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Law Review

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LETTER FROM THE EDITOR-IN-CHIEF

"When day comes we ask ourselves, where can we find light in this never-ending shade?"

—Amanda Gorman[1]

Dear Reader:

The *Howard Human & Civil Rights Law Review* ("HCR") recognizes that we are a light that dares to beam through the darkness that looms as we continue to navigate a global pandemic in the face of so many precarious occasions — just in the first quarter of 2021. We have already endured an insurrection, the senseless murders of six Asian American women, the tragic murders of Daunte Wright and Adam Toledo, and re-traumatization from the trial of Derek Chauvin, the murderer of George Floyd, to name a few. Yet, we have also witnessed Kamala Harris, daughter of Howard University, become the first woman and Black Vice President of the United States. Although we grow weary in the wake of death and injustice, HCR understands that the sun never sets on the fight for justice. Proud moments that still feel too few and far between encourages us to press forward as we encourage reflection on relevant injustices and proffer meaningful solutions from a legal perspective.

Above all else, HCR is a collective cohort of minds focused on social justice issues. As lawyers with a conscience, we strive to become a more perfect representation of the Charles Hamilton Houston legacy we inherited. As the foremost authority on human and civil rights issues, HCR continues to bring to the forefront the issues affecting our communities and provide several forums to strategize for a better tomorrow, such as our annual C. Clyde Ferguson, Jr. Symposium. Our Symposium, created in honor of one of Howard Law's most beloved Deans, and the Spring Issue of Volume V of the *Howard Human & Civil Rights Law Review* continues to uphold Dean Ferguson's commitment to advocacy against social ills that plague our society and the broader global community.

The Spring Issue of Volume V begins with the keynote address from the Sixth Annual C. Clyde Ferguson, Jr. Symposium. Titled "*Algorithms of Injustice & The Calling of Our Generation: The Building Block of a New AI Justice in the Technological Era of Global Predatory Racial Capitalism*," Maurice R. Dyson, Professor at Suffolk University Law School, peels back the layers of technological racism through a critical analysis of biased algorithms and calls for solutions through artificial intelligence. The next piece titled "*Nurturing Freedom Dreams: An Approach to Movement Lawyering in the Black Lives Matter Era*" is written by Dr.

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* Amanda Gorman, poet laureate, The Hill We Climb, Address at the Presidential Inauguration of Joseph R. Biden (Jan. 20, 2021), *available at* CNN (Jan. 20, 2021, 10:22 PM), https://www.cnn.com/2021/01/20/politics/amanda-gorman-inaugural-poem-transcript/index.html.

Amanda Alexander, the Founding Executive Director of the Detroit Justice Center and Senior Research Scholar at the University of Michigan Law School. This essay, an extension of Volume V's Fall issue, explores movement lawyering through the lens of Detroit residents and the Detroit Justice Center. The essay that follows is written by Michael Conklin, the Powell Endowed Professor of Business Law at Angelo State University. Titled "*Racial Preference in COVID-19 Vaccination: Legal and Practical Implications*," this piece examines the justifications behind prioritizing the vaccine for communities of color and the potential constitutional implications of those justifications. Bennet Capers, Professor of Law and Director of the Center on Race, Law, and Justice at Fordham Law School ushers in the fourth piece. "*A Feminist Response to 'A Feminist Critique of Police Stops' and an Imagined Dialogue*" reviews Professor Josephine Ross's newest book through a critical analysis of Ross's police-civilian interactions from a feminist perspective, a discussion between legal scholars, and a presentation of additional feminist arguments that were not present in Ross's book. HCR's very own Candice Jones closes out the Spring Issue. Titled "*A Broken PATTERN: A Look at the Flawed Risk and Needs Assessment Tool of the First Step Act*," this student note examines the Department of Justice's Risk and Needs Assessment System and offers proposals for fostering a more equitable and effective system for individuals incarcerated within the Federal Bureau of Prisons.

I am certain that the collection of pieces curated for the Spring Issue will edify you and facilitate a discussion on timely issues affecting our community. We extend our deepest appreciation to the Howard University School of Law faculty and advisers for this issue: Dean Danielle Holley-Walker, Professor Darin Johnson, and Professor Jasbir (Jesse) Bawa. To our Law Review Manager, Mrs. RaNeeka Witty, we thank you for your tireless efforts on our behalf. We also thank the rest of the Howard University School of Law community for its continued support.

As a publication that stands on the shoulders of giants, we also extend our profound appreciation to our predecessors: The *Human Rights & Globalization Law Review* and the *Howard Scroll: The Social Justice Review*. These previous publications' unrelenting efforts provided the possibility of HCR's existence, and we are eternally grateful to the prior members and editorial boards for their contributions. As Editor-in-Chief, I would be remiss not to underscore the hard work of all of the members of the *Howard Human & Civil Rights Law Review* to produce this Spring Issue of Volume V. We have had a tremendously productive, enjoyable academic year, and I am incredibly proud to serve on this editorial board.

To our readers, I invite you to fully engage the discourse as you read this collection of legal scholarship and think critically about the ideas presented. We look forward to your support and hope that you find that this issue fulfills our obligation to publish timely, relevant pieces that make a meaningful contribution to the ongoing legal conversation in the field of human and civil rights.

ASHLYNE J. POLYNICE
Editor-in-Chief
Howard Human & Civil Rights Law Review

THE SIXTH ANNUAL
C. CLYDE FERGUSON JR. SYMPOSIUM
KEYNOTE ADDRESS
January 28, 2021

Algorithms of Injustice & The Calling of Our Generation: The Building Blocks of a New AI Justice in the Technological Era of Global Predatory Racial Capitalism

MAURICE R. DYSON*

I would like to thank Dean Holley-Walker, Howard University School of Law, Professor Darin Johnson, Kayla Strauss, the staff of the *Howard Human & Civil Rights Law Rev*iew, and the beloved spirit and legacy of C. Clyde Ferguson Jr., that continually inspires and guides this Annual Symposium. And we are beyond grateful for your thought leadership and those of my colleagues who have embraced me in this circle to speak on one of the most profound and unprecedented matters of precious import to the legal profession, and to our nation at this pivotal moment in history.

Indeed, we have seen a great deal of developments in the space of artificial intelligence and its profound implications for civil rights and civil liberties, but the stakes are far greater than society has yet to acknowledge, and its profound responsibilities are correspondingly far deeper than we have yet to assume. We have already envisioned the benefits that could derive from AI technology that are capable of holding a mirror to ourselves and our conduct. It can allow us to im-

* Professor of Law, Suffolk University Law School; J.D., Columbia University School of Law; A.B., Columbia College, Columbia University.

prove our efficiency, our ability to diagnose, assess, and treat our bodies' health, improve service delivery, and ourselves, when so informed and imbued with this intent. We can see its promise in improving our society's ability to meet the substantive needs of the human condition; but that is only if we vigilantly persist in the cause of our mutual understandings to speak to the root underlying conditions of our inequity. It cannot continue to manifest in laws and policies that seek to become the technological equivalent of Jim Crow.

But what we confront today is a far greater golden opportunity to shape this emerging technology in ways that can help us to become more aware. To be more aware of the trajectory of not just our actions, but ultimately our conscious and subconscious patterns of thinking and feeling, which is when we can really begin to understand how AI algorithms seek to exploit those hidden and overt biases within us. So legal technologists must now seek a means of making the new. Where loving correction through accountability and where love, in practice, is not circumstantial to politics, nor transactional, conditional or carceral in nature with new AI applications.

Because we know we are the same branches of the same tree of humanity, we refuse to have the Rosewood[1] and Tulsa tragedies[2] of yesteryear become new proxies of algorithmic predatory capitalism today.[3] The consciousness that produces these results seeks profits at any and all costs over humanity's sake. And now is the time for humanity to take its stand, front and center, to unite and embrace a jurisprudence that requires truth, reconciliation and accountability in law and technology.

But we must remember our rights have also been discursively constructed, and that is no less true in dialogues shaped by AI where we see even greater parallels to our own lexicon. For instance, the rhetoric of strict scrutiny has never been just rhetorical, not for those on the receiving end of its inhumanity and when it comes to AI, as with the law's language, context matters. Strict scrutiny is not only a

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1. *See, e.g.*, Richard A. Ryles, *The Rosewood Massacre: Reparations for Racial Justice*, Nat'l Bar Assoc. Mag., Apr. 1995, at 15.

2. *See, e.g.*, Deenen L. Brown, *Remembering Red Summer When White Mobs Massacred Blacks from Tulsa to D.C.*, Nat'l Geographic (June 19, 2020), https://www.nationalgeographic.com/history/2020/06/remembering-red-summer-white-mobs-massacred-blacks-tulsa-dc/#close.

