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## Law and the Persistence of Racial Inequality in America

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# Law and the Persistence of Racial Inequality in America

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## I. INTRODUCTION

In 2020, America was once again required to confront its legacy of racial inequality.<sup>1</sup> Widely viewed videos of police violence against Black Americans, a resurgent Black Lives Matter (BLM) movement,<sup>2</sup> and racial disparities exposed during the COVID-19 pandemic<sup>3</sup> are motivating law school faculty and sociolegal scholars to examine law's role in perpetuating the ravages of racial bias.<sup>4</sup> Research reviewed in this article demonstrates that America's legal system has long provided an infrastructure for inequality between white and Black Americans. While racial bias embedded in daily interactions should be a focus of close examination and change, the behavior of individuals is learned, shaped, and guided by American society's public and private institutions, many of them founded in law.

The research we review shows that the legal system itself consists of interacting organizations, role-players, and ideas that combine in patterns that contribute to enduring racial inequality in other institutions as well as the legal system itself. The recent COVID-19 pandemic's well-documented impact on communities of color is a direct effect of institutionalized racial inequality, the foundations of which are laid in

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1. See David Lopez, Foreword, *The Great Pandemic and the Great Reckoning: Law and Society in an Emerging World*, 72 RUTGERS U. L. REV. 1265, 1289 (2020). Some of the important scholarship examining sources of continuing racial inequality is reviewed in this article; its continuing presence in American society has also been documented by numerous reports and publications by the U.S. Commission on Civil Rights. See, e.g., Memorandum from The Oklahoma Advisory Committee, U.S. Comm'n on C.R., to the U.S. Commission on Civil Rights (June 2021) (on file with author) (focusing on racial disparities in policing); U.S. COMM'N ON C.R., PERFORMANCE AND ACCOUNTABILITY REPORT (PAR) FOR FISCAL YEAR 2020 (2020) (identifying COVID-19 as a catalyst for an increase in anti-Asian racism, strained relations between police and Black Americans, and voting barriers).
  2. See generally Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History* (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.
  3. The U.S. Centers for Disease Control (CDC) expressed concern about the national pattern of racial inequality in access to medical care and treatment of COVID-19. See *Health Equity Considerations and Racial and Ethnic Minority Groups*, CDC [hereinafter *CDC Health Equity*], <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> (Jan. 25, 2022). Local data also highlighted specific regional patterns of racial inequality. See, e.g., *COVID-19: Racial and Ethnic Disparities*, WIS. DEP'T OF HEALTH SERVS., <https://www.dhs.wisconsin.gov/covid-19/disparities.htm> (Jan. 20, 2022); *COVID-19 SURVEILLANCE DATA UPDATE*, VA. DEP'T OF HEALTH 16 (July 19, 2021); Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus* (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.
  4. Recent law review symposia reflect these contemporary concerns about race. See, e.g., Symposium, *2021 Policing, Race, and Power*, 73 STAN. L. REV. ONLINE 120 (2021) (co-hosted by Black Law Students Association, Stanford); Symposium, *From the Equal Rights Amendment to Black Lives Matter: Reflecting on Intersectional Struggles for Equality*, 107 VA. L. REV. ONLINE 1 (2021) (co-sponsored by Center for the Study of Race and Law, UVA Law); Symposium, *Structural Inequality & the Law*, 69 UCLA L. REV. 1 (2022); Symposium, *Taking Our Space: Women of Color and Antiracism in Legal Academia*, 73 RUTGERS U. L. REV. 857 (2021).

law documented in this research. Overcrowded housing,<sup>5</sup> insecure employment,<sup>6</sup> lower income,<sup>7</sup> poor health care,<sup>8</sup> and untreated chronic illnesses (and resulting suspicion of health care institutions),<sup>9</sup> as well as racially-biased criminal justice,<sup>10</sup> characterize communities of color and are related to the role of law in our sordid history of race relations. Outcomes such as a higher death rate from COVID-19 are to be expected when such conditions exacerbate the risk of a fatal disease.<sup>11</sup> Our review of research reveals a remarkable truth: recent developments in our legal system, as well as its past history, continue racial inequality just as racial inequality continues to shape our legal system in ways that may not be immediately apparent but are carried forward by mechanisms that shape the system today.<sup>12</sup>

Sources of racial inequality that are not immediate or transactional, meaning not caused by implicit or intentional racial bias,<sup>13</sup> are often lumped together as “institutional” or “structural”—general terms for the patterns of organization and interaction that persist from habit.<sup>14</sup> Too little time has been given to examining the invisible role of race in the construction of the legal framework of these ongoing patterns sustaining racial inequality, namely, how they were created and how they persist, much less to the cumulative effects of the multiple, interlocking institutions created by law or the structures and the practices they sustain. Not only do these ongoing institutional or structural patterns have roots in the past, but new

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5. See Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U. L. Q. 737, 738–42 (1989) (explaining how the creation, upholding, and enforcement of racial covenants proliferated the number of Black families in overcrowded, substandard housing).
  6. See generally Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOY. L.A. L. REV. 351 (2001) (examining the racially disparate impact of America’s preferred “at-will” term of employment).
  7. See Moritz Kuhn et al., *Income and Wealth Inequality in America, 1949–2016*, 9 FED. RESRV. BANK MINNEAPOLIS 1, 4 (2018).
  8. See Courtney Connely, *Racial Health Disparities Already Existed in America—The Coronavirus Just Exacerbated Them*, CNBC, <https://www.cnbc.com/2020/05/14/how-covid-19-exacerbated-americas-racial-health-disparities.html> (June 3, 2020).
  9. See ROBERTA SPALTER-ROTH ET AL., RACE, ETHNICITY, AND THE HEALTH OF AMERICANS 2 (2005) (“Racial prejudices and practices are institutionalized in this [healthcare] system and frequently result in unequal access to medical care, unequal treatment for similar severity of illnesses and conditions, and differences in health [sic] insurance protection.”); René Bowser, *Racial Bias in Medical Treatment*, 105 DICK. L. REV. 365, 372–74 (2001) (criticizing racialized research).
  10. See THE SENTENCING PROJECT, REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 5–6 (2018).
  11. See CDC Health Equity, *supra* note 3.
  12. Edward A. Purcell, Jr., *Race and the Law: The Visible and the Invisible*, 66 N.Y.L. SCH. L. REV. 141 (2021–2022).
  13. See generally Guy A. Boysen & David L. Vogel, *Bias in the Classroom: Types, Frequencies, and Responses*, 36 TEACH. OF PSYCH. 12, 13 (2009) (“[I]mplicit bias tends to be subtle, automatic, and often occurs without the perpetrator’s intention or awareness.”).
  14. For an article illustrating this mix of causes of racial inequality in the justice system, see Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J. F. 406 (2017).

mechanisms that perpetuate and preserve racial bias and white dominance are also being created.

Better understanding of the separate but interrelated mechanisms perpetuating racial inequality in American society will enrich our efforts to change the direction of our history, and this essay provides an introduction to recent research in the social sciences that examines underlying sources of persistent inequality based on race.

## II. MECHANISMS OF RACIAL INEQUALITY

Deep racial inequality persists in the United States more than fifty years after the end of de jure segregation<sup>15</sup> and passage of sweeping national civil rights legislation.<sup>16</sup> While changes have bettered the lives and opportunities for a fragile Black middle-class,<sup>17</sup> on average, Black Americans continue to experience the deep historical legacies of racial division and structural inequality. Scholars have devoted considerable effort to explaining the enduring entanglement between law, inequality, and race by examining the impact of civil rights laws, mechanisms that carry forward the legacy of racial division predating civil rights, and new sources of racial inequality.

At least two achievements of what we term the civil rights era—the culmination of movements in the 1950s and 1960s leading to civil rights legislation—have improved the landscape of racial equality. First is the expansion of the Black American middle class through greater access to education, jobs, and housing;<sup>18</sup> the second is increasing access to the ballot, gained in no small part through the Voting Rights Act of 1965 (VRA).<sup>19</sup> But both gains remain insecure. While the Black American middle class has grown since the 1960s, its position is far more fragile than that of whites.<sup>20</sup> And while effective enforcement of the VRA, in part, led to the changed demographic profile of elected officials at the local, state, and federal level,<sup>21</sup> the Supreme Court recently held a key part of the VRA unconstitutional,<sup>22</sup>

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15. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (finding segregation in public education contrary to the Fourteenth Amendment’s equal protection guarantee).
  16. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. and 52 U.S.C.).
  17. See, e.g., William Lazonick et al., *How the Disappearance of Unionized Jobs Obliterated an Emergent Black Middle Class* 7 (Inst. for New Econ. Thinking, Working Paper No. 125, 2020).
  18. See generally Richard B. Freeman, *Changes in the Labor Market for Black Americans, 1948–72*, 1 BROOKINGS PAPERS ON ECON. ACTIVITY 67 (1973).
  19. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.); see also RICHARD O. LEMPERT & JOSEPH SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE 361–62 (1986) (examining the statutory structure that makes the VRA particularly effective). In *Shelby County v. Holder*, the Supreme Court struck down section 4(b) of the VRA, which required certain jurisdictions with a history of voter discrimination to receive preclearance from the federal government before adopting new voting laws. 570 U.S. 529, 537–38, 557 (2013).
  20. Freeman, *supra* note 18; see PEW RSCH. CTR., *THE AMERICAN MIDDLE CLASS IS LOSING GROUND* 22 (2015) [hereinafter *THE AMERICAN MIDDLE CLASS IS LOSING GROUND*].
  21. See JOINT CTR. FOR POL. & ECON. STUD., *STATE OF RACE IN POLITICS* 24–34 (2015).
  22. See *Shelby County*, 570 U.S. at 550–51 (2013) (invalidating section 4(b)).

allowing conservative state majorities to tailor voter access and redistricting laws to weaken the power of Black American voters.<sup>23</sup>

Further, despite change and improvement for some Blacks, across most dimensions of American society the landscape remains bleak.<sup>24</sup> Initial gains have been slowed by failure to enforce civil rights laws<sup>25</sup> and resistance to integration. With the ending of the postwar economy and election in 1980 of a conservative administration, gains for the working class in general, and Black Americans in particular, came to an abrupt halt.<sup>26</sup> Harsh changes in criminal justice have increased racial inequality. Mass incarceration has become the most important determinant of unequal opportunity for white and Black Americans, and since the 1960s, the chance that a Black man will be incarcerated is one in four, significantly greater than his chance of completing college.<sup>27</sup>

Not only have stark differences between whites and Blacks in income and wealth remained almost unchanged since the 1970s,<sup>28</sup> but large numbers of Black Americans continue to live in conditions of concentrated disadvantage.<sup>29</sup> Only a few percent of all white children born in the 1990s grew up in neighborhoods with 30 percent or more living in poverty, a condition experienced by more than a third of all Black Americans, the same proportion as the generation born in the 1970s.<sup>30</sup> Unlike white families, Black Americans have been unable to translate economic resources into

