossible the entry into force and implementation [the agreement], or defeat its

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[10] *The Foundation of International Human Rights Law,* UNITED NATIONS, https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html (last visited May 7, 2021); *see Women Who Shaped The Universal Declaration*, UNITED NATIONS, https://www.un.org/sites/un2.un.org/files/women_who_shaped_the_udhr.pdf (last visited May 7, 2021).

[11] George J. Andreopoulos, *Universal Declaration of Human Rights,* ENCY. BRITANNICA, https://www.britannica.com/topic/Universal-Declaration-of-Human-Rights (last updated Jan. 2, 2020).

[12] Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 304 (1998).

[13] Robin H. Gise, *Rethinking McClesky v. Kemp: How U.S. Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination Provides a Remedy for Claims of Racial Disparity in Death Penalty Cases*, FORDHAM INT'L. L.J. 2270, 2272 (1998).

[14] Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994).

basic purpose and value to the other party or parties."[15] In any case, these international instruments provide important normative standards that can be used to determine whether a government is adequately promoting the general welfare.

International human rights instruments provide a powerful framework for addressing the current severe racial impacts of the COVID-19 pandemic within the U.S. International law recognizes that a government's failure to protect the health and lives of its residents is a human rights violation. Article 12(1) of the ICESCR sets out "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[16] This elaborates on article 25(1) of the UDHR, which recognizes that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."[17] The Committee on Cultural, Economic, and Social Rights (the "CESCR"), which monitors compliance with the ICESCR, defines the

> right to health . . . as an inclusive right extending not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition, and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.[18]

Furthermore, article 6(1) of the ICCPR recognizes a right to life.[19] This elaborates on article 3 of the UDHR, which recognizes

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[15] RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 cmt. d (AM. L. INST. 2017).

[16] ICESCR, *supra* note 9, at 8.

[17] UDHR, *supra* note 6, at 5.

[18] Comm. on Cultural, Econ. And Soc. Rts., Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 14 (2000), ¶ 11, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter CESCR GC 14].

[19] Hum. Rts. Comm., Article 6: Right to Life, ¶ 26, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) [hereinafter HRC GC 36].

that "everyone has the right to life, liberty, and security of the person."[20] The Human Rights Committee, which monitors compliance with the ICCPR, defines the right to life expansively as the right to a life with dignity.[21] Therefore, "the right to life include[s], where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as . . . health care . . . and effective emergency health services . . . ."[22]

The COVID-19 pandemic exposes the U.S.'s failure to equally protect the rights to health and life of all people by its disproportionate impact on people of color, specifically Black Americans. A study that looked at "county-level health outcomes, comparing counties with disproportionately Black populations to all other counties" concluded that, "while disproportionately Black counties account for only 30% of the U.S. population, they were the location of 56% of COVID-19 deaths."[23] Additionally, the Centers for Disease Control and Prevention (the "CDC") has reported that, "Racial and ethnic minority groups have disproportionately higher hospitalization rates among every age group, including children aged younger than 18 years."[24] Additionally, the CDC notes that

> "Non-Hispanic American Indian or Alaska Native persons have an age-adjusted hospitalization rate approximately 5.5 times that of non-Hispanic White persons, non-Hispanic Black persons have a rate approximately 4.5 times that of non-Hispanic White persons, while Hispanic or Latino persons have a

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[20] UDHR, *supra* note 6, at art. 3.

[21] HRC GC 36, *supra* note 19, at ¶ 26.

[22] *Id*.

[23] Maria Godoy & Daniel Wood, *What Do Coronavirus Disparities Look Like State by State*, NPR (May 30, 2020 6:00 A.M.), https://www.npr.org/sections/health-shots/2020/05/30/865413079/what-do-coronavirus-racial-disparities-look-like-state-by-state.

[24] *COVID-19 Racial and Ethnic Health Disparities,* CTR. DISEASE CONTROL (Dec. 10, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/disparities-hospitalization.html.

> rate approximately 4 times that of non-Hispanic White persons."[25]

The impact of COVID-19, thus, differs sharply by race and ethnicity.

The disproportionate impact of COVID-19 based on race, further, stems from the U.S.'s violation of the right to equality and non-discrimination, which is a right that is foundational to all human rights, including health, and espoused in every human rights instrument. The first article of the UDHR sets out that "All human beings are born free and equal in dignity and rights."[26] Article 2 follows by recognizing freedom from discrimination with regards to all rights in the UDHR, including the right to health, on the basis of "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[27] Both the ICCPR and ICESCR echo this with regards to the rights set out in these treaties,[28] and the ICCPR sets out a stand-alone right to non-discrimination and equality.[29] Furthermore, the ICERD links the

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[25] *COVIDView Summary ending on June 13, 2020*, CTR. DISEASE CONTROL (June 19, 2020) [hereinafter COVIDView], https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/past-reports/06192020.html.