3. *See* Tressie McMillan Cottom, *Where Platform Capitalism and Racial Capitalism Meet: The Sociology of Race and Racism in the Digital Society*, 6 Socio. Race & Ethnicity 441-449 (2020); *see also* Sam McKenzie, Jr., *Why Racism Is an Issue of Predatory Capitalism: Capitalism Must Change to End Racism*, Medium.com (Oct. 13, 2018), https://sammckenziejr.medium.com/why-racism-is-an-issue-of-predatory-capitalism-ccd6acd94b72.

jurisprudential interpretation in constitutional law.[4] Strict scrutiny has become a reality — a massive state strict scrutiny due to increasing AI surveillance technologies.

That strict scrutiny mindset also seeks to be fatal in fact when it is rooted in the consciousness of Jim Crow.[5] This same consciousness, which also produced the U.S. Capitol insurrection, undoubtedly reveals a nation that must be put into balance with itself. We must come to terms with a deeper truth that has become evident from the insurrection, which is so important in achieving systemic justice now.

Much of what we have seen in the attempts to undermine legitimacy have led to calls of "fake news." But if in this polarization, we could put politics aside for just a moment, we can realize an important question that never gets asked, nor answered enough: it is despite any intention to distort political perception, what becomes of the rhetoric of fake news as a viable argument now when deep fakes,[6] secretive surveillance,[7] facial recognition technology,[8] voice spoofing,[9] and targeted algorithms can rock the bedrock of democratic legitimacy?[10]

When such technology evaluates user preferences by manipulating the engineering of a Brexit vote as to alter and reshape the geopolitical economic power structure of nations,[11] or by leveling a massive misinformation campaign in a domestic U.S. election,[12] or to instigate

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4. This doctrine holds that all race-based classifications must be subjected to strict scrutiny, set forth by the U.S. Supreme Court in Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), overruling Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

5. *See, e.g.*, Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State's Rights, Last Rites, and Voting Rights*, 47 Conn. L. Rev. 481, 486 nn.23-24 (2014); Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 Denv. L. Rev. 1023, 1024 n.7 (2009); *see generally* Margaret Hu, *Algorithmic Jim Crow*, 86 Fordham L. Rev. 633 (2017).

6. Kristina Libby, *Deepfakes Are Amazing. They're Also Terrifying for Our Future: Everything You Need to Know About the Technology That Poses Real Dangers to Our Democracy*, Popular Mechs. (Aug. 13, 2020), https://www.popularmechanics.com/technology/security/a28691128/deepfake-technology/.

7. Kalev Leetaru, *Facebook As The Ultimate Government Surveillance Tool?*, Forbes (June 20, 2018, 3:15 PM), https://www.forbes.com/sites/kalevleetaru/2018/07/20/facebook-as-the-ultimate-government-surveillance-tool/?sh=3fb110952909.

8. Vishaal Narsey, *Facebook Developed A Secret Facial Recognition App*, Fashion Inst. Broad. (Nov. 27, 2019), https://fashionindustrybroadcast.com/2019/11/27/facebook-developed-a-secret-facial-recognition-app/.

9. Jesse Damiani, *A Voice Deepfake Was Used to Scam A CEO Out of $243,000*, Forbes (Sept. 3, 2019, 4:42 PM) https://www.forbes.com/sites/jessedamiani/2019/09/03/a-voice-deepfake-was-used-to-scam-a-ceo-out-of-243000/?sh=20e616332241.

10. Libby, *supra* note 6.

11. Mark Scott, *Cambridge Analytica Helped 'Cheat' Brexit Vote and US Election, Claims Whistleblower*, Politico (Mar. 27, 2018, 5:46 PM), https://www.politico.eu/article/cambridge-analytica-chris-wylie-brexit-trump-britain-data-protection-privacy-facebook/.

12. *Id.*; *see also* Elaine Kamarck, Malevolent Soft Power, AI and the Threat to Democracy, *available at* https://www.brookings.edu/research/malevolent-soft-power-ai-and-the-threat-to-democracy/ ("The fact of Russian interference in the 2016 election is now well known in the United States. What is less well known is that the Russians have been at this in

ethnic tensions in Myanmar,[13] can it truly be said that we are too far away from the day this technology, which exploits destructive sentiments, might one day be used for further undermining law and accountability?

Just this week, we can read that Facebook is targeting right-wing paramilitary extremists with ads for tactical gear clearly intended for combat at a time the nation is crying out for reconciliation and healing.[14] Facebook surveils 2.6 billion users and filed a patent to collect user face print information without their knowledge to sell to merchants, including a "trustworthiness score" for each face.[15] We must refuse a digital caste system AI racism and classism seek to produce. The Facebook–Cambridge Analytica scandal — where the personal data of eighty-seven million Facebook users was allegedly harvested in order to sway a general presidential election has, and continues to, raise alarms.[16] Facebook's platform has also been allegedly used to help incite WhatsApp lynchings in India,[17] and to spread misinformation of QAnon[18] and the hate of the Proud Boys.[19] It is also said that Beijing allegedly surveils 1.4 billion people to develop a "social credit score," which assesses each citizen's social and economic standing based on data to discriminate in services and to track those of different faiths and backgrounds that may be deemed politically

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other countries; from elections in the Ukraine, to the Brexit vote in Great Britain, to Scotland, Austria, Belarus, Bulgaria, Czech Republic, France, Germany, Italy, Malta, Moldova, Montenegro, Netherlands, Norway and Spain.").

13. Angshuman Choudhury, *How Facebook Is Complicit in Myanmar's Attacks on Minorities: Facebook Faces Accusations of Favoring a Majoritarian Regime in Myanmar*, THE DIPLOMAT (Aug. 25, 2020), https://thediplomat.com/2020/08/how-facebook-is-complicit-in-myanmars-attacks-on-minorities/.

14. Igor Vamos, *Facebook is Bombarding Rightwing Users with Ads for Combat Gear. See for Yourself*, THE GUARDIAN (Jan. 26, 2021, 6:08 AM), https://www.theguardian.com/commentisfree/2021/jan/26/facebook-ads-combat-gear-rightwing-users?CMP=oth_b-aplnews_d-1.

15. Kalev Leetaru, *Why Facebook's New User Trustworthiness Scores Are So Frightening*, FORBES (Sept. 10, 2018, 1:48 PM), https://www.forbes.com/sites/kalevleetaru/2018/09/10/why-facebooks-new-user-trustworthiness-scores-are-so-frightening/?sh=4e052c2c49f5.

16. Rosalie Chan, *The Cambridge Analytica Whistleblower Explains How the Firm Used Facebook Data to Sway Elections*, BUS. INSIDER (Oct. 5, 2019, 5:53 PM), https://www.businessinsider.com/cambridge-analytica-whistleblower-christopher-wylie-facebook-data-2019-10.

17. *How WhatsApp Helped Turn an Indian Village Into a Lynch Mob*, BBC NEWS, https://www.bbc.com/news/world-asia-india-44856910.

18. Jessica *Guynn, QAnon Still Pushing Conspiracies, Lies About the Election and Former President Trump on Facebook and Twitter*, USA TODAY (Jan. 27, 2021, 3:05 PM), https://www.usatoday.com/story/tech/2021/01/27/facebook-twitter-qanon-election-trump-capitol-gab-biden/4280816001/.

19. Taylor Hatmaker, *Facebook is the Recruiting Tool of Choice for Far-right Group the Proud Boys*, TECH CRUNCH (Aug. 10, 2018, 10:59 PM), https://techcrunch.com/2018/08/10/proud-boys-facebook-mcinnes/.

undesirable, as a form of enforcing authoritarian social control.[20] Baltimore police used facial recognition to quash First Amendment rights to peaceably assemble by targeting those with outstanding warrants in the crowd at the Freddie Gray protests to arrest them, which in turn suppresses and chills the demands for police accountability.[21]

It is against this backdrop that the National Institute of Standards and Technology released a report analyzing 189 facial recognition algorithms from ninety-nine companies, which revealed that it saw higher rates of false positives for Asian and African American faces relative to images of Caucasians.[22] The differentials often ranged from a factor of ten to one hundred times in errors, that is, errors on African American and Asian faces were ten to one hundred times more than errors on Caucasian faces.[23] Their study revealed that African American female faces were most likely to be misidentified disproportionately, and thus subject to the greater possibility of false accusations.[24] The Gender Shades Project and the great work of the Algorithmic Justice League have shown significant disparities in facial recognition technologies for people of color, often preferring a lighter phenotype.[25] And while there is much talk of the promise of AI to help law enforcement with crime fighting, the reality is that AI Algorithms not only misidentify, they lack predictive value in law enforcement recidivism rates. When COMPAS' predictive recidivism scores of 7,000 people arrested in Broward County, Florida, were compared with the criminal histories of those same people over the next few years, "the score proved remarkably unreliable" in forecasting violent crime where "only twenty percent of the people predicted to commit violent crimes actually went on to do so."[26] They also concluded that

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20. Nicole Kobie, *The Complicated Truth About China's Social Credit System*, Wired (Jun. 7, 2019), https://www.wired.co.uk/article/china-social-credit-system-explained.