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23. Max Feldman, *Voting Rights in America, Six Years After Shelby v. Holder*, BRENNAN CTR. FOR JUST. (June 25, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voting-rights-america-six-years-after-shelby-v-holder>. For a nationwide look at changes in voter ID laws since 2000, see *Voter ID Chronology*, NAT'L CONF. OF STATE LEGIS. (Sept. 29, 2021), <https://www.ncsl.org/research/elections-and-campaigns/voter-id-chronology.aspx>.
  24. THE AMERICAN MIDDLE CLASS IS LOSING GROUND, *supra* note 20.
  25. Progressive groups have long criticized the lack of enforcement of federal civil rights laws. See generally CITIZENS' COMM'N ON C.R., *THE EROSION OF RIGHTS 9* (William L. Taylor et al. eds., 2007). In Part V, we describe research documenting a less visible mechanism undermining civil rights enforcement. See *infra* pp. 197–200.
  26. See KEVIN STAINBACK & DONALD TOMASKOVIC-DEVÉY, *DOCUMENTING DESEGREGATION* 157–59 (2012); see also Hadas Mandel & Moshe Semyonov, *Going Back in Time? Gender Differences in Trends and Sources of the Racial Pay Gap, 1970 to 2010*, 81 AM. SOCIO. REV. 1039, 1044, 1047–49 (2016).
  27. See SARA WAKEFIELD & CHRISTOPHER WILDEMAN, *CHILDREN OF THE PRISON BOOM* 13–15 (2013) [hereinafter *CHILDREN OF PRISON BOOM*]. But see E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., *PRISONERS IN 2019*, at 1, 9 (2020) (suggesting a more recent ratio of roughly one in forty-four based on year-end 2019 statistics reporting “1,096 [B]lack prisoners [at the state and federal level] per 100,000 [B]lack residents”); see also Katharina Buchholz, *Black Incarceration Rates Are Dropping in the U.S.*, STATISTA (Feb. 19, 2021), <https://www.statista.com/chart/18376/us-incarceration-rates-by-sex-and-race-ethnic-origin/> (estimating “one in 45” Black men per one hundred thousand Black residents held in state or federal prison in 2019).
  28. See PATRICK SHARKEY, *STUCK IN PLACE* 2–3 (2013).
  29. See *infra* note 171 (defining “concentrated disadvantage”); see also Etienne C. Toussaint, *Of American Fragility: Public Rituals, Human Rights, and the End of Invisible Man*, 52 COLUM. HUM. RTS. L. REV. 826, 880 (2021) (same).
  30. SHARKEY, *supra* note 28; cf. AUSTIN NICHOLS, *URB. INST., EXPLAINING CHANGES IN CHILD POVERTY OVER THE PAST FOUR DECADES* (2013).

movement to better neighborhoods; consequently, “the same families have experienced the consequences of life in the most disadvantaged environments over multiple generations.”<sup>31</sup>

Research reviewed below shows that racial inequality has new sources and has taken new forms in part because of economic globalization and massive immigration. Among industrialized democracies, the United States alone has responded to globalization by dismantling its economic safety net, allowing the minimum wage to stagnate, failing to address economic dislocation caused by deindustrialization or the increasing need for technical skills, and downsizing government employment.<sup>32</sup> The absence of government intervention has undermined the lives of both white and Black working poor and unemployed, fueling racial resentment and backlash against civil rights and, in turn, perpetuating a “legacy of race, which continues to divide poor, working class, and middle class Americans from one another and deliver their political support to politicians who serve the powerful, wealthy, and affluent.”<sup>33</sup> Further, perceptions of racial inequality have been altered by massive immigration adding millions to a deeply divided low-wage labor force.<sup>34</sup> This complex stream of immigrants, some arriving with economic and educational advantages over Black Americans, has placed racial inequality in a new light for both white and Black Americans.<sup>35</sup>

Research on these sources of racial inequality shows that the legal system continues to be a major contributor to each of these persistent patterns. Indeed, law, as a guarantor of social relationships and legitimate distribution of power, is fundamental to systemic racism—racial bias that results from the ordinary functioning of social systems and patterns of interaction that make up life in modern America without explicit reference to race. Our review describes research on the mechanisms by which law contributes to the persistence of racial inequality in the most important areas of daily life. We begin with policymaking, a mechanism fundamental to all the others. Part III describes three points of entry to examination of the impact of policymaking on racial inequality—interest group influence, racial formations and exogenous social and economic change.

Next, Part IV considers sociologist Douglas Massey’s conclusion that “two structural configurations are central to perpetuating [B]lack disadvantages in the

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31. SHARKEY, *supra* note 28; see SCOTT WINSHIP ET AL., BROOKINGS & AM. ENTER. INST., *LONG SHADOWS: THE BLACK-WHITE GAP IN MULTIGENERATIONAL POVERTY* 9 (2021); Bradley Hardy & Trevon Logan, *Race and the Lack of Intergenerational Economic Mobility in the United States*, in *VISION 2020* 157, 161–63 (2020) (suggesting policies to promote intergenerational mobility).

32. See generally Douglas S. Massey, *Globalization and Inequality: Explaining American Exceptionalism*, 25 *EURO. SOCIO. REV.* 9, 11 (2009) [hereinafter *Globalization and Inequality*].

33. *Id.* at 22.

34. See generally George Sanchez, *Face the Nation: Race, Immigration, and the Rise of Nativism in Late Twentieth Century America*, 31 *INT’L MIGRATION REV.* 1009, 1019–21, 1025 (1997) (analyzing “antiforeign sentiments” shared by many white and Black Americans); MARTHA ROSS & NICOLE BATEMAN, BROOKINGS, *MEET THE LOW-WAGE WORKFORCE* 9 (2019) (reporting that Latinos and Hispanics hold 25 percent of the low-wage workforce, and whites hold 52 percent).

35. See *infra* note 96.

post-civil rights era: the housing market and the criminal justice system.”<sup>36</sup> Review of recent scholarship on the second of these policy points, the impact of the criminal justice system and mass incarceration on racial stratification, follows. Part V takes up an issue closely related to both policymaking and criminal justice, the transformation of law-on-the-books into law-in-action, using recent research on enforcement of civil rights in employment as a case study. Part VI reviews research on the other institutional configuration identified by Massey,<sup>37</sup> the persistence of segregation and concentrated neighborhood disadvantage. Part VII, our conclusion, returns to a theme that deserves special emphasis: the need, above all at this moment in our history, for scholarship and action by our colleagues and students that will change the discourse, politics, and law perpetuating racial inequality and finish the fight for civil rights.

### III. RACE AND POLICYMAKING

An important field of research examines mechanisms by which race became, and remains, a key factor in legislative action (and inaction).<sup>38</sup> Scholars conclude that persistent entanglement between race and policymaking grows from a “deep structure” of “race-framed conflict” in politics.<sup>39</sup> We review three overlapping points of entry by scholars who find evidence that racial biases infuse American political institutions. The first of these grows from a long tradition of studying the relationship between interest groups in American politics and the legislative strategies that control agendas, distribution of power, and the structure of government itself.<sup>40</sup> The second point of entry uses a broader lens to find evidence of racial formations in American politics that drive party agendas, political conflict, and the emergence of new discourses about race and racial inequality.<sup>41</sup> The third point of entry emphasizes changes in the context of policymaking and implementation, especially sea changes accompanying global and domestic upheaval, including the Great Depression, social

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36. See DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL* 110 (2007) [hereinafter *CATEGORICALLY UNEQUAL*].

37. *Globalization and Inequality*, *supra* note 32.

38. For many of the ideas elaborated here, we acknowledge our debt to Charles Epp’s insightful comments on the importance of new policy studies in law and social sciences, which “focus on how public policies are shaped by, and work to deepen, economic and racial inequalities.” See Charles R. Epp, *Commentary on Carroll Seron’s Presidential Address: Taking Policy Seriously*, 50 *LAW & SOC’Y REV.* 40 (2016) [hereinafter Epp, *Commentary*].

39. *Id.* at 42.

40. See *infra* Section III.A; see also, e.g., E. PENDLETON HERRING, *THE BROOKINGS INST., GROUP REPRESENTATION BEFORE CONGRESS 2–3* (1929) (democracy requires group organizing). This field of study is well developed, but most of its research has been confined to the second half of the twentieth century. See Daniel J. Tichenor & Richard A. Harris, *Organized Interests and American Political Development*, 117 *POL. SCI. Q.* 587, 588–89 (2003) (“To understand patterns and secular shifts in interest group politics over time requires theory and data that are not overdetermined by the present.”).

41. See *infra* Section III.B; see also Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 *AM. POL. SCI. REV.* 75, 82–84 (2005) [hereinafter King & Smith 2005].

movements and global leadership in the 1950s and 1960s, and later, deindustrialization, economic globalization, and massive immigration.<sup>42</sup>

*A. Race, Interest Group Politics, and Policymaking*

Recent studies of the New Deal foundations of the American welfare state, the pinnacle policy achievements of the civil rights era, and policy decisions in the era of civil rights backlash and globalization, examine the critical role of interest groups aligned with maintaining or reducing racial inequality. A comprehensive 2005 study of the New Deal by Professor Ira Katznelson (the “Katznelson study”) asks, in the years after World War II when key New Deal welfare victories remained in place and Americans enjoyed unprecedented prosperity, why were Black Americans left out?<sup>43</sup> The study shows that three mechanisms employed by partisan interest groups, principally a bloc of Southern congressmen, shaped the racial effects of New Deal and Fair Deal legislation: First was the legislation’s provision of little-to-no benefits and protections for work performed predominantly by Black Americans and Latinos (for example, farm labor and domestic service); second was the delegation of administrative control to local stakeholders with a known bias; and, ironically, third was the absence of a mechanism for reviewing claims of discrimination.<sup>44</sup> Further, the Katznelson study shows that compromises engineered by the powerful Southern bloc in Congress employed well-understood forms of federalism, allowing racially biased local governmental authorities or union leaders to control actual benefits or union protections of overtly race-neutral legislation.<sup>45</sup> These compromises limited access not only to safety net benefits but also to unions, higher education, and home mortgages.<sup>46</sup> In addition, they created barriers to accumulation of economic and social capital that left multiple generations of Black Americans far behind whites in wealth, education, and job security.<sup>47</sup>

Racial inequality persists in part because of the lasting political impact of the New Deal’s racially biased labor protections. The New Deal’s failure to assure Black Americans a place in the labor movement guaranteed that equal employment legislation would become an important goal of the civil rights movement. It has been argued that the political consequences of belated equalization of employment rights have been enormous.<sup>48</sup> Instead of granting whites and Blacks equal rights, the

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42. See *infra* Section III.C; see also CATEGORICALLY UNEQUAL, *supra* note 36 (arguing that social inequalities stem from the universal human tendency to categorize others into various social groups).

43. IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE (2005).

44. *Id.* at 38–41.

45. *Id.*

46. See Ann Thomas, Foreword, *Symposium 1999: Women, Equity and Federal Tax Policy: Open Questions*, 16 N.Y.L. SCH. L. REV. 1 (1999) (detailing the racial impact of Internal Revenue Code mortgage policies).

47. KATZNELSON, *supra* note 43, at 162–66 (2005); RICHARD ROTHSTEIN, THE COLOR OF LAW 177–93 (2017).

48. See PAUL FRYMER, BLACK AND BLUE 99 (2008).

separate protections of the National Labor Relations Act and Title VII of the Civil Rights Act of 1964 seemed to pit taken-for-granted labor rights of the white working class against the civil rights of Black Americans.<sup>49</sup> As deindustrialization and global competition ended American economic expansion,<sup>50</sup> conservatives recruited disillusioned white workers, turning them against the Civil Rights Act and other civil rights laws that were characterized as unfairly benefiting Black Americans and their Democratic Party sponsors.<sup>51</sup>

Other research has argued that, just as the Southern Democratic bloc left its mark on New Deal and Fair Deal legislation, entrenched political interests weakened major civil rights laws enacted in the 1960s.<sup>52</sup> Comparison of the enforcement powers granted federal agencies by Title VII, the VRA, and the Fair Housing Act of 1968 (FHA)<sup>53</sup> revealed the power of key members of Congress and the executive branch who paid lip service to civil rights while channeling the reservations of white majorities.<sup>54</sup> Their preferences carried extra weight during negotiations that crippled Title VII and the FHA, but not the VRA.<sup>55</sup> The agencies charged with enforcing the

