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Dying for Equal Protection

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Articles

Dying for Equal Protection

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When health policy experts noticed that health outcomes for African Americans were consistently worse than those of their White counterparts, many in the health care community assumed that the poor outcomes could be blamed on poverty and lifestyle choices. Subsequent research told a different story. Studies repeatedly showed that neither money, nor marriage, nor educational achievement protect African American men, women, or children from poor health. Instead, the disparities were more likely explained by racism. Specifically, multiple studies have shown that experiencing racism has been linked to increased infant and maternal mortality rates, elevated stress levels, and an increased risk of numerous diseases, including cardiovascular disease, high blood pressure, and breast cancer.

Mounting evidence makes it clear that health disparities cannot be eliminated simply by changes in diet or socioeconomic status; it requires eliminating racism and building a more just society. A just society starts with a just government, but racially-biased government policies and practices have existed since the founding of our country and have had—and continue to have—a direct and devastating impact on the health of African American individuals and communities. This Article traces the racially discriminatory laws and policies enacted or tolerated by state and federal governments in America from colonial times to the present—including slavery, Black Codes, convict leasing, lynching, segregation, and discriminatory policing—and links that racism to poorer health outcomes for African Americans. It concludes by discussing the need for criminal justice and social reforms to explicitly consider their impact on the health of the African American community.

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INTRODUCTION

When health policy experts noticed that health outcomes for African Americans were consistently worse than those of their White counterparts, many in the health care community assumed that the poor outcomes could be blamed on poverty and lifestyle choices.[1] Early efforts to eliminate the disparities focused on education, building stable two-parent families, and economic success, but the disparities persisted. Subsequent studies repeatedly showed that neither money, nor marriage, nor educational achievement protect African American men, women, or children from poor health.[2] In fact, a high income and educational attainment sometimes *increased* their health risks.[3]

Instead, researchers found that the disparities were more likely explained in significant part by racism.[4] Specifically, multiple studies have shown that being the victim of racial discrimination and witnessing others of the same race who are targets of racism negatively impacts the health of racial minorities, especially African Americans.[5] Experiencing racism has been linked to increased infant and maternal mortality rates,[6] elevated stress levels, and an increased risk of numerous diseases, including cardiovascular disease, high blood pressure, and breast cancer.[7] This evidence makes it clear that health disparities cannot be eliminated simply by changes in habits or socioeconomic status; it requires eliminating racism and building a more just society. But eliminating (or even reducing) racism and racism-related stress requires an understanding of how racism has been fostered and perpetuated in our society.

Racism is not harbored and spread solely by individuals. Racially-biased government policies and practices have existed since the founding of our country and have had—and continue to have—a direct and devastating impact on the health of African American individuals and communities. Beginning in colonial times, state and federal governments supported slavery. The physical and emotional trauma associated with being treated as chattel, and the lack of access to healthcare (unless it benefitted the slave owner) marked the beginning of racial health disparities in America.[8] Even after the Civil War and ratification of

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1. *See, e.g.*, DAYNA BOWEN MATTHEW, JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTH CARE 1 (2015) ("[I]t is popular to blame the poor for their poor health by pointing to risky health behaviors."); *see also infra* Subpart I.B.

2. MATTHEW, *supra* note 1, at 1 ("[R]acial and ethnic differences in health treatment and outcomes persist in multiple studies even after controlling for differences in insurance status, income, education, geography, and socioeconomic status.") (footnote omitted).

3. *See* IMARI Z. SMITH ET AL., FIGHTING AT BIRTH: ERADICATING THE BLACK-WHITE INFANT MORTALITY GAP 4 (2018) (noting that the infant mortality rate is *highest* among African American women with doctorate or professional degrees).

4. *See infra* Subpart I.C.

5. *See, e.g.*, SMITH ET AL., *supra* note 3, at 4, 6.

6. *See* David R. Williams & Selina A. Mohammed, *Discrimination and Racial Disparities in Health: Evidence and Needed Research*, 32 J. BEHAV. MED. 20, 20–21 (2009); *see also infra* Subpart I.B.

7. Williams & Mohammed, *supra* note 6, at 27–38; *see infra* Subpart I.B.

8. MATTHEW, *supra* note 1, at 10 (describing how conditions of slavery and discrimination impacted the health of slaves).

the Fourteenth Amendment, the federal government continued to tolerate racist policies targeting African Americans.

Laws such as Black Codes limited economic opportunities for African Americans and ensured continuing poverty and lack of access to quality care.[9]

And although the Fourteenth Amendment requires equal protection of the laws, for many decades Congress and the states failed to pass or enforce laws that would have provided protection against racially-motivated violence, including the thousands of lynchings that took place after the end of the Civil War and into the first half of the twentieth century.[10] Lynchings not only cut short the lives of so many African Americans, they also served to terrorize entire communities with the knowledge that African Americans could be tortured and killed with impunity.[11] The stress of living in constant fear took a physical and psychological toll on the health of those who lived in the aftermath of each murder.[12]

Unfair trials in front of biased or racist all-White judges and juries meant that the vast majority of lynchings by White perpetrators went unpunished.[13] Meanwhile, African Americans were routinely convicted of crimes based on little or no evidence.[14] Convict leasing programs allowed White landowners to skirt the Thirteenth Amendment's prohibition on slavery and secure cheap labor by returning convicted African Americans to involuntary servitude in conditions that were sometimes worse than slavery.[15] Convicts could literally be worked to death since there was no incentive to keep them alive, much less healthy.[16]

While progress was made in the Civil Rights Era, racially-biased government policies and practices have continued. Today, there is over-policing in communities of color, which has led to incarceration of record numbers of African American men and placed tremendous strain on their families.[17] Even

9. *Id.* at 9–10 (noting that "Black Codes" limited opportunities for newly freed slaves and ensured available cheap labor for southern plantation owners who could no longer rely on slave labor). *See infra* Subpart III.B.

10. EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 4 (3d ed. 2017), https://eji.org/wp-content/uploads/2019/10/lynching-in-america-3d-ed-080219.pdf. The Equal Justice Initiative documented more than 4000 lynchings between the end of the Civil War and 1950. *Id*; *see also infra* Subpart III.C.

11. *Id.* at 35 (noting that lynchings sent the message that Whites would not be punished for killing African Americans).

12. *Id.* at 68.

13. *Id.* at 48 (noting that those who carried out lynchings were rarely prosecuted and almost never convicted).

14. MARGARET VANDIVER, LETHAL PUNISHMENT: LYNCHINGS AND LEGAL EXECUTIONS IN THE SOUTH 90, 93, 94–102 (2006) (African Americans were tried by all-White juries who sentenced African Americans more harshly, particularly with respect to the death penalty).

15. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 156–57 (2012) (discussing the history of convict leasing); *see also infra* Subpart III.B.

16. Melvin Gutterman, *"Failure to Communicate"—The Reel Prison Experience*, 55 SMU L. REV. 1515, 1527 (2002) ("[The convict leasing system] condemned a generation of black prisoners to hardships far worse than they had ever experienced."); *see also infra* Subpart III.B.

17. ALEXANDER, *supra* note 15, at 5–6 (noting the devastating impact that the War on Drugs had on African American families and communities); *see also infra* Subpart IV.B.

very young children of color in preschool and elementary schools are disciplined more often and more harshly than their White classmates,[18] which can be traumatizing and lead to negative self-image and harmful behaviors.[19] These policies and practices are racially discriminatory, and they contribute to the stress and diseases that plague African Americans at higher rates than White Americans.[20]

In her groundbreaking book *Just Medicine*, Professor Dayna Bowen Matthew explores the impact of racial and ethnic discrimination on health in minority populations.[21] She describes discrimination as "the single most important determinant of health disparities that is *not* being widely discussed in straightforward terms."[22] Her book identifies structural racism as a key driver of health disparities, but the book focuses on implicit bias in the health care system and the steps that can be taken within that system to reduce disparities. This Article builds on the work of health law scholars such as Professor Matthew and Professor Michele Goodwin,[23] as well as the many social scientists whose research confirms the link between racism and health disparities. However, this Article shifts the focus from health care providers to the role of the government in creating, sustaining, and fostering racism through explicitly racist policies and racially biased enforcement of facially neutral laws.[24]

Part I identifies existing racial health disparities and discusses research identifying racism as a cause of the disparities. Part II discusses the state and federal governments' failure to protect African Americans from discrimination and violence before and immediately after the Civil War. Part III explains how state-sponsored and state-tolerated racism allowed violence and discrimination against African Americans to continue for nearly a century—from the Reconstruction Era until the Civil Rights Era—and explains how that discrimination negatively impacted the health of African Americans.

While lauding the progress toward racial equality in the Civil Rights Era, Part IV laments the racially-biased enforcement of facially-neutral practices and policies that continue to have a negative impact on African Americans. Part V

18. Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 924–25, 925 n.27 (2016) (citing empirical evidence that African American students are more harshly and more frequently punished than White students for the same behavior); *see infra* Subpart IV.A.

19. *Fact Sheet: Health Disparities and Stress*, AM. PSYCHOL. ASS'N, https://www.apa.org/topics/health-disparities/fact-sheet-stress.aspx (last visited Mar. 20, 2020) ("Perceived discrimination/racism has been shown to play a role in unhealthy behaviors such cigarette smoking, alcohol/substance use, improper nutrition and refusal to seek medical services.").

20. *See infra* Subpart I.B (explaining how stress associated with repeated racial discrimination increases the risk of disease in African Americans).

21. MATTHEW, *supra* note 1.

22. *Id.*

23. *See* MICHELE GOODWIN & NAOMI DUKE, COGNITIVE BIAS IN MEDICAL DECISION-MAKING, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 95, 102 (Justin D. Levinson & Robert J. Smith eds., 2012).

24. Racism, including racism by government actors, affects many people of color. Although some struggles are common to all, each group has a uniquely painful history. This Article focuses on African Americans and their experience with racism throughout the history in the United States, from slavery through the Civil Rights Era, to the present day.

explores how the governments' ongoing failure to provide equal protection continues to contribute to racial health disparities. Finally, Part VI argues that because racial health disparities are largely the result of long-term government action and inaction, eliminating the disparities will require government action to prevent discrimination and lessen racism-related stress. To this end, those who are working on social and criminal justice reform must consciously consider and study the effect of reforms on the health of racial minorities. Otherwise, any effects—negative or positive—may be missed, and health disparities will remain or even worsen, leaving the promise of the Equal Protection Clause unfulfilled.

I. HEALTH DISPARITIES AND THEIR CAUSES IDENTIFIED

On the whole, Americans have made significant gains in terms of overall health and life expectancy over the last fifty years.[25] Between 1960 and 2011, life expectancy increased from just under seventy years to approximately seventy-nine years.[26] However, the progress was not uniform across the population; by numerous measures, African Americans lag behind people of other races. [27] While it was once commonly believed that the disparities could be blamed on poverty, lack of education, and lifestyle choices, substantial research has proved that racism is largely to blame.[28]

A. HEALTH DISPARITIES IDENTIFIED

Statistics illustrate the enormity of the impact of racial health disparities, which start at birth.[29] As of 2013, African Americans were *twice* as likely to die before their first birthday as Whites.[30] For African American mothers, the risks associated with childbirth are also alarming. "In 2007, the maternal mortality rate among non-Hispanic Black women (28.4 per 100,000 live births) was roughly *3 times* the rates among non-Hispanic White and Hispanic women (10.5 and 8.9 per 100,000, respectively)."[31]

As African Americans age, the disparities continue.

> For most of the 15 leading causes of death including heart disease, cancer, stroke, diabetes, kidney disease, hypertension, liver cirrhosis and homicide, African Americans (or blacks) have higher death rates than whites. These elevated death rates exist across the life-course with African Americans and

25. Centers for Disease Control and Prevention, *CDC Health Disparities and Inequalities Report*, MMWR, Nov. 22, 2013, at 1.

26. *Id.*

27. *Id*. There are also variations by gender, sex, geographic location, and socioeconomic status. *Id.*

28. *See* SMITH ET AL., *supra* note 3, at 1; *see also supra* Subpart I.B.

29. *See* Tyan Parker Dominguez et al., *Racial Differences in Birth Outcomes: The Role of General, Pregnancy, and Racism Stress*, 27 HEALTH PSYCHOL. 194, 194 (2008). The African American infant mortality rate is "more than double the rate" for Whites. Centers for Disease Control and Prevention, *supra* note 25, at 1.

30. *See id*. The infant mortality rate for African American infants is "closer to that of lower income nations like Thailand, Romania, and Grenada." SMITH ET AL., *supra* note 3, at 1.

31. *Maternal Mortality*, HEALTH RES. & SERS. ADMIN, https://mchb.hrsa.gov/whusa10/hstat/mh/pages/237mm.html (last visited Mar. 20, 2020) (emphasis added).

> American Indians having higher age-specific mortality rates than whites from birth through the retirement years.[32]

The cumulative effect of these disparities is a lower life expectancy for African Americans. In 2014, the life expectancy was 81.8 years for Hispanics (79.2 for males and 84.0 for females); 78.8 years for non-Hispanic Whites (76.4 for males and 81.2 for females); and 75.2 for non-Hispanic Blacks (72.0 for males and 78.1 for females).[33] Some data indicates that "almost 100,000 black persons die prematurely each year who would not die if there were no racial disparities in health."[34]

B. RACISM AS A CAUSE OF HEALTH DISPARITIES

Racial health disparities have existed for centuries and can be traced to racism as manifested by slavery and legally-enforced segregation in housing, education, and health care.[35] While it might not be surprising that legalized racism affected the health of African American communities in the past, some are surprised to learn that racism still affects health outcomes today.[36] Many people, including researchers and those in the healthcare industry, assumed that health disparities were the result of some combination of poverty, unhealthy habits, and genetics.[37] But recent studies have shown that while some of these factors are relevant, they do not fully explain persistent disparities.[38]

For example, for White women, the risks of preterm birth and infant mortality vary depending on the age of the mother at delivery, with higher rates for teens and lower rates when a woman reaches her twenties.[39] However, for African American women, the infant mortality rates remain significantly higher at every age, leading some researchers to conclude that "[e]ssentially, there is

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32. Williams & Mohammed, *supra* note 6, at 20 (citations omitted).

33. ELIZABETH ARIAS, CHANGES IN LIFE EXPECTANCY BY RACE AND HISPANIC ORIGIN IN THE UNITED STATES, 2013–2014 1-3 (2016). Although life expectancies for African Americans are lower than that for Whites, in some categories, Whites fare worse than African Americans; specifically, suicide rates are highest among American Indians/Alaska Natives and non-Hispanic Whites. Centers for Disease Control and Prevention, *supra* note 25, at 1.

34. Williams & Mohammed, *supra* note 6, at 20.

35. MATTHEW, *supra* note 1, at 10 (explaining how slavery and discriminatory laws and practices related to housing, education, and food contribute to health disparities).

36. *Id.* at 33 (noting that physicians interviewed by the author were often surprised to learn that health disparities still exist).

37. *See* SMITH ET AL., *supra* note 3, at 1 ("There is a common perception that racial disparities in [infant mortality rates] are driven primarily by risky behaviors.").

38. Dominguez et al., *supra* note 29, at 194 ("Well-known sociodemographic, medical, and behavioral risk factors do not fully explain the racial disparity in adverse birth outcomes."); Williams & Mohammed, *supra* note 6, at 20 (examining studies about the causes of health disparities, including a study showing that "even after adjustment for income, education, gender and age, blacks had higher scores on blood pressure, inflammation, and total risk. Importantly, blacks maintained a higher risk profile even after adjusting for health behaviors (smoking, poor diet, physical activity and access to care)."). Research has eliminated genetic factors as contributors to health disparities. Jay S. Kaufman et al., *The Contribution of Genomic Research to Explaining Racial Disparities in Cardiovascular Disease: A Systematic Review*, 181 AM. J. EPIDEMIOLOGY 464, 470 (2015) (finding no evidence that health disparities can be explained by genetic factors).

39. SMITH ET AL., *supra* note 3, at 3. The risks begin to rise again when women reach their mid-thirties. *Id.*

no safe age for black women to have children."[40] Higher education is another factor that lowers infant mortality rates for Whites, but not African Americans.[41] "Not only does the black-white disparity for infant mortality exist at all educational levels, it is greatest for those with a master's degree or higher. Further, the [infant mortality rate] is *highest* for black women with a doctorate or professional degree."[42] Similarly, a higher income does not provide the same protection for African Americans as it does for women of other races.[43]

Researchers have studied these disparities and many have concluded that racism plays a substantial role in the poorer health outcomes for African Americans. Specifically, the stress caused by experiencing racism negatively impacts African Americans' physical and mental health.[44]

According to Linda Goler Blount, president and CEO of the Black Women's Health Imperative, "[i]t is very common for people to say 'race plays a factor,' and in fact it's not race so much as racism and the experience of being a black woman or a person of color in this society."[45] Perceived discrimination is generally linked to increased levels of inflammation and systolic and diastolic blood pressure, depressive systems, and allostatic load.[46]

Allostatic load is defined as "the cumulative biological burden exacted on the body through daily adaptation to physical and emotional stress" and it is a risk factor for "coronary vascular disease, obesity, diabetes, depression, cognitive impairment and both inflammatory and autoimmune disorders."[47] African Americans have been found to have higher allostatic load scores than Whites, which researchers concluded "partially explains higher mortality among blacks, independent of [socioeconomic status] and health behaviors."[48]

The effect of perceived discrimination also explains why factors that tend to protect or improve the health of White Americans do not yield the same results

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40. *Id.*

> Black women consistently are at a higher risk of infant mortality at every age during their childbearing years. The slight drop in risk for black women at 25–34 years of age compared to the much larger drop for white women still results in a 2.3–2.6 ratio of black infants dying to every white infant death per 1000 live births.