21. Shira Ovide, *A Case for Banning Facial Recognition: A Google Research Scientist Explains Why She Thinks the Police Shouldn't Use Facial Recognition Software*, N.Y. Times (June 9, 2020), https://www.nytimes.com/2020/06/09/technology/facial-recognition-software.html.

22. *NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software: Demographics Study on Face Recognition Algorithms Could Help Improve Future Tools*, Nat'l Inst. of Standards & Tech. (Dec. 19, 2020), https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software.

23. *Id.*

24. *Id.*

25. *How Well Do IBM, Microsoft, and Face++ AI Services Guess the Gender of a Face?*, Gender Shades, http://gendershades.org/.

26. Julia Angwin et al., *Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And it's Biased Against Blacks*, ProPublica (May. 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing (noting that there has been troubling amounts of expanded use of these risk assessment scores throughout the criminal justice system from arraignment to bond to sentencing. Increasingly, more courtrooms where judges are given these algorithm scores impact people of color in Arizona, Colorado, Delaware, Kentucky, Louisiana, Oklahoma, Virginia, Washington and Wisconsin.).

the algorithm was twice as likely to falsely flag Black defendants as future criminals as it was to falsely flag White defendants as future criminals.[27]

A judge in Wisconsin overturned a plea deal of one year in jail, which had been jointly agreed on by the prosecution and defense, and gave the defendant more jail time (two years in state prison and three years of supervision) because of the defendant's high "risk assessment" score.[28] Is this an acceptable way to use an AI determined risk assessment? This is not just an abuse of discretion. It is the abdication of discretion in the solemnity of the judicial function.[29] To see that this technology is unreliable and unfair, consider Amazon's facial recognition technology, Rekognition, which allegedly falsely matched criminal photo arrays with twenty-eight members of the U.S. Congress.[30] What have been the fruits of this technology in the hands of the self-serving? Predictive policing, sentencing and bail reform show a disturbing pattern that relies on compromised policing practices.[31] Such deeply compromised flawed practices and over-policing in communities of color form the flawed arrest data to determine risk assessment scores.[32] But make no mistake, dirty data has never led to clean outcomes. And clean, fair outcomes are even less probable with few Black and Brown people on code engineering teams. Indeed, we also remember Timmit Gebru, who, as one of the few Black women in her

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27. *Id.*

28. Julia Angwin et al., *Risk Scores Attached to Defendants Unreliable, Racially Biased*, J. SENTINEL (May 30, 2016), http://archive.jsonline.com/news/crime/risk-scores-attached-to-defendants-unreliable-racially-biased-b99732973z1-381306991.html.

29. Judge Noel L. Hillman, *The Use of Artificial Intelligence in Gauging the Risk of Recidivism*, ABA (Jan 1. 2019), https://www.americanbar.org/groups/judicial/publications/judges_journal/2019/winter/the-use-artificial-intelligence-gauging-risk-recidivism/ (Judge Hillman notes three primary objections to use of such scores in sentencing: "(1) the use of AI at sentencing may violate basic tenets of due process, (2) current AI technology presents unacceptable risks of error and implicit bias, and (3) reliance on AI to predict recidivism improperly cedes the discretionary sentencing power to nonjudicial entities. In short, to date, the use of AI at sentencing is potentially unfair, unwise, and an imprudent abdication of the judicial function.").

30. Jacob Snow, *Amazon's Face Recognition Falsely Matched 28 Members of Congress With Mugshots*, ACLU (July 28, 2016, 8:00 AM), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28#:~:text=in%20a%20test%20the%20ACLU,been%20arrested%20for%20a%20crime.&text=our%20test%20used%20Amazon%20Rekognition,with%20a%20database%20of%20mugshots.

31. Officer A. Cab, *Confessions of a Former Bastard Cop*, MEDIUM.COM (June 6, 2020), https://medium.com/@OfcrACab/confessions-of-a-former-bastard-cop-bb14d17bc759.

32. *See generally* Rashida Richardson et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. ONLINE, 192 (2019), *https://www.nyulawreview.org/wp-content/uploads/2019/04/NYULawReview-94-Richardson-Schultz-Crawford.pdf*; *see also* N.Y. C.L. UNION, THE PROBLEMS WITH PRETRIAL RISK ASSESSMENT TOOLS, https://www.nyclu.org/sites/default/files/field_documents/20200309_bailriskassessment_v3.pdf.

field, was allegedly fired from Google for speaking out about unethical AI.[33]

Even more troubling is that risk assessment factors in AI discriminate against immutable characteristics and now criminalize those characteristics in ways that manifestly violate notions of fundamental fairness in our justice system when an individual has no control over these factors that an algorithm employs.[34] Should these factors equal probable cause? Or are we using AI as yet another means to criminalize poverty and race in the United States? Consider the immutable factors that are comingled indiscriminately in an algorithm that forms the basis for risk assessment scores. They include:

- Geography of birth
- Parents' marital status
- Parents' education
- Where you were raised & surrounding income level
- Number of arrests in your neighborhood
- Type of crimes committed in your community where you grew up.[35]

Is this approach determining danger and culpability based on conduct? No. By these factors alone, the algorithm would likely declare that I should not be here. Yet here I stand before you as the living, breathing truth that defies the mechanistic Calvinism of AI risk assessment factors. And yet here you are. We are broad and diverse as we come. These risk assessment scores and the factors they rest upon simply cannot be left unquestioned or ignored in the long history of the U.S as a predatory racial capitalist state.[36] Indeed, its greatest

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33. Nitasha Tiku, *Google Hired Timnit Gebru to Be an Outspoken Critic of Unethical AI. Then She Was Fired for It.*, Wash. Post (Dec. 23, 2020, 2:15 PM), https://www.washingtonpost.com/technology/2020/12/23/google-timnit-gebru-ai-ethics/.

34. The Supreme Court has extended strict scrutiny to immutable classes such as illegitimacy, race, alienage, national origin, and gender but has been less willing to extend the concept of immutability. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985). Others have argued immutability extends beyond these classes as well. *See, e.g.*, Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 Wm. & Mary L. Rev. 1483, 1531-37 (2011) (noting appearance, parental status, marital status, and political affiliation should be understood as immutable); Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 Law & Soc. Inquiry 1, 31 (2003); *see also* Donald Braman, *Of Race and Immutability*, 46 UCLA L. Rev. 1375, 1381 (1999).

35. *See*, Sarah Picard-Fritsche et al., Ctr. for Court Innovation, Demystifying Risk Assessment: Key Principles and Controversies 1-22 (2017).

36. *See* Ruth Wilson Gilmore & Craig Gilmore, *Restating the Obvious*, *in* Indefensible Space: Architecture of the National Insecurity State 141, 147 (Michael Sorkin ed., 2013) ("The history of the United States is, in large part, the history of capitalists figuring out how to develop and use large-scale complex governmental institutions to secure their ability to

reliability rests in its unreliability to be used fairly for people of color, and the poor. And if this was not an egregious enough affront to our precarious rhetoric and unrealized notions of meritocracy, fairness, and reliability, we can see AI tech is rapidly being used in attempts to unilaterally allocate life opportunities for all Americans. You will have awakened to a world where it is not the Constitution, nor the rule of law, but an AI algorithm that determines unilaterally, without your knowledge, what rights you have and how you may or may not exercise them, given the private information exchanges defining the global marketplace. Think about how an algorithm can set the terms and conditions of your digital destiny. This is the era of the "score ranked digital caste system" and we see it already in determining who gets what, including:

- Home mortgages
- Car loan and car insurance
- University admissions offers
- Credit financing
- Employment
- Health benefits
- Consumer rewards
- Police stops, arrests, and detention
- "At risk" student designations to justify surveillance in public schools

The history of fabricated evidence and racial hostility at the Capitol should be evidence enough to serve as a reflective mirror to the nation to see for itself the need to put transparent, accountable and replicable, reversed engineered safeguards into the technology. But perhaps even that can be spoofed in deep neural networks. Simply put, the use of these factors criminalizes poverty without regard to any

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get rich. A cursory study of any U.S. history—the Civil War, the Progressive Era, the New Deal, the postwar New Frontier/Great Society—reveals examples of the ways that capitalists helped develop "the state" in order to disable monopolist adversaries, secure access to raw materials and new markets, murder indigenous people, outlaw or circumscribe worker-organizing, or socialize the cost of protections against calamity and opportunities for advancement in order to minimize vulnerability to wage demands. Workers of all races and conditions weren't gifted with concession but, rather, won them through fighting hard, sometimes together and sometimes not. . ..[but] the antistate state's fable promising its own demise is a central part of the *rhetoric* of neoliberalism [which involves the]. . .telling and retelling the story [as] part of the discourse of globalization, a crucial part of the current attempt to normalize market ideology in order to reshape and renew global domination. Central to. . .the project of state rebuilding more generally, is the way that the state's ability to erect barriers, enforce boundaries, patrol borders, and create enemies is rejigging the dynamic categories of poverty, race and citizenship and imposing new threats on the life chances of the world's working people.").