49. See National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169; Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e–2000e-17.
50. See Cynthia L. Estlund, *The Changing Workplace as a Locus of Integration in a Diverse Society*, 2000 COLUM. BUS. L. REV. 331, 349–50 (2000) (highlighting the impact felt by the labor force post-New Deal due to a decline in industrialization and an increase in global competition).
51. Desmond S. King & Rogers M. Smith, *Strange Bedfellows? Polarized Politics? The Quest for Racial Equity in Contemporary America*, 61 POL. RSCH. Q. 686, 690–92 (2008) [hereinafter King & Smith 2008].
52. See, e.g., Nicholas Pedriana & Robin Stryker, *From Legal Doctrine to Social Transformation? Comparing U.S. Voting Rights, Equal Employment Opportunity, and Fair Housing Legislation*, 123 AM. J. SOCIO. 86, 127 (2017) [hereinafter *From Legal Doctrine to Social Transformation?*] (citations omitted) (“[Our research] reminds us how much law, courts, and civil and political rights figured in constructing the contours and exceptionalism of a U.S. welfare state in which regulatory and social policies are deeply intertwined, and the politics of race is fundamental.”); LAUREN B. EDELMAN, WORKING LAW 11 (2016) [hereinafter WORKING LAW] (discussing how civil rights policies have “coexisted with discriminatory practices and cultures” in a way that weakens existing civil rights laws); Sean Farhang, *The Political Development of Job Discrimination Litigation, 1963–1976*, 23 STUD. AM. POL. DEV. 23, 24–25 (2009) (describing how Congress wrote civil rights statutes that rely on private rather than public enforcement to avoid political backlash); JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION 20–22 (1996) (analyzing right-leaning resistance to affirmative action between 1964 and 1971); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures*, 97 AM. J. SOCIO. 1531, 1533 (1992) [hereinafter *Legal Ambiguity*] (noting critics who argue that social reform laws give the appearance of change but operate to preserve the status quo).
53. Compare 42 U.S.C. § 2000e-4 (enforcement powers to EEOC), with Voting Rights Act of 1965 § 3, 52 U.S.C. § 10302 (enforcement powers to U.S. attorney general), and Fair Housing Act of 1968 § 808, 42 U.S.C. § 3608 (enforcement powers to HUD secretary).
54. *From Legal Doctrine to Social Transformation?*, supra note 52, at 128.
55. E.g., Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. PA. L. REV. 1417, 1438 (2003) (describing Senate and House efforts to limit the scope of enforcement powers granted by Title VII).  
[Amendments offered to Title VII by Republican congressional leaders] dramatically limited the enforcement powers of the [EEOC] . . . ; deleted the authority of a nongovernmental group, such as the [NAACP], to sue on behalf of a protected worker;

first two acts, the Equal Employment Opportunity Commission (EEOC) and the Department of Housing and Urban Development (HUD), emerged from committee negotiations with conservative white congressmen with power to conciliate and process complaints but lacked power to enforce, reducing their work in the words of one scholar, to a “fiasco.”<sup>56</sup>

Title VII also became a robust source of protection for employment rights in the 1970s through interpretation by a sympathetic federal judiciary.<sup>57</sup> Persuaded to adopt a broad “group-centered effects” construction of ambiguous statutory language,<sup>58</sup> the courts stretched Title VII to permit plaintiffs to show evidence of “systemic group disadvantage rather than individual harm, discriminatory consequences rather than discriminatory intent, and substantive, remedial group results rather than formal procedural justice.”<sup>59</sup> Following President Ronald Reagan’s election in 1980, the will of the Department of Justice to pursue “group-centered” class actions disappeared, and the EEOC deemphasized systemic enforcement in favor of the statute’s original, compromised legislative mandate to resolve individual complaints.<sup>60</sup> FHA enforcement was similarly weakened by statutory language, and even after amendments strengthened HUD’s enforcement power, it never became a force for structural change.<sup>61</sup>

The VRA, enacted in 1965 as a brutal struggle for voting rights in Selma, Alabama, and other southern cities played out on nightly television, expressly incorporated “group-centered” language mandating preclearance of voting practices

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[and added] several other procedural rules . . . that would make it more difficult to enforce the antidiscrimination prohibitions of the Act.

*Id.* at 1471–72.

56. See sources cited *supra* note 52.
57. Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971*, 110 AM. J. SOCIO. 709, 717 (2004); BERNARD GROFMAN & CHANDLER DAVIDSON, *QUIET REVOLUTION IN THE SOUTH* 35 (1994); LEMPERT & SANDERS, *supra* note 19, at 378–85 (contextualizing the sympathetic federal judiciary).
58. The language which the courts found ambiguous, and therefore subject to a broad “group-effects” interpretation, is found in section 703(a)(1) of the Civil Rights Act of 1964, which does not mention intent but refers to discrimination “because of” race—language that could but need not be construed as requiring proof of intentional discrimination. 42 U.S.C. § 2000e-2(a)(1). The major differences between the standards of culpability to be applied by the courts enforcing Title VII and the VRA came from language in Title VII, which emphasized the importance of intent, and a parallel provision in the VRA, which required use of an effects test. See *From Legal Doctrine to Social Transformation?*, *supra* note 52, at 102–05.
59. *From Legal Doctrine to Social Transformation?*, *supra* note 52, at 88. The Court in *Griggs v. Duke Power Co.*, for example, construed Title VII as requiring proof of discriminatory impact, not discriminatory intent. 401 U.S. 424, 431–32 (1971).
60. See Spencer Rich, *Reagan Panel, Citing ‘New Racism,’ Urges Easing of EEOC Rules*, WASH. POST (Jan. 30, 1981), <https://www.washingtonpost.com/archive/politics/1981/01/30/reagan-panel-citing-new-racism-urges-easing-of-eecoc-rules/dfd79721-7bbc-4ef0-91a3-ee5425904abe/>.
61. SHARKEY, *supra* note 28, at 53.

that could potentially impede Black American voting.<sup>62</sup> A strong public consensus behind voting rights prevailed over southern and conservative reservations in part because the act required preclearance by southern but few northern states.<sup>63</sup> Until the Supreme Court's 2013 decision in *Shelby County v. Holder*<sup>64</sup> rendering preclearance inoperable, the VRA had been uniquely effective civil rights legislation.<sup>65</sup>

These studies of the legislative process demonstrate the pervasive influence of key interest groups which expect to gain or lose from changes in racial hierarchy. Although few studies provide similarly detailed documentation of interest group influence on enactment and enforcement of thousands of state and local laws that complement federal legislation on the basic structure of the welfare state and civil rights, there is little doubt that interest group dynamics prevail at every level. Subsequent parts of this review consider studies which describe the role of important types of local policymaking on racial inequality, including criminal justice enforcement, regulation of employment, and local zoning and housing policies.

### B. Racial Formation

Theories of “racial formation” provide an explanation for the pervasive presence of racial hierarchy in ideologies maintaining major political coalitions.<sup>66</sup> According to these theories, in every generation, gaining political power in America has required recruitment of, among others, actors invested in preserving or reducing white advantage maintaining a preexisting institutional order (bureaucracies, Congress, established non-state actors) that perpetuates the racial politics of prior eras. Two racial orders have always been present, if not always in balance: one promoting or maintaining white advantage, and another allied with those who oppose it.<sup>67</sup>

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62. Voting Rights Act of 1965 § 4(b), 42 U.S.C. § 1973b(b) (2006), *invalidated by* *Shelby County v. Holder*, 570 U.S. 529 (2013) (current version at 52 U.S.C. § 10303); *see also* RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS* 4 (2004).

63. *Jurisdictions Previously Covered by Section 5*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (last visited Apr. 30, 2022).

64. 570 U.S. at 557.

65. *Id.* (“The [VRA] has proved immensely successful at redressing racial discrimination and integrating the voting process.”); GROFMAN & DAVIDSON, *supra* note 57.

66. Nearly three decades ago, influential scholars Michael Omi and Howard Winant defined “racial formation” as the “sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed,” attributing the embedding of race in American politics to the “racial projects” of American elites who led social movements in the 1960s and 1970s. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 55 (1994). Refining and extending Omi and Winant's concept, Desmond S. King and Rogers M. Smith argue that the formation of “racial orders”—political coalitions bound together by racial commitments—provide a “framework for organiz[ing] empirical evidence of the extent and manner in which structures of racial inequalities have been interwoven with economic as well as gender and religious hierarchies and social institutions.” King & Smith 2005, *supra* note 41.

67. King and Smith provide a synthesis of mainstream political science and racial orders research, and we summarize their analysis in this section discussing racial formation. King & Smith 2005, *supra* note 41, at 3–10.

While political coalition members may have varied motives, they must sign on to a common agenda to keep the coalition together, an agenda that necessarily accommodates maintaining or reducing a legacy of white advantage.<sup>68</sup> Racial orders<sup>69</sup> explain the influence of race not only on legislation with an explicit racial impact, but also on the vast array of non-racial government policies and practices which “have never developed apart from pressures to alter or maintain the nation’s racial ordering.”<sup>70</sup> Similarly, battles over racial hierarchies pervasively influence government agency practices such as program administration, hiring, promotion, and unionization.<sup>71</sup>

Social movements in the 1970s and 1980s, led by conservative political entrepreneurs, placed political representatives at every level<sup>72</sup> supporting legislation that contributed to sharply rising levels of economic inequality, minimization of welfare state benefits for the working class,<sup>73</sup> and severe reductions in protection for civil rights.<sup>74</sup> The new discourse of resistance to affirmative action created by “active and conscious rhetorical construction of conservatives” avoided “hot rhetoric” that invoked racial status directly.<sup>75</sup> Opposition to affirmative action was framed as “colorblind” resistance to racial discrimination by the government, thus embracing racial equality while denying government authority to intervene to redress benefits of

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68. FRYMER, *supra* note 48, complements arguments made by KATZNELSON, *supra* note 43, in arguing that conflict over race has been “embedded in institutions . . . that promote rules and sources which in turn make appeals to racism a politically inviting strategy.” See also MICHAEL TESLER, *POST-RACIAL OR MOST-RACIAL?* 30, 34–35 (2016).
69. “The ‘racial orders’ thesis rejects claims that racial injustices are aberrations in America, for it elaborates how the nation has been pervasively constituted by systems of racial hierarchy since its inception.” King & Smith 2005, *supra* note 41, at 75, 78 (using the racial orders concept to expose race in U.S. politics).
70. *Id.* at 84.
71. See Sungjoo Choi & Hal G. Rainey, *Managing Diversity in U.S. Federal Agencies: Effects of Diversity and Diversity Management on Employee Perceptions of Organizational Performance*, 70 *PUB. ADMIN. REV.* 109, 116 (2010).
72. E.g., John P. Heinz et al., *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 *LAW & SOC. REV.* 5, 34–35 (2003); ANN SOUTHWORTH, *LAWYERS OF THE RIGHT* 14–18, 23–25 (2008) (noting that lawyers from conservative public interest firms worked for the Reagan administration); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 389–422 (2010) (describing the making of the Federalist Society and its network of conservative lawyers).
73. See “policy context” discussion *infra* Section III.C.
74. See MICHELLE ALEXANDER, *THE NEW JIM CROW* 40 (2010) (“Proponents of racial hierarchy found they could install a new racial caste system without violating the law or the new limits of acceptable political discourse, by demanding ‘law and order’ rather than ‘segregation forever.’”); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS* (2006) [hereinafter *PRISON AND GALLOWS*] (questioning the absence of public opposition to an expanding carceral state).
75. Julie Novkov, *Rethinking Race in American Politics*, 61 *POL. RSCH. Q.* 649, 655 (2008); Daniel Martinez-HoSang, *The Triumph of Racial Liberalism, The Demise of Racial Justice*, in *RACE AND AMERICAN POLITICAL DEVELOPMENT* 288, 296, 306–07 (Joseph E. Lowndes et al. eds., 2008).

past racial subordination.<sup>76</sup> “Colorblind” policy advocacy draws support from and in turn legitimizes “symbolic racism,” a stereotype shared by a significant proportion of whites that Black Americans themselves are to blame for inequality because they do not value education, work, or marriage.<sup>77</sup>

In addition to increased opposition to equality-enhancing legislation, widespread anti-government sentiment has also increased support for “colorblind” policies on punitive welfare and crime control.<sup>78</sup> Policy “drift” through legislative inaction must also be understood as a choice reflecting costs and benefits to key political interests.<sup>79</sup> Failure to maintain the minimum wage or welfare benefits notwithstanding rising need or inflation has disadvantaged disproportionate numbers of Black Americans.<sup>80</sup> Such choices, a leading scholar observes, are the “legacy of race, which continues to divide poor, working class, and middle class Americans from one another and deliver their political support to politicians who serve the powerful, wealthy, and affluent.”<sup>81</sup>

Perhaps the most important bellwether of the new racial order is the Supreme Court, an institution regarded as the bulwark of constitutionalism and American

76. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 378 (2003) (Thomas, J., dissenting) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

77. See HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA* 293–96 (rev. ed. 1997) (defining “symbolic racism” as a blend of values and morals that Blacks were said to be violating); David O. Sears & P.J. Henry, *Over Thirty Years Later: A Contemporary Look at Symbolic Racism*, 37 *ADVANCES EXPERIMENTAL SOC. PSYCH.* 95, 98–101 (2005) (“[S]ymbolic racism [i]s one of the most widely used measures of explicit racism today.”); DONALD R. KINDER & CINDY D. KAM, *US AGAINST THEM* 47–48 (2009) (describing racial stereotypes as an ethnocentric belief within white culture); Lawrence D. Bobo & Camille Z. Charles, *Race in the American Mind: From the Moynihan Report to the Obama Candidacy*, 621 *ANNALS AM. ACAD. POL. & SOC. SCI.* 243, 245–47 (2009) (highlighting the negative racial stereotypes subscribed to by a “substantial portion of the white population”).