Id.

41. *Id.* at 4.

42. *Id.* (emphasis added); *see* Williams & Mohammed, *supra* note 6, at 21 ("African American women with a college degree or more education have a higher rate of infant mortality than White, Hispanic (or Latino), and Asian and Pacific Islander women who have not completed high school.").

43. SMITH ET AL., *supra* note 3, at 7 ("[T]he lack of protection that higher income and occupation levels have for infants born to high achieving black women.").

44. *See* Kathryn Freeman Anderson, *Diagnosing Discrimination: Stress from Perceived Racism and the Mental and Physical Health Effects*, 83 SOC. INQUIRY 55, 77 (2012).

45. SMITH, ET AL., *supra* note 3, at 6.

46. *Id.*

47. *Fact Sheet: Health Disparities and Stress*, *supra* note 19 ("Perceived discrimination . . . has been found to be a key factor in chronic stress-related health disparities among ethnic/racial and other minority groups [including African Americans].").

48. O. Kenrik Duru et al., *Allostatic Load Burden and Racial Disparities in Mortality*, 104 J. NAT'L MED. ASS'N 89, 89 (2012).

for African Americans. For example, while one might think that moving from a poor African American neighborhood with a high crime rate to a predominantly White, higher income neighborhood with a lower crime rate would yield health benefits, "[r]eports of encounters with racial discrimination are higher for blacks that live in predominantly white middle class neighborhoods" and "racial and community level stress contribute to changes in inflammation and hormones that trigger adverse pregnancy outcomes."[49] Consequently, moving to a "better" White neighborhood brings health risks for African Americans that blunt the benefits of less crime and higher-ranked schools. In addition, "racial isolation may explain the lack of protection that higher income and occupation levels have for infants born to high achieving black women."[50] One researcher posited that "this limited protection for high achieving blacks results from increased experiences of discrimination and stress as they attain higher levels of education."[51]

In a study published in 2013, Professor Kathryn Freeman Anderson sought to determine how "being a racial minority affect[s] the experience of emotional or physical stress from perceived racism[.]"[52] The results of the study showed that "the association of race with the experience of physical or emotional stress from racism is substantial."[53] In other words, as compared to Whites and people of other races, African Americans "were most likely to experience mental or emotional symptoms from experiences of perceived racism when compared to whites."[54]

Moreover, it is well-settled that stress has a negative effect on health.[55] "Stress has been shown to accelerate cellular aging, which can wear down the

49. SMITH ET AL., *supra* note 3, at 6–7 (explaining why factors that tend to result in improved health for Whites do not provide the same results for African Americans).

50. *Id.* at 7.

51. *Id*. at 4 (citing Darrick Hamilton, *Post-Racial Rhetoric, Racial Health Disparities, and Health Disparity Consequences of Stigma, Stress, and Racism* (Wash. Ctr. for Equitable Growth, Working Paper, Oct. 2017)).

52. Anderson, *supra* note 44, at 55. The study used the "reactions to Race" module of the 2004 Behavioral Risk Factory Surveillance System from the National Center for Chronic Disease Prevention and Health Promotion (Centers for Disease Control and Prevention 2004). *Id*. at 59. Data was collection from respondents in Arkansas, Colorado, Delaware, Mississippi, Rhode Island, South Carolina, Wisconsin, and the District of Columbia. *Id*. Participants were asked to report their race (with the option of identifying as non-Hispanic White, non-Hispanic Black, Hispanic, multiracial, and other). *Id.* at 60. They were asked, "During the past 30 days, have you felt emotionally upset, for example angry, sad, or frustrated, as a result of how you were treated based on your race?" *Id*. They were next asked "Within the past 30 days, have you experienced any physical symptoms, for example, headache, upset stomach, tensing of your muscles, or a pounding heart, as a result of how you were treated based on your race?" *Id.* Participants were also asked about "the number of poor mental health days and poor physical health days they experienced within the past 30 days," and how often they thought about race (with available answers ranging from never to constantly). *Id.* at 60–61.

53. Anderson, *supra* note 44, at 77 (concluding that African Americans were most likely to experience emotional and physical stress from perceived racism); *see also Fact Sheet: Health Disparities and Stress*, *supra* note 19.

54. Anderson, *supra* note 44, at 66.

55. *Id.* at 57 (noting that stress may negatively impact health at a cellular level and may lead to unhealthy coping behaviors).

body's systems and produce a variety of illnesses and premature mortality."[56] Stress from racial discrimination is particularly harmful. "African Americans, Native Hawaiians and Latin Americans have been impacted greatly by hypertension and diabetes due to chronic stress resulting from discrimination."[57] Discrimination also contributes to mental health disorders and is "a key factor in chronic stress-related health disparities."[58] One study found that African American women who identified themselves as victims of racial discrimination were thirty-one percent more likely to be diagnosed with breast cancer when compared to those who did not report experiencing discrimination.[59]

Racism can also affect the self-image of African Americans, which can negatively impact health.

> For example, internalized racism among Blacks who exhibit racial prejudice toward other Blacks is positively associated with alcohol use and psychological stress. Self-reported experiences of racial discrimination and the internalization of negative racial group attitudes are both found to be risk factors for cardiovascular disease among African American men.[60]

Racism-related stress may also "prompt unhealthy coping behaviors such as eating, or substance abuse in the form of smoking, drinking, and drug use."[61]

Notably, studies have shown that even when people (particularly people of color) do not themselves experience racism, they may suffer physically when they observe or learn about traumatic, racially motivated incidents involving *others* of the same race.[62] For example, a group of researchers from the University of Michigan analyzed birthweights of babies born in Iowa before and after an immigration raid in Iowa.[63]

> The ICE raid on a meat-processing plant in Postville, Iowa, on 12 May 2008 was implemented without advance warning to local or state officials. ICE deployed 900 agents using military tactics, including armed officers and a UH-60 Black Hawk helicopter, to arrest 389 employees, 98% of whom were Latino. Agents used presumed race/ethnicity to identify suspected undocumented immigrants, allegedly handcuffing all employees assumed to be Latino until their immigration status was verified.

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56. *Id.*

57. *Fact Sheet: Health Disparities and Stress*, *supra* note 19.

58. *Id.*

59. Brian D. Smedley, *The Lived Experience of Race and Its Health Consequences*, 102 AM. J. PUB. HEALTH 933, 934 (2012) (citing Teletia R. Taylor et al., *Racial Discrimination and Breast Cancer Incidence in Black Women: The Black Women's Health Study*, 166 AM. J. EPIDEMIOLOGY 46 (2007)).

60. *Id.*

61. Anderson, *supra* note 44, at 57; *cf. Fact Sheet: Health Disparities and Stress*, *supra* note 19, ("Perceived discrimination/racism has been shown to play a role in unhealthy behaviors such cigarette smoking, alcohol/substance use, improper nutrition and refusal to seek medical services.").

62. *See, e.g.*, Dominguez et al., *supra* note 29, at 201 ("[R]acism vicariously experienced in childhood, most often via a parent or guardian, was the only component of the perceived racism lifetime score that was a significant independent predictor of birth weight, even after using the most stringent controls for [socioeconomic status.]"); Nicole L. Novak et al., *Change in Birth Outcomes Among Infants Born to Latina Mothers After a Major Immigration Raid*, 46 INT'L J. EPIDEMIOLOGY 839, 846 (2017).

63. Novak et al., *supra* note 62, at 839.

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> The raid separated hundreds of families, most often from their primary breadwinner. Fear of follow-up home raids kept many Postville families from staying in their own homes, choosing instead to sleep in church pews or leave town altogether. News of the raid immediately spread throughout the state. La Prensa, a Spanish-language newspaper in western Iowa, published eyewitness testimony of arrestees detained at a cattle fairground, cuffed and chained together from the waist to the ankles.[64]

The raid was described as "the largest single-site raid yet seen in the USA."[65]

Before the raid, infants born to White and Latina women had similar prevalence of low birth weights.[66] However, the researchers found that the risk of low birth weight for infants born to Latina mothers in Iowa increased by twenty-four percent after the raid compared to a year earlier.[67] Importantly, rates of low birth weight increased in Latina women born in the United States as well as those who were foreign born.[68] Thus, even those Latina women who were not at risk of deportation appeared to be affected by the raid.[69] "Racism may pose a particularly noxious threat to well-being because it is an undeniably negative, demeaning, and threatening reaction to an immutable personal characteristic."[70]

This was also the conclusion of researchers studying students at Duke University before and after an African-American woman accused members of the Duke lacrosse team of rape.[71] The study was originally designed to study "stress responses, as measured by salivary cortisol, to a laboratory-induced social evaluative threat and the moderating role of racial identity among African-American college students."[72] Levels of cortisol in the participants' saliva was

64. *Id*. at 840–41 (citations omitted).

65. *Id*. at 840. Since then, the Immigration and Customs Enforcement Agency (ICE) has conducted raids in other parts of the country, including one at a food processing plant in Morton, Mississippi in 2019 during which 680 people were detained. Camilo Montoya-Galvez, *ICE Rounds up Hundreds of Undocumented Workers in Immigration Sweeps in Mississippi*, CBS NEWS, (Aug. 18, 2019, 1:03 PM), https://www.cbsnews.com/news/ice-raids-in-mississippi-officials-tout-largest-single-state-immigration-sweeps-in-us-history-today-2019-08-07/.

66. Novak et al., *supra* note 62, at 842.

67. *Id*. The risk of low birth weight for infants born to White mothers decreased after the raid (in line with national trends). *Id.*

68. *Id*.

69. Other researchers have also found a relationship between racism-related stress and low birth weight. Dominguez et al., *supra* note 29, at 201. In a study examining the role of racism in racial differences in birth outcomes, the authors found that "lifetime and childhood indicators of perceived racism predicted birth weight and attenuated racial differences, independent of medical and sociodemographic control variables" and "that perceived racism was a significant predictor of birth weight in African Americans, but not in non-Hispanic Whites." *Id.* at 194.

70. *Id.* at 195.

71. Laura Smart Richman & Charles Jonassaint, *The Effects of Race-Related Stress on Cortisol Reactivity in the Laboratory: Implications of the Duke Lacrosse Scandal*, 35 ANN. BEHAV. MED. 105, 108 (2008).

72. *Id*. at 106.

measured before and after watching video clips "of prominent figures and events relevant to their own race and ethnicity."[73]

However, midway through the study, the accusations against the lacrosse team became a high-profile, racially-charged scandal.[74] This real-life incident allowed the researchers to study the African American students' stress response.[75]

> An examination of the student newspaper and public dialogues across campus support the notion that Duke's African-American students and the African-American women in particular experienced high levels of stress and questioned their sense of belonging and safety in the weeks after the alleged incident. Consequently, although this research was not originally designed to test this hypothesis [the researchers] were able to analyze whether there were different patterns in cortisol reactivity for [their] experimental manipulation before the naturally occurring stressor [(the Lacrosse scandal)] and after.[76]

The researchers found higher cortisol levels in the African-American students after the lacrosse scandal, with a stronger effect on women.[77] The effects after the racially-charged incident were higher than levels found after another stressful event—final exams—that had no racial component.[78] "The findings suggest that recent exposure to race-related stress can have a sustained impact on physiological stress responses. Such alterations in physiological processes and adrenocortical responses in particular can have a negative impact on long-term health outcomes."[79] This research confirms studies linking racism-related stress to poorer health outcomes in communities of color. The effect of stress and racism on health may also help explain why health disparities have been observed for as long as African Americans have been in America.

II. GOVERNMENTS' FAILURE TO PROTECT AFRICAN AMERICANS BEFORE AND IMMEDIATELY AFTER THE CIVIL WAR

Discrimination by private individuals certainly plays an important role in poorer health outcomes for people of color, but federal, state, and local governments are also to blame. From the time that the American colonies were first settled to the present day, racially discriminatory laws and practices have had a negative impact on the health of people of color generally, and African

73. *Id*.

74. *Id.*; *Looking Back at the Duke Lacrosse Scandal 10 Years Later*, ABC 11 (Mar. 13, 2016), http://abc11.com/news/duke-lacrosse-scandal-looking-back-10-years-later/1244112/ ("The case sparked outrage from the Durham community as well as students and faculty at Duke University and was covered as a top story locally and throughout the country. . . . During the investigation, the woman's claims deeply divided the community and the university, in part because Mangum is black and claimed her attacker was white.").

75. Richman & Jonassaint, *supra* note 71, at 106.

76. *Id.*

77. *Id*. at 108.

78. *Id*.

79. *Id*. at 108–09.

Americans in particular.[80] While the United States government had a moral duty to protect all of those within its jurisdiction, it had no such legal duty before ratification of the Fourteenth Amendment.[81] After that amendment, the federal government had the duty and the means of protecting all of its citizens, including African Americans, from race-based violence. Had it fulfilled its obligations, African Americans would have had a much easier time developing safe and healthy communities. Unfortunately, it failed to ensure equal protection of the laws, and African American communities continued to struggle against discrimination and racially motivated violence and oppression. As a direct consequence, health disparities persisted even as the general population thrived.

A. NO LEGAL DUTY TO PROTECT: RACISM FROM COLONIAL TIMES THROUGH THE CIVIL WAR

During the colonial era, slavery had direct negative effects on the health of those enslaved.[82] Slaves were treated as property and given medical care only to the extent that it served the needs of their White owners.[83] Slaves were also forced to participate in medical experiments, although they were not allowed to benefit from the advancements resulting from those experiments.[84] After the Revolutionary War, the original United States Constitution not only failed to release African Americans from slavery, it prohibited abolishing slavery.[85]

80. MATTHEW, *supra* note 1, at 1–26 (tracing discriminatory laws and practices from colonial times to present day, and describing their negative effect on the health of people of color).

81. Before the Thirteenth Amendment was ratified, enslavement of African Americans was legal and African Americans could not be citizens until the Fourteenth Amendment was ratified. Dred Scott v. Sandford, 60 U.S. 393, 406, 408 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (Justice Taney noted that in colonial America, slaves were "an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States," and held that neither slaves nor descendants of Africans could be citizens of the United States).

82. MATTHEW, *supra* note 1, at 10.

83. *Id.* at 14–15. "[E]ven laws that had nothing directly to do with health or health care efficiently created disparate health outcomes merely by reflecting and reinforcing the hegemony that exposed minorities to inferior living and working conditions—conditions that ravaged their health and the health of their descendants." *Id.* at 10.

84. *See* GOODWIN & DUKE, *supra* note 23, at 102. Graves of slaves were robbed and the corpses used to train White medical students. *Id.* However, African Americans were denied access to White healthcare facilities well into the twentieth century. *Id*. at 102–03. Other non-White populations suffered as well. Native Americans dispossessed of their land lacked immunity to diseases such as smallpox, measles, and influenza that were introduced in America by European settlers. MATTHEW, *supra* note 1, at 13. Native Americans were considered "savages" who were inferior to colonizing Europeans, which was used to justify taking their land. *Id*. Chinese immigrants were lured to America to work on the railroads but were prohibited from becoming citizens and required to live in overcrowded ghettos. *Id*. at 15. Mexican workers living in American areas that were formerly a part of Mexico often worked in jobs such as agriculture, mining, and railroad work that had high rates of illness and death. *Id.* at 17 ("Immigrants attracted to jobs in [the regions formerly belonging to Mexico] could either accept deplorable working conditions or face the threat of jail or deportation for violating immigration provisions.").

85. U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight."); *see* U.S. CONST. art. V (establishing process for amending the Constitution, but stating that

Worse, it expressly protected the rights of owners to retrieve escaped slaves.[86] Clearly, there was no expectation that slaves were entitled to any protection from the federal government. There was hope for change after the Civil War and the passage of the Fourteenth Amendment. But that amendment failed to provide the protection necessary to achieve healthy African American communities.