individual culpable conduct whatsoever. And that in itself presents a looming legitimacy crisis that cannot be easily resolved. That crisis of legitimacy is further amplified when the powers use, abuse, and lose our biometric data. And when, without our knowledge, it is used to harness, hack, and harm us, then the Republic has already lost the war on legitimacy. It has already lost the war in failing to regulate use, in failing to secure data, and in failing to validate that hacked or harnessed data is not used in any criminal adjudication or investigation. For what good is a "biometric match" or "facial match" to justify incarcerating anyone when there can be no clear guarantees of chain of custody or authenticity? But it can and should be used against any authority or entity who nonetheless proposes its continued use in prosecutions or investigations because it then demonstrates their impermissible bias. It does the same when reliable data can be illicitly harnessed and used unreliably to manufacture "biometric matches" at will. Legitimacy is further compromised when, as Timnit Gebru points out, AI models not only favor the wealthy, but leave an unacceptably large carbon footprint that harms climate change and hits people of color the most.[37] Legitimacy is compromised when a Facebook machine translation allegedly distorts a Palestinian's words from an innocuous "good morning" to "attack them," leading to his arrest by Israeli police.[38] Does this look like a friendly AI technology meant to make our lives better, or one that is de facto operating to further exacerbate divisions and inequality in our society? At what point does the promise of AI technology become cover for turning a blind eye to these realities?

We therefore reject a racially biased technology and a racially biased use of it as well. We reject the use of this technology as currently practiced until a racial reconciliation based upon technological justice, not rhetoric, is first and finally made. It is justice that begins in a national and international moratorium. And if it is violated, it should result in reparative treble damages and injunctive relief for the harm caused on platforms to those harassed by AI-induced racial profiling, or misidentification that becomes the new digital justification for stop and frisk. A student denied entry into school or college based only on

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37. *See* Karen Hao, *We Read the Paper that Forced Timnit Gebru Out of Google. Here's What it Says*, MIT Tech. Rev. (Dec. 4, 2020), https://www.technologyreview.com/2020/12/04/1013294/google-ai-ethics-research-paper-forced-out-timnit-gebru/.

38. *See* Alex Hern, *Facebook Translates 'Good Morning' into 'Attack Them', Leading to Arrest*, Guardian (Oct. 24, 2017), https://www.theguardian.com/technology/2017/oct/24/facebook-palestine-israel-translates-good-morning-attack-them-arrest.

an algorithm,[39] an uber driver denied work because of faulty facial technology,[40] or a CEO duped by voice spoof out of nearly $250,000 begin to show the depth of concern.[41] With such broad use of this technology, can we really ever now discern, authenticate, and therefore trust what actions are taken, and by whom — be they cybercriminals, supremacist, law enforcement, or others?

With the specter of this technology, can we ever discern from now on whether probable cause is technologically manufactured? Or even if clear and convincing evidence truly exists when this technology can so easily fabricate evidence, which our history of race relations in this country shows we have been far too inclined to use as a tactic in order to deny one's liberty interest? When does doubt become reasonable doubt as a result of this increasing technological manipulation? But this technology genie has been released and it is even in the hands of cybercriminals. Therefore, it is both reasonably prudent and urgent that we should act with all deliberate intent, and we must endeavor from now on to be clear in our understanding that intent in the law must be aligned to an understanding of the impact such algorithms of injustice produce. They should be informed, scrutinized, and analyzed by its consequences on everyday people's lives.

In jury sequestrations, how do we know juror psychological preferences are not exploited unbeknownst to the juror when the AI algorithm feeds their entertainment preferences in the shows they watch in the comfort of their own home? If algorithms and code developers have learned to psychologically profile its users to manipulate an election, what has or will stop others from infiltrating the psyche of prospective jurors? Witness tampering, juror tampering and the fabrication of evidence may be taken to a whole new level where there is no transparency; and with such a high degree of secrecy that now exist over this technology, such questions must be answered forthwith with transparency and accountability.

In a world of increasing prevalence for deep fakes, voice spoofs, conspiracy theories and suspect intentions, it is only in examining their

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39. *See* Amit Katwala, *An Algorithm Determined UK Students' Grades. Chaos Ensued: This year's A-Levels, the High-Stakes Exams Taken in High Schools, Were Cancelled Due to the Pandemic. The Alternative Only Exacerbated existing Inequalities*, Wired (Aug. 15, 2020, 10:00 AM), https://www.wired.com/story/an-algorithm-determined-uk-students-grades-chaos-ensued; *see also* Rebecca Koenig, *As Colleges Move Away From the SAT, Will Admissions Algorithms Step In?*, EdSurge (July 10, 2020), https://www.edsurge.com/news/2020-07-10-as-colleges-move-away-from-the-sat-will-admissions-algorithms-step-in.

40. Jaden Urbi, *Some Transgender Drivers Are Being Kicked Off Uber's App*, CNBC (Aug. 8, 2018, 11:16 AM), https://www.cnbc.com/2018/08/08/transgender-uber-driver-suspended-tech-oversight-facial-recognition.html.

41. *See* Damiani, *supra* note 9.

impact on our society can we ever be more certain that the purported uses intended for such technologies remain in faithful congruity with our democratic principles when it becomes unmoored from truth itself. How can we discern from now on what is true and what is not? How may we be assured what is real and what is doctored? If this challenge is taken on seriously, then these questions cannot, nor should not, be denied or delayed any longer for they call into question a legal system where sound, principled adjudication is dependent upon sound fact finding. How can we be assured as a legal community and as a society that these technologies are not now being employed for misguided ends given all of this dubious context and history?

If we can disrupt political elections, what does that say for judicial elections, sheriff elections, and those who must endure their consequences when shaping law and policy toward us? Does the technology become useful to target judges for recall or can it be used to remove bias once and for all? There is much promise yet to be substantiated, but the pitfalls are far more a danger to the rule of law and the legal profession now that the time to act has come and it is long overdue. This technology has already become increasingly pervasive and more sophisticated. We cannot legislate as if we operate on a blank slate.

Lives right now are being impacted and the ability to discern the truth which is so central to our principle of equal justice under the law has now been profoundly called into question for all. We must independently evaluate AI use, by strictly scrutinizing the code developers and the algorithm design based on the outcomes produced. We can strive to know by reverse engineering the programmed classifiers that these algorithms of injustice are trained on. We shall then know the true purpose or "algorithmic functional intent" by its outcome nexus. A good and productive use of AI technology as a means to understand how to better serve users, does not bring forth corrupt ends of social control and divisions. But neither does a corrupt use of AI technology bring forth good fruit for a democracy and its people. A code developer who intentionally or foreseeably stirs up conflict or exploit it to then sell ads that promote weapons to the perpetrator is just as much an accomplice as the one who pulls the trigger. And they must take their victims as they find them and be liable to them to the full extent of their foreseeable and unforeseeable harm their actions cause.

Yes, in the ecosystem of deep fakes, every use of AI technology must be examined by its own materialist outcomes on people of color as upon nations. But such accountability requires not just a linear un-

derstanding of a causal nexus when that nexus can be so cloaked and disguised by technology itself. Instead, it requires an inferential analysis rooted in the careful use of inferential legal tools such as a res ipsa loquitur, and the disparate impact principle. Indeed, the troubling outcomes of the AI algorithms employed on social media platforms "speak for itself." There are promises and pitfalls to this technology. The weight of the evidence not only shows the technology is biased in design, but its use can be as well. In looking at its impact in today's context, we must ask soberly, how likely will mass incarceration increase or decrease with the exploitation of this technology in the hands of the supremacist politician, regulator, or police? Or how likely will it be used to analyze those sworn to serve and protect for psychological bias against Blacks or to shed light on any suspected supremacist affiliations based on their profiles or facial data sets to target remediation or corrective efforts? Will it be used to combat racial gerrymandering or voter suppression, or will it be used to enforce them? How likely will we use AI to constructively uncover and combat AI bias? Time will tell. But we seek a trust that aims to rebuild society on better terms for humanity, not in building a trust with the aim to further exploit it to its own demise.