78. See Carol J. Greenhouse, *Life Stories, Law's Stories: Subjectivity and Responsibility in the Politicization of the Discourse of “Identity,”* 31 *POL. & LEGAL ANTHRO. REV.* 79, 80 (2008); MARTIN GILENS, *WHY AMERICANS HATE WELFARE* 3–4, 182–85 (1999).

79. “Policy drift is the problem of policies remaining in place even as evolving conditions justify updating and fine-tuning those policies—with the result running contrary to the interests of most in the country.” David Kamin, *Legislating for Good Times and Bad*, 54 *HARV. J. LEGIS.* 202, 203–04 (2017) (footnote omitted).

Failure on the part of Congress to refine section 5 of the VRA, which “required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism,” in the aftermath of *Shelby County* is an important example of “policy drift.” Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c; 570 U.S. 529, 535 (2013) (limiting its holding to section 4(b) of the VRA without ruling on section 5); see also Angelica Rolong, *Access Denied: Why the Supreme Court's Decision in Shelby County v. Holder May Disenfranchise Texas Minority Voters*, 46 *TEX. TECH. L. REV.* 519, 552–53 (2014).

80. See Epp, *Commentary*, *supra* note 38, at 42–43; see also JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS* 117–18 (2010) [hereinafter *WINNER-TAKE-ALL POLITICS*].

81. *Globalization and Inequality*, *supra* note 32, at 22; see also CHUCK COLLINS ET AL., *INST. FOR POL'Y STUD.*, *TEN SOLUTIONS TO BRIDGE THE RACIAL WEALTH DIVIDE* 11 (2019) (citing “slavery, Jim Crow, red lining, [and] mass incarceration” as factors contributing to the racial wealth gap). For more on the racial wealth gap, see Ann F. Thomas, *The Racial Wealth Gap and the Tax Benefits of Homeownership*, 66 *N.Y.L. SCH. L. REV.* 247, 249–55 (2021–2022); and on policy context, see *infra* Section III.C.

political values.<sup>82</sup> Far from defending the vision of *Brown v. Board of Education*,<sup>83</sup> recent conservative majorities of the Court have channeled skepticism characteristic of the new racial order, by embracing “colorblindness” while severely limiting possibilities for affirmative action and thereby expressing concern that otherwise undeserving groups might gain unfair advantage.<sup>84</sup> In 1989, the Court’s apparent indifference to the effects of a long history of pervasive discrimination caused dissenting Justice Thurgood Marshall to remark that “a majority of th[e] Court signals that it regards racial discrimination as largely a phenomenon of the past.”<sup>85</sup>

### C. Policy Context

Studies of the relationship between race, political structure, and policy show the powerful influence of changes in the domestic or international social and economic order, which we call “policy context.”<sup>86</sup> New Deal origins of a racially divided welfare state cannot be separated from the economic upheaval accompanying the Great Depression. Likewise, the post-World War II civil rights era depended on support from a working class benefiting from an expanding economy and elite concern about the legitimacy of America’s claim to global leadership. Post-World War II global and domestic priorities created conditions favorable to *Brown*’s epistemic break with Jim Crow and de jure segregation, and an opening for civil rights legislation.

A decade later, economic globalization and massive immigration contributed to a very different context for interest group strategies, racial formation, and realization of *Brown*’s mandate. Included in these contributory factors was deindustrialization

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82. For further examination of racial bias in Supreme Court jurisprudence, see Purcell, *supra* note 12.

83. 347 U.S. 483 (1954) (prohibiting racial segregation in public schools).

84. Compare *id.* at 493–95 (finding racially segregated schools “inherently unequal” and violative of the Equal Protection Clause), with *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (plurality opinion) (subjecting all race-based classifications, remedial or not, to strict scrutiny), and *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 747–48 (2007) (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

85. *Richmond*, 488 U.S. at 552 (Marshall, J., dissenting). Since 1976, the Court has typically required plaintiffs to prove discrimination claims with evidence of discriminatory intent. See, e.g., *Washington v. Davis*, 426 U.S. 229, 240–41 (1976) (“[T]he basic equal protection principle [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”).

Doris Marie Provine comments that the Court thus ignores complexities of racialized fears and misperceptions, implicit bias, and institutional rules that encourage people to act in racially discriminatory ways. DORIS MARIE PROVINE, *UNEQUAL UNDER LAW* 10 (2007); see also Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 435–47 (2007); Margaret Richardson & Todd L. Pittinsky, *The Mistaken Assumption of Intentionality in Equal Protection Law: Psychological Science and the Interpretation of the Fourteenth Amendment 2–3* (John F. Kennedy Sch. of Gov’t, Harv. Univ., Working Paper No. RWP05-011, 2005). For a contrasting statutory ruling considering whether disparate impact claims are cognizable under the FHA, see *Texas Department of Housing and Community Affairs v. Inclusive Communities*, 576 U.S. 519 (2015).

86. *Globalization and Inequality*, *supra* note 32; King & Smith 2005, *supra* note 41.

beginning as early as the 1960s,<sup>87</sup> further job losses following the oil crisis in 1973,<sup>88</sup> and growing competition from minorities—initially Black Americans migrating from the South to urban centers in the North in the 1950s and 1960s.

More recently, massive numbers of immigrants created backlash and an opportunity for the conservative realignment that absorbed a large part of a white working class and other moderates opposed to further government intervention. The new coalition has supported reversal of years of progress in reducing racial disparity in school quality, employment security, and advantages of economic and cultural capital possessed by whites in seeking higher education.<sup>89</sup> This new alignment favors “colorblind” policies that oppose affirmative action and welfare but, ironically, also policies favoring the wealthy who control the new legislative coalition.<sup>90</sup>

Policies that affect inequality are no longer organized expressly along lines of race but along lines of class, creating competition between racial minorities and poorer white men.<sup>91</sup> Black American interests are represented in legislative battles by what is now a losing political coalition. The winners are the wealthy, supported by those they have recruited with the help of globalization and deindustrialization to oppose regulatory intervention and government spending.<sup>92</sup> But the coalition also supports tax breaks and subsidies for the wealthiest,<sup>93</sup> leaving poor whites and especially Black Americans, already disadvantaged by a vast wealth divide, further behind.<sup>94</sup>

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87. See BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 4, 6 (1982). For a graphic representation, see Paul Krugman, *Trade and the Decline of U.S. Manufacturing Employment*, N.Y. TIMES (May 19, 2015), <https://krugman.blogs.nytimes.com/2015/05/19/trade-and-the-decline-of-us-manufacturing-employment/>.
88. John F. Early, *Effect of the Energy Crisis on Employment*, 97 MONTHLY LAB. REV. 8, 10–11 (1974) (tying 380,000 job losses between November 1973 and March 1974 to the oil crisis). An oil embargo was instituted against the United States by oil-exporting countries after the U.S. government provided emergency war aid to Israel. Michael Corbett, *Oil Shock of 1973–74*, FED. RESRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/oil-shock-of-1973-74>.
89. See *Globalization and Inequality*, *supra* note 32 (noting the impact of reduced social funding on the working class and working poor). These themes come together around the policy domain of the carceral state, to which we turn in Part IV.
90. King & Smith 2005, *supra* note 41, at 83; see discussion *supra* note 66.
91. *Globalization and Inequality*, *supra* note 32.
92. See WINNER-TAKE-ALL POLITICS, *supra* note 80, at 77–79.
93. *Id.* at 50; see also THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 451 (Arthur Goldhammer trans., Harv. Univ. Press 2014) (studying global economic and social patterns affecting accumulation and distribution of wealth); *Globalization and Inequality*, *supra* note 32 (contending that progressive taxation policies were restructured to shift the tax burden from rich to poor). But see SUZANNE METTLER, *THE SUBMERGED STATE* 33 (2011) (citing tax breaks benefitting the working poor).
94. See David Jacobs & Jonathan C. Dirlam, *Politics and Economic Stratification: Power Resources and Income Inequality in the United States*, 122 AM. J. SOCIO. 469, 475 (2016) (citing MELVIN OLIVER & THOMAS SHAPIRO, *BLACK WEALTH/WHITE WEALTH* (2006)) (“African-Americans (and probably Hispanics) have not accrued nearly as much personal wealth as whites.”); Douglas S. Massey & Robert J. Sampson, *Moynihan Redux: Legacies and Lessons*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 6 (2009) (criticizing economic policy rewritten to benefit the wealthy over the working class).

Race-neutral deregulation in the era of free market globalization has not only increased the economic disadvantages of the poor, a group that is disproportionately Black American,<sup>95</sup> but has also disproportionately destabilized the Black American middle class<sup>96</sup> by reducing government employment,<sup>97</sup> deregulating the mortgage market,<sup>98</sup> ending enforcement of school desegregation,<sup>99</sup> and encouraging segregated housing markets.<sup>100</sup>

Immigration policy illustrates the pervasive influence of policy context on interest group strategies and racial formation.<sup>101</sup> Influential organizations in the dominant political coalition of the 1960s which opposed racial stereotyping, including the NAACP and its allies, together with elites influenced by the Cold War, supported the Immigration and Nationality Act of 1965 (INA). The act, for the first time in a century, opened the door to immigration from Asia, Latin America, and later, Africa.<sup>102</sup> Subsequently, massive immigration linked to globalization, especially from Asia and Latin America, shifted the racial and ethnic profile of the United States.<sup>103</sup> This shift fostered new “discourses about the ‘new immigrants’ . . . that perpetuate stereotyped notions of racial identities,”<sup>104</sup> often to the disadvantage of Black

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95. EMILY A. SHRIDER ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2020, at 15 fig.9 (2021) (charting a 19.5 percent poverty rate for Blacks, 17 percent for Hispanics, 8.2 percent for white non-Hispanics, and 8.1 percent for Asian Americans).

96. THE AMERICAN MIDDLE CLASS IS LOSING GROUND, *supra* note 20, at 13; SHARKEY, *supra* note 28 (arguing that there has not been a meaningful expansion of the Black middle class); *see generally* George Wilson & Ian Sakura-Lemessy, *Earnings Over the Early Work Career Among Males in the Middle Class: Has Race Declined in its Significance?*, 43 SOCIO. PERSPS. 159 (2000) (comparing earnings of white and Black middle-class males between 1975 and 1982 and then 1985 and 1992).

97. *Globalization and Inequality*, *supra* note 32.

98. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Mortgage Foreclosure Crisis*, 75 AM. SOCIO. REV. 629, 632 (2010) (first citing Paul Langley, *Sub-prime Mortgage Lending: A Cultural Economy*, 37 ECON. & SOC'Y 469 (2008); then citing Paul Langley, *Debt, Discipline, and Government: Foreclosure and Forbearance in the Subprime Mortgage Crisis*, 41 ENV'T & PLAN. 1404 (2009); and then citing GUY STUART, *DISCRIMINATING RISK* (Cornell Univ. Press 2003)).

[L]ucrative subprime lending and securitization practices did not suddenly appear ‘at the fringes of finance,’ but were produced and legitimated by the financial industry using new, high-tech tools such as credit scoring, risk-based pricing, securitization, credit default swaps, and variable rate mortgages that were billed as rational, scientific, and safe.