[26] UDHR, *supra* note 6, at art.1

[27] *Id.* at art. 2.

[28] ICCPR*, supra* note 7, at art. 2; ICESCR*, supra* note 9, at art. 3. ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."). In pertinent part, the ICCPR reads as follows:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR, *supra* note 8, at art. 2.

[29] ICCPR*, supra* note 7, at art. 26. Article 26 of the ICCPR states that

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language,

rights to health and equality by requiring State parties "to eliminate racial discrimination in all its forms and to guarantee the right of everyone . . . to equality before the law, notably in the enjoyment of . . . the right to public health [and] medical care."[30] While domestic law in the U.S. only focuses on rectifying intentional discrimination,[31] international human rights law has a much broader approach to equality, calling for substantive equality and addressing disparate impacts.[32] The failure in the U.S. to eliminate racial discrimination in health services and the underlying determinants of health is highlighted by the disproportionate infection rates among the Black American community.[33]

Inequalities in health services include inferior and biased care, as well as disparate access to health care services. Inferior and biased care is a direct violation of the right to health, which requires that health facilities and goods be scientifically and medically appropriate and of good quality.[34] In 2005, a National Academy of Medicine (the "NAM") study concluded that "racial and ethnic minorities receive lower-quality health care than white people—even when insurance status, income, age, and severity of conditions are comparable."[35] In addition, the study showed that minori-

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> religion, political or other opinion, national or social origin, property, birth or other status.

Id.

[30] ICERD, *supra* note 9, at art. 5(e)(iv).

[31] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp, 429 U.S. 252, 269–271 (1977); Jennifer M. Hesch, Village of Arlington Heights v. Metropolitan Housing Development Corp., BRITANNICA ONLINE ENCYC., https://www.britannica.com/topic/Village-of-Arlington-Heights-v-Metropolitan-Housing-Development-Corp (last visited May 7, 2021). (noting that United States Supreme Court held that racial discriminatory intent or purpose must be the motivating factor of a government action for there to be a violation of Fourteenth's Amendment's equal protection clause).

[32] Hum. Rts. Comm., General Comment 18: Non-discrimination (Thirty-seventh session, 1989), U.N. Doc. HRI/GEN/1/Rev. 1, at 26 (July 29, 1994).

[33] Godoy & Wood, *supra* note 23; *see* COVIDView, *supra* note 25.

[34] CESCR GC 14, *supra* note 18, at ¶ 12(d).

[35] Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, AM. BAR ASS'N, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/racial-disparities-in-health-care/ (last visited May 7, 2021).

ties in the U.S. are less likely than white Americans to receive appropriate cardiac care, kidney dialysis or transplants and that minorities are less likely than white Americans to be given the best treatments for cancer, stroke, or AIDS.[36] The NAM study also showed that Black Americans were less likely to be given coronary bypass operations and angiography, and are discharged earlier than white Americans after surgery—"at a stage when discharge is inappropriate."[37] The NAM study has been corroborated in recent years with new studies that show that "providers are less likely to deliver effective treatments to people of color when compared to their white counterparts—even after controlling for characteristics like class, health behaviors, comorbidities, and access to health insurance and health care services."[38] For instance, one study of 400 hospitals in the U.S. found that Black Americans with heart disease were given "older, cheaper, and more conservative treatments" than white Americans.[39]

Additionally, the disproportionate effect of the coronavirus on the Black American community exemplifies the physical and economic inaccessibility of health care services. The right to health requires that "[h]ealth facilities, goods and services must be accessible to everyone without discrimination, within the jurisdiction of the State party."[40] A 2014 National Institutes of Health study found that hospitals in predominantly Black American neighborhoods are more likely to close down than those in predominantly white neighborhoods.[41] However, the right to health requires that "health facilities, goods and services be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities."[42] Therefore, the lack of physical

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] CESCR GC 14, *supra* note 18, at ¶ 12(b)(ii).

[41] Eugene Scott, *4 Reasons Coronavirus is Hitting Black Communities So Hard*, WASH. POST (Apr. 10, 2020, 3:10 PM), https://www.washingtonpost.com/politics/2020/04/10/4-reasons-coronavirus-is-hitting-black-communities-so-hard/.

[42] CESCR GC 14*, supra* note 18, at ¶ 12(b)(iii).

accessibility to hospitals in predominantly Black American communities is a violation of the right to health.