But we have nonetheless allowed an invasive technology that harms all communities, but especially communities of color. And we have done so with absolutely no oversight, no enforceable regulations, no legal standards, no benchmarks, no uniform best practices, no training, and no transparency that violates so blatantly so many of our existing legal rights. We cannot stay asleep at the wheel any longer as a society or a profession. Perhaps all state and private code developers and those who contract with them should be cautioned not to use further a technology that can lead to massive legal exposure. Given the enormity of that exposure, it seems only appropriate that damages be calculated not merely to restore the victim, but to truly deter the wrongdoer, and that can only happen when we stop allowing tort judgments to be meager relative to the market capitalization of companies; that it is simply written off as the cost of doing business. That does not seem unreasonable when one considers AI can violate the law, if not it's clear spirit and intent. Indeed, AI tech is a hydra whose deep reaching tentacles violates the intent and spirit of so many of our laws including the:

- First Amendment Freedom of Association;
- Fourth Amendment Unreasonable Searches without Probable Cause;

- Fifth Amendment Due Process Notice issue because of lack of transparency in disclosure or potential Brady evidence;
- Sixth Amendment Confrontation Clause problem where evidence sounds of a testimonial nature;
- Federal Rules against prejudicial and propensity evidence under R. 403, 404, 609, and Hearsay;
- Fourteenth Amendment Equal Protection Clause problems;
- Title VI, Title VII and Title IX disparate impact concerns;
- Federal and state antirust & RICO laws;
- Defamation of Character and False Light;
- Invasion of Privacy based on intrusion upon seclusion, disclosure of private facts, and appropriation of name & likeness;
- Conversion, consumer & data rights protections;
- Informed consent principles; and
- False imprisonment and false arrest based on AI misidentification.

This behemoth of a problem in the law is precisely why a moratorium is needed now.

Transparency is desperately needed. The "proprietary work product" of private companies hawking their services to states continues to be a familiar mantra. But we deserve to see transparency in the impermissible risk factors that may have been incorporated in risk assessments systems such as those offered by the Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS"), the Public Safety Assessment ("PSA"), and the Level of Service Inventory Revised ("LSI-R"). Such opaqueness leave us with this question: What can we truly know? Where the scaffolding of a worldwide COINTELPRO must be dismantled, and FOIA records continue to be litigated with resistance and incomplete piecemeal disclosure, what happens if the code is proprietary, when no open record laws apply, and when no transparency into the algorithm exist? This too also speaks to the pressing need of a moratorium. That need is only further underscored when one considers, for instance, that data anonymization, data cleaning, and direct calibration are methods and techniques that are not sufficient to eradicate bias, when word clusters and second order associations still signals identities with immutable characteristics and affiliations — all of which can reflect and amplify bias. Linear models, and especially deep networks, still hide bias and should not be used to train linear classifiers. Adversarial learning can help, but it needs to take into account not just identity classifiers, but

power dynamics in context. Inclusive curation may ensure greater accuracy for race and ethnicity, but that alone will not assure case uses are appropriate as employed.

The conduct of many tech companies requires, in the words of one Republican president, that we "trust but verify."[42] Both compromised leaders and the unelected bureaucrats across the nation have de facto made a new strict scrutiny a ubiquitous technological reality, and it must now become a two-way street. There must be a collective audit through a transparent, and independently organized and recorded global crypto cyber ledger monitored by the world, including a new generation of civil rights lawyer-technologists and civil liberties tech watchdogs that is of the people, by the people, and for the people, wherein it must be disclosed who uses these technologies and for what purposes.

These local and global audits should be collaborative but also independent of government and private venture fiat where legal, financial, and "technological expungement remedies" are enforceable by "global digital citizens" or those granted standing whom the algorithm is demonstrably calculated to be adversely employed against. A trusted decentralized worldwide algorithmic organization for global oversight is needed. And Congress must make quick work of a national moratorium until sensible legislation that builds off the Algorithmic Accountability Act can step effectively into the void and begin to bring order out of chaos.[43]

But legislation aside, we find ourselves inevitably returning to that deeper truth. You know it. Perhaps you have seen at dinner tables and chats with colleagues of a different political stripe. We are embedded in our biases in ways that seem resistant to reasonable and rational discourse. We know we have a deeply rooted psychological need that births misguided allegiance to misguided ideals. We learn from our modern political context, rights and remedies are rhetorically constructed even without AI. But under AI, is it big tech, and not the rule of law, that seeks to determine what and how rights may be recognized and by whom? AI is already a weaponized discursive employing and exploiting racially charged language, images and views calculated to dehumanize all of humanity for the ignoble goal and unlimited appetite for avarice profit-making at the expense of life.

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42. Suzanne Massie, *The Reagan Years 1948-88*, SUZANNEMASSIE.COM, http://www.suzannemassie.com/reaganYears.html.

43. *See* Press Release, Sen. Cory Booker, Booker, Wyden, Clarke Introduce Bill Requiring Companies to Target Bias in Corporate Algorithms (Apr. 10, 2019) (on file with author).

When tech platforms exploit deeply rooted emotional predicates that produce violence against its own people, it is time for the law to take notice and act with strict accountability. The law provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[44] But when that service provider distorts, curates, targets, and amplifies hate and grossly misinformed speech, or worse, intentionally or recklessly allows it to be weaponized against the vulnerable, or to undermine open democratic choice, it no longer operates as a neutral intermediary platform — it becomes a publisher deserving of no absolute immunity and greater strict scrutiny as an accomplice to the atrocities their algorithms facilitate. If they hand the gun to someone else, they ought to be held responsible as if they pulled the trigger themselves. We still require immunity to preserve freedom of speech, but it should be removed for those with an inordinate amount of de facto market power to influence speech, evidenced through its market capitalization, global reach, past conduct, and the amplification of its algorithmic design as evidenced in its actual or foreseeable potential impact on real people's lives.

As lawyers, we supplant concepts of emotions with "intent," but in the world of AI, it is our words, emotional emoji icons, family photos, post, likes, books, consumer habits, legal and illegal actions that all matter, and they clearly evoke an energy that has been harnessed, coded, and engineered to drive our collective behavior. It is time to rewrite our own story and begin a new plan — one where we can find common cause with media feeds rather than one calculated to spread niche paramilitary interest tied to violent supremacist views. Can we be more ambitious and try to create tech that builds rather than undermines civic society, and that strengthens rather than weakens our system of checks and balances? Can our algorithmic designs privilege a sense of love and community over fear? — To build the bridges that bind, heal, and help each other become the best versions of ourselves? That is where the promise of AI can be truly realized and not just the pretext of promising rhetoric. But what guarantees can we install in the tech and in our oversight to ensure that free speech won't be undermined by algorithms that place Black Lives Matter protests in social media feeds that invite violent confrontation? Suddenly, freedom of speech is not so free when guns are that brought to rallies and weaponized algorithms — for the sake of targeted reve-

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44. Communications Decency Act of 1996, 47 U.S.C. § 230 (1996).

nue and targeted chaos — are done with ill-advised or ill-intended ends.

Justice Brandeis said: "If there be time to expose through discussion, the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[45] But it would seem evident that this is an assumption that no longer holds true, if it ever did at all. Is more speech better when it may mean more politically motivated conspiracy theories and falsehoods and assaults on democratic institutions? We have yet to know who would do the monitoring of AI and how. How would algorithms be revised? We still have no plan and that itself is telling whether this technology will actually prove up to its promise, or if we will fall prey to the pitfalls of social control this technology may portend. Social control through algorithmic design is not a bridge too far when we consider we are a society that seems less interested in investing in education to enlighten its citizenry as we are interested in social control now as evidenced in investing billions in for-profit prisons, for profit debtor jails, and for-profit probation.[46]

Again, context matters and it is significant that the recent authoritarian culture wars exacerbated by exclusionary algorithmic design cast doubt on its unchecked use and its ability to realize its promise and potential. When it comes to tech companies, we must verify there was a robust, good faith, effective, institutional implicit bias check conducted of the organizational culture, the staff, internal processes employed, and the final design of the AI algorithm, product, or service by independent auditors. In determining what is "robust" for purposes of an implicit bias check, it should be determined in reference to both the procedural and substantive mechanism and safeguards involved in all decision-making impacting data outcomes.

Interpretative policy guidance for determining "procedural & substantive robustness" must also be clear. For instance, we must know whether a defendant established there is diversity of engineering staff involved in algorithm development or if there are equalizing decisional mechanisms for all staff to have an equal voice in the design process. We must know if there is an implicit bias check of data driving machine learning. We need to know if there was a confidential in camera review of algorithm formula assumptions by potentially af-

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45. Whitney v. California, 274 U.S. 357, 372-80 (1927), wherein Justice Louis D. Brandeis established it in his classic concurring opinion: the counter speech doctrine.

46. *See e.g.*, Kara Gotsch & Vinay Basti, The Sent'g Project, Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons (2018), https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/.

fected stakeholders and an independent technical review. Today, trade secrets are shielded through use of protective orders, in camera review, and monitoring attendees. Proof of reasonable necessity still governs the need for protected disclosure and that provides a framework to balance rights and responsibilities fairly and transparently here too. We must ask, was there was an "algorithm use impact assessment statement" after a trial period of administration and monitoring before being formally adopted? Was there a "diverse human check" to ensure that no reckless indifference or knowledge to bias (either actual or constructive) exists? Is there retained court jurisdiction with court appointed masters to see that technology and its uses are periodically and randomly reviewed and audited?