*Id.*

99. CHARLES T. CLOTFELTER, AFTER *BROWN* 39 (2004).

100. CATEGORICALLY UNEQUAL, *supra* note 36, at 158.

101. Lenni B. Benson, *Seeing Immigration and Structural Racism: It's Where You Put Your Eyes*, 66 N.Y.L. SCH. L. REV. 277 (2021–2022).

102. *See* HENRY YU, THINKING ORIENTALS 1, 6, 152 (2001).

103. *See* Press Release, U.S. Census Bureau, 2020 Census Statistics Highlight Local Population Changes and Nation's Racial and Ethnic Diversity (Aug. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/population-changes-nations-diversity.html>.

104. King & Smith 2005, *supra* note 41, at 89.

Americans.<sup>105</sup> In turn, new immigrants who wish to support certain policy choices must engage in what one scholar refers to as “racial triangulation,” which requires them to choose sides in debates dominated by Black-versus-white distinctions or bear the burden of distinguishing themselves from both sides of this polarized perception of race.<sup>106</sup>

All policy regimes have consequences for racial inequality. Policy that perpetuates inequality is an outcome of interest group agendas and legislative strategies, racial formations created by political coalition building, and significant change in policy context—currently, globalization, deindustrialization, and massive immigration. Each explanation illuminates the formation of policy goals, distributive outcomes, and racial stereotypes that allow them to go unchallenged. Going forward, law and social science scholars have an opportunity to draw on these strands of theory and research to suggest better explanations of outcomes and more promising ways to reduce inequality.

#### IV. THE CARCERAL STATE

The consolidation of the carceral state, including the growth of incarceration in state prisons and county jails since the 1970s, disproportionately affects communities of color and has become the most important policy sustaining racial inequality in the post-civil rights era. Here, we highlight three bodies of scholarship. First, we review research that builds on new policy studies to unpack the politics behind the expansion of the carceral state. Next, we review an emerging body of research that focuses on the oft-unrecognized connections between the census and incarceration. Finally, we review the literature on mass incarceration as a mechanism of stratification and its collateral consequences.<sup>107</sup>

##### A. *The Politics of the Carceral State*

The contemporary policy of incarceration has deep roots in American political development that long predate the massive buildout of prisons beginning in the 1970s.<sup>108</sup> Crime policy is, moreover, deeply entwined with a strong federalist

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105. CATEGORICALLY UNEQUAL, *supra* note 36; *see, e.g.*, KATHERINE S. NEWMAN, NO SHAME IN MY GAME 39–40 (1999); Philip Kasinitz & Jan Rosenberg, *Missing the Connection: Social Isolation and Employment on the Brooklyn Waterfront*, 43 Soc. PROBS. 180, 193–94 (1996).

106. Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & Soc’y 105, 107 (1999); TESLER, *supra* note 68, at 30–31.

107. For related discussion, see Lynn Su, *Unpacking the Teaching Potential of a Hypothetical Criminal Case Involving a Cross-Racial Eyewitness Identification*, 66 N.Y.L. SCH. L. REV. 339 (2021–2022).

108. *See generally* PRISON AND GALLOWES, *supra* note 74, at 29 (adding that certain industries have reaped financial reward from the prison-building boom); BERT USEEM & ANNE MORRISON PIEHL, PRISON STATE 41–43 (2008) (tying Black incarceration rates to the removal of industry from cities in the 1970s); VANESSA BARKER, THE POLITICS OF IMPRISONMENT 16–17 (2009) (citing increasing crime as a basis for penal policy change); DAVID GARLAND, THE CULTURE OF CONTROL 116 (2001) (summarizing the commercialization of penal institutions and the U.S. criminal justice system). Scholars have also recognized a shift from rehabilitative policy:

tradition, with notable historical variations among states and regions of the country.<sup>109</sup> Despite these differences, by the late 1970s every state in the country was building more prisons.<sup>110</sup> An important body of research explores reasons for this policy convergence around incarceration and whether fundamental reform is feasible.

Research has shown that the policies of the civil rights movement and its progeny were met with significant, strident, and sophisticated backlash that is deeply embedded in a historical legacy of “racial hierarchy that deems Black Americans mostly responsible for their situation.”<sup>111</sup> A politics of law and order coupled with anti-Black sentiment is rarely far beneath the surface in American politics—and often bipartisan.<sup>112</sup> Across the South and among white working-class citizens in the North, civil rights reforms were often linked to a fear of crime and lawlessness.<sup>113</sup> Such rhetoric was a critical factor in laying the foundation for reforms in crime-related policies, including sentencing, victims’ rights, prison litigation, and policing.<sup>114</sup>

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Almost concurrent with the start of the imprisonment boom was a notable break with the underlying rationale for the penal institution itself. As a number of observers have pointed out, during the 1970s, faith in the rehabilitative ideal that had prevailed in penology for the past century began to erode among criminal justice practitioners, academics, and policymakers.

MONA LYNCH, *SUNBELT JUSTICE 2* (2009) (first citing FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (Yale Univ. Press 1981); then citing DAVID GARLAND, *THE CULTURE OF CONTROL* (2001); and then citing Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 36 *PUB. INT.* 22 (1974)).

109. See LISA L. MILLER, *THE PERILS OF FEDERALISM* (2008).

110. Cf. Eric Schlosser, *The Prison-Industrial Complex*, *THE ATLANTIC* (Dec. 1998), <https://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/> (reporting roughly one thousand new prisons and jails built between the late 1970s and 1990s).

111. Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 *ANN. REV. L. & SOC. SCI.* 41, 50 (2011); see also ALEXANDER, *supra* note 74, at 11 (“Mass incarceration . . . is the most damaging manifestation of the backlash against the Civil Rights Movement.”); Jacob S. Hacker & Paul Pierson, *After the “Master Theory”: Downs, Schattschneider, and the Rebirth of Policy-Focused Analysis*, 12 *PERSPS. ON POL.* 643, 651–52 (2014) [hereinafter *Master Theory*] (discussing the long history of racial hierarchies in the United States).

112. See PRISON AND GALLOWES, *supra* note 74, at 6, 15, 34.

113. Michael C. Campbell & Heather Schoenfeld, *The Transformation of America’s Penal Order: A Historicized Political Sociology of Punishment*, 118 *AM. J. SOCIO.* 1375, 1390 (2013) (describing “law and order” rhetoric of politicians in the 1960s and 1970s); see also Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 *STUD. AM. POL. DEV.* 230, 242 (2007) (recounting common congressional debates as to whether “civil rights would engender a crime wave and integration would bring lawlessness”).

114. For example, Campbell & Schoenfeld, *supra* note 113, at 1377, maps state-level policies that resulted in prison expansion and, with it, the mass incarceration of Black Americans and Hispanics, particularly men; it also demonstrates the ways in which historical legacies and political mechanisms coalesce around a policy regime that arguably resulted in a politics of “governing through crime.” See also JONATHAN SIMON, *GOVERNING THROUGH CRIME* 4–7, 18–20 (2007); GARLAND, *supra* note 108, at 27–29, 168–171, 194.

Drawn from comparative case studies of eight states in different regions, Campbell & Schoenfeld, *supra* note 113, at 1377, found that, over time, national political competition, federal crime control policy, and federal court decisions helped create state-level political innovation and special interest groups that pushed lawmakers to increasingly define the crime problem as a lack of punishment and to choose policy

Research also documents recent attempts to challenge the politics of the carceral state.<sup>115</sup> After nearly twenty years of litigation, in 2013 the Supreme Court held in *Brown v. Plata* that the conditions of confinement in California's prisons violated the Eighth Amendment,<sup>116</sup> and ordered the state to reduce the prison population by approximately thirty thousand inmates, to 137.5 percent of design capacity.<sup>117</sup> The Public Safety Realignment Act<sup>118</sup> (the "California Experiment") is designed to downsize the state's prison population through county-supported programs that return non-violent, non-sexual, non-serious prisoners to local supervision.<sup>119</sup> Implementation of the reform is left to the county innovations which may range from increasing the capacity of jails to rehabilitation in what has been described as one of "the biggest penal experiment[s] in American incarceration policy."<sup>120</sup> The California Experiment in prison downsizing, along with other reforms, such as reentry programs, have engendered the most recent turn in the debate around the carceral state. Analysis of the impact of the experiment suggests that we should remain skeptical about the impact of the Supreme Court's *Plata* decision. Innovative reentry strategies to tackle recidivism and stronger political support may help, but progress will be impeded by contemporary "pathologies that run through the carceral state [and] also run through American politics," including neoliberalism, globalization, immigration, deindustrialization, and policies creating significant structural

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solutions that put more people in prison for longer periods of time. *Id.*; see also, e.g., PRISON AND GALLOWES, *supra* note 74 (discussing prison growth and sentencing); MARIE GOTTSCHALK, CAUGHT 1–2 (2015) [hereinafter CAUGHT] (same); David Jacobs & Aubrey L. Jackson, *On the Politics of Imprisonments: A Review of Systematic Findings*, 6 ANN. REV. L. & SOC. SCI. 129 (2010) (describing "political appeals" for law and order); Michelle Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33 (2011) (envisaging prison downsizing).

115. Despite the ways in which the Prison Litigation Reform Act of 1996 (PLRA) undermined potentially impactful case law, prisoner rights advocates in California leveraged a unique set of resources to challenge the conditions of confinement in the state's prisons. See generally Margo Schlanger, *The Just Barely Sustainable California Prisoners' Rights Ecosystem*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 62, 71–73 (2016) (advocating for prisoners' rights via resources in the public interest sector).
116. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
117. 563 U.S. 493, 501, 525 (2011) (describing the conditions of confinement in issue as an interrelated "spider web" resulting from overcrowding, which contributed to inadequate prisoner healthcare).
118. Assemb. B. 109, 2011–12 Leg. (Cal. 2011).
119. Revisions to the California Experiment focus on reducing California's prison population and its corrections budget. See PUB. SAFETY REALIGNMENT ACT OF 2011 IMPLEMENTATION PLAN 1 (CMTY. CORR. P'SHIP ALAMEDA CNTY 2011). This is achieved largely through transferring responsibility for incarceration and supervision of many low-level inmates and parolees from the California Department of Corrections and Rehabilitation to the county level. *Id.*; see also Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL'Y REV. 327, 332 (2014).
120. See Petersilia, *supra* note 119, at 328; see also Anjuli Verma, *The Law-Before: Legacies and Gaps in Penal Reform*, 49 L. & SOC'Y REV. 847, 848 (2015); Mia Bird & Ryken Grattet, *Realignment and Recidivism*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 176, 177 (2016) (citing Michael Santos, *California's Realignment: Real Prison Reform or Shell Game?*, HUFFPOST, [https://www.huffpost.com/entry/california-prison-realignment\\_b\\_2841392](https://www.huffpost.com/entry/california-prison-realignment_b_2841392) (May 11, 2013)).

inequality.<sup>121</sup> Yet, an article produced as part of a 2014 symposium suggests that the California Experiment may offer hope of meaningful decarceration.<sup>122</sup> Documenting how these efforts unfold will remain a ripe vein for future scholarship.

### B. *The Politics of the Census*

Debates among demographers have long turned on how to count non-white populations, especially population enumeration required for each decennial census.<sup>123</sup> As recent research shows, the unit of analysis used by the U.S. Census Bureau to count employment and housing among other demographic patterns has important race-related implications, and these designs have changed significantly over time.<sup>124</sup> Any method of enumeration that undercounts Black Americans affects not only each state's representation in Congress (the principal purpose for the constitutional requirement of a periodic census),<sup>125</sup> but also affects formulas used to allocate federal tax dollars to states for housing, health, education, and other programs that may provide disproportionate benefits to Black Americans and poor households generally.

The Census Bureau's decision to omit prison inmates in the analysis of employment and housing is a particularly important illustration.<sup>126</sup> Mass incarceration eroded many of the gains that had been made toward racial workplace integration and, by omitting inmates from the number of unemployed, "conventional labor force statistics significantly overestimate[d] the labor force involvement of [Black American] men, and young [B]lack men in particular."<sup>127</sup> Similarly, by omitting prison populations, census data does not document the expansion of the criminal justice system post-1970s and its impact on the residence of large proportions of young Black men. According to this analysis, taking incarceration into account significantly expands the

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121. CAUGHT, *supra* note 114, at 20.