B. FOURTEENTH AMENDMENT RATIFICATION AND THE SUPREME COURT'S RESTRICTIVE INTERPRETATION

The federal government is one of enumerated powers, with the scope of its authority outlined in the federal Constitution.[87] Consequently, the federal government's power to protect citizens, and particularly people of color, was arguably limited until passage of the Fourteenth Amendment. But after its passage, each branch of the federal government had the authority and the responsibility to protect African Americans from the physical, emotional, and economic harms of state-imposed and state-tolerated racial discrimination.[88] It could have been a turning point in terms of their economic, physical, mental, and emotional well-being. However, the government still lacked the *political will* to fulfill the promise of equal protection written into the Fourteenth Amendment. While Congress periodically enacted legislation intended to protect racial minorities and promote equal treatment, the executive branch often failed to enforce those laws.[89]

Worse, the Supreme Court interpreted the Fourteenth Amendment far more narrowly than many of its drafters intended,[90] most notably by holding that it did not apply to discrimination by private actors.[91] Within a few decades of

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"no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article").

86.

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labor may be due.

U.S. Const. art. IV, § 2, cl. 3.

87. "The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution." United States v. Cruikshank, 92 U.S. 542, 551 (1876). "The government . . . of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." Martin v. Hunter's Lessee, 14 U.S. 304, 326 (1816).

88. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

89. *See infra* Part III.

90. *See infra* Subpart II.B.2.

91. *See* John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421, 468 (1972) (noting that the Fourteenth Amendment has been interpreted to only apply to "affirmative state action, having no bearing upon discriminatory acts by private persons"). "A general

ratification, the Supreme Court struck down crucial federal civil rights laws as outside the scope of the Fourteenth Amendment's enforcement powers.[92] By the end of the Reconstruction Era, many states either turned a blind eye to, or actively participated in the sometimes violent oppression of African Americans.[93] As a result, long after the Fourteenth Amendment's ratification, African Americans and other people of color lived in fear of race-based violence and discrimination, and the stress of living with racism continued to take its toll on their physical and emotional health.[94]

1. History and Purpose of the Fourteenth Amendment

The Fourteenth Amendment was one of the three Civil War Amendments.[95] While some have argued that the Civil War was fought to vindicate the principle of states' rights or because of economic concerns,[96] there is overwhelming evidence that the issue of slavery is what divided the nation and precipitated the war.[97] Indeed, soon after the war ended, the Supreme Court dismissed contrary claims.

> The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between

judgment of this sort was so totally foreign to the conceptions of those who passed the amendment that no real assessment of it can be made in terms of the attitudes during Reconstruction." *Id.*

92. *See infra* Subpart II.B.2. (discussing the Supreme Court's restrictive interpretation of the Fourteenth Amendment).

93. *See* EQUAL JUSTICE INITIATIVE, *supra* note 10, at 48 (noting that Southern states passed anti-lynching laws in order to convince Congress that no federal legislation was necessary, but refused to enforce those laws and instead blamed lynching on its victims, who were characterized as violent sub-humans).

94. *See supra* Subpart I.B (discussing the negative health impact of racism-related stress on African Americans).

95. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 126 (1970) (referring to the Thirteenth, Fourteenth, and Fifteenth Amendments as the "Civil War Amendments"); *see also*, Frank & Munro, *supra* note 91, at 427 (referring to the post-Civil War amendments as "[t]he Civil War amendments").

96. *See, e.g.*, Ariela J. Gross, *All Born to Freedom? Comparing the Law and Politics of Race and the Memory of Slavery in the U.S. and France Today*, 21 S. CAL. INTERDISC. L.J. 523, 538 (2012) ("Some unreconstructed Southerners continue to argue that the South fought for states' rights rather than to defend slavery, while revisionist historians argue that Union soldiers fought to defend White 'free labor' from being swallowed up by the 'slave power' rather than to free Black slaves."). "Despite the almost universal understanding of serious scholars that slavery and racial subordination were at the root of secession and the Civil War—and the almost endless statements of Confederate leaders supporting this analysis—a considerable number of Americans cling to the belief that secession was about "states' rights," and that southerners left the Union to escape a tyrannical national government that was trampling on their rights." Paul Finkelman, *States' Rights, Southern Hypocrisy, and the Crisis of the Union*, 45 AKRON L. REV. 449, 451 (2012).

97. *See* Slaughter-House Cases, 83 U.S. 36 (1873) (discussing the origins of the Civil War Amendments); *see also* Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L.J. 405, 406 (2013) ("Ultimately, slavery was the cause of the War.").

> Abraham Lincoln noted in his second inaugural in 1865, "[o]ne-eighth of the whole population were colored slaves, not distributed generally over the Union, but localized in the southern part of it. These slaves constituted a peculiar and powerful interest. All knew that this interest was somehow the cause of the war."

Finkelman, *supra* note 96, at 449 (quoting Abraham Lincoln, *Second Inaugural Address*, THE COLLECTED WORKS OF ABRAHAM LINCOLN 332, 332 (Roy P. Basler ed., 1953)).

> those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.[98]

Although slavery was its cause, the war itself did not resolve the issues related to the status and rights of slaves and former slaves during the war or after its end.

While President Abraham Lincoln signed the Emancipation Proclamation on January 1, 1863, that proclamation declared only that "all persons held as slaves within any State or designated part of a State, *the people whereof shall then be in rebellion against the United States*, shall be then, thenceforward, and forever free . . . ."[99] Thus, it did nothing to free slaves in the states or parts of states that had not joined the rebellion.[100] There were also concerns that the nature of the Proclamation—enacted pursuant to the President's wartime powers—could make it unenforceable after the end of the war.[101] Finally, the Proclamation was criticized as unconstitutional because it exceeded the proper scope of Presidential authority.[102] It was not until ratification of the Thirteenth Amendment that slavery was abolished throughout every American state and territory.[103]

Yet it soon became apparent that merely freeing the slaves from formal bondage was insufficient to guarantee their ability to function on equal terms with their former owners and the broader White society.[104] Immediately after the war, former slave-holding states passed laws with the purpose and effect of severely limiting the rights and freedom of the former slaves.[105]

> They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives

98. *Slaughter-House Cases*, 83 U.S. at 68.

99. Emancipation Proclamation, 12 Stat. 1268 (1863) (emphasis added).

100. *Id.* (specifying the states and portions of states that were in rebellion and those that were not).

101. "The Emancipation Proclamation did not adequately deal with the problem [of slavery]. Indeed, congressmen and President Lincoln recognized that the Proclamation was inadequate to eradicate slavery since its legal justification rested on the President's wartime powers and would be ineffectual following the end of conflict." Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1807–08 (2006).

102. *See id.* at 1808 ("The constitutional uncertainties surrounding the Emancipation Proclamation gave rise to the political resolve to pass a constitutional amendment abolishing slavery.").

103. "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

104. *Slaughter-House Cases*, 83 U.S. at 70.

105. *Id.*; *see* Frank & Munro, *supra* note 91, at 425 (noting that the Thirteenth Amendment ended slavery, but allowed "a caste system holding Negroes as a separate group with permanent disabilities").

> were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.[106]

Congress realized that without further protection in the Constitution, "their freedom was of little value."[107] This recognition that African Americans would need additional protection from hostile citizens and state governments led to passage of The Civil Rights Act of 1866 (the "Act").[108]

The Act was passed under the enforcement authority of the Thirteenth Amendment, and was broad and ambitious, declaring that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[109] It gave all such citizens the right to enforce contracts, to sue, to give evidence in lawsuits, the right to buy, sell, and inherit property, and "to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by White citizens."[110] President Andrew Johnson was among the critics of the Act who argued that Congress lacked authority under the Constitution to enact such a law.[111] The Fourteenth Amendment was enacted, in part, in response to those concerns.[112]

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106. *Slaughter-House Cases*, 83 U.S. at 70. In addition, the Thirteenth Amendment allowed involuntary servitude as punishment for crimes. U.S. CONST. amend. XIII, § 1. States exploited this exception "by transforming criminal codes into legislation that specifically targeted Blacks." Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 360–361 (2012). Criminal convictions were also used to suppress the votes of African Americans. *Id.* at 360 ("Criminal disenfranchisement, along with terror and violence, was routinely used in the South after Reconstruction to suppress the votes of African Americans."); *see also* Paul Finkelman, *"Let Justice Be Done, Though the Heavens May Fall:" The Law of Freedom*, 70 CHI.-KENT L. REV. 325, 354 (1994) ("While most of the white South shuddered in horror at the thought of emancipation and black equality, wily legislators throughout the former slave states worked to create new laws to suppress the freedmen.").

107. *Slaughter-House Cases*, 83 U.S. at 70.

108. The Act was passed by Congress, vetoed by President Andrew Johnson, and became law when Congress overrode the veto. John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1135–36 (1990).

109. Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1818 (2010) ("Perhaps the best example of Congress's enforcement powers is the very first bill passed to enforce the Thirteenth Amendment: the Civil Rights Act of 1866."); *see* Tsesis, *supra* note 101, at 1818 (noting that the Act was passed pursuant to the Thirteenth Amendment's enforcement clause).

110. Franklin, *supra* note 108, at 1135.

111. *Id*. at 1136; Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 283 (2010) (discussing the debate preceding enactment of the Civil Rights Act of 1866). "Opponents of the 1866 Act argued that Section 2 was insufficient to empower Congress to enact such a statute because that power was limited to the simple task of ending the institution of slavery." *Id.* Professor Jack M. Balkin acknowledges that the Act "reaches well beyond what a court could be expected to strike down under the authority of a constitutional ban on slavery." Balkin, *supra* note 109, at 1818.

> But that is precisely the point: The framers of the Thirteenth Amendment did not wish to leave the fate of blacks to the discretion of the Supreme Court, an institution which had failed them so often before. The enforcement clause of the Thirteenth Amendment gives Congress the power not only to prevent slavery, but to establish freedom.

Id. at 1818–19.

112. Frank & Munro, *supra* note 91, at 441 ("The principle statements on the floor of Congress concerning the first section [of the Fourteenth Amendment] were to the effect that it put the Civil Rights Act of 1866 beyond the reach of repeal."); *see* Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*,

Section 1 of the Fourteenth Amendment includes what are commonly referred to as the Citizenship Clause, the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause.[113] The Citizenship Clause makes every person born or naturalized in the United States (with limited exceptions)[114] a citizen of the United States and the State in which they reside.[115] "That its main purpose was to establish the citizenship of [African Americans] can admit of no doubt."[116] The purpose and scope of the remaining clauses of Section 1 have been the subject of debate almost since their inception.

2. The Supreme Court's Narrow Interpretation Limits the Effectiveness of the Fourteenth Amendment

The purpose of the Privileges and Immunities Clause has been debated by scholars for over a century, but its fate was sealed soon after the Fourteenth Amendment was ratified. According to some scholars, "[p]rivileges and immunities to be protected from state interference were intended by the two major sponsors of the section to include at least the first eight amendments of the Constitution, and perhaps a good deal more."[117] However, in the 1872 *Slaughter-House Cases*, the Supreme Court rejected that interpretation of the phrase and interpreted it so narrowly that it has been reduced "to a virtual nullity."[118]

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94 TEX. L. REV. 1361, 1361 (2016) ("Leading works on the post-Civil War Constitution regularly point out that Section One of the Fourteenth Amendment, if not the entire Fourteenth Amendment, was intended to entrench the Civil Rights Act of 1866 and resolve lingering doubts about the constitutionality of that measure.").

113. The full text of Section 1 reads:

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

U.S. CONST. amend. XIV, § 1.

114. "The phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States." *Slaughter-House Cases*, 83 U.S. at 73 (concluding that persons born in the United States but not "subject to the jurisdiction thereof" are not automatically citizens of the United States (quoting U.S. CONST. amend. XIV, § 1, cl. 1)). President Donald Trump recently reignited a debate about whether the Citizenship Clause guarantees citizenship to children born to parents who are in the United States illegally. Clare Foran, *Trump Reignites Debate in Congress Over Ending Birthright Citizenship*, CNN, (Nov. 1, 2018, 6:07 A.M.), https://www.cnn.com/2018/11/01/politics/birthright-citizenship-congress-trump-steve-king-lindsey-graham/index.html.

115. U.S. Const. amend. XIV, § 1; *see* United States v. Wong Kim Ark, 169 U.S. 649, 675 (1898) ("In the forefront, both of the Fourteenth Amendment of the Constitution, and of the Civil Rights Act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms.") This clause effectively overturned the Supreme Court's decision in *Dredd Scott*, which held that persons of African descent could never be United States citizens. *Slaughter-House Cases*, 83 U.S. at 73 (noting that the Dred Scott case had never been overruled and although the Thirteenth Amendment had freed all slaves, they "were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution").

116. *Slaughter-House Cases*, 83 U.S. at 73.

117. Frank & Munro, *supra* note 91, at 429.

118. *Id.*

The *Slaughter-House Cases* involved challenges to actions by the Louisiana legislature which created a corporation and granted it the exclusive right to have and maintain slaughterhouses in a section of the state that included the city of New Orleans. Although the slaughterhouse legislation raised no issues involving race relations, the opposition argued "that the act of the Louisiana legislature made a monopoly and was a violation of the most important provisions of the thirteenth and fourteenth Articles of Amendment to the Constitution of the United States."[119] In deciding the case, the Supreme Court took the opportunity to interpret the Thirteenth and Fourteenth Amendments for the first time.[120]

After recounting the history of all three Civil War Amendments, the Court summarized their purpose:

> We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[121]

While the Court acknowledged that people of other races—including the White plaintiffs in that case—were protected by the Amendments, their original purpose remained relevant.[122] Yet, despite noting the facts motivating passage of the Fourteenth Amendment and its necessity to protect African Americans from discrimination and abuse, the Court's interpretation of the Privileges and Immunities Clause severely limited its scope and usefulness.[123]

The Court noted that the Citizenship Clause distinguished between being a citizen of a state and being a citizen of the United States.[124] The Court held that

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119. *Slaughter-House Cases*, 83 U.S. at 43.

120. *Id.* at 67.

121. *Id*. at 71–72.

122. *Id*. at 72.

123. Prominent historian Eric Foner notes that debates about the "original intent" of the Fourteenth Amendment seem "pointless" to historians. Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1591 (2012).

> Few, if any, historians believe that a single intent characterized the laws and amendments Reconstruction (or, indeed, any other important historical documents). These measures represented a radical break from prevailing prewar definitions of American citizenship, the rights pertaining to it, and the sources of protection for citizens' basic rights. Yet all the major accomplishments of the Reconstruction era, from the Civil Rights Act of 1866 to the Fourteenth and Fifteenth Amendments and the Civil Rights Act of 1875, were compromises, the work of numerous individuals and factions within the Republican Party.

Id. Yet, because the Amendments lacked clarity, it was left to the courts to interpret the scope and nature of the rights identified, and the Supreme Court chose narrow interpretations in most of the early cases. *Id.* at 1591–92.

124. *Slaughter-House Cases*, 83 U.S. at 73. One could be a citizen of the United States by virtue of having been born within its borders or naturalized, but to be a citizen of a state required residence in the state. *Id*. at 74.

the Privileges and Immunities Clause only prohibited states from abridging "the privileges or immunities of citizens of the *United States*."[125] With respect to state citizenship, the Court adopted the interpretation of the Article IV Privileges and Immunities Clause.[126]

> We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental;* which belong of right to the citizens of all free governments . . . . They may all . . . be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.[127]

In this formulation, the state government—but not the federal government—is responsible for the protection of all civil rights, and it is for such protection that State governments were created.[128]

The Court then addressed the privileges and immunities of citizens of the United States. The Court understood the plaintiffs to argue that the slaughter-house monopoly violated civil rights that were protected under the Fourteenth Amendment Privileges and Immunities Clause, which required a finding that the Fourteenth Amendment was intended to bring civil rights under the protection of the federal government.[129] But the Court did not agree that the Fourteenth Amendment was intended to so drastically alter the role of the federal government or the balance of power between the states and the federal government.[130]

> [S]uch a construction . . . would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment.[131]

The Court was unwilling to adopt such a "radical" interpretation "in the absence of language which expresses such a purpose too clearly to admit of doubt."[132] Instead, the Court held that the Fourteenth Amendment Privileges and

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125. U.S. CONST. amend. XIV, § 1 (emphasis added).

126. Slaughter-House Cases, 83 U.S. at 76.

127. *Id.*

128. *Id.*

129. *Id.* at 77–78.

130. *Id.*

> Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?

Id. at 77.

131. *Id.* at 78.

132. *Id*. Of course, the plain language of the Fourteenth Amendment itself expresses such a purpose very clearly. It was the first amendment to expressly limit the power of the states and only the second amendment to expressly grant Congress enforcement powers (the first being the Thirteenth Amendment).