The high expense of health care in the U.S. and lack of a public option further serve to bar access for Black and Hispanic Americans. The right to health requires States to ensure that "payment for health-care services, as well services related to the underlying determinants of health" are "based on the principles of equity," meaning that "socially disadvantaged groups" and "poorer households should not be disproportionately burdened with health expenses as compared to richer households."[43] The U.S. is one of the only industrialized countries in the world that does not have a universal healthcare system, requiring Americans to either have private health insurance or directly pay for health care.[44] Instead of a healthcare system, the U.S. is more accurately described as having a health insurance system, in which most Americans get health insurance through their employers.[45] However, Black and Hispanic Americans are overrepresented in low-income jobs that lack benefits like health insurance.[46] These low-income jobs include agricultural, domestic, and service vocations.[47] The devaluation of these low-income jobs are the results of intentional government policy and is the legacy of slavery, Jim Crow, and the New Deal.[48] As a result, only 55% of Black Americans have private health insurance compared to 75% of white Americans, according to the U.S. De-

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[43] *Id.*

[44] Timothy Callaghan, *3 Reasons the U.S. Doesn't Have Universal Health Coverage*, U.S. NEWS (Oct. 26, 2016, 12:22 P.M.), https://www.usnews.com/news/national-news/articles/2016-10-26/3-reasons-the-us-doesnt-have-universal-health-coverage.

[45] *How Do Most Americans Get Their Health Insurance?*, USA Facts (Mar. 23, 2020, 4:41 PM), https://usafacts.org/articles/how-most-americans-get-their-health-insurance-medicare-employers/.

[46] Courtney Connley, *Racial Health Disparities Already Existed in America—The Coronavirus Just Exacerbated Them*, CNBC (June 3, 2020, 10:29 AM), www.cnbc.com/2020/05/14/how-covid-19-exacerbated-americas-racial-health-disparities.html.

[47] Danyelle Solomon, Connor Maxwell & Abril Castro, *Systematic Inequality and Economic Opportunity*, CTR. AM. PROGRESS (Aug. 7, 2019, 7:00 AM), https://www.americanprogress.org/issues/race/reports/2019/08/07/472910/systematic-inequality-economic-opportunity/.

[48] *Id*.

partment of Health and Human Services.[49] This is a violation of the right to access health care, requiring "health facilities, goods and services [to] be affordable for all."[50]

Black and Hispanic American workers disproportionately earn lower wages than white American workers, violating both their right to work in decent conditions and to an adequate standard of living. The U.S. violations of these rights further impede on the rights of Black and Hispanic American workers to health and a life with dignity. A 2019 report by the Brookings Institution highlights the disparity in income faced by many Black and Hispanic workers: "63% of Latino or Hispanic workers and 54% of Black workers earn low wages, compared to 40% of Asian American workers and 37% of white workers," and even in these low-income jobs, Black and Hispanic employees "earn less than white workers with the same education level and experience."[51] This is a violation of the right to equal pay for equal work, outlined in article 5(e)(i) of the ICERD, which requires States Parties to prohibit and eliminate racial discrimination in all its forms.[52]

The 2019 Brookings report, further, categorized "low wages," as "jobs that pay a median salary of $10.22 per hour or $17,950 per year."[53] Paying such low wages to workers is a violation of the right to work. Article 23(3) of the UDHR sets out the right to work as the "right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection."[54] Article 7(a)(ii) of the ICESCR sets out the "right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular: remuneration which provides all workers, as a minimum with . . . a decent living for themselves and their families."[55]

Moreover, a salary that is insufficient to enable access to health care violates the right to an adequate standard of living, outlined in

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49 Connley, *supra* note 46.
50 CESCR GC 14, *supra* note 18, at ¶ 12(b)(iii).
51 Connley, *supra* note 46.
52 ICERD, *supra* note 9, at art. 5(e)(i).
53 Connley, *supra* note 46.
54 UDHR, *supra* note 6, at art. 23(3).
55 ICESCR, *supra* note 9, at art. 7(a)(ii).

article 11(1) of the ICESCR and article 25(1) of the UDHR. Article 11(1) of the ICESCR states that everyone has the "right to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."[56] This elaborates on article 25(1) of the UDHR, which states that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care . . . ."[57] Allowing employers to remunerate workers with low wages that makes access to basic health services an impossibility and further violates the right to a life with dignity. As the Human Rights Committee General Comment no. 36 explains:

> The duty to protect life also implies that States parties should take appropriate measures to address general conditions in society that may . . . prevent individuals from enjoying their right to life with dignity . . . . The measures called for to address adequate conditions for protecting the right to life include . . . measures designed to ensure access . . . to health care. [58]

In addition to the stark inequalities in quality and access to health care based on race, inequalities in the underlying determinants of health have also resulted in the racially skewed impact of COVID-19. Specifically, this consists of housing discrimination, poor access to healthy foods, and dangerous work conditions for many Black Americans. Housing conditions are an influential factor in determining the likelihood of contracting the coronavirus. The CDC has stated that

> Crowded living conditions and unstable housing contribute to transmission of infectious diseases and can hinder COVID-19 prevention strategies like hygiene measures, self-isolation, or self-quarantine . . . . Among people with COVID-19,

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[56] *Id.* at art. 11(1).
[57] UDHR, *supra* note 6, at art. 25(1).
[58] HRC GC 36, *supra* note 19, at ¶ 26.