122. See Bird & Grattet, *supra* note 120, at 177 (examining recidivism outcomes following delegations of authority over certain offenses to local officials); Symposium, *The Great Experiment: Realigning Criminal Justice in California and Beyond*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 4 (2016); see also TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE* 9 (2014) (citing California's efforts to reduce prison populations).

123. U.S. CONST. art. 1, § 2; see *Our Censuses*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/censuses.html> (Nov. 19, 2021).

124. See KENNETH PREWITT, *WHAT IS "YOUR" RACE?* 109 (2013) (noting "demographic analysis" as a method used to undercount racial minorities). Bias in census taking was well illustrated by the Trump administration's efforts to add a question on citizenship, which seemed to many a thinly disguised effort to discourage legal immigrant voters. See Nicole Narea, *Trump's Obstruction of the 2020 Census, Explained*, CTR. FOR PUB. INTEGRITY (Oct. 9, 2020), <https://publicintegrity.org/politics/system-failure/trump-obstruction-of-2020-census/>. Efforts to communicate a different intent were impeded by the Trump administration's decision to end the count early, in the middle of a global pandemic. *Id.*

125. U.S. CONST. art. I, § 2, cl. 3.

126. Becky Pettit & Bryan L. Sykes, *Civil Rights Legislation and Legalized Exclusion: Mass Incarceration and the Masking of Inequality*, 30 SOCIO. F. 589, 600 (2015).

127. *Id.*

degree of “hypersegregation” in American society.<sup>128</sup> Not only does prison exclude individuals from census tabulations, but it also has consequences for employment post-release,<sup>129</sup> and for voting,<sup>130</sup> health,<sup>131</sup> and jury service.<sup>132</sup>

*C. Incarceration: A Mechanism of Stratification with Collateral Consequences*

Although education and employment are typically considered the most important determinants of mobility, social status, and labor force participation, today, mass incarceration and its disproportionate impact on Black Americans and Hispanics should also be treated as a mechanism determinative of mobility.<sup>133</sup> Mass incarceration has wide-ranging collateral consequences for individual social mobility and the well-being of family members and children. The effects of imprisonment of an individual on their partner and children has been termed “secondary prisonization.”<sup>134</sup> These “legal bystanders” often undergo a Kafkaesque process to see their partner or parent: Compliance with rules and regulations and undergoing checks and re-checks through a bureaucratic maze are required before an often very short visit.<sup>135</sup> These collateral burdens in time lost at work, plus the cost of travel, amount to an additional form of punishment.<sup>136</sup>

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128. The term “hypersegregation” has been defined as a condition occurring “when a race/ethnic group is highly segregated in multiple ways, no matter how segregation is conceptualized or measured.” Nancy A. Denton, *Hypersegregation*, in BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY 2196 (George Ritzer ed., 2007).

129. DEVAH PAGER, MARKED 58, 65–66 (2007); see also Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 195–98, 209 (2009).

130. JEFF MANZA ET AL., LOCKED OUT 165–67, 170–78 (2006).

131. See generally Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 LAW & SOC’Y REV. 275 (2008).

[R]acial differences in health . . . become nonsignificant when exposure to incarceration is considered. . . . [But] even if the effect of incarceration on later health is the *same* across races, the impact will be greater on the aggregate health of minorities because minorities are considerably more likely to be exposed to the detrimental health effects of incarceration.

*Id.* at 292.

132. See James M. Binnall, *Sixteen Million Angry Men: Reviving a Dead Doctrine to Challenge the Constitutionality of Excluding Felons from Jury Service*, 17 VA. J. SOC. POL’Y & L. 1, 15–17 (2009).

133. See Sara Wakefield & Christopher Uggen, *Incarceration and Stratification*, 36 ANN. REV. SOCIO. 387, 393 (2010); see also ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME 5 (2016) (providing a more recent analysis of mass incarceration’s disproportionate impact).

134. MEGAN COMFORT, DOING TIME TOGETHER 14–15 (2008).

135. See ALICE GOFFMAN, ON THE RUN 224 (2014) (noting the long hours waited by loved ones visiting inmates).

136. See generally MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT 201 (1992) (“If the stigma of the criminal sanction is not viewed as a significant sanction, the concrete costs of the pretrial process take on great significance. When this occurs, the process itself becomes the punishment.”).

Another collateral consequence of mass incarceration among Black American men is the increased risk of housing eviction of their female counterparts and family members.<sup>137</sup> In poor, predominantly Black neighborhoods, women are more likely to hold a lease, in part because of their male partners' past criminal record or current incarceration.<sup>138</sup> Also in these poor neighborhoods, women are more likely to be evicted than men, and the overall eviction rate is higher than it is for men or women in predominantly white neighborhoods.<sup>139</sup> Research documents the manner in which racial hierarchy is systematically reproduced in interactions between landlords and their Black female renters when the rent cannot be paid or the landlord fails to make a repair.<sup>140</sup>

Institutionalization of mass incarceration also has consequences for child well-being.<sup>141</sup> Initially, one might assume that removing a parent who has committed a crime has a beneficial effect on a child's homelife and upbringing. And before the prison boom of the 1970s, incarceration of a father was relatively rare.<sup>142</sup> Today, however, more criminal laws, more frequent incarceration of the mentally ill, and "three strikes" sentencing guidelines,<sup>143</sup> among other factors, have transformed that probability into a "common [reality] for recent generations of [B]lack children—especially those whose fathers dropped out of high school."<sup>144</sup> Incarceration of Black American fathers significantly increases the odds that their offspring have serious mental health and behavioral problems, infant mortality, and homelessness.<sup>145</sup> Each

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137. Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIO. 88, 91 (2012) ("If incarceration has become typical in the lives of men from impoverished [B]lack neighborhoods, eviction has become typical in the lives of women from these neighborhoods.").

138. *Id.* at 105 (detailing the common dilemma facing Black women, namely, that Black women are more likely to be named on their household's lease but less likely to make ends meet as compared to their male counterparts).

139. *Id.* at 98; *see also, e.g.*, MATTHEW DESMOND, MACARTHUR FOUND., POOR BLACK WOMEN ARE EVICTED AT ALARMING RATES, SETTING OFF A CHAIN OF HARDSHIP 2 (2014) ("In high-poverty [B]lack [Milwaukee] neighborhoods, one male renter in 33 and one woman in 17 is evicted. In high-poverty white [Milwaukee] neighborhoods, in contrast, the ratio is 134:1 for men and 150:1 for women.").

140. *See* MATTHEW DESMOND, EVICTED 53–55 (2016) (illustrating the typical Black-woman/landlord relationship).

141. *See generally* CHILDREN OF PRISON BOOM, *supra* note 27, at 131; Holly Foster & John Hagan, *Maternal and Paternal Imprisonment and Children's Social Exclusion in Young Adulthood*, 105 J. CRIM. L. & CRIMINOLOGY 387, 390, 423 (2015) (finding lower socioeconomic status of children with incarcerated parents); Bryan L. Sykes & Becky Pettit, *Severe Deprivation and System Inclusion Among Children of Incarcerated Parents in the United States After the Great Recession*, 1 RSF: RUSSELL SAGE FOUND. J. SOC. SCIS. 108, 110 (2015) (describing behavioral and social challenges facing children of incarcerated parents).

142. *See* Kristin Turney & Rebecca Goodsell, *Parental Incarceration and Children's Wellbeing*, 28 FUTURE OF CHILD. 147, 148 (2018) (reporting that incarceration affected roughly 161 of every one hundred thousand adults in the 1970s).

143. 18 U.S.C. § 3559(c)(1) (mandating a life sentence for a person convicted of a serious felony if he or she has two or more other felonies or drug offenses of a certain kind).

144. King & Smith 2008, *supra* note 51, at 341.

145. *See* CHILDREN OF PRISON BOOM, *supra* note 27, at 131.

of these factors has long-term consequences for success as an adult. In a sobering note, authors Sara Wakefield and Christopher Wildeman conclude that “parental imprisonment is a distinctively American force for promoting intergenerational social inequality in the same league with decaying, urban public-school systems and highly concentrated disadvantage in urban centers that distinctively touch—and disadvantage—poor [B]lack children.”<sup>146</sup>

## V. TRANSLATING THE LAW ON THE BOOKS TO THE LAW IN ACTION: THE CASE OF TITLE VII

Judicial and legislative achievements of the civil rights movement present ripe sites for explaining the steps taken to institutionalize the goals embodied in rulings and statutes, from the institutionalization of K–12 school desegregation to affirmative action in higher education to housing and employment. Part V reviews one particularly rich site—employment—where law and social science scholars have made particularly important contributions to our understanding.<sup>147</sup> While this literature is intrinsically important for what it demonstrates about scholarly debate around whether and to what extent the Civil Rights Act of 1964, and specifically Title VII, has achieved its goal, it also illustrates a more general point, namely, that the law in action is often more telling than the law on the books.

Title VII of the Civil Rights Act, barring discrimination in employment, is remarkably ambiguous in its wording and provides little guidance on implementation or on evaluating compliance.<sup>148</sup> Title VII has had an impact on the organization and management of the contemporary workplace, becoming a pivotal focus of human resources (HR) management.<sup>149</sup> Professional HR managers have, over time, developed corporate standards for affirmative action in hiring, training, work assignment, and later, diversity and inclusion programs (for example, mentoring and networking initiatives).<sup>150</sup> Two points are worth noting. First, HR experts “peddled”

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146. *Id.* at 157.

147. For another particularly important example of racial bias in policy implementation—specifically, in the implementation of special education policies under federal legislation—see Richard D. Marsico, *The Intersection of Race and Special Education: The Role of Structural Inequities in the IDEA*, 66 N.Y.L. SCH. L. REV. 207 (2021–2022).

148. Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e–2000e-17; see FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 220–24 (2009) (discussing programs designed by corporate personnel to supplement Title VII’s shortcomings); see also *Legal Ambiguity*, *supra* note 52, at 1536–37 (contending that Title VII’s broad and ambiguous language undermines corporate antidiscrimination policies); see also *From Legal Doctrine to Social Transformation?*, *supra* note 52.

149. CHARLES R. EPP, *MAKING RIGHTS REAL* 1 (2009) (noting strategies used by activists and professionals to institutionalize the objectives of Title VII); see also DOBBIN, *supra* note 148, at 101–02 (same).

150. See Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management*, 41 AM. BEHAV. SCIENTIST 960, 965, 969, 972–83, 978–79 (1998). Building on a post-New Deal model of managerial labor-management relations (excluding union participation in favor of management prerogative to control of labor conditions), the field of HR expertise became the corporate site for devising policies and practices designed to address what was in its earliest iteration referred to as affirmative action. See *id.* at 969.

their programs in prominent business journals,<sup>151</sup> and though changes in HR best practices “happened piecemeal, by the beginning of the new century, they had revolutionized the employment relationship.”<sup>152</sup> Second, research shows that the threat of lawsuits by individuals and the government casts a shadow that keeps everyone on the HR innovation bandwagon, though often with little attention to assessing its overall effectiveness.<sup>153</sup>

Pathbreaking research organized in Professor Lauren Edelman’s *Working Law* examined why implementation of federal legal mandates under the Equal Employment Opportunity Act (EEO)<sup>154</sup> in the workplace<sup>155</sup> has failed to mitigate racial and gender discrimination. Her research demonstrates that expertise in law and management have blurred to the point where the law is, in essence, little more than an extension of management’s interpretation of it, a process termed “endogeneity.”<sup>156</sup> As used in analysis of that context, and borrowed subsequently by other scholars who apply it more generally to enforce policy, “endogeneity” refers to the outcome of relying on experts within the regulated group to control law’s meaning. No longer an expression of commitment to rights and a rule of law, Title VII’s requirements have been reframed by HR professionals, many of whom are employed by regulated companies, to implement equal opportunity within a framework of objectives defined by management while putting law-like guidelines and court-like practices in place to manage claims of racial (or gender) discrimination.