Immunities Clause protected only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws."[133]

The Court did not believe it necessary to define the precise scope of the privileges and immunities of citizens of the United States, but did give some examples, including the right to go to the "seat of government to assert any claim" against it or to transact business with it; the right to free access to ports that engage in foreign commerce; the right of access to the courts; the right of protection "when on the high seas or within the jurisdiction of a foreign government"; to use navigable waters of the United States; the right "to peaceably assemble and petition for redress of grievances"; the right to petition for the writ of habeas corpus; the right to travel to any state in the United States; and any rights granted by treaties with foreign governments.[134] The plaintiffs' claims did not fall within any of those categories; consequently, their Fourteenth Amendment claims were rejected.[135]

The protective potential of the Fourteenth Amendment was further weakened by the Supreme Court in *United States v. Cruikshank*.[136] That case involved the massacre of African American men in connection with a dispute over election results in Louisiana.[137] Although the Supreme Court failed to include any of the facts leading to the indictments challenged in the case, the factual background is key to understanding the context and impact of the Court's decision.[138]

Historian Eric Foner described the facts leading up to what became known as the "Colfax massacre."[139] The conflict began with a dispute over the results of the 1872 election in Louisiana.[140]

> In Grant Parish, freedmen who feared Democrats would seize the government cordoned off the county seat of Colfax and began drilling and digging trenches under the command of black veterans and militia officers. They held the tiny town for three weeks; on Easter Sunday, whites armed with rifles and a small cannon overpowered the defenders and an indiscriminate slaughter followed, including the massacre of some fifty blacks who lay down their arms under a white flag of surrender. Two whites also died.[141]

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133. *Id.* at 79.

134. *Id*. at 79–80.

135. *Id.* at 80. Of course, claims about discrimination and violence by private individuals would not fall within this description either. *See* United States v. Cruikshank, 92 U.S. 542, 559 (1875).

136. 92 U.S. 542 (1875).

137. Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, A Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1420 (2009).

138. Without the context of the massacre, the Court's analysis appears almost clinical and it is impossible to understand the immediate consequences of the decision (the racially-motivated murders of up to 150 men will go unpunished) much less the long-term consequences (future racially-motivated murders will go unpunished).

139. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 437 (1988).

140. *Id.*

141. *Id.*

Several men, including Bill Cruikshank, were indicted for killing those who surrendered.[142]

"Bill Cruikshank shot Levi Nelson and William Williams, making a sport out of lining them up so close to each other that he could kill them with a single bullet."[143] In addition to those who were murdered after they surrendered, many more were killed during the fighting or were hunted down and killed afterward.[144] Many African Americans were killed after Whites set fire to the courthouse in which they had barricaded themselves; they were shot as they fled the burning building.[145] The exact number of fatalities is unknown, with estimates ranging from 70 to 165.[146]

The Supreme Court was asked to consider the indictment of several men for violations of the 1870 Enforcement Act.[147] Specifically, they were charged with "banding" and "conspiring" to injure two African American men, "with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges 'granted and secured' to them . . . by the constitution and laws of the United States."[148] The Court noted that in order for the charges in the indictments to stand, "it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States."[149] The Court held that the Act did not protect the right to peaceably "assemble for lawful purposes," or the right to bear arms as alleged by the indictment, because those rights existed before the Constitution and, therefore, were not rights granted by the Constitution;[150] the First and Second Amendments grant protection of the right only from infringement by Congress, not private actors.[151]

The Court was even more critical of the charge in the indictment that alleged deprivation of life and liberty without due process of law.[152]

> This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. . . . It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

142. *See* United States v. Cruikshank, 92 U.S. 542 (1876).

143. CHARLES LANE, THE DAY FREEDOM DIED: THE FOLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 106 (2008).

144. LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION 105–06, 109 (2008); *see also* LANE, *supra* note 143, at 99 ("The hunt for fleeing freedmen was almost frenzied. Killing black men even took precedence over saving a wounded white man.").

145. LANE, *supra* note 143, at 102 ("The first dozen Negroes to exit, some of them waving their pocket-handkerchiefs as tokens of capitulation, were met by gunfire.").

146. KEITH, *supra* note 144, at 109.

147. *Cruikshank*, 92 U.S. at 549.

148. *Id.* at 548.

149. *Id.* at 549.

150. *Id.* at 552–53.

151. *Id.* at 552.

152. *Id.* at 553.

> The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.[153]

The counts of the indictment alleging deprivation of equal protection of the law were also dismissed because the alleged deprivation came at the hands of individuals, and not the State.[154]

The Court did acknowledge that the Fifteenth Amendment granted a new constitutional right to be free from "discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude."[155] The indictment alleged that this right had been infringed, but the Court found that the indictment failed to allege that the discrimination was on account of their race. "We may suspect that race was the cause of the hostility; but it is not so averred."[156] None of the convictions were upheld.[157]

More recently, the Supreme Court severely restricted reliance on the Equal Protection Clause to remedy discrimination that takes place in the guise of race-neutral law enforcement policies and practices.[158] The Court has held that in order for a litigant to prevail in a case alleging an Equal Protection violation, she must prove that the government acted with a "discriminatory purpose."[159]

> A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. But, as was made clear in *Washington v. Davis* . . . and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, . . . even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.[160]

Consequently, simply showing that a policy or practice has a disparate impact on people of a particular race is not sufficient to prevail on an Equal

153. *Id.* at 553–54.

154. *Id.* at 554–55.

155. *Id.* at 555.

156. *Id.* at 556. Of course, no reasonable observer would have had any doubt that racial animus motivated the mob's action. The remaining counts of the indictment—which alleged infringement on "free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them as citizens of the United States" on account of their race and color—were held to "lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them." *Id.* at 559.

157. *Id.* at 559.

158. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.") (citation omitted).

159. *See* Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2452 (2017) (discussing the Supreme Court decision in Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979), as well as the limits of the Equal Protection Clause).

160. *Feeney*, 442 U.S. at 272 (citations omitted).

Protection claim.[161] Meeting this burden is exceedingly difficult unless a state actor admits his intention to discriminate on the basis of race.[162] Since such confessions are rare, few disparate impact equal protection claims have been successful.[163]

III. STATE-TOLERATED AND STATE-SPONSORED RACISM FROM RECONSTRUCTION THROUGH THE CIVIL RIGHTS ERA

The end of the Civil War did not mean freedom or equality for African Americans in many parts of the former Confederacy. Instead, the period immediately following the end of the Civil War was a time of violence that reached "staggering proportions."[164] Many southern Whites refused to acknowledge any change in the status of African Americans, and some reacted violently when they were not shown the same deference they demanded from slaves.[165] Former slaves were also met with violence when they attempted to leave plantations and assert their rights as free people.[166] In Texas, 1000 Blacks were murdered by Whites between 1865 and 1868.[167] The reasons given included: not removing a hat in the presence of a White man, speaking before being spoken to, and simply wanting to reduce the number of African Americans.[168] One witness reported seeing twenty-four African American men, women, and children hanging from trees in a Black settlement that had been set on fire in Pine Bluff, Arkansas after "some kind of dispute" between Whites and newly freed African Americans.[169]

The Fourteenth Amendment gave the federal government the necessary tools to stem the violence against African Americans, but after the Supreme Court declared federal civil rights legislation unconstitutional to the extent that it was aimed at protecting people from discrimination and violence by private parties, African Americans and other people of color were forced to rely on the states to protect them from violence by individuals.[170] However, states routinely failed to provide that protection, and violence against African Americans went

161. Huq, *supra* note 159, at 2452.

162. *Id.*; *see also* McClesky v. Kemp, 482 U.S. 279 (1987) (holding that courts should not infer discriminatory purpose from statistical evidence demonstrating disparate sentencing based on the race of the defendant and race of the victim). "Absent the miraculous happenstance of testimonial or documentary evidence of bias—a stroke of luck that befell plaintiffs in the challenge to New York's [stop-question-and-frisk] policy—*McClesky* means that the courthouse door is effectively shut to discriminatory-purpose challenges in the criminal justice context." Huq, *supra* note 159, at 2454–55 (footnote omitted).

163. *See* Huq, *supra* note 159, at 2455.

164. FONER, *supra* note 139, at 119.

165. *Id.* at 120 ("[B]ehavior that departed from the etiquette of antebellum race relations frequently provoked violence").

166. *Id.* at 121.

167. *Id.* at 120.

168. *Id.*

169. *Id.* at 119.

170. *See* United States v. Cruikshank, 92 U.S. 542, 554 (1876).

largely unchecked in many states.[171] The threat of violence and the knowledge that neither the state nor the federal government would intervene to protect them from that violence, meant that African Americans lived in a state of constant fear and stress,[172] which adversely affected their physical and mental health.[173] Laws mandating segregated healthcare facilities—which left African Americans with inferior facilities, where they existed at all—prevented adequate treatment for the resulting ailments.[174] This cycle of physical violence and medical neglect perpetuated health disparities.

A. BLACK CODES

For many Whites, the freeing of slaves did not make African Americans equal, or even fully human.[175] The ideals of White supremacy continued to be enforced through violence, not only by former slave owners, but by White society more broadly.[176] "In effect Negroes were now the slaves of every white man. As subordination and discipline had been enforced by the lash before, it continued to be so now, but without the restraining influence of the slaveholder's self-interest."[177]

Immediately after the Civil War, southern states and localities enacted laws designed to limit the rights of the newly freed African Americans and to re-establish the caste system formerly defined by slavery.[178] While the Codes gave African Americans the right to own property, marry, enter into contracts, and sue and be sued by other African Americans, their main purpose was to ensure a stable workforce for their former owners and to limit their employment options.[179] In essence, the Codes were designed to place the freedmen in a state that was "as near to slavery as possible."[180] "Virtually all the former Confederate

171. "The era of slavery was followed by decades of terrorism and racial subordination most dramatically evidenced by lynching." EQUAL JUSTICE INITIATIVE, *supra* note 10, at 3. The Equal Justice Initiative was founded by New York University School of Law Professor Bryan Stevenson, who is also the Executive Director. "EJI is a private, 501(c)(3) nonprofit organization that provides legal representation to people who have been illegally convicted, unfairly sentenced, or abused in state jails and prisons." *About EJI*, EQUAL JUSTICE INITIATIVE, https://eji.org/about-eji (last visited Mar. 20, 2020).

172. *See infra* Subpart III.C (explaining the almost non-existent prosecutions of those who lynched of African Americans).

173. *See supra* Subpart I.B (discussing the negative health impact of racism-related stress on African Americans).

174. *See supra* Subpart I.B.

175. ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION xvi (1971) ("The newly freed slave was regarded as occupying an intermediate stage between humanity and the lower orders of animal life.").

176. *Id.*

177. *Id.*

178. MATTHEW, *supra* note 1, at 17 ("These laws required blacks to obtain permits to perform anything other than agricultural work and prohibited them from raising their own crops. Travel permit requirements and limitations on labor options enforced food and job insecurity."); *see also* FONER, *supra* note 139, at 205.

179. FONER, *supra* note 139, at 199.

180. *Id.* (quoting Radical Benjamin F. Flanders, speaking of the Louisiana legislature's goal in enacting the Codes).

states enacted sweeping vagrancy and labor contract laws, supplemented by 'antienticement' measures punishing anyone offering higher wages to an employee already under contract."[181]

In Mississippi, African Americans were required to have written proof by January of their employment for the following year.[182] Failure to complete the term of an employment contract was punishable by arrest by any White person, and attempting to change employment before completing the contract term led to imprisonment or a $500 fine.[183] African Americans were prohibited from renting land in cities, and were subject to fines or "involuntary plantation labor" for such crimes as "'insulting' gestures or language', 'malicious mischief,' and preaching the Gospel without a license."[184] South Carolina enacted similar laws regulating employment between African American "servants" and their White "masters," and additionally limited lawful employment for African Americans to farming and work as servants.[185]

Perhaps most disturbing were laws that allowed White employers to keep African American orphans and those whose parents were deemed unable to care for them in "apprenticeships" that were essentially unpaid labor—in other words, a thinly-veiled version of slavery.[186] These alleged orphans were often older and some were even married with children of their own.[187] These arrangements with White "guardians" could be made without the knowledge or consent of the parents, thus exploiting and extending the separation of families that occurred during slavery.[188] Some of these laws were struck down after passage of the Civil Rights Act of 1866 and the Fourteenth Amendment, but others survived, and new laws emerged to discourage emigration out of the South and to ensure a stable labor force for plantation owners.[189]

B. CONVICT LEASING

Although the Thirteenth Amendment abolished slavery and "involuntary servitude," it made an exception when the involuntary servitude was punishment

181. *Id.* at 200. Even in those states whose laws were race neutral, it was understood that the laws were intended to apply to African Americans. *Id.* at 200–01. These laws made it risky for African Americans to travel to seek new jobs because being without a permanent home and job meant they could be prosecuted for vagrancy. David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 787 (1998).

182. FONER, *supra* note 139, at 199.

183. *Id.* In Florida, Whites who abandoned the contracts could only be sued in civil courts. *Id.* at 200.

184. *Id.* at 200. In order to ensure that no opportunity to convict African Americans was overlooked, the legislature declared all laws criminalizing acts by slaves and free blacks to be in force unless changed by law. *Id.*

185. *Id.*

186. *Id.* at 201.

187. *Id.* Ten percent of these apprenticed "orphans" in North Carolina were over the age of sixteen. *Id.*

188. *Id.*

189. Bernstein, *supra* note 181, at 791 (noting that states passed emigrant agent laws that prohibited agents from assisting African American workers who wanted to move to other parts of the United States, where the economic and social opportunities were better).

for a person convicted of a crime.[190] White southerners exploited this exception to push newly freed African Americans back into forced unpaid labor.[191] "If individual whites could no longer hold blacks in involuntary servitude, courts could sentence freedmen to long prison terms, force them to labor without compensation on public works, or bind them out to white employers who would pay their fines."[192] This was known as "convict leasing."[193] White law enforcement officers arrested African American freedmen, who were tried and found guilty by all-White juries in courts presided over by White judges.[194]

The prisoners were sentenced to work off their debt, but since they were paid little or nothing, they were effectively sentenced to a lifetime of forced labor, in conditions that were sometimes worse than slavery.[195] "Their prison time would be served in the coal mines and railroad camps and sometimes on the very same cotton fields that they had just worked before as slaves."[196] Although the system of convict leasing was not new, it took on a distinctively racial characteristic during the Jim Crow era in which the vast majority of convicts were African American.[197] The system not only "satisfied the South's indispensable need for racial oppression,"[198] it ensured capable workers would remain in the South to provide much-needed cheap labor to replace the slaves.[199] Prisoners were sold to the highest bidders, who could treat them as brutally as they desired.[200] Unlike slaveholders, who had the right to a slave's labor for the entirety of the slave's life, prisoners were only valuable until the end of their sentence, which removed any incentive for the "employers" to treat the prisoners humanely or provide for their well-being beyond their term of service.[201] Moreover, the system no doubt reinforced and entrenched beliefs about Black criminality that continue to be used to justify discriminatory policing in African American communities today.[202]

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190. U.S. CONST. amend. XIII, § 1.

191. FONER, *supra* note 139, at 205 (explaining how the Thirteenth Amendment exception for persons convicted of crimes was exploited to return freedmen to bondage).

192. *Id.*

193. *See* ALEXANDER, *supra* note 15, at 156–57 (comparing the convict leasing system to the modern criminal justice system); Gutterman, *supra* note 16, at 1527 (crediting the post-Civil War version of convict leasing to a proposal by Edmund Richardson in which he agreed to feed, clothe, and guard convicts in exchange for all of the profits from their labor and payment by the state of Mississippi to cover the cost of their maintenance). "Richardson's convict lease strategy condemned a generation of black prisoners to hardships far worse than they had ever experienced." *Id.*

194. FONER, *supra* note 139, at 205.

195. Gutterman, *supra* note 16, at 1527–28.

196. *Id.*

197. *Id.* at 1528. Ninety percent of convicts were African American during this era. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 1529.

201. *Id.* ("Once he was leased, the prisoner was subjected to greater danger and physical abuse than he had suffered during slavery. There was no interest in his well-being, so the bosses worked him like an animal.").

202. *See infra* Part V (analyzing commonly held beliefs about African American criminality and its effect on policing priorities and practices).

C. LYNCHING

The period immediately following the end of the Civil War was characterized by profound changes in American political and social structures.

> Reconstruction represented a remarkable repudiation of the prewar tradition that defined the United States as a "white man's Government"; it created for the first time an interracial democracy in which rights attached to persons not in their capacity as members of racially defined groups but as members of the American people.[203]

The Reconstruction Acts of 1867 gave African American men the right to vote and stripped voting rights from former Confederates.[204] In addition, southern states were required to ratify the Fourteenth Amendment before they would be readmitted into the Union.[205] This ushered in an era of African American political power not seen before or since, including more than six hundred African American state legislators, eighteen state executive positions, and, in Louisiana, P.B.S. Pinchback became the first Black governor in America (and the only Black governor until 1990).[206]

Unfortunately, by 1877 Reconstruction had been essentially abandoned and this progress was halted by White supremacists who "launched a bloody reign of terror that would overthrow Reconstruction and sustain generations of white rule."[207] The attacks on African Americans had roots in both racial and political concerns.[208] Some Whites viewed efforts to uplift former slaves as discrimination against Whites.[209] Moreover, nearly all African Americans voted for Republican candidates, posing a serious threat to White Democratic rule.[210] After President Hayes ended Reconstruction and withdrew federal troops from the South, African Americans were left vulnerable to violence and

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203. Foner, *supra* note 123, at 1586–87; *see also* TRELEASE, *supra* note 175, at xvi ("After promoting for a generation and more the idea of innate Negro inferiority in order to justify slavery, Southerners could hardly be expected suddenly to abandon it with the coming of emancipation, especially in the wake of military defeat.").

204. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 10.

205. *Id.*

206. *Id.* at 10–11. The Civil War Amendments also marked a shift in the power dynamic between the states and the federal government. Foner, *supra* note 123, at 1587. Those amendments not only expressly limited state power, they expressly authorized Congress to pass legislation enforcement of those restrictions. U.S. CONST. amend. XIV, § 5.

207. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 11. Congress passed the Amnesty Act in 1872, reinstating the civil rights of Confederate leaders and their right to run for public office. *Id.* at 18–19. Former Confederate officers became governors of Georgia and Virginia. *Id.* at 19. When the 1876 presidential election ended in a deadlock, it was resolved by a compromise that declared Republican Rutherford Hayes would be the new President, if he promised to end Reconstruction. *Id.* at 21 (citing FONER, *supra* note 139, at 584). "Within two months of taking office, President Hayes took action to end the federal troops' role in Southern politics." *Id.*

208. *Id.* at 12.

209. *See* Foner, *supra* note 123, at 1588 (quoting President Johnson who wrote in connection with his veto of the Civil Rights Act of 1866 that it was "made to operate in favor of the colored and against the white race"); *see also* The Civil Rights Cases, 109 U.S. 3, 25 (1883) (referring to African Americans as "the special favorite of the laws," in the words of Justice Bradley).

210. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 12–15 (documenting the rise of the Ku Klux Klan and efforts to re-establish "white dominance" through violence and intimidation of African Americans, particularly African Americans who sought to exercise their right to vote).

disenfranchisement.[211] While racial segregation and laws that effectively disenfranchised African Americans limited their legal rights, "white supremacy depended on the ability of whites to inflict violent repression on blacks with impunity."[212] Lynchings accomplished that goal.[213] In this way, entire communities could be terrorized, controlled, and subjugated even though relatively few were direct victims of such heinous crimes.[214]

As part of its racial justice project, the Equal Justice Initiative researched and "documented 4084 racial terror lynchings in twelve Southern states between the end of Reconstruction in 1877 and 1950."[215] More than 300 more were documented in states outside of the South.[216] Lynching in America began before the Civil War, and its victims were not all people of color.[217] In the early 1800s, lynching referred to non-fatal beatings or floggings, often as a form of vigilante justice in the Western territories.[218] In the decades preceding the Civil War, lynching came to mean hanging.[219] While Whites might also be lynched, African American victims were often tortured, burned, or mutilated (or all of the above).[220] By the early 1900s, the ratio of White to Black lynching victims rose from 1:4, to 1:17.[221]

The purpose of lynching evolved as well.[222] Lynchings became a means of enforcing White social and economic dominance in Southern society.[223] African Americans were lynched not only on suspicion of criminal acts, but for violating

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211. *Id*. at 22. Eleven former Confederate States rewrote their constitutions, adding restrictions such as literacy tests and poll taxes to disenfranchise African Americans. *Id*. at 23. Their purpose was not only apparent, but openly admitted. *Id.* at 22. Alabama opened its constitutional convention "with a statement of purpose: 'Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this state.'" *Id*. Further, "[a]s black people became voters with significant political power, especially in states and counties where they constituted majorities, disputed elections often devolved into bloody massacres." *Id.* at 12; *see also* discussion of the Colfax Massacre, *supra* Subpart II.B.2.

212. MANFRED BERG, POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA 93 (2011).

213. Lynchings sent a message to African Americans that "whites who undertook the duty of carrying out lynchings would face no legal repercussions." EQUAL JUSTICE INITIATIVE, *supra* note 10, at 35. Georgia, Texas, Alabama, North Carolina, and South Carolina all passed anti-lynching statutes, but they did not lead to significantly higher conviction rates. BERG, *supra* note 212, at 153. Federal anti-lynching legislation was introduced in Congress many times, but it failed each time. *Id*. at 153–155.

214. BERG, *supra* note 212 at 93 ("Lynchings did not have to happen every day to fill black communities with fear and horror. As with all forms of terror, the ever-present threat sent a powerful message of intimidation.").

215. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 4. In the EJI report, "racial terror lynchings" (as opposed to hangings or other mob violence) were defined as "acts of terrorism because these murders were carried out with impunity, sometimes in broad daylight, often 'on the courthouse lawn.'" *Id.* The EJI report built on the research of other scholars and institutions, including Stewart E. Tolnay and E.M. Beck, and the research collection at Tuskegee University. *Id*. at 4–5; *see supra* Subpart III.C.

216. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 4.

217. *Id.* at 27.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 27–29.

223. *Id.*

social norms, such as for having interracial relationships or for behaving "disrespectfully" toward White citizens.[224]

> Southern states were equipped with readily-available, fully functioning criminal justice systems eager to punish African American defendants with hefty fines, imprisonment, terms of forced labor for state profit, and legal execution. Lynching in this era and region was not used as a tool of crime control, but rather as a tool of racial control wielded almost exclusively by white mobs against African American victims.[225]

Klansmen also targeted "economically independent freedmen" to prevent them from achieving financial success.[226] Other African Americans were the victims of violence "simply because they were [B]lack and present when the preferred party could not be located."[227]

These were not secret killings carried out anonymously under the cover of night. Lynchings were often public spectacles, "festival gatherings" in which White crowds watched the torture and murder of African Americans.[228] "Many were carnival-like events, with vendors selling food, printers producing postcards featuring photographs of the lynching and corpse, and the victim's body parts collected as souvenirs."[229] The intent was to "terrorize and restrain" the African American population.[230]

A 1917 lynching in Memphis, Tennessee attracted thousands of spectators. Not only was the victim tortured, "[a] ten-year-old black child was forced to sit next to the fire and watch him die."[231] The victim's severed head was "thrown into a crowd in Memphis's black commercial district."[232] Other lynching victims had fingers and ears cut off, eyes gouged with hot pokers, were castrated, had

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224. *Id.* at 29.

225. *Id.* (citing STEWART E. TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930, at 112–13 (1995)).

226. FONER, *supra* note 139, at 429 (characterizing economic successful African Americans as the "most offensive" to racist White Southerners). "Night riders in Florence, South Carolina, killed a freedman on one plantation 'because it is rented by colored men, and their desire is that such thing ought not to be.'" *Id; see also* EQUAL JUSTICE INITIATIVE, *supra* note 10, at 44–45 ("When black people moved and built communities outside the South in growing numbers during the lynching era, they were often targeted and violently terrorized in response to racialized economic competition, unproven allegations of crime, and violations of the racial order.").

227. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 29 (describing a woman who was lynched because her brother, who was suspected of a crime, had escaped from a lynch mob). Others were lynched for "race prejudice," having a "bad reputation," and testifying on behalf of another African American. VANDIVER, *supra* note 14, at 10.

228. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 28 (describing the torture, dismemberment, and burning of lynching victims); *see also* BERG, *supra* note 212, at 92–94 (noting that White supremacists relied on "spectacle lynchings" in order to maintain power and control). *Id.* at 93.

229. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 33.

230. *Id*. at 28 (quoting JAMES CUTLER, LYNCH LAW: AN INVESTIGATION INTO THE HISTORY OF LYNCHING IN THE UNITED STATES 273–74 (1905)). History Professor Manfred Berg explained that lynchings occurred because, even after the end of Reconstruction, "white Southerners continued to be deeply troubled by the fact that they found themselves living amidst a large black population no longer restrained by the institution of slavery." BERG, *supra* note 212, at 92.

231. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 35 (citing PHILLIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 231–34 (2003)).

232. *Id*.

holes bored into their bodies by corkscrews, chunks of flesh cut out, their bodies dismembered, and were burned alive.[233] White lynchings were not only far less frequent,[234] White victims were not tortured in the same way.[235]

Sometimes the violence spread to entire communities.

> [I]n 1921, a black elevator operator named Dick Rowland was arrested in Tulsa, Oklahoma, after a misunderstanding led to rumors that he had attacked a white woman. Though charges against Mr. Rowland were soon dropped and he was released, a white mob quickly gathered to lynch him. When the black community banded together to help the young man leave town, the mob indiscriminately attacked the prosperous local black residential and business district known as Greenwood. Over the next two days, the mob killed at least thirty-six black people, displaced many more, and destroyed the once vibrant community. No member of the mob was ever convicted.[236]

In the township of Ocoee in Orange County, Florida in 1920, "a black farmer killed two attackers in self-defense, result[ing] in a three-day orgy of mob violence that left scores of African Americans dead and the entire village destroyed."[237]

Lynchings also took place in northern cities with smaller African American populations.

> In Omaha, Nebraska, in October 1891, thousands of white people gathered to seize George Smith, a black man, from the local jail after he was accused of assault. Though he had an alibi and most reports of the alleged crime were false, the mob beat Mr. Smith, dragged him through the streets with a rope around his neck, and then hanged him from telephone wires in front of a local opera house. Despite the severe physical injuries inflicted, the coroner concluded that Mr. Smith had died of "fright." As a result, seven white men, including the local police captain, who were arrested for coordinating the lynching were never prosecuted.[238]

The lack of prosecutions was not unusual. Although lynchings were carried out openly, in the light of day, and sometimes with thousands of witnesses—occasionally after notice of the lynching had been placed in the newspaper—few were ever charged or prosecuted in connection with lynchings.[239]

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233. *Id*. at 33–35.

234. *Id.* at 27 ("The ratio of black lynching victims to white lynching victims was 4 to 1 from 1882 to 1889; increased to more than 6 to 1 between 1890 and 1900; and soared to more than 17 to 1 after 1900.").

235. BERG, *supra* note 212, at 94 ("Because the excessive violence of spectacle lynchings was rarely applied to white victims, no one could miss the point that the cruelty served the purpose of dehumanizing African Americans."). "From the content of the gallows sermons to the choice of execution technique, the ceremony of execution included a variety of rituals intended to broadcast a message of white dominance." Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, *in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 97 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

236. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 46.

237. BERG, *supra* note 212, at 93.

238. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 47.

239. *Id.* at 33–35 (describing public spectacle lynchings and including photocopy of newspaper announcing lynching planned for later in the day); *see also* VANDIVER, *supra* note 14, at 11 ("[M]ost executions and many lynchings in southern states were carried out in public, at announced times and places, before large and enthusiastic crowds.").

Most state and federal legislatures, police officers, and judges either encouraged the violence, passively observed without intervening, or were impotent to enforce the guarantees of due process and equal protection promised by the Constitution.[240] Local law enforcement often stood by and allowed lynchings to occur, and even participated in the violence.[241] In some cases, lynchings happened after sham trials, with government officials participating in both.[242] "The line between a lynching and an official execution could be thin. The participants in lynchings often included the very same people who, in their official capacities, administered the criminal justice system."[243]

"Sheriffs were elected by the community and shared the mentality and prejudices of their constituents."[244] Attempts to stop mob violence against African Americans carried tremendous personal and professional risk, since protecting African Americans was seen as an affront to the values of the White community.[245] On the contrary, collusion with the mob carried almost no risk, and sheriffs who were indifferent to or complicit in racial violence faced no legal consequences and were routinely re-elected.[246] Justice was also elusive in the higher state courts. For example, the Alabama Supreme Court dismissed a case brought by the state attorney general to impeach a sheriff who neglected to protect a prisoner.[247] Those who were prosecuted were almost never convicted.[248]

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240. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 48. Congress could not pass anti-lynching legislation, in part because opponents argued that such laws showed "favoritism" toward African Americans and would be unconstitutional under the Supreme Court's holding in *Cruikshank*. *Id.* at 48.

241. BERG, *supra* note 212, at 155.

242. Banner, *supra* note 235, at 106 (describing a hanging which took place less than an hour after the jury was sworn in).

243. *Id.*

244. BERG, *supra* note 212, at 155.

245. *Id.* While the heightened passions of the community might make it difficult for law enforcement to prevent lynchings, it was certainly possible. *Id.* at 157. Sheriffs often had advance notice that lynching was being contemplated or planned and the intended victim—who was often in the county jail in the sheriff's custody—could be moved to an undisclosed location. *Id.* They could also seek assistance from the state or federal governments. *Id.* Of course, the sheriff could use force or threats of force, as Sheriff W.T. Cate of Knox County, Tennessee did when he and his deputies fired shots over the heads of the crowd until the mob dispersed. *Id.*

246. *Id.* at 155 (noting that sheriffs were "almost immune from federal or state interference and could count on the refusal of all-white local juries in the South to convict officers for aiding a lynch mob"); *see also* VANDIVER, *supra* note 14, at 11 ("Members of lynch mobs and spectators were serenely confident that they were safe from any negative legal or social consequences; there are many photographs of lynchers posing by the bodies of their victims.").

247. BERG, *supra* note 212, at 155.

248. *Id.* at 153 (noting that less than one percent of lynchings after 1900 led to convictions).

> As a rule, coroners' inquests concluded that "persons unknown" had caused the death of the victim. Prosecutors did not bring charges, and, if they did, grand juries rarely issued indictments. In those extraordinary cases where lynchers actually faced trial, juries usually acquitted them. After all, the jurors as well as the official representatives of the law were part of the local communities and often shared the lynchers' values and viewpoints, or at least were unwilling to defy them openly.

Id. Even convictions typically resulted in fines or suspended sentences instead of jail time. *Id.*

Although bills were introduced in Congress to prevent or punish lynchings that were taking place in—and outside of—the South, those bills were defeated by southern Congressmen who "predictably and consistently protested so-called federal interference in local affairs."[249] Opponents also argued that the legislation was unconstitutional under the reasoning of *Cruikshank*.[250] Several southern states passed their own anti-lynching laws as proof that states were up to the task of protecting African Americans and that there was no need for federal intervention.[251] However, those laws were not enforced and "of all lynchings committed after 1900, only 1 percent resulted in a lyncher being convicted of a criminal offense."[252]

The effect of such brutal racism and lack of accountability on the physical, mental, and emotional well-being of African Americans was devastating.[253] First and foremost, more than 4000 people were murdered because the federal and state governments failed to protect them from racially motivated violence. In addition to the suffering of those who lost their lives, the entire community suffered. "Whether the victims were family members, friends, classmates, acquaintances, or strangers, African Americans who witnessed or heard about a lynching survived a deeply traumatic event and suffered a complex psychological harm."[254]

Lynchings taught African Americans that they had no protection from the impulses of a potentially violent, even sadistic, White mob. "Anticipating white preferences and whims became a matter of safety and survival for black Southerners."[255] This required hypervigilance that was passed down to younger generations.[256] In this way, fear, suspicion, powerlessness—and the stress accompanying those emotions—would survive long after a lynching. That stress had (and has) a direct negative effect on health.[257]

The violence had an economic effect on the communities as well. Segregation and Jim Crow laws left limited opportunities for economic advancement among newly freed African Americans. Attacks on communities such as Greenwood in Tulsa, Oklahoma wiped out vibrant, thriving neighborhoods because of the spurious claims of a small number of

249. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 48.

250. *Id.* Opponents seized on Justice Bradley's statement that African Americans should no longer be "favorite[s] of the laws" and argued that anti-lynching laws showed favoritism toward African Americans since they were the most frequent victims of lynching. *Id.*

251. *Id.*

252. *Id.* (quoting BERG, *supra* note 212, at 146).

253. *Id.* at 68 (describing the "overwhelming sense of fear and terror" experienced by African Americans after lynchings).

254. *Id.*

255. *Id.* (quoting LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 322 (1998)).

256. *Id.*

257. *See supra* Subpart I.B. (explaining that racism-related stress has been linked to high blood pressure, coronary vascular disease, obesity, diabetes, depression, cognitive impairment, and autoimmune disorders).

individuals.[258] They also underscored how precarious economic gains could be, especially in the South, while reinforcing the belief that Black success would always be vulnerable to White hatred and power.[259] So long as these tragedies lived in the collective memory of African Americans, they continued to serve as reminders and warnings to those who dared to seek success or pushed for social change. The lack of accountability for perpetrators of violence proved that neither state nor federal governments had the political will to put an end to the violence and provide the protection necessary for African Americans to thrive economically or live in peace.

Lynching also helped drive the Great Migration of African Americans to urban centers in the North.[260] Millions of African Americans left the South for greater economic opportunities and to escape the racial terror exemplified by lynchings.[261] But the displacement from their homes brought its own trauma. "African American migrants were less terrorized in their new cities and towns, but they were not entirely welcomed."[262] Most worked as unskilled laborers, lived in poverty, and faced discrimination and competition from European immigrants.[263] Poverty and laws mandating segregated hospitals meant that African Americans were still unable to access the care that they needed to achieve and maintain good health.[264]

Conditions in Chicago in the early twentieth century exemplified these difficulties.