A plaintiff should prevail in challenging the AI formula if she can show that there are equally effective algorithm formulas or more reliable vetted metadata that could have been employed. Evidence of machine learning that would lead to less or no adverse discriminating consequences would matter. A plaintiff can also prevail if she can show that the coder failed to provide "verifiable decisional tracing" technology to allow reverse engineered analysis of algorithm formulas or that the defendant employed spoof technology to subvert and conceal the true operating classifiers embedded in its AI deep neural networks.

Now some will say we need the Voting Rights Act restored, and they are certainly right in light of algorithms and violence employed to facilitate voter suppression. But it should become increasingly clear that we need a whole new regime of civil rights safeguards that are equipped with hyper-dimensionally threaded cyber enforcement in deep neural networks that can uncover hidden operational bias secretly embedded in any exclusionary code. A new civil rights predicated even more so on the work of data analytic scientists, and technologists are needed to scrutinize AI networks closely. Again, the manifest outcomes of AI employed in and across the world by tech platforms speaks for itself.

So where does that leave us, or as King said: "*Where Do We Go from Here: Chaos or Community?*"[47] That choice is still the same today as it was then but it requires a plan if we are to break free from America's racial karma cycle. A plan for building community is needed — just as King saw — as the only answer to our survival as a people and as a human species. But if we do not plan, then as the

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47. *See generally* MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? (1967).

saying goes, we plan to fail and humanity simply cannot afford that. And as a further corollary to that rule, if we do not have a plan for ourselves, someone else will find a way to fit us into theirs. Whose plan are we fitting into now? Whenever leaders act with the best interest of community, and act as molders of consensus to build an inclusive, healing community, humanity wins. When we act for self, or based on ratings, polls, revenue projections, geopolitical White supremacy and algorithms that reflect a lower consciousness of Jim Crow, it portends an ominous fate for us all. So, we have now identified the moral and technological crisis, and now it is time to take the bold steps to confront it. Now is the hour of fate we must summon the courage to do what ought to have been done, to do what needs to be done, and to move past blame to heal. We can't just blame tech, supremacists, law enforcement, politics, the marketplace or anyone else unless we look honestly in the mirror at ourselves and collectively move as one to humanity's rebirth in a higher consciousness in law and policy.

Warren and Brandeis' right to be let alone, the right to privacy, or for that matter the right to define and re-define who we are, must become a renewed ideal that now ushers in a new reality of outcomes to forget our digital and online footprint, to be able to make mistakes, and the ability to reform our character for the better.[48] We have the right to have agency over own face, voice, words, digital bodies and life affairs. But we know the best agency comes from a will to bestow consideration, accountability and fairness, and not just a will to receive and take at all costs across the globe.

When we build a legal regime from the outside perspective of cosmetic appearances, as Derrick Bell suggests we did for Cold War appeasement with integration, that intent infuses the law's outcomes.[49] And so there can be no surprise again when external outcomes also cosmetically seeks to appease from an intent that has only that as its goal. But the time is now when we take action to inwardly embrace, as our whole-hearted intent, the true reconciliation of humanity, born from the sacred regard for the equality of the races, where we will see new and better outcomes. We invoke an energy of understanding, an intent of true inclusivity. We invoke a spirit of compassion, wisdom, and peace rooted in mutual understanding. One that exists in the world where there is no mass incarceration, but only mass

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48. *See generally* Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

49. *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 531-32 (1980).

liberation from the more egregious machinations of AI manipulation. We step out of our own ego-driven desires and now declare ourselves united to the principle of adjudicating law with mutual self-regard, generosity of spirit, and a will to bestow full and complete racial justice that redeems and heals; a will to bestow a love that reintegrates, rejuvenates and revitalizes the constitution's full, augmented reach to AI's consequences. That is the awareness and orientation we must step into the AI space with to bring much needed change.

We abandon the old punitive mindset to now fully embrace and invoke a loving reconnection with one another, and our coding programs will help us find new ways to find common ground and to find new ways to employ language to build bridges across all digital platforms and their communities. Perhaps we can now see the hidden evolutionary impulse of society to overcome its challenges to extinction, and that impulse is doing so by moving us closer and closer to the realization of our concealed unity as a global village. Coronavirus, for better or worse, made the ramifications of being in a global village known, and we are one, whether that truth is acknowledged or not.

AI has the potential to be a societal mirror that illuminates our conscious and subconscious biases to make us better teachers, officers, lawyers, technologists, doctors, engineers, scientists, and leaders. But is that the true aim of mass tech platforms and code developers today? How can we discern? As already noted, the thing speaks for itself. We "shall know them by their fruits. Do men gather grapes of thorns, or figs of thistles?"[50] Do they aim to build up society and put humanity back on the course of survival with the existential climate change crisis, or to derail it for an impressive quarterly earnings report?

We can look in the mirror if AI allows us to reflect and change ourselves, but that will and intention is up to us and what intention we bring into AI to see it is both accurate, accountable and constructive. Given the manifest destruction, division and upheaval we have seen wrought across the globe by inflammatory content on tech platforms, it is not hard to see what intent may be operating in all of the dismissive ambivalence, half-hearted measures, and cosmetic fixes we see in headlines with no real true desire to get it right for the American people. Instead, what we have now, at best with AI, is a "distorted mirror," or it reveals the distortion in us as a society that is trained on weaponizing our biases, rather than overcoming them, and enforcing white supremacy rather than yielding to a vision where there is more than enough for everyone to meet our essential needs with basic

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50. *Matthew* 7:16-20 (King James).

human dignity for all — in recognizing we are children of our Creator, where each of us are just one of its many different facets of the collective One. We can become a healed society that is centered, balanced within itself, and can finally then see with our own inner eyes, the tangible outward legal and illegal creations of our own hidden intentions to externally rebuild society. We have seen what kind of world is erected around us when our internal intentions operate from boundless greed and self-interest. It is now time to imagine what an external world looks like when we begin to build it from within — from the solemn, internal, sincere intention of loving our neighbor and planet as much as ourselves. That is where and how the true promises of AI will finally materialize into justice.

Now it is said whether it is vector machine learning, which looks at multiple examples and variables to predict behavior, or deep neural networks, where several layers of interconnected but independent neurons find relational connections between data points, that each method supposedly lacks the ability to fully understand AI's decision-making process and the inability to predict AI's decisions based upon a discretionary analysis of complex factors. We often talk about this as the "Black Box Problem" AI presents for transparency and accountability, but a black box for who exactly? When it comes to Black Americans and people of color at the receiving end of algorithmic designs that harm, that simply cannot stand as a sufficient response — it never has and it never will.

The task before our generations is now clear. We must meet it head on. In his remarks, "The Calling of Our Generation," Kennedy put it best as to the task before us when he declared:

> In the long history of the world, only a few generations have been granted the role of defending freedom in its hour of maximum danger. I do not shrink from this responsibility — I welcome it. I do not believe that any of us would exchange places with any other people or any other generation. The energy, the faith, the devotion which we bring to this endeavor will light our country and all who serve it — and the glow from that fire can truly light the world.[51]

Thank you.

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51. President John F. Kennedy, Inaugural Address in Washington, D.C. (Jan. 20, 1961) (transcript available in the John F. Kennedy Presidential Library and Museum).

Nurturing Freedom Dreams:
An Approach to Movement Lawyering
in the Black Lives Matter Era

AMANDA ALEXANDER, JD/PhD*

Introduction

How might lawyers work with movements to build power and create more possibilities? What roles might lawyers play in truly transformative social change? How can lawyers and legal workers hasten change in cities like Detroit, where interlocking crises — tens of thousands of water shutoffs[1] and tax foreclosures,[2] sky-high asthma rates,[3] school closures,[4] entrenched poverty,[5] and racist segregation[6] — do not map easily onto civil rights, or even human rights, claims?

We are trained as lawyers to shoehorn complex problems into neat claims about equal protection or due process. We are trained to issue spot, not honor and encourage freedom dreams.[7] But this moment demands more from us. When organizers pose fundamental questions about power, freedom, and the essential conditions of our lives, as they do now, we must listen. And we must train our attention to remain in the habit of listening.

In the summer of 2020, people across the U.S. marched in the streets for over 100 days after Minneapolis Police Officer Derek

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1. *See e.g.*, Joel Kurth & Mike Wilkinson, *I Hate to Complain, but I Haven't Had Water in a Year. A Detroit Story.*, Bridge Mich. (Feb. 17, 2020), https://www.bridgemi.com/michigan-health-watch/i-hate-complain-i-havent-had-water-year-detroit-story.

2. *See e.g.*, Bernadette Atuahene & Christopher Berry, *Taxed Out: Illegal Property Tax Assessments and the Epidemic of Tax Foreclosures in Detroit*, 9 U.C. Irvine L. Rev. 847, 848 (2019).