Most revealing, however, has been judicial deference to these practices.<sup>157</sup> Federal courts have held that workplace policies and procedures crafted by corporate EEO professionals evidence compliance with the law, and in some cases, constitute an affirmative defense to hostile work environment and harassment claims.<sup>158</sup> Thus, the federal courts have increasingly empowered company-employed experts to interpret

151. DOBBIN, *supra* note 148, at 223 (“Rather than hiding their innovations from competing firms, personnel experts peddled them in the pages of *Fortune* and *Human Resources Management*.”).

152. *See id.* at 224.

153. *Id.* at 232; *see Master Theory, supra* note 111.

154. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 5 and 42 U.S.C.).

155. To view the “EEO is the Law” poster that employers must conspicuously display in the workplace, see *Equal Employment Opportunity is the Law, Employers*, U.S. EEOC (Nov. 2009), [https://www.eeoc.gov/sites/default/files/migrated\\_files/employers/eeoc\\_self\\_print\\_poster.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/employers/eeoc_self_print_poster.pdf).

156. WORKING LAW, *supra* note 52.

157. *Id.* at 178–81.

158. *Id.* at 211–13; *see, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72–73 (1986) (declining to “issue a definitive rule on employer liability” but providing that “absence of notice to an employer does not necessarily insulate that employer from liability”); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (noting that an employee’s failure to exercise reasonable care to “avoid harm” may be enough to satisfy the second element of an employer’s affirmative defense against a Title VII claim); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (finding that an antiharassment policy may appropriately satisfy the first element of the affirmative defense against a Title VII claim); *Vance v. Ball State Univ.*, 133 U.S. 421, 430 (2013) (explaining how an employer can mitigate or avoid liability).

the law while limiting the scope of judicial interpretation. Pessimistically, Edelman concludes, “we live not in a post-civil rights society but rather in a symbolic civil rights society.”<sup>159</sup>

Other research finds that employment practices are guided by a market logic that recognizes the pragmatics and usefulness of “racial realism,” or a “strategy of using membership in a racial group as a qualification.”<sup>160</sup> How “racial realism” plays out depends on the employment sector and often on racial or ethnic stereotypes. Employers in low-paying sectors prefer stereotypically “hardworking” immigrants to native-born white or Black Americans.<sup>161</sup> Employers who hire doctors according to race and ethnicity rely on research in medicine that suggests that racially concordant doctor-patient matching has significant, positive effects on quality of health.<sup>162</sup> These institutionalized practices take place under the radar of formal law, and often without legal challenge, with problematic consequences in less formal, more poorly compensated sectors of the economy (for example, home care aides). As a result of discriminatory “realism” in hiring that permeates the modern workplace yet operates beside the law, one scholar concludes, “America’s civil rights laws have become, in some very real and perhaps morally troubling sense, anachronisms.”<sup>163</sup>

These studies speak to the limits of the judiciary’s capacity to address a deeply engrained legacy of institutionalized racial discrimination. Research on specific professions, including medicine,<sup>164</sup> law,<sup>165</sup> and engineering,<sup>166</sup> for example, consistently corroborate the stalled pace of workplace integration along racial lines, particularly in the upper echelons of these respective fields. We also note that recent research looks closely at the specific design of civil rights and diversity policies that do and do

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159. WORKING LAW, *supra* note 52, at 216.

160. JOHN DAVID SKRENTNY, *AFTER CIVIL RIGHTS* 3 (2013).

161. *See, e.g.*, NEWMAN, *supra* note 105, at 176–79 (describing a Spanish-speaking immigrant who benefitted from the “view that Latino immigrants are harder workers”).

162. King & Smith 2008, *supra* note 51, at 342; *see also* SKRENTNY, *supra* note 160, at 11 (discussing racial matching in professional fields).

163. King & Smith 2008, *supra* note 51, at 342; *see also* SKRENTNY, *supra* note 160, at 266–67 (arguing that racial realism in the workplace is unsupported by U.S. civil rights law).

164. *See* SKRENTNY, *supra* note 160, at 40–50.

165. *See* Monique R. Payne-Pikus et al., *Experiencing Discrimination: Race and Retention in America’s Largest Law Firms*, 44 L. & Soc’y REV. 553, 560–62 (2010) (theorizing that Big Law firms struggle to retain Black lawyers, particularly at the associate level, because of disparities in partner contact and mentorship opportunities).

166. *See* Angela Byars-Winston et al., *Race/Ethnicity and Sex in U.S. Occupations, 1970–2010: Implications for Research, Practice, and Policy*, 87 J. Vocational Behav. 54, 65 (2015) (reporting little change in racial diversity in STEM, and especially engineering, fields between the 1970s and 2010s); LIANA CHRISTIN LANDIVAR, U.S. CENSUS BUREAU, *DISPARITIES IN STEM EMPLOYMENT BY SEX, RACE, AND HISPANIC ORIGIN* 15 (2013) (“[T]he average racial and ethnic distribution of the STEM workforce is 71 percent non-Hispanic White, 15 percent Asian, 6 percent Black, and 7 percent Hispanic.”).

not prove effective for ameliorating racial discrimination.<sup>167</sup> How and to what extent such findings inform future policymaking that is transformative remains, however, an open question.

## VI. LAW, SEGREGATION, AND CONCENTRATED DISADVANTAGE<sup>168</sup>

In the late 1970s, a seminal analysis of isolated, impoverished Black American communities answered racial stereotyping and moral judgments by conservatives who claimed that Black Americans themselves were responsible for the failure of civil rights era anti-poverty programs.<sup>169</sup> Evidence from large cities like Chicago suggested that, while expressly discriminatory policies no longer accounted for the lack of progress, profound restructuring of urban economies over the latter half of the twentieth century gutted opportunity structures,<sup>170</sup> contributing to continuing isolation and exposure to concentrated disadvantage.<sup>171</sup> In turn, concentrated disadvantage had become an independent cause of deep poverty. Middle and employed working class families tended to move, leaving behind neighborhoods virtually devoid of role models of upward mobility, community-based institutions, and opportunities for education and employment.<sup>172</sup> The impact of continuing de facto segregation, especially the so-called “neighborhood effects” of segregation on an individual’s opportunities, motivations, and choices, explained persistence of concentrated disadvantage over recent generations. Segregation, prominent scholars

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167. See Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 L. & Soc. INQUIRY 855, 883 (2006) (“[L]awsuits and compliance reviews had significant positive effects on the subsequent share of white women, [B]lack women, and [B]lack men in management.”); Alexandra Kalev & Frank Dobbin, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOCIO. REV. 589, 590 (2006) (finding that white women benefit more than Black women, who benefit more than Black men, from corporate affirmative action programs, diversity training programs, and mentorship and networking programs).
168. For a closer look at disadvantages flowing from housing and land use policies, see Richard Chused, *Strategic Thinking About Racism in American Zoning*, 66 N.Y.L. SCH. L. REV. 307 (2021–2022).
169. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 16, 62, 132 (1987) (citing increased poverty and unemployment as variables that undermined civil rights law and anti-poverty programs).
170. This restructuring included gutting access to jobs, better education, and paths out of poverty for minority groups, and creating policies to, for example, relocate industries to remote locations and place low-income housing in poorer neighborhoods. *Id.* at 135.
171. *Id.* at 136. Collaborators of author William Julius Wilson have argued that disadvantages experienced by Black Americans—measured by multiple indicators including poverty, unemployment, female-headed households, welfare receipt, density of children, and underfunding of critical public and private sector institutions—are often simultaneously present in Black-majority neighborhoods, amounting to a “concentrated disadvantage.” *Id.* at 58. Such concentrated disadvantage leads to qualitatively different community life, special barriers to advancement, and enduring inequality. *Id.* at 60; see also ROBERT J. SAMPSON, *GREAT AMERICAN CITY* 20 (2012) [hereinafter *GREAT AMERICAN CITY*] (citing concentrated disadvantage as a factor contributing to community violence).
172. The mobility of more well-to-do families is one element of Wilson’s argument. WILSON, *supra* note 169, at 50, 55–56; see also ELIJAH ANDERSON, *CODE OF THE STREET* 145 (1999) (depicting the exodus of working-class families from neighborhoods riddled with poverty).

concluded, is responsible for “enabling all other forms of racial oppression” in a process that “binds them together into a coherent and uniquely effective system of racial subordination,” making racial segregation and its institutional form, the Black ghetto, “the key structural factors responsible for the perpetuation of Black poverty in the United States.”<sup>173</sup>

Historical analysis shows that the “evolution of segregated, all-[B]lack neighborhoods . . . was not the result of impersonal market forces,” but an entity “constructed through a series of well-defined institutional practices, private behaviors, and public policies by which whites sought to contain growing urban Black populations.”<sup>174</sup> Segregated neighborhoods have deep roots in employment, and education and housing subsidies offered by the New Deal to whites were largely denied to Black Americans. A legislative coalition anchored by southern Democrats and moderates acting on behalf of ambivalent white constituents weakened enforcement provisions of the 1968 Fair Housing Act (FHA). More effective enforcement made possible by 1988 revisions was undermined initially by presidential opposition during the end of the Reagan administration, local resistance, and more recently, Supreme Court hostility to civil rights litigation.<sup>175</sup>

Likewise, local zoning and development policies reflect strong pressure to separate, rather than integrate, Black Americans.<sup>176</sup> National and local civil rights policies forbidding racial steering by brokers and redlining by mortgage lenders are poorly enforced.<sup>177</sup> Policy failures are consistent with the views of large constituencies: Survey data continue to show that, while Black Americans remain the group most open to living in an interracial community, they are considered the least desirable neighbors by Hispanics and whites as well as better-off Black Americans.<sup>178</sup>

Ironically, effective interventions exist. A test of a theory similar to William Julius Wilson’s “neighborhood effects” hypothesis was already underway when Wilson wrote;<sup>179</sup> that test came in the form of a court-ordered remedy for racial

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173. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 8–9 (1993).

174. *Id.* at 10.

175. *See, e.g.*, *Filarsky v. Delia*, 566 U.S. 377, 389–92 (2012) (exhibiting hostility to § 1983 suits by “[a]ffording immunity not only to public employees but also to others acting on behalf of the government . . . to ensure that [they] are not deterred [from acting] by the threat of damages”); *Minneci v. Pollard*, 565 U.S. 118, 120, 131 (2012) (deflecting to state tort law on a federal prisoner’s claim for damages); *From Legal Doctrine to Social Transformation?*, *supra* note 52, at 120–23.

176. *See* SHARKEY, *supra* note 28, at 61–62, 111–12.

177. *See generally* Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375, 427 n.268 (2010) (citing Sam Roberts, *Westchester County Agrees to Desegregate Housing in Mostly White Towns*, N.Y. TIMES, Aug. 11, 2009, at A14) (noting the necessary role of private enforcement to prevent FHA violations); Carolyn Bond & Richard Williams, *Residential Segregation and the Transformation of Home Mortgage Lending*, 86 SOC. FORCES 671, 673 (2007).

178. Bobo & Charles, *supra* note 77, at 250; *see also* RACHAEL A. WOLDOFF, *WHITE FLIGHT/BLACK FLIGHT* 12–13 (2011).

179. WILSON, *supra* note 169, at 144.

discrimination by the Chicago Housing Authority (CHA).<sup>180</sup> In a decision concerning the remedy for the CHA's discriminatory practice of placing new low-income housing primarily in the city's majority Black neighborhoods, the Supreme Court authorized remedial action employing housing vouchers which could be used anywhere throughout the metropolitan area including Chicago's predominantly white suburbs.<sup>181</sup> Although results were initially disputed, re-analysis and subsequent research discovered positive "neighborhood effects" from moving to a low poverty neighborhood, including "massive" improvements in health and neighborhood safety.<sup>182</sup> A subsequent replication of the initial experiment with improved design found strong positive effects on employment, earnings, and household income.<sup>183</sup>

The initially controversial hypothesis about the causes of isolation—that the residents of isolated neighborhoods contribute to the reproduction of concentrated disadvantage and inequality—has proven a fruitful source of insight into the racially unequal impact of discriminatory policies, among them crime control and housing. Individual behavior is linked to neighborhood "capital," namely, social and economic resources that influence an individual's development, knowledge of the world, and opportunities for mobility and their understanding of how to use these resources. In turn, neighborhood "capital" is dependent upon urban structure and policy through mediating processes such as neighborhood social interaction, perceptions of neighborhood disorder, and collective capacity for informal social control, neighborhood institutional resources, and the spatial organization of land use.<sup>184</sup>

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180. See *Hills v. Gautreaux*, 425 U.S. 284, 288, 299 (1976) ("The relevant geographic area for purposes of [public] housing options is the Chicago housing market, not the Chicago city limits.").