> In 1919 . . . the South Side's demographic revolution was seen as a threat by many of the city's whites, many of them themselves recent arrivals from Europe. As black workers claimed industrial jobs in the South Side's steel mills and stockyards, whites feared they would depress wages and undercut union power as strikebreakers.[265]

Whites also worried about how the increasing number of Black voters might affect politics in the city.[266] Moving to Chicago gave many African Americans an opportunity to vote without the hazards present in the South.[267] "In April 1919, black voters, aligned with the Republicans since Reconstruction,

258. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 46.

259. *See* FONER, *supra* note 139, at 429 (noting that members of the KKK targeted "economically independent freedmen" and the Whites who encouraged or engaged in commerce with them). Furthermore, "[l]egal and extralegal killings displayed the power of whites, their racial solidarity, and the impunity from punishment they enjoyed for their collective attacks on blacks." VANDIVER, *supra* note 14, at 10.

260. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 55, 65.

261. *Id.* at 55 (noting that "close to six million black Americans fled the South between 1910 and 1970" and fear of mob violence and lynchings was determined to be one of the major causes of the exodus).

262. *Id.* at 69.

263. FONER, *supra* note 139, at 472 ("The bulk of the North's black population remained trapped in urban poverty and confined to inferior housing and menial and unskilled jobs.").

264. *See* MATTHEW, *supra* note 1, at 21–23 (discussing how racism and legal segregation in health care facilities negatively affected the health of African Americans before the Civil Rights Era).

265. Adam Green, *How a Brutal Race Riot Shaped Modern Chicago*, N.Y. TIMES (Aug. 3, 2019), https://www.nytimes.com/2019/08/03/opinion/how-a-brutal-race-riot-shaped-modern-chicago.html.

266. *Id.*

267. *Id.*

provided the margin of victory for the party's candidate in a divisive mayoral election—a result that, for many whites, confirmed their role as public enemy."[268] Yet again, simply engaging in constitutionally protected activities made African Americans a target for hatred and violence.

The animosity eventually erupted into a race riot in 1919.[269] The rioting continued for several days, with gangs of White youth terrorizing African American neighborhoods, pulling African American citizens off of street cars and beating them with "planks, pipes, bricks, and fists."[270] Police officers were tasked with establishing and keeping the peace, but the vast majority of officers were stationed in the area separating African American and White neighborhoods and essentially contained the destruction to the African American areas.[271] Thousands of African Americans were left homeless.[272]

The police did not simply sit idly by and allow the destruction and violence to take place. Some participated and took steps to ensure that Whites would not be brought to justice.

> In some cases, white officers rode along with the white gangs to shield them from arrest. In others, when officers responded to attacks on blacks, they failed to collect sufficient evidence from the scene, ensuring that few assailants were prosecuted (only 47 people were indicted) and signaling that they would turn a blind eye toward most violence. Although they made up two-thirds of the over 500 recorded casualties, blacks were indicted at double the rate of whites—the first clear instance of racial disparity in city criminal justice, but by no means the last.[273]

Once again, the government displayed an unwillingness to provide African Americans with equal protection under the law.

D. RACIALIZED CAPITAL PUNISHMENT

In Southern states, both lynching proponents and opponents claimed that lynchings were common because the criminal justice system was too slow or too

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268. *Id.*

269. *Id.* The riot "began on July 27, consumed the city for three days and left 38 people dead and 537 injured." *Id.*

270. *Id.*

271. *Id.*

> During the first few hours of the violence, 2,800 officers, out of 3,500 total, were deployed along the edges of the Black Belt, forming a cordon.
>
> . . . .
>
> And the "dead line" cordon intended to separate the races worked only if the police were as committed to preventing white assailants from coming in as they were to keeping blacks from going out. This proved not to be the case: Much of the worst violence took place within the Black Belt itself.

Id.

272. *Id.* ("Whites set fire to scores of black-owned houses, leaving a thousand African-Americans homeless.").

273. *Id.*

lenient.[274] As lynchings decreased in the first half of the twentieth century, scholars attempted to prove a causal connection between the rise in capital punishments and a decrease in the number of lynchings during that same time.[275] The relationship between lynching and capital punishment remains a subject of debate;[276] however, it is clear that capital punishment in America has always had a racial component.[277]

Before ratification of the Fourteenth Amendment, several colonial and state governments identified specific crimes punishable by death only for African Americans.[278] When the defendant was a slave, these laws allowed capital punishment for rebellion, destroying crops or goods, enticing other slaves to run away, preparing medicines,[279] and for injuring White people.[280] Often, Whites who committed the same actions were either not guilty of a crime at all (as was the case for preparing medicines) or were subject to more lenient penalties.[281] "In his 1856 treatise summarizing the slave laws of the southern states, George Stroud counted sixty-six capital crimes for slaves in Virginia against only one (murder) for whites. In Mississippi he found thirty-eight capital crimes for slaves but not whites."[282]

Laws applicable to the White population were thought to be insufficiently harsh to deter crime by slaves, who were believed to "have less faith than whites in the system of eternal rewards and penalties provided by the Christian concepts of heaven and hell."[283] While it is notable that slaves were tried and convicted under the law instead of being summarily killed by Whites, slave trials were

274. *See, e.g.*, BERG, *supra* note 212, at 159 (noting that many moderates and conservatives who opposed lynching agreed "that lynching had its roots in ineffective law enforcement and lenient punishment"); VANDIVER, *supra* note 14, at 13 (noting that inefficiency and corruption in the criminal justice system were a frequent complaint and lynching was viewed as necessary to achieve justice).

275. *See* BERG, *supra* note 212, at 159 ("Evidence . . . suggests that capital punishment administered by the state played an important role in the demise of Judge Lynch."); EQUAL JUSTICE INITIATIVE, *supra* note 10, at 62 ("Southern legislatures shifted to capital punishment so that legal and ostensibly unbiased court proceedings could serve the same purpose as vigilante violence: satisfying the lust for revenge.").

276. *Compare* BERG, *supra* note 212, at 159 (noting that while the evidence is not definitive, the decline in the ratio of lynchings to legal executions "suggests" that "capital punishment gradually replaced lynching as the key instrument employed by American society in suppressing the perceived threat of black crime"), *with* VANDIVER, *supra* note 14, at 14 ("[D]espite the large volume of historical and statistical literature on capital punishment and lynching, the nature of the relationship between these two deadly social responses to perceived deviance remains unclear.").

277. *See generally* Banner, *supra* note 235 (tracing the history of capital punishment in America and how race affected and shaped its use).

278. *Id*. at 98.

279. This law was in response to fears of slaves poisoning their masters. *Id.*

280. *Id.*

281. *Id.* at 98–99. For example, in nineteenth century Texas, slaves and free Blacks—but not Whites—could be executed for insurrection and arson. *Id.* at 99. Capital punishment could also be imposed for "attempted murder, rape, attempted rape, attempted robbery, and assault with a deadly weapon," but only if the victim was White. *Id.* Free blacks could also be put to death for kidnapping a White woman. *Id.*

282. *Id.*

283. *Id.* at 98. In addition, the harsh conditions of slaves' lives were thought to make ordinary punishments seem less severe. *Id.*

often far from fair.[284] Expedited procedures were employed and trials were conducted by justices of the peace instead of trained judges, and without juries.[285] In some cases, trials were conducted in the shadow of threats of mob violence, and were conducted with little regard for evidence, process, or the innocence of the accused.[286] The only advantage to legal execution was that there was no torture or mutilation involved, as there might be with lynching.[287] Slaves were executed at much higher rates than Whites,[288] and slaves were subject to the more horrific forms of death, including being burned alive.[289]

After the Fourteenth Amendment made racially-targeted laws unconstitutional, laws became race-neutral on the books, but African Americans were tried by "all-white juries who could be trusted to sentence black defendants to death more frequently that white defendants."[290] The belief that capital punishment was necessary to control the African American population has been offered as an explanation for why southern states almost exclusively continued to use capital punishment when other states either abolished it entirely or left it as an option only for murder.[291] African Americans continued to be executed at a higher rate than Whites, a disparity that continued well into the latter half of the twentieth century.[292] Racial disparities in capital punishment cases decreased when the Supreme Court held that capital punishment for rape violated the Eight Amendment prohibition on cruel and unusual punishment and after the civil rights movement,[293] when African Americans were better represented on juries.[294]

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284. *Id.*

285. *Id.*

286. VANDIVER, *supra* note 14, at 12.

> Trials that were held under the threat of mob violence were exceptional for the swiftness and certainty of their verdicts, even given the speed of most legal proceedings and the casual attitude toward the protection of defendants' rights. In cases in which lynchings were threatened, court proceedings sometimes accomplished little beyond giving legal authority to a killing that would have occurred in any event.

Id.

287. *Id.*

288. *See* Banner, *supra* note 235, at 99.

289. *Id.* at 103. These forms of punishment were reserved for crimes that threated the social hierarchy, such as slaves killing their masters or women killing their husbands. *Id.*

290. *Id.* at 100.

291. *Id.* at 101 ("The belief that capital punishment was necessary to restrain a primitive black population became an article of faith among white southerners lasting well into the twentieth century.").

292. *Id.* at 101, 108–109.

293. *Id.* at 109 (citing Coker v. Georgia, 433 U.S. 584 (1977)). "Rape had always been the crime for which the race of the defendant made the biggest difference, so *Coker* instantly wiped away more discrimination than any reform of murder sentencing could have." *Id*.

294. *Id.* (noting that after the civil rights movement, African Americans were better represented on juries, particularly in the South).

E. RACISM IN HOUSING

> Housing has been recognized as one of the 'social determinants of health'—the circumstances in which people are born, grow up, live, work, and age, and the systems put in place to deal with illness, shaped by economics, social policies, and politics, all of which impact individual and communal health outcomes.[295]

Government action and inaction has played a role in driving African Americans into segregated housing that is often in neighborhoods "in declining, crime-ridden, central-city areas with high concentrations of poverty and little access to better schools, jobs, and social contacts that might foster upward mobility."[296] Residents of these neighborhoods often pay a high percentage of their incomes on inadequate housing.[297]

Segregated housing outside of the South has its origins in the Great Migration in the early twentieth century, and it continues today.[298] As African Americans fled the South and moved to the northern cities, those cities became increasingly racially segregated.[299] While they may initially have chosen to live in close proximity to other African Americans, as the number of African Americans increased and strained the supply of affordable housing, private and government policies began to restrict African Americans to certain areas and prevent them from moving into predominantly White neighborhoods.[300] Government action in this regard took the form of racially restrictive zoning, even after such practices had been declared unconstitutional by the Supreme Court.[301]

By the 1940s, most African Americans in the North were living in segregated areas known as "Black Belts" in large cities.[302] These neighborhoods were often overcrowded and the cost was high, considering the income of the residents.[303] Finding housing outside of the Black Belt was made difficult by

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295. Roberta Rubin & Andrea Ponsor, *Affordable Housing and Resident Health*, 27 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 263, 263 (2018) (footnote omitted).

296. Michelle Adams, *Separate and [Un]Equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 430 (1996) ("[B]lack residential segregation has reached epidemic proportions").

297. Rubin & Ponsor, *supra* note 295 at 265 ("Among very low-income households, a near-record 43% have worst case housing scenarios where they pay more than 50% of their income in rent or live in inadequate conditions.").

298. Adams, *supra* note 296, at 431 (noting that the "vast majority" of African Americans left the South and moved North in the early twentieth century).

299. *Id.* at 432 ("By the outbreak of World War II, Northern blacks were to a great extent living in segregated communities within the large cities.").

300. *Id.* The tactics used ranged from restrictive covenants prohibiting the sale of homes to racial minorities, to banks' refusal to lend money to African Americans to buy homes in White neighborhoods, and even violence. *Id.*

301. *Id.* at 432–433 ("Notwithstanding the fact that the Supreme Court held in 1917 that such practices were a violation of section 1982 [of the Civil Rights Act], 'cities continued to pass laws mandating or encouraging segregation.'") (footnote omitted).

302. *Id.* at 432.

303. *Id.*

policies and practices of private parties such as White property owners who enforced racially restrictive covenants forbidding transfer of property to racial minorities; real estate agents who refused to show African Americans homes in White neighborhoods; and banks that refused to lend to African Americans who sought to purchase homes outside of the Black Belts.[304]

But government policies are also to blame. Until the landmark case of *Shelley v. Kraemer*[305] was decided in 1948, both local housing and the federal housing program authorities operated segregated public housing projects.[306] Manuals distributed by the Federal Housing Authority instructed underwriters in how to prevent racial minorities from entering predominantly White areas, which it claimed would lower property values.[307] Urban redevelopment after World War II resulted in destruction of African American neighborhoods, forcing those families to move.[308] However, it was often difficult to find safe, affordable housing and the public housing available was deteriorating in quality.[309]

Over the next several decades, public housing continued to be segregated in practice, if not by law, with African Americans largely concentrated in high poverty areas in lower quality housing,[310] which has been shown to correlate with poor health.[311]

> Children who live in substandard housing have increased rates of asthma, increased exposure to lead, and higher rates of childhood accidents. . . . When lack of affordability leads a family to live in crowded conditions, research has shown an impact on a child's mental health, higher risk for childhood injuries, elevated blood pressure, respiratory conditions, and exposure to infectious disease.[312]

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304. *Id.* Alternatively, real estate agents facilitated sales of homes to African Americans, then reaped profits by helping White residents seeking to flee the newly integrated neighborhoods sell their homes and buy homes in White neighborhoods (a practice known as "blockbusting"). *Id.*

305. 334 U.S. 1, 23 (1948) (holding that judicial enforcement of racially restrictive covenants violated the Equal Protection Clause of the Fourteenth Amendment).

306. Adams, *supra* note 296, at 435.

307. *Id.* (citing Glenda G. Sloane, *Citizens Commission on Civil Rights, The Federal Government and Equal Housing Opportunity: A Continuing Failure, reprinted in* CRITICAL PERSPECTIVES ON HOUSING, 296–97 (Rachel G. Bratt et al. eds., 1986)).

308. Adams, *supra* note 296, at 438–439.

309. *Id.* at 439.

310. *Id.* at 442–447 (discussing the development of higher quality public housing for elderly (mostly White) residents in the suburbs and contrasting it with the older, poorer quality public housing for families that tend to be concentrated in higher poverty urban areas and occupied by racial minorities).

311. Rubin & Ponsor, *supra* note 295, at 266.

312. *Id.* (footnotes omitted); *see also* INTERDISCIPLINARY ENVTL CLINIC AT WASH. UNIV. SCH. OF LAW, ENVIRONMENTAL RACISM IN ST. LOUIS 3 (2019) (noting the effects of "environmental racism" on African American residents of St. Louis, Missouri). "[B]lack St. Louisans are disproportionately harmed by lead poisoning, asthma, mold, and high energy costs—all of which are associated with factors such as substandard housing conditions and air pollution—due to living near industrial facilities, highways, and building demolitions." *Id.*

Solving the housing crisis for lower income Americans, particularly African Americans, will help solve the health disparities that plague those communities.

IV. THE CIVIL RIGHTS ERA

The Civil Rights Era culminated in the passage of the Civil Rights Act of 1964, which prohibits discrimination by certain private actors, including hotels, restaurants, and other places of public accommodation.[313] However, that Act was merely the latest incarnation of federal legislation first passed at the end of the Civil War. Soon after the war ended, Congress exercised its authority under the enforcement provisions of the Thirteenth and Fourteenth Amendment by passing laws designed to protect African Americans and ensure their equal rights and treatment.[314] Yet once again, the Supreme Court stymied those efforts with its narrow interpretation of the Civil War Amendments and Congress' legislative authority pursuant to their enforcement provisions.[315]

In *United States v. Harris*, twenty men were accused of beating four men and killing one of them while the victims were in prison awaiting trial for various crimes.[316] They were charged with violating the following provision of the 1871 Ku Klux Klan Act[317]:

> If two or more persons in any state or territory conspire or go in disguise upon the highway or on the premises of another for the purpose of depriving,

313. 42 U.S.C. § 2000e et seq. (2018).

314. The Reconstruction Acts of 1867 gave African American men the right to vote and stripped voting rights from former Confederates. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 3 (citing FONER, *supra* note 139, at 69). In addition, southern states were required to ratify the Fourteenth Amendment before they would be readmitted into the Union. *Id*. at 10. This ushered in an era of Black political power not seen before or since, including more than six hundred African American state legislators, eighteen in state executive positions, and, in Louisiana, P.B.S. Pinchback became the first Black governor in America (and the only Black governor until 1990). *Id*. at 10–11. Unfortunately, this progress was halted by White supremacists "launched a bloody reign of terror that would overthrow Reconstruction and sustain generations of white rule." *Id*. at 11; *see also supra* Subpart III.C. (discussing violence against African Americans post-Reconstruction).

315. Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Chief Justice William Rehnquist relied on cases from the post-Reconstruction era as support for a narrow reading of Congress's legislative power under this provision. United States v. Morrison, 529 U.S. 598, 599 (2000).

> [T]he Fourteenth Amendment places limitations on the manner in which Congress may attack discriminatory conduct. Foremost among them is the principle that the Amendment prohibits only state action, not private conduct. This was the conclusion reached in *United States v. Harris*, 106 U.S. 629, and the *Civil Rights Cases*, 109 U.S. 3, which were both decided shortly after the Amendment's adoption. The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time, who all had intimate knowledge and familiarity with the events surrounding the Amendment's adoption.

Id.

316. 106 U.S. 629, 629–30 (1883). The four men were Robert R. Smith, William J. Overton, George W. Wells, Jr., and P. M. Wells. *Id.* All of the men were beaten, and P.M. Wells was killed. *Id*. at 629–632.

317. *Id.* at 632. The Act is referred to as Section 5519 of the Revised Statutes of the United States in the opinion.

> either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws, each of said persons shall be punished by a fine of not less than $500 nor more than $5000, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.[318]

While the Court acknowledged that Section 5 of the Fourteenth Amendment gave Congress authority to pass legislation to enforce its provisions, the Court relied on the decisions in the *Slaughter-House Cases* and *Cruikshank* in support of its conclusion that the statute was unconstitutional.[319] Because the statute was "directed exclusively against the action of private persons, without reference to the laws of the states, or their administration by the officers of the state," the Court found that the Act was not within Congress's authority under section 5 of the Fourteenth Amendment.[320]

The nail in the coffin of federal civil rights legislation was the decision in the *Civil Rights Cases* less than one year after *Harris*.[321] At issue was the constitutionality of provisions of the Civil Rights Act of 1875.[322] Section 1 of the Act provided:

> That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.[323]

Section 2 of the Act set out civil and criminal penalties for violations.[324]

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318. *Id.*

319. *Id.* at 638.

320. *Id.* at 640.

321. 109 U.S. 3 (1883). Justice Bradley wrote the opinion for the Court in the *Civil Rights Cases*. He also authored the Circuit Court opinion in *Cruikshank* that argued for a narrow interpretation of the Fourteenth Amendment. *See* Curtis, *supra* note 137, at 1420–22. The Supreme Court largely adopted Bradley's argument in its opinion. *Civil Rights Cases*, 109 U.S. at 4.

322. *Id.*

323. *Id*. at 9.

324. *Id*. Justice Bradley explained:

> That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall, also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by state statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this act or the criminal law of any state: *And provided, further*, that a

Before deciding the constitutionality of the Act, Justice Bradley first explained the purpose and scope of Sections 1 and 5 of the Fourteenth Amendment.[325] He explained that Section 1 prohibits any state action "which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws."[326] Section 5 granted Congress the power to enforce the prohibitions in Section 1.[327] "To adopt appropriate legislation for correcting the effects of such prohibited State law and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it."[328]

Justice Bradley rejected the argument that Section 5 granted Congress authority to enact laws to regulate private rights.[329] He concluded that the Civil Rights Act of 1875 was unconstitutional because it did not seek to redress any state law or action that violated any rights protected by the Fourteenth Amendment.[330]

> In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which by the amendment they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which by the amendment they are prohibited from committing or taking.[331]

Because the Act did not reference any state action, nor was liability premised on any state action, the Court held that the provisions of the Act under review were unconstitutional.[332] That opinion, in conjunction with *Cruikshank*,

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> judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.

325. *Id.* at 10–11.

326. *Id.* at 11.

327. *Id.*

328. *Id.*

329. *Id.* The majority opinion stated:

> Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect.

Id. at 11–12.

330. *Id.* at 13 ("[U]ntil some State law has been passed, or some State action . . . has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment . . . can be called into activity. . . .").

331. *Id.* at 13–14.

332. *Id.* at 14. The Court noted that it had properly upheld other provisions of the Act (including a section prohibiting exclusion from juries on the basis of race) that were "corrective" in character. *Id.* at 15–17. The Court also rejected claims that Congress had authority under the enforcement provision of the Thirteenth Amendment. *Id.* at 23 (holding that a private party's refusal to provide accommodations or admission to a place of amusement or public conveyance did not "inflict upon such persons any manner of servitude, or form of slavery").

significantly impaired efforts to enforce civil rights for eighty years.[333] During that time, African Americans continued to face racial violence, as well as discrimination in employment, housing, and healthcare. Those barriers limited economic progress and ensured ongoing health disparities.

Federal efforts to enforce civil rights were finally successful when the Warren Court upheld the Civil Rights Act of 1964, although it relied on Congress's authority under the Commerce Clause, and not the Fourteenth Amendment.[334] The Act represented the culmination of nearly a century of struggle and the beginning of sustained progress for African Americans. However, legislation could not immediately erase the prejudices that engendered and sustained centuries of discrimination and violence against African Americans, nor could it undo the physical and psychological damage that they caused.[335]

V. GOVERNMENT DISCRIMINATION CONTINUES TO DRIVE HEALTH DISPARITIES

Even after the Civil Rights Movement, local, state, and federal governments have not only failed to provide equal protection of the laws, they have continued to implement laws and policies that are race-neutral on their face but have a disparate negative impact on African American communities. There is abundant evidence that African Americans are targeted more often and treated more harshly than Whites in contexts as varied as preschools and encounters with law enforcement.[336] Interactions with police at an early age increases the likelihood of being incarcerated as an adult, and simply being African American increases the likelihood of being targeted by police, arrested, convicted and incarcerated.[337] All of which leads to stress and stress-related health problems. It also contributes to the negative perceptions of African Americans by everyone in society, including healthcare workers whose biases affect treatment decisions.

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333. Curtis, *supra* note 137, at 1426 (noting that *Cruikshank* "hobbled statutes designed to reach Klan violence" and the *Civil Rights Cases* allowed continuing racial discrimination).

334. *Id.; see* Heart of Atlanta Motel v. U.S., 379 U.S. 241, 261 (1964) (holding that Congress had authority under the Commerce Clause to enact Title II of the Civil Rights Act of 1964); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (same). The Voting Rights Act was passed in 1965. Curtis, *supra* note 137, at 1426.

335. Nor is it clear that future civil right legislation will be upheld by the Supreme Court on the grounds that sustained the Civil Rights Act of 1964. In 2000, the Supreme Court held that the Violence Against Women Act could not be upheld under the Fourteenth Amendment or the Commerce Clause. U.S. v. Morrison, 529 U.S. 598, 627 (2000); *see also* Curtis, *supra* note 137, at 1427 (citing *Morrison* and discussing the Rehnquist Court's return to the reasoning employed in *Cruikshank* and the *Civil Rights Cases*).

336. *See* Nance, *supra* note 18, at 929 (noting racial disparities in school discipline); ALEXANDER, *supra* note 15, at 124 (noting that the decision to focus law enforcement efforts in communities of color is based on political concerns, not evidence of higher levels of criminal activity).

337. *See* Judith A.M. Scully, *Examining and Dismantling the School-to-Prison Pipeline: Strategies for a Better Future*, 68 ARK. L. REV. 959, 970 (2016) (citing research concluding that disciplinary referrals at school are the best predictor of future involvement in the criminal justice system).

A. POLICING IN SCHOOLS: THE SCHOOL-TO-PRISON PIPELINE

In schools, concerns about school safety have led to an increased presence of security guards and law enforcement officers in school buildings.[338] But these officers are often called to handle behavior issues as well.[339] Behavior that is disrespectful or defiant—but not violent[340]—has been met with force by armed security personnel and suspension, expulsion, and even arrest, for children as young as four years old.[341] "As with referrals to law enforcement and school-based arrests, data also indicate that the majority of these suspensions and expulsions resulted from only trivial infractions of school rules or offenses, not from offenses that endangered the physical well-being of other students."[342] While some have defended such tactics as a means of deterring future bad behavior,[343] "[e]mpirical evidence demonstrates that incarcerating juveniles limits their future educational, housing, employment, and military opportunities. It also negatively affects a youth's mental health, reinforces violent attitudes and behavior, and increases the odds of future involvement in the justice system."[344]

While using the criminal justice system to discipline non-violent behavior in schools is troubling on its own, empirical evidence further shows that African Americans are disciplined more often and more harshly than White students who engage in similar behavior.[345] Once again, researchers tend to blame the disparity on implicit bias instead of conscious racism.[346] Intentional or not, the result is that more African American children are pushed into a system that

338. *See id.* at 967 ("This 'get tough' approach to criminal justice was eventually exported to public schools in the form of zero tolerance policies, police and security presence in schools, and a rise in school-based arrests.").

339. *Id.* at 969 (noting that zero-tolerance policies not only related to violent behavior in schools, but also "trivial incidents that—twenty years prior—would have resulted in a verbal reprimand by the principal and a parent.").

340. Sarah E. Redfield & Jason P. Nance, *American Bar Association: Joint Task Force on Reversing the School-to-Prison Pipeline*, 47 U. MEM. L. REV. 1, 27 (2016) ("Harsher treatment . . . occurs for relatively minor 'offenses'").

341. *Id.* at 12 (analyzing data from the U.S. Department of Education's Civil Rights Data Collection (CRDC) and describing an incident in which a sheriff's deputy handcuffed a four-year-old elementary school student who was having a "temper tantrum," took him to the sheriff's office, and shackled him).

342. *Id.* at 14; *see also, e.g.*, Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1064 (2016) (noting that schools "routinely" employ "extreme disciplinary measures" for minor offenses); Scully, *supra* note 337, at 970 ("[W]alking out of a classroom or refusing to sit down, talking or making noise in class, and public displays of affection were all cited as causes for students receiving out-of-school suspensions of up to twenty days.").

343. Nance, *supra* note 18, at 923.

344. *Id.* at 954; *see also* Scully, *supra* note 337, at 970 (citing research concluding that disciplinary referrals at school are the best predictor of future involvement in the criminal justice system).

345. Nance, *supra* note 342, at 1066 ("While one might suggest that the reason behind these disparities is that minority children tend to misbehave more than other children, several empirical studies debunk this misconception.").

346. *Id.* at 1067–68 (opining that most administrators and teachers "are probably acting in good faith most of the time when dealing with students," and noting that most researchers blame unconscious racial bias for disparities in disciplinary actions).

erodes their mental health and ability to achieve economic success.[347] Such encounters can also reinforce the image of African Americans as criminals who are more dangerous and less moral than their White counterparts. These negative stereotypes, in turn, breed support for over-policing in African American neighborhoods, both by police and by private citizens who call police to report African Americans engaging in "suspicious" behavior (which is often simply being African American in a predominantly White area).[348] Such incidents include calling the police on: an African American woman eating in the common room at Smith College;[349] an African American student who was napping in her dorm's common room at Yale University;[350] an African American man babysitting two White children;[351] and an African American girl selling water in front of her home without a permit.[352] These encounters can be stressful and traumatizing and can negatively impact health.[353]

B. OVER-POLICING IN AFRICAN AMERICAN COMMUNITIES: THE WAR ON DRUGS AND STOP-AND-FRISK

One of the most glaring examples of over-policing is the war on drugs, which has been waged primarily in communities of color. The "war" was first declared by then-President Ronald Reagan in 1982 at a time when drug use was actually *declining*.[354] Although the "war" is usually associated with escalating

347. *Id*.

348. *See A White Woman, Teresa Klein, Called the Police on a Black Child She Falsely Said Groped Her*, N.Y. TIMES (Oct. 12, 2018), https://www.nytimes.com/2018/10/12/nyregion/woman-calls-police-black-boy-brooklyn.html (describing multiple incidents of White citizens calling police to report African Americans who have not committed any crime). Teresa Klein called the police claiming that a nine-year-old African American boy "sexually assaulted" her in a corner store in New York. *Id.* Another patron videotaped the call and her interaction with the boy and his mother. *Id.* The boy is seen sobbing and terrified as other patrons berate Ms. Klein for calling the police. *Id.* When Ms. Klein went to the store another day to buy cigarettes, the owner showed her security camera footage of the incident, which revealed that the boy's backpack had brushed against her when he turned to someone behind him. *Id.* She publicly apologized to the boy, but in an interview, he said that he was traumatized and humiliated. Karma Allen, *"I Felt Humiliated": 9-Year-Old Boy in "Cornerstore Caroline" Video Speaks Out*, ABC NEWS (Oct. 19, 2018, 5:25 AM), https://abcnews.go.com/GMA/News/black-child-falsely-accused-viral-cornerstore-caroline-video/story?id=58606508.

349. *Police Called on Black Smith College Student Eating Lunch*, CBS NEWS (Aug. 3, 2018, 6:35 AM), https://www.cbsnews.com/news/police-called-on-black-smith-college-student-eating-lunch/ (describing feeling nervous and having "a complete meltdown" after the incident).

350. Christina Caron, *A Black Yale Student Was Napping, and a White Student Called the Police*, N.Y. TIMES (May 9, 2018), https://www.nytimes.com/2018/05/09/nyregion/yale-black-student-nap.html?module=inline (the student reported frustration and disappointment, but said that such incidents happened every day and were "not shocking anymore").

351. Melissa Gomez, *Babysitting While Black: Georgia Man Was Stalked by Woman as He Cared for 2 White Children*, N.Y. TIMES (Oct. 9, 2018), https://www.nytimes.com/2018/10/09/us/black-man-babysitting.html (Mr. Lewis described feeling that his "character was being criminalized").

352. Ashley May, *"Permit Patty" Resigns as CEO of Cannabis Company Following Viral Video Backlash*, USA TODAY, https://www.usatoday.com/story/news/nation-now/2018/06/27/permit-patty-resigns-ceo-cannabis-company/737298002/ (last updated June 27, 2018, 12:50 PM).

353. *See supra* Subpart I.B. (discussing research linking race-related stress to various diseases, including high blood pressure, cardiovascular disease, diabetes, and cancer).

354. ALEXANDER, *supra* note 15, at 6.

sales and use of crack cocaine, crack did not spread to poor African American communities until years later.[355] At that point, the Reagan administration highlighted the problem in the press in a successful attempt to gain political support for the war.[356] More than a decade later, it was revealed that the CIA blocked efforts to reduce the flow of drugs into poor African American neighborhoods because the drug sales were funding its allies in the covert war in Nicaragua.[357]

The war on drugs has been devastating to already struggling African American communities and families.[358] The population of prison inmates in the United States skyrocketed from around 300,000 to over 2 million, from 1920 to 2007,[359] and the vast majority of the increase is attributable to drug convictions.[360] Contrary to the image of drug users and dealers perpetuated by law enforcement and the media, the high rates of drug stops, arrests, and convictions among African Americans and Latinos is unrelated to their rates of drug use and drug sales.[361] In fact, studies have consistently shown that people of all races use and sell illegal drugs at very similar rates.[362]

In 2016, the Centers for Disease Control and Prevention reported that 10.8 percent of Whites used an illicit drug in the past month, compared to 12.5 percent of African Americans and 9.2 percent of Hispanics or Latinos.[363] In fact, surveys suggest that White youth are *more* likely to sell and use illegal drugs than people of color.[364] Yet African Americans are prosecuted and incarcerated for drug crimes at a much higher rate.[365] "In some states, black men have been admitted

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355. *Id.* at 5.

356. *Id.*

357. *Id.* at 6.

> The CIA admitted in 1998 that guerrilla armies it actively supported in Nicaragua were smuggling illegal drugs into the United States—drugs that were making their way onto the streets of inner-city black neighborhoods in the form of crack cocaine. The CIA also admitted that, in the midst of the war on drugs, it blocked law enforcement efforts to investigate illegal drug networks that were helping to fund its covert war in Nicaragua.

Id. at 6. These admissions fueled conspiracy theories that the CIA was committing genocide against African Americans. *Id.*

358. *Id.*

359. CHARLES OGLETREE ET AL., *Coloring Punishment: Implicit Social Cognition and Criminal Justice*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 45, 45 (Justin D. Levinson & Robert J. Smith eds., 2012).

360. ALEXANDER, *supra* note 15, at 6.

361. *Id.* at 7 ("Studies show that people of all colors *use and sell* drugs at remarkably similar rates.") (footnote omitted).

362. *Id.*

363. *Table 50. Use of Selected Substances in the Past Month Among Persons Aged 12 and Over, by Age, Sex, Race, and Hispanic Origin: United States, Selected Years 2002–2016*, NAT'L CTR. FOR HEALTH STAT., https://www.cdc.gov/nchs/data/hus/2017/050.pdf (last visited Mar. 20, 2020).

364. ALEXANDER, *supra* note 15, at 100 (reports show White youth are more likely to sell illegal drugs than African American youth, and reports also show lower rates of drug use by African American adolescents and 12th graders, as compared to White 12th graders and adolescents). Moreover, White youth have triple the number of emergency room visits for drug overdose than African American youth. *Id.* at 99.