3. *See e.g.*, Peter DeGuire et al., Mich. Dep't of Health & Hum. Servs. Bureau of Disease Control, Prevention and Epidemiology, Detroit: The Current Status of the Asthma Burden (2016), https://www.michigan.gov/documents/mdhhs/Detroit-AsthmaBurden_516668_7.pdf.

4. *See e.g.*, Terrance L. Green et al., *Closed Schools, Open Markets: A Hot Spot Spatial Analysis of School Closures and Charter Openings in Detroit*, 5 AERA Open 1, 5 (2019).

5. *See e.g.*, Niraj Warikoo, *Detroit Has Highest Concentrated Poverty Rate Among Top 25 Metro Areas*, Detroit Free Press (Apr. 26, 2016, 10:38 PM), https://www.freep.com/story/news/local/michigan/2016/04/26/detroit-has-highest-concentrated-poverty-rate/83395596/.

6. *See e.g.*, Michael Jackman, *Report Finds Greater Detroit Among Most Segregated U.S. Metropolitan Areas*, Detroit Metro Times (May 25, 2018, 11:06 AM), https://www.metrotimes.com/news-hits/archives/2018/05/25/report-finds-greater-detroit-among-most-segregated-us-metropolitan-areas.

7. *See* Robin D. G. Kelley, Freedom Dreams: The Black Radical Imagination 9-10 (2003) ("In the poetics of struggle and lived experience, in the utterances of ordinary folk, in the cultural products of social movements, in the reflections of activists, we discover the many different cognitive maps of the future, of the world not yet born.").

Chauvin killed George Floyd on May 25.[8] They took to the streets —
amid the COVID-19 pandemic — with grief and rage over the killings
of Floyd, Breonna Taylor, Tony McDade, and so many others.[9] By
July, as many as twenty-six million people had participated in pro-
tests.[10] The *New York Times* reported that these numbers made the
Movement for Black Lives the largest movement in U.S. history.[11]

The demand is clear: defund police and invest in communities.[12]
Organizers are rejecting all of the reforms that have been regurgitated
in recent years and that have not kept people safe.[13] All the focus on
police training and body cameras has only meant that billions of dol-
lars have flowed into police departments, but police have not stopped
killing people.[14] Organizers are calling for transformation. And they
are winning victories across the country.[15]

In ten months, organizers in over twenty cities secured divest-
ment of more than $840 million from police departments and won in-
vestments of at least $160 million in communities.[16] They have
successfully campaigned to kick cops out of schools in twenty-five cit-
ies.[17] The Movement for Black Lives also unveiled the BREATHE
Act, which would divest federal money from policing and punishment

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8. *See After 100 Days of Protest, Writers and Photographers Reflect on What They've Wit-
nessed*, HARPER'S BAZAAR (Sept. 4, 2020, 02:50 PM), https://www.harpersbazaar.com/culture/
politics/a33825519/100-days-protests-timeline/.

9. *See* Sarah Al-Arshani, *George Floyd Was One of Many Black Americans Killed at the
Hands of Police. Now Protests Across America Are Demanding Justice for Them All.*, INSIDER
(June 10, 2020, 04:41 AM), https://www.insider.com/heres-who-protesters-are-remembering-
across-the-country-2020-6.

10. *See* Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S.
History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-
floyd-protests-crowd-size.html.

11. *See id.*

12. *See* MOVEMENT FOR BLACK LIVES, #DEFEUNDTHEPOLICE, #FUNDTHEPEOPLE,
#DEFENDBLACKLIVES: CONCRETE STEPS TOWARD DIVESTMENT FROM POLICING & INVESTMENT
IN COMMUNITY SAFETY 3 (2020), https://filtermag.org/wp-content/uploads/2020/06/Defund-
Toolkit.pdf.

13. *See* CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS IN POLICING,
https://static1.squarespace.com/static/59ead8f9692ebee25b72f17f/t/5b65cd58758d46d34254f22c/
1533398363539/CR_NoCops_reform_vs_abolition_CRside.pdf.

14. *See* Charlotte Rosen, *Abolition or Bust: Liberal Police Reform as an Engine of Carceral
Violence*, RADICAL HISTORY REV. (June 25, 2020), https://www.radicalhistoryreview.org/
abusablepast/abolition-or-bust-liberal-police-reform-as-an-engine-of-carceral-violence/; *see also*
Derecka Purnell, *How I Became a Police Abolitionist*, ATLANTIC (July 20, 2020, 01:37 PM),
https://www.theatlantic.com/ideas/archive/2020/07/how-i-became-police-abolitionist/613540/.

15. *See* Sam Levin, *The Movement to Defund Police Has Won Historic Victories Across the
US. What's Next?* GUARDIAN (Aug. 15, 2020, 6:00 PM), https://www.theguardian.com/us-news/
2020/aug/15/defund-police-movement-us-victories-what-next; *see also* INTERRUPTING CRIMINAL-
IZATION, THE DEMAND IS STILL #DEFUNDTHEPOLICE: LESSONS FROM 2020 (2021), https://
static1.squarespace.com/static/5ee39ec764dbd7179cf1243c/t/60099f1b3353a01c4bbc4587/
1611243303836/%23DefundPolice+2021.pdf.

16. INTERRUPTING CRIMINALIZATION, *supra* note 15, at 5.

17. *See id.*

and invest in community health and safety.[18] It would eliminate agencies like the Drug Enforcement Administration, ban the use of surveillance technology, and more.[19] This was possible because the Movement for Black Lives never stopped organizing since it was launched in December 2014,[20] and because this movement stands on the shoulders of 400 years of Black liberation struggle.[21] Local organizers are making visionary demands; they are offering us clear examples of what we are fighting *for* and the world that we can build. They are offering us freedom dreams that are backed by clear strategies to build the power necessary to realize them.

We can see this type of creativity and generative strategy across so many communities and movements. For years, organizers have been pushing to shut down jails and block new jail construction across the country — in Milwaukee, St. Louis, Philadelphia, Los Angeles, San Francisco, Seattle, Atlanta, and elsewhere.[22] In Atlanta, activists are turning their city jail into a Center for Wellness & Freedom.[23] In Detroit and other cities, people are putting their hands back in the

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18. *See* Movement for Black Lives, *The BREATHE Act Unveiling*, YouTube (July 7, 2020), https://www.youtube.com/watch?v=GAET2x_rwZ8.

19. *See* Movement for Black Lives, The BREATHE Act, https://breatheact.org/wp-content/uploads/2020/07/The-BREATHE-Act-PDF_FINAL3-1.pdf.

20. *About us*, Movement for Black Lives, https://m4bl.org/about-us/ (last visited Mar. 2, 2021).

21. The Movement for Black Lives (M4BL) is a national organization that represents over 50 signatory organizations, including the Black Lives Matter Network. M4BL is distinct from Black Lives Matter, which is a decentralized grassroots movement with regional chapters around the country.

22. *See, e.g.,* Michelle Liu, *Community Organizers Demand Closure of Milwaukee Secure Detention Facility*, Milwaukee J. Sentinel (Jun. 30, 2017, 11:58 AM), https://www.jsonline.com/story/news/crime/2017/06/30/organizers-demand-closure-milwaukee-secure-detention-facility/432122001/; Clark Randall, *'The Workhouse': Activists Celebrate Decision to Close 'Hellish' St. Louis Jail*, Guardian (Aug. 3, 2020), https://www.theguardian.com/us-news/2020/aug/03/st-louis-workhouse-jail-legislation-close; Samantha Melamed, *Philly's House of Correction, a 'Dungeon,' to Close by 2020*, Phila. Inquirer (Apr. 18, 2018), https://www.inquirer.com/philly/news/pennsylvania/philadelphia/house-of-correction-closing-department-of-prisons-20180418.html; Francisco Aviles Pino, *Los Angeles County Votes to Stop Construction of New Jail-Like Facility, Adding Momentum to National Abolition Movement*, Intercept (Aug. 22, 2019, 6:00 AM), https://theintercept.com/2019/08/22/los-angeles-county-mental-health-facility-abolition/; No New SF Jail Coalition, *We've Done it: 850 Bryant St. Jail Shutters its Doors*, S.F. Bay View (Oct. 2, 2020), https://sfbayview.com/2020/10/weve-done-it-850-bryant-st-jail-shutters-its-doors/; *VICTORY: Less Than a Year After Opening, County Announces Plans to CLOSE the Jail!!!*, No New Youth Jail (July 21, 2020), https://nonewyouthjail.com/2020/07/21/victory-less-than-a-year-after-opening-county-announces-plans-to-close-the-jail/; *BREAKING: Atlanta City Council Passes Legislation toward Closing and Repurposing City Jail*, Close the Jail ATL (May 22, 2019), https://www.closethejailatl.org/post/atlanta-city-council-passes-legislation-toward-closing-and-repurposing-city-jail.