181. *Id.*

182. See Susan Clampet-Lundquist & Douglas S. Massey, *Neighborhood Effects on Economic Self-Sufficiency: A Reconsideration of the Moving to Opportunity Experiment*, 114 AM. J. SOCIO. 107, 112 (2008) (correlating socioeconomic benefits with low-poverty living); see also Robert J. Sampson, *Moving to Inequality: Neighborhood Effects and Experiments Meet Social Structure*, 114 AM. J. SOCIO. 189 *passim* (2008) [hereinafter *Moving to Inequality*] (testing the neighborhood effects theory); Jens Ludwig, *Guest Editor's Introduction*, 14 CITYSCAPE, no. 2, 2012, at 1, 18–19 (reporting that the "Moving to Opportunity" (MTO) social experiment, through which some families in public housing had an opportunity to relocate to lower poverty neighborhoods, positively impacted the health of those families).

183. See Rebecca Casciano & Douglas S. Massey, *Neighborhood Disorder and Individual Economic Self-Sufficiency: New Evidence from a Quasi-Experimental Study*, 18 HEALTH & PLACE 180, 197–99 (2012). Another effect of neighborhood isolation is that it creates a barrier to opportunities to move to better neighborhoods. *Id.* An unexpected outcome of voucher programs tied to moving, such as the MTO experiment, was that some recipients gave priority to neighborhoods in which they felt comfortable, rather than neighborhoods where they might maximize opportunities valued by those conducting the experiment. *Id.* Because such choices often returned individuals to relatively low-income neighborhoods with high crime, the researchers dubbed these choices "moving to inequality." *Moving to Inequality*, *supra* note 182, at 213, 226.

184. See Stuart M. Butler & Jonathan Grabinsky, *Tackling the Legacy of Persistent Urban Inequality and Concentrated Poverty*, BROOKINGS (Nov. 16, 2020), <https://www.brookings.edu/blog/up-front/2020/11/16/tackling-the-legacy-of-persistent-urban-inequality-and-concentrated-poverty> ("Promoting regional initiatives aimed at increasing the connectivity and mobility of urban residents, and connecting communities to regional assets and opportunities, mak[e] it easier for people in different communities to interact."); see also GREAT AMERICAN CITY, *supra* note 171, at 38–39; Christopher

Concentrated disadvantage has been shown to have an effect on income, employment, education, and exposure to concentrated disadvantage in the next generation, independent of a parent's status with respect to each measure.<sup>185</sup>

Further, “neighborhood effects” influence patterns of policing and their impact. “Broken windows” policing concentrates on punishing perpetrators of minor infractions on the theory that, if unchecked, the offenders will not only commit crimes of increasing seriousness but also create the appearance of disorder (for example, broken windows) in the relevant neighborhood, suggesting neglect and lawlessness welcoming of further violations.<sup>186</sup> Questioning the theory's premise, namely, that disorder leads to escalating crime and warrants more comprehensive enforcement of quality-of-life infractions, Wilson's collaborators have shown that any direct link between actual neighborhood disorder (for example, broken windows) and crime is quite weak.<sup>187</sup> By contrast, collectively shared perceptions of disorder can have important consequences, including neighborhood disinvestment or out-migration.<sup>188</sup>

For example, perceptions of disorder correlate with areas of concentrated minority and impoverished populations, rather than actual disorder. Ironically, perceptions of disorder rather than actual disorder also predict future levels of crime, a self-perpetuating cause of further isolation and crime which is suggested to be “one of the underappreciated causes of continued racial [and economic] segregation in the United States [and perhaps elsewhere].”<sup>189</sup> Police presence, arbitrary stop and frisk, and frequent arrests likewise contribute to “high levels of intersubjectively shared cynicism and perceived irrelevance of legal rules” correlated with higher levels of violence and lower readiness for civic participation.<sup>190</sup> Counterintuitively, greater police presence and more arrests may also lead to adverse perceptions of a neighborhood's social order and an increase in crime.<sup>191</sup>

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Jencks & Susan E. Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood*, in *INNER-CITY POVERTY IN THE UNITED STATES* 111, 113–15 (Laurence E. Lynn, Jr., & Michael G.H. McGeary eds., 1990) (delineating the benefits of “advantaged neighbors”).

185. See SHARKEY, *supra* note 28, at 156–64.

186. See generally Charlotte Ruhl, *The Broken Windows Theory*, SIMPLY PSYCH. (July 26, 2021), <https://www.simplypsychology.org/broken-windows-theory.html> (citing George L. Kelling & James Q. Wilson, *Broken Windows*, THE ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>) (“[V]isible signs of crime and civil disorder, such as broken windows . . . create an urban environment that promotes even more crime and disorder.”).

187. See Jeffrey D. Morenoff et al., *Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence*, 39 CRIMINOLOGY 517, 519–20 (2001).

188. See Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 Soc. PSYCH. Q. 319, 322, 337 (2004) [hereinafter *Seeing Disorder*].

189. *Id.* at 337.

190. See GREAT AMERICAN CITY, *supra* note 171, at 366.

191. See *Seeing Disorder*, *supra* note 188, at 319 (“[R]esidents read signs of disorder as evidence of a deeper neighborhood malaise.”). *But see* Zusha Elinson et al., *Cities Reverse Defunding the Police Amid Rising Crime*, WSJ (May 26, 2021), <https://www.wsj.com/articles/cities-reverse-defunding-the-police-amid-rising-crime-11622066307>; *As Violent Crime Leaps, Liberal Cities Rethink Cutting Police Budgets*, THE

These and similar findings over many years of research show that racial inequality arises from multigenerational exposure to concentrated disadvantage. On the basis of this research, one scholar concludes that “[t]he social structure of urban America is such that absent forceful intervention, powerful, institutionalized, socially-embedded processes will operate to replicate the existing ecological landscape.”<sup>192</sup> Mediating structures, including social policies, law enforcement, and institutions outside the ghetto play an indirect role in creating “persistent cultural mechanisms” constituting a “deep structure” reproducing racial inequality.<sup>193</sup>

## VII. CONCLUSION

This essay originated during the political turmoil of the 2020 presidential election. Its themes resonate with hotly contested and divisive debates over domestic policy that have not abated.<sup>194</sup> Political conflict made race a forceful issue, creating momentum for racial reckoning and an opportunity to address longstanding patterns of the racial inequality that we have described here. Since we began, backlash against efforts to bring about change has grown in some sectors of American society.<sup>195</sup> Racial minorities continue to face unequal challenges, including disproportionate incarceration and its collateral consequences for child and family well-being. There are parallel inequalities in employment, education, health, and housing. It is worth quoting the Supreme Court’s sadly misinformed decision in *Shelby County*, striking down a key enforcement provision of the VRA while claiming “that the conditions that originally justified [section 4(b)] no longer characterize voting in the covered

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ECONOMIST (Jan. 15, 2022), <https://www.economist.com/united-states/2022/01/15/as-violent-crime-leaps-liberal-cities-rethink-cutting-police-budgets>.

192. Douglas S. Massey, *Inheritance of Poverty or Inheritance of Place? The Emerging Consensus on Neighborhoods and Stratification*, 42 CONTEMP. SOCIO. 690, 693 (2013).

193. *Id.*

194. The 2016 and 2020 election cycles generated extraordinary and bitter contention not only over race and policies with a racial impact but also manipulation of racially coded discourse with divisive effects on the public. See, e.g., SIMON CLARK, CTR. FOR AM. PROGRESS, HOW WHITE SUPREMACY RETURNED TO MAINSTREAM POLITICS 7, 10 (2020) (highlighting vague catchphrases used by far-right commentators to take white nationalism mainstream); Jack Holland & Ben Fermor, *The Discursive Hegemony of Trump’s Jacksonian Populism: Race, Class, and Gender in Constructions and Contestations of US National Identity, 2016–2018*, 41 POL. 64, 75–76 (2020) (noting how President Trump’s rhetoric embraced the working-class white male as the identity and backbone of the nation).

195. See, e.g., The Brookings Cafeteria, *Charlottesville: One Year Later*, BROOKINGS (Aug. 3, 2018), <https://www.brookings.edu/podcast-episode/charlottesville-one-year-later/> (Charlottesville protest); Emmitt Y. Riley & Clarissa Peterson, *I Can’t Breathe: Assessing the Role of Racial Resentment and Racial Prejudice in Whites’ Feelings toward Black Lives Matter*, 1 NAT’L REV. BLACK POL. 496, 497–99 (2020) (“all lives matter” and “blue lives matter” demonstrations); Esther Schrader, *BLM Backlash: The Nation’s Racial Reckoning Meets Bitter Resistance at a High School in Florida Named for a Confederate Leader*, S. POVERTY L. CTR. (May 21, 2021), <https://www.splcenter.org/news/2021/05/21/blm-backlash-nations-racial-reckoning-meets-bitter-resistance-high-school-florida-named> (removing BLM banner from high school classroom).

jurisdictions.”<sup>196</sup> In many respects, the Court had already rendered similar judgments about the need for policies addressing racial inequality in other areas,<sup>197</sup> tracking beliefs held by the American public.<sup>198</sup> Notwithstanding the Court’s opinion, we observe that, in the aftermath of *Shelby County*, a number of states, especially in the South, have recently imposed state-level requirements restricting access to the voting booth that disproportionately affect minority constituents.<sup>199</sup>

The scholarship reviewed here paints a portrait of inequality in the United States that is dramatically different from the Court’s characterization in *Shelby County*. Indeed, the scholarship reviewed here shows significant setbacks beginning in the 1980s in America’s aspiration to achieve a more egalitarian, integrated, fair, and equitable society. The generation inspired by the civil rights movement asked tough questions and brought rigor, depth, sophistication, and insight to an analysis of its legacy. Emerging scholars in law and social science continue to build on a remarkably solid foundation of scholarship. Thus, during the most racially divisive period in our memory, we face the challenge of remaining optimistic about our role as scholars of law and social science in overcoming a legacy of structural inequality along lines of race and class. We take solace in the words of Rev. Martin Luther King Jr.: “The arc of the moral universe is long, but it bends toward justice.”<sup>200</sup> At this dark moment in our nation’s history, we do not have the luxury to sit back because, simply put, it is too important to keep pushing that bend toward justice.

In closing, we encourage our colleagues and students to take concrete and pragmatic steps to act on research documenting the persistence of racial inequality. And if our mission as teachers and scholars is to set the record straight so that something can be done to create a more just society, then we must convey an accurate understanding of this long-existing problem to future generations of legal practitioners, policymakers, legislators, and members of the judiciary as well as the public, urging them to seek remedies and deeper understanding.

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196. *Shelby County v. Holder*, 570 U.S. 529, 535 (2013); see Morgan Kousser, *Do the Facts of Voting Rights Support Chief Justice Roberts’s Opinion in Shelby County?*, 1 *TRANSATLANTICA* 2, 8 (2015). The Court cited state-imposed literacy tests and other devices designed to suppress minority voter registration, turnout, and the election of Black officials as “conditions that [were] originally justified” but have since been eradicated through section 4(b)’s enactment. *Shelby County*, 570 U.S. at 547, 551; see also CONG. RSCH. SERV., IF11908, *VOTING RIGHTS ACT AND H.R. 4 (117TH CONGRESS): AN OVERVIEW* 1 (2021).

197. See *supra* Part IV.

198. See *supra* Part II.

199. See Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression>; see also *Voter ID Chronology*, *supra* note 23.

200. *Remaining Awake Through a Great Revolution, National Cathedral, Martin Luther King, Jr.* (Mar. 31, 1968) (accessed using Spotify); see also Penelope Andrews, *A Commission on Recognition and Reconstruction for the United States: Illusory or Inspirational?*, 66 *N.Y.L. SCH. L. REV.* 359 (2021–2022).