365. *Id.* at 7.

to prison on drug charges at rates twenty to fifty times greater than those of white men."[366]

Biased attitudes about race affect African American neighborhoods as well, to devastating effect. Although Whites are far more likely to be drug dealers and users,[367] and data shows that Whites are more likely to use and sell drugs in White neighborhoods,[368] law enforcement efforts are heavily concentrated in poor minority neighborhoods.[369] "From the outset, the drug war could have been waged primarily in overwhelmingly white suburbs or on college campuses."[370] Instead, high profile military tactics were used to wage the drug war in poor minority communities who lack the political power wielded by wealthier White citizens.[371]

The "stop and frisk" policies adopted in many large urban minority communities have also been criticized as discriminatory, harmful, and ineffective.[372] These policies were implemented in response to increasing levels of violent crimes,[373] but despite the staggering number of stops—which occurred disproportionately in poor minority communities—there was little evidence that the stops were effective in reducing the number of violent crimes.[374] Critics of these policies have also pointed out that while people in African American and Hispanic neighborhoods are stopped, questioned, and frisked by the police far more frequently than those in other neighborhoods, police are substantially slower to respond to requests for police *assistance*.[375] "Policing is thus both under-supplied and over-provided simultaneously."[376]

Researchers have also found that African Americans who are stopped by police are also at greater risk of being on the receiving end of non-lethal force,

366. *Id.*

367. *Id.* at 98. While this statistic may be surprising to some, Whites make up the majority of the population. *See Quick Facts*, U. S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/RHI125217#viewtop (stating that 76.5% of the United States population is White). Thus, if people of all races sell and use drugs at a similar rate, it makes sense that the majority of drug dealers are White, not African American or Latino.

368. Again, this should not be surprising since studies consistently show that people buy from people of their own race, in their own communities. ALEXANDER, *supra* note 15, at 100 ("Whites tend to sell to whites; blacks to blacks. University students tend to sell to each other. . . . White high school students typically buy drugs from white classmates, friends, or older relatives.").

369. *Id.* at 124.

370. *Id.*

371. *Id.* ("The enduring racial isolation of the ghetto poor has made them uniquely vulnerable in the War on Drugs. What happens to them does not directly affect—and is scarcely noticed by—the privileged beyond the ghetto's invisible walls. . . . SWAT teams are deployed here; buy-and-bust operations are concentrated here; drug raids of apartment buildings occur here; stop-and-frisk operations occur on the streets here.").

372. *See, e.g.*, Huq, *supra* note 159, at 2399 (noting the public controversy sparked by "stop, question, and frisk" policies employed in New York City, Chicago, Philadelphia, and other large American cities).

373. *Id.* at 2398.

374. *Id.* at 2419 (discussing studies of the use of stop and frisk in New York City showing no significant reduction in the number of shooting incidents even as the use of stop and frisk increased dramatically). "While there is some empirical support for an effect from [stop, question, and frisk] in small-scale experiments, there is no existing evidence that this effect can be replicated at a citywide level." *Id.* at 2421.

375. *Id.* at 2425.

376. *Id.*

such as slapping, grabbing, or being pushed to the ground or into a wall.[377] The high rate of non-consensual interaction with police takes an emotional and physical toll on its victims.[378] A survey of 1200 young men in New York revealed that "contact with the police (primarily in the form of *Terry* stops) was consistently associated with persisting 'stigma,' 'trauma,' 'anxiety,' and 'depressive symptoms.'"[379]

The policies and practices referred to above represent the latest examples of state and federal law enforcement violating the right to equal protection and the courts failing to enforce laws intended to prevent those violations or provide civil remedies to compensate the victims and deter future violations.[380] Thus, the abuses continue. For families, this has meant millions of children growing up with at least one parent incarcerated.[381] On any given day, one of every eight African American males is in jail or prison,[382] and one in three can expect to go to jail at some point in their lives.[383] These men cannot work to support themselves or their families while they are imprisoned, and it is difficult to find stable, well-paying jobs when they are released.[384]

Once arrested, poor men and women are incentivized to plead guilty—even when they are innocent—if they cannot afford bail and face weeks or months in prison before they are tried. They may be persuaded to plead guilty without realizing that doing so leaves them with a felony conviction that may make them ineligible for certain employment or professional licenses, education assistance, public housing, or subsidies to buy food for themselves and their children.[385] This may result in homelessness, hunger, and an inability to find work to provide for their families. Depending on the reason for the imprisonment, the terms of

377. *Id.* at 2432.

378. *Id.* at 2431.

379. *Id.* (citing Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2321–22 (2014)).

380. While the Supreme Court has severely limited Equal Protection claims based on disparate impact, see *infra* Part II, several state and federal laws allow for recovery when a race-neutral law has a disparate racial impact. *See* Huq, *supra* note 159, at 2459 (citing Title VI of the Civil Rights Act of 1964, which applies to state and local police forces, and civil rights statutes in Illinois and California). None of these provide a private right of action, but have been used to obtain consent decrees in New Orleans and Baltimore. *Id.* However, these are only as effective if the agencies charged with enforcing those laws are diligent in their efforts. While the Department of Justice under President Obama was aggressive in investigating allegations of racially biased policing, the Department has been far less interested in these cases under President Trump. *See, e.g.*, Eric Lichtblau, *Sessions Indicates Justice Department Will Stop Monitoring Troubled Police Agencies*, N.Y. TIMES (Feb. 28, 2017), https://www.nytimes.com/2017/02/28/us/politics/jeff-sessions-crime.html ("Attorney General Jeff Sessions indicated on Tuesday that the federal government would back away from monitoring troubled police departments, which was the central strategy of the Obama administration to force accountability onto local law enforcement amid rising racial tensions.").

381. "At the turn of the millennium, approximately 1.5 million children had at least one parent in jail or prison, and 10 million have had a parent in jail at some time during their lives." OGLETREE, ET AL., *supra* note 359, at 45.

382. *Id.* at 46.

383. *Id.*

384. ALEXANDER, *supra* note 15, at 151 (exploring how criminal records harm job applicants).

385. ALEXANDER, *supra* note 15, at 143.

their release, and the jurisdiction in which they live, their time in jail may also result in permanent disenfranchisement and inability to serve on juries.[386] They may also lose access to government funded health care.[387] In other words, they are left in poverty, under tremendous stress, and unlikely to have access to quality healthcare. Compromised health is all but inevitable.

C. DEADLY REACTIONS TO UNREASONABLE FEAR

Highly publicized killings of unarmed African Americans by law enforcement officers are another source of stress and trauma for victims' families and the entire African American community.[388] One recent study used data from African American respondents to a nationwide survey of non-institutionalized adults from 2013–2015.[389] The survey asked respondents about their mental health at the time of the survey.[390] The researchers also accessed data about police killings of unarmed African Americans from 2013–2016.[391] The researchers then compared "the mental health of black Americans surveyed after a police killing of an unarmed black American in the same state with the mental health of black Americans residing in the same state but surveyed before that event or more than 3 months after the event."[392] "Exposure to one or more police killings" was associated with an increase in poor mental health days.[393] The impact was strongest in the one to two months following the killing.[394] Killings of *armed* African Americans or *unarmed White* Americans, did not have a statistically significant impact on the mental health of African Americans (or

386. *Id.* at 142–43.

387. *Id.* at 143.

388. Josh Hafner, *Police Killings of Black Men in the U.S. and What Happened to the Officers*, USA TODAY, https://www.usatoday.com/story/news/nation-now/2018/03/29/police-killings-black-men-us-and-what-happened-officers/469467002/ (last updated Mar. 30, 2018, 10:46 PM),) ("[Reporting on] what happened after the deaths of other black men after police interactions in high-profile cases nationwide, from Tamir Rice to today"); *see also* Samuel R. Aymer, *"I Can't Breathe": A Case Study—Helping Black Men Cope with Race-Related Trauma Stemming from Police Killing and Brutality*, 26 J. HUM. BEHAV. SOC. ENV'T 367, 368 (2016) (identifying several unarmed African American men killed by police between 1999 and 2015). Jacob Bor et al., *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-based, Quasi-Experimental Study*, 392 LANCET 302, 302 (2018) ("Police killings of unarmed black Americans have adverse effects on mental health among black American adults in the general population.").

389. The data was collected as part of the U.S. Behavioral Risk Factor Surveillance System, "a nationally representative, telephone based, random digit dial survey of non-institutionalised adults aged 18 years and older." *Id.* at 303. African American respondents were identified using self-reported race information. *Id.* The study sample included 103,710 African Americans with a mean age of 44.9 years. *Id.* at 306.

390. They were asked: "Now thinking about your mental health, which includes stress, depression, and problems with emotions, for how many days during the past 30 days was your mental health not good?" *Id.* at 304.

391. *Id.* at 303. This data was found in the Mapping Police Violence database, "which has tracked police killings in the USA since 2013." *Id.*

392. *Id.* at 304. The researchers adjusted for "state-specific seasonal patterns in mental health and for temporal trends in mental health of black Americans living in other states." *Id.*

393. *Id.* at 306.

394. *Id.* at 307.

White Americans).[395] The researchers concluded that "police killings of unarmed black Americans have a meaningful population-level impact on the mental health of black Americans."[396]

Not only is it traumatizing to see non-violent, unarmed men, women, and children killed by police, it reinforces the already-prevalent belief that it is reasonable for *everyone* to be afraid of African Americans. At least one study has shown that both Whites and African Americans associate African American faces with crime.[397] Another suggests that African Americans are associated with animals, which may be linked to conceptions of African Americans as less evolved or less human than Whites.[398] Being viewed and treated as sub-human criminals affects the self-image of African Americans and affects how they are treated by others.[399]

D. DISCRIMINATION IN HEALTHCARE SETTINGS

The consistent government reinforcement of negative racial stereotypes directly impacts the treatment that African Americans receive from healthcare workers. In 2003, the Institute of Medicine issued a report that provided "the first comprehensive and systematic proof" that disparate and inferior treatment by medical professionals contributes to health disparities.[400] "Doctors provide inferior preventative care for blacks when compared to whites," and doctors are less likely to receive the most appropriate treatment for diseases such as cardiac

395. *Id.* Moreover, there was no association between the mental health of White Americans and the killing of unarmed African American. *Id.*

396. *Id.* at 308.

397. OGLETREE, ET AL., *supra* note 359, at 48. In the study, participants who were primed with the face of an African American were able to identify pictures of knives or guns more quickly than when they were primed with a White face or no face at all. *Id.* (citing Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 PERSONALITY & SOC. PSYCHOL. 876, 880 (2004)).

398. OGLETREE, ET AL., *supra* note 359, at 49 (citing Philip A. Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 306 (2008)). In the study, participants were shown pictures of an ape that was initially unrecognizable, but came into focus in successive frames. *Id.* ("The study found that, when primed with a consciously undetectable image of a black face, participants were able to identify the ape in fewer frames. When primed with a consciously undetectable white face, however, participants required more frames to recognize the ape than when they received no prime at all.").

399. Take, for example, other findings from Professor Goff's study:

> Professor Goff asked a different set of participants to watch a video of a black suspect being beaten by police officers. Before viewing the video, participants were primed either with a consciously undetectable image of an ape or a consciously undetectable image of a big cat. Participants primed with the ape image were more likely to report that the police beating was "deserved" and "justified" than those participants primed with the big cat image. This finding is consistent with the broader literature on dehumanization, which suggests that as a person becomes dehumanized it is both increasingly more difficult for people to express empathy toward and attribute a range of positive emotions to the dehumanized subject.

Id. at 49–50 (footnotes omitted).

400. MATTHEW, *supra* note 1, at 57.

illness.[401] Similar disparities can been seen in the treatment of other diseases. Even though African Americans and Whites have similar survival rates when they receive the same treatments for cancers at a similar stage, physicians are significantly less likely to recommend the treatments for their African American patients that offer the best outcomes.[402]

African Americans and Hispanics are also persistently undertreated for pain management, including "postoperative, chronic acute or end-of-life pain—in a wide variety of settings."[403] These findings are not surprising given the evidence of racial bias in perceptions of African Americans' pain.[404] In one study, researchers collected data from 418 medical students and residents to assess their beliefs about biological differences between African Americans and Whites.[405]

> [M]any white medical students and residents hold beliefs about biological differences between blacks and whites, many of which are false and fantastical in nature, and [] these false beliefs are related to racial bias in pain perception. Furthermore, [the study] also reveals that white medical students and residents who endorsed false beliefs showed racial bias in the accuracy of their pain treatment recommendations. Specifically, participants who endorsed more of these beliefs reported that a black (vs. white) target patient would feel less pain and they were less accurate in their treatment recommendations for the black (vs. white) patient.[406]

These false beliefs about biological differences between people of different races go back hundreds of years and have been used to justify all manner of atrocities against African Americans.[407] The fact that vestiges of these clear falsehoods remain today is as depressing as it is shocking.

VI. THE NEED FOR JUST GOVERNMENT POLICIES AND HEALTH-CONSCIOUS REFORMS

Healthy African American communities cannot exist in the midst of racial discrimination and oppression. Although the Fourteenth Amendment requires providing people of all races with equal protection of the laws, state and federal law enforcement have consistently enforced facially neutral laws in ways that place unequal burdens on people of color, particularly African Americans. Thus,

401. *Id.* at 57. Notably, "[o]ver a dozen studies have demonstrated persistent underuse of invasive procedures that are effective in treating coronary disease, such as angiography and bypass graft surgery, in African Americans as compared with white patients." *Id.* at 58.

402. *Id.* at 59–60.

403. *Id.* at 149.

404. Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 PROC. NAT'L ACAD. SCI. 4296, 4296–97 (2016).

405. *Id.* at 4298.

406. *Id.* at 4299–300. The study showed that, "[o]n average, participants endorsed 11.55% (SD = 17.38) of the false beliefs. About 50% reported that at least one of the false belief items was possibly, probably, or definitely true." *Id.* at 4298.

407. *Id.* at 4297.

it is clear that laws alone will not solve the problem of racism or the related health disparities.[408] While a full discussion of necessary or desirable policy changes is beyond the scope of this Article, a few broad principles are worth noting.

In the criminal justice system, everyone—from political leaders who set criminal justice priorities, police officers who decide whether and how to investigate potential crimes and make split decisions about whether to use deadly force against civilians, prosecutors who decide what charges to bring, to judges who decide what sentences to impose—must be willing to confront their biases and interpret and enforce laws fairly. In schools, teachers and administrators must become aware of how their implicit biases may negatively impact the students they are charged with educating. Moreover, people who make policies and set priorities must stop blaming African Americans' poor health on poverty and bad habits and connect the dots between their negative and racially biased interactions with African Americans and African Americans' relatively poor health.

Even social activists must consider the connection between health and race-related stress. Many scholars, activists, and researchers have been working to bring attention to racial injustice and much progress has been made, but the potential adverse health effects of particular methods of activism are not obvious or well-understood. For example, many activists have begun to use social media platforms to publicize incidents of racial discrimination and violence.[409] The publicity makes it easier to mobilize large numbers of people to pressure prosecutors and public officials to investigate and prosecute such incidents and to bring about institutional change. However, constantly reading descriptions of racist conduct and watching videos of racial violence is stressful and may increase health risks for African Americans.[410] This does not mean that social media activism should be abandoned; only that careful thought must be given to how such incidents are publicized. There should also be a greater emphasis in the African American community on mental and physical health. Additional research on effective measures to reduce racism-related stress is also needed.

Likewise, policies encouraging diversity and inclusion also have laudable goals but hidden health risks. Adding a few African Americans to a college campus, police force, or board of education may further the goal of diversity and inclusion, but those positions may also come with feelings of isolation, increased stress, and exposure to racial discrimination. All of these can negatively impact the health of those who were meant to be helped. Ensuring adequate emotional

408. Huq, *supra* note 159, at 2456 (concluding that the Equal Protection doctrine "provides the *moral justification* but not the *doctrinal tools*" for dealing with [stop and frisk policies]).

409. *See, e.g.*, Shaun King, FACEBOOK, https://www.facebook.com/shaunking/ (last visited Mar. 20, 2020) (showing the Facebook page for activist Shaun King who routinely posts videos and links to news stories about incidents of alleged racial discrimination and violence).

410. *See supra* Subpart I.B. (discussing and citing studies showing that people of color may suffer physically when they observe or learn about traumatic, racially motivated incidents involving others of the same race).

support and mentoring may be necessary to ensure that the battle for inclusion is not won at the cost of individual or community wholeness and health.

CONCLUSION

Racism is a longstanding problem in America, and for as long as it has existed it has brought about emotional and physical pain to its victims. The racial health disparities that we see today are the product of racist policies and practices throughout our nation's history. Working solely to change the hearts and minds of individuals will not solve the problems that lead to poorer health outcomes and shorter life expectancies for African Americans. Just as government actions have contributed to the problem, change at all levels and within all branches of government is necessary for healthy African American communities.

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