> people in racial and ethnic minority groups were more likely to live in areas with higher population density and more housing units or inadequate housing (such as lack of indoor plumbing).[59]

Adequate housing is both an underlying determinant of health and a component of the right to an adequate standard of living.[60] Furthermore, a component of the right to adequate housing is habitability, which includes "providing the inhabitants with adequate space and protecting them from . . . threats to health," further linking the right to adequate housing to the right to health.[61]

Furthermore, housing discrimination and redlining, "the systemic practice of refusing government resources to predominantly black neighborhoods because they've been deemed a financial risk," has resulted in many Black Americans living in what is known as "food deserts," with implications for health, as well as the right to food.[62] Food deserts are neighborhoods that lack access

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[59] *COVID-19 Racial and Ethnic Health Disparities*, CTR. FOR DISEASE CONTROL, https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/increased-risk-exposure.html (last updated Dec. 10, 2020).

[60] CESCR GC 14, *supra* note 18, at ¶ 11. ("The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health."); UDHR, *supra* note 6, at art. 25(1) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."); ICESCR, *supra* note 9, at art. 11(1). ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.").

[61] Comm. on Cultural, Econ. and Soc. Rts., General Comment No. 4: The Right to Adequate Housing (Art. 11), ¶ 8(d), U.N. Doc. E/1992/23 (Dec. 13, 1991).

[62] Connley, *supra* note 46.

to affordable and good-quality, healthy options.[63] Clinical pharmacist Jessica Caporuscio noted that "this may be due to having a limited income or living far away from sources of healthful and affordable food."[64] Access to adequate food is both an underlying determinant of health, as well as a component of an adequate standard of living.[65] However, for many Black Americans living in food deserts, the food decisions they make are the result of a survival mindset in which they do not have the luxury of considering the long term effect of their diet.[66] Black Americans living in food deserts "tend to rely on high calorie foods that are cheaper and more accessible," and result in chronic diseases that raise the risk of death from COVID-19.[67] This has also resulted in a disproportionate number of Black Americans with underlying health prob-

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[63] *Id.*

[64] Jessica Caporuscio, *What Are Food Deserts, and How Do They Impact Health?,* MED. NEWS TODAY (June 22, 2020), https://www.medicalnewstoday.com/articles/what-are-food-deserts.

[65] CESCR GC 14, *supra* note 18, at ¶ 11. ("The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health."); UDHR, *supra* note 6, at art. 25(1). ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."); ICESCR, *supra* note 9, at art. 11(1). ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."). Comm. on. Cultural, Econ. & Soc. Rts., Article 11: the Right to Adequate Food, ¶ 6, U.N. Doc. E/C.12/1999/5 (May 12, 1999) ("The right to adequate food is realized when every man, woman, and child, alone or in a community with others, have physical and economic access at all times to adequate food or means for procurement.") ; *id* at ¶ 8 ("The availability of food in quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture.").

[66] Connley, *supra* note 46.

[67] *Id*.

lems, such as heart disease, diabetes, and hypertension, which raise the risk of death from COVID-19.[68]

The COVID-19 pandemic serves as a fatal awakening that the U.S. must change the way it views human rights, specifically the right to health. Currently, the U.S. is disinclined to acknowledge positive rights as legitimate, including health care.[69] While negative rights "prevent the state from violating individual autonomy," positive rights "impose a duty on the state to provide certain goods and services."[70] If the U.S. can work towards actively realizing "the highest attainable standard of physical and mental health" as a right to which all Americans are entitled, this would be a big step towards ensuring the health and well-being of all Americans.[71] Only by adopting the ICESCR can the U.S. truly claim to be a leader in promoting human rights and a country that guarantees basic rights for all. Furthermore, the U.S. must adopt a more robust right to equality that seeks to address disproportionate impacts based on race. The first step is to acknowledge that the playing field is systematically unequal for racial minorities.

The COVID-19 pandemic has exposed severe structural inequalities in the U.S., which disproportionately impact racial and ethnic minorities. The U.S. has failed to ensure the rights to equality and health with regard to both health care quality and access, as well as with regard to the underlying determinants of health, including access to adequate housing and food and to decent working conditions. Moreover, with the COVID-19 pandemic leading to premature deaths, these breaches have had fatal consequences, further violating the right to life.

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[68] *Id*.

[69] Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 4 (2004).

[70] *Id*.

[71] ICESCR, *supra* note 9, at art. 12(1).