23. *Introducing the Center for Wellness & Freedom*, Close the Jail ATL (Mar. 14, 2019), https://www.closethejailatl.org/post/introducing-the-joan-garner-center-for-wellness-freedom; Kimberly Lawson, *'Starving the Beast': The Women Working to Close a Misused Atlanta Jail,* Vice (Feb. 8, 2019, 11:55 AM), https://www.vice.com/en/article/kzdzyw/starving-the-beast-the-women-working-to-close-a-misused-atlanta-jail.

soil, growing food, and sharing seeds and tools.[24] They are building resilient local food systems and economies.[25] People are refining their approach to mutual aid, especially in response to the COVID-19 pandemic, to make sure that we, as communities, can meet each other's needs.[26] Organizers are doing the hard work of creating transformative justice practices that respond to harm and center survivors' needs.[27] Young people are creating healing hubs in their neighborhoods.[28] People are figuring out how to keep their neighborhoods affordable for generations to come through community land trusts.[29] People are asking their neighbors what would give them a sense of safety and belonging, and they're coming up with freedom dreams together — and fighting hard to make them real.

So how can we, as lawyers, match the power, energy, and vision of movement organizers? It is a question that many of us have been wrestling with, and with particular urgency in recent years. This article is an attempt to explore real-time lessons from recent work in Detroit and to begin to identify some practices that can guide the strategies of movement lawyers in this moment.[30] My hope is to help

24. *See Food Justice*, FOODPRINT, https://foodprint.org/issues/food-justice/ (last visited Oct. 3, 2020); *see also* Rhonda J. Smith, *First Five Detroit Black Farmer Land Fund Grantees Finalize Land Purchases,* PLANET DETROIT (Mar. 11, 2021), https://planetdetroit.org/2021/03/first-five-detroit-black-farmer-land-fund-grantees-finalize-land-purchases/?fbclid=IWAR2E8K5tVVNZq C9AB_LvBm0TEM_lzGHTXe_l9u173Yo-FAwAB0wzBZ9rTOA; *Home*, KEEP GROWING DETROIT, http://detroitagriculture.net/.

25. *See, e.g.,* Estelle Slootmaker, *Michigan's Local Food Economy Rises to Meet COVID-19's Challenges*, MODEL D MEDIA (July 7, 2020), https://www.modeldmedia.com/features/localfoodcovid07022020.aspx; *Home*, DETROIT BLACK CMTY. FOOD SEC. NETWORK, https://www.dbcfsn.org/.

26. *See, e.g.*, Jia Tolentino, *What Mutual Aid Can Do During a Pandemic*, NEW YORKER (May 11, 2020), https://www.newyorker.com/magazine/2020/05/18/what-mutual-aid-can-do-during-a-pandemic; Dean Spade, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT) (2020).

27. *See e.g.*, *Beyond Punishment: The Movement for Transformative Justice*, RUSTBELT ABOLITION RADIO (July 10, 2017), https://rustbeltradio.org/2017/07/10/ep07/; MARIAME KABA & SHIRA HASSAN, FUMBLING TOWARDS REPAIR: A WORKBOOK FOR COMMUNITY ACCOUNTABILITY FACILITATORS (2019); EJERIS DIXON & LEAH LAKSHMI PIEPZNA-SAMARASINHA, eds., BEYOND SURVIVAL: STRATEGIES AND STORIES FROM THE TRANSFORMATIVE JUSTICE MOVEMENT (2020).

28. *See, e.g., Detroit Youth-Led Healing Hub*, DETROIT HEALS DETROIT (May 30, 2020), https://www.detroithealsdetroit.org/l/detroit-youth-led-healing-hub/.

29. *See, e.g.,* Ramona Giwargis, *Activists Plan a San Jose Community Land Trust for Affordable Housing*, SAN JOSE SPOTLIGHT (Jan. 10, 2019), https://sanjosespotlight.com/activists-plan-a-san-jose-community-land-trust-for-affordable-housing/; *Community Control: Organizing for Community Land Trusts in NYC*, NEW ECON. PROJECT (Nov. 12, 2015), https://www.neweconomynyc.org/2015/11/community-control-organizing-community-land-trusts-nyc/; Abigail Savitch-Lew, *How Community Land Trusts Can Fix Detroit's Foreclosure Mess*, YES! MAGAZINE (Dec. 24, 2016), https://www.yesmagazine.org/economy/2016/12/24/how-community-land-trusts-can-fix-detroits-foreclosure-mess/.

30. Of course, movement lawyering, just like any other part of social movements, is deeply collaborative. Some of what I'll say are ideas I've developed, but much of it is influenced by things I have learned and conclusions I have reached with others.

train lawyers to listen for freedom dreams. I hope we can get better at paying attention — a practice that lawyers will need to develop to be able to uplift, rather than trample, the vision of organizers.

I have always been a reluctant lawyer. Before law school, I was an organizer first. I still sometimes consider myself an organizer with legal skills. I learned more about creating social change and shifting power from my mentors in the AIDS Coalition to Unleash Power ("ACT-UP"), who trained me as a student organizer in college, than I ever did in law school. Those movement elders organized and won access to HIV treatment in the 80s and 90s, putting their bodies on the line because they were sick of watching their loved ones die. They taught me how to make powerful people uncomfortable enough to give you what you want, and how to turn out 1,000 people for a rally, hold a press conference, and plan a direct action. They taught me how to organize to shift power and win what communities need.

This article is for law students, lawyers, and legal workers interested in transformative change. Many of you are asking whether and how you can use the law to tackle the problems you are concerned about. You are also eager to find concrete strategies for relating to and supporting social movements as lawyers. But there may be a lot of unlearning to do. It is not just that we were not trained how to work alongside organizers in law school, it is that much of our training undermines potential relationships.[31] Lawyers can so easily dull the radical energy of movements by telling organizers what they *cannot* or *should not* do (or list the dozens of different ways legal precedent might get in their way).[32]

I felt this tension deeply as a law student. In fact, much of what is now more widely considered a 'movement lawyering approach' came from side conversations with law school friends, jottings in the margins of notepads, and from those moments when I felt alienated for calling things into question. As law students and later as lawyers, we began to trust ourselves and began practicing together. What I was worried made me "not a real lawyer" was actually my greatest source of insight, connection, and innovation. For many of us, this came

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31. *See generally* William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 Ohio N.U. L. Rev. 455 (1994); William P. Quigley, *Ten Ways of Looking at Movement Lawyering*, 5 How. Hum. & C.R. L. Rev. 23 (2020); Amanda Alexander et al., *Love Letter: The Legal Community Gears Up for Battles Ahead*, Organizing Upgrade (Dec. 5, 2020), https://organizingupgrade.com/love-letter-the-legal-community-gears-up-for-battles-ahead.

32. *See* Betty Hung, *Law and Organizing from the Perspective of Organizers: Finding a Shared Theory of Social Change*, 1 L. A. Pub. Int. L.J. 4, 15 (2008) (noting an organizer's half-joking observation that "a lawyer's mantra is 'no se puede.'").

down to being attuned to who was not in the room, whose voices we should be hearing, and our experiences of people's power as organizers. And it was what was needed; just as Black feminist theory has long helped us understand, wisdom lies in the margins.[33] My most useful insights have derived from my training as a historian, organizer, doula, facilitator, teacher, meditator, gardener, and more — not from my legal education. Lawyers have a lot of unlearning to do; there is so much we can borrow from other ways of being and knowing.

Sometimes communities need people to show up as lawyers to support their work. Just as often, though, we need to be ready to show up, not as lawyers, but as people ready to listen, to build deep relationships with each other, to hold each other through our trauma, to practice our freedom together, and to heal. That is part of the creative and transformational work of movement building. This is why it's so important during law school to hold onto what you already know, to stay rooted in that wisdom, and to keep learning and exceeding your legal training. Instead of solely thinking about legal precedent, you might ask yourself on a regular basis: What is my inheritance? What do I already know about listening well, being part of a community, and being grounded in the wisdom of ancestors who helped me get here? Who, outside of law school, has taught me about my purpose and how to create change in the world? And how can I keep connecting with that each day? Law school did not teach me the answers to these questions or even encourage me to ask them, but they are essential to the way I show up for our people and our movements as a lawyer.

In the sections that follow, I will share some of the lessons that Detroit has refined for me about the role that law, policing, courts, and power play in people's lives. For much of the past six years since organizers launched the Movement for Black Lives,[34] many of us in the National Conference of Black Lawyers Detroit chapter and Law for Black Lives have been trying to figure out, in real time, the role of lawyers in supporting what is becoming the largest movement in U.S.

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33. *See* bell hooks, *Choosing the Margin as a Space of Radical Openness*, 36 FRAMEWORK: J. CINEMA & MEDIA 15 (1989); *see also* Amna Akbar, Sameer Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 24 (Forthcoming 2021) ("By co-generating ideas with social movements seeking to transform the political, economic, and social status quo, movement law scholars adopt a countercultural posture within the academy and profession. Movement law aims to disrupt the processes of social reproduction within law and legal education that naturalize the status quo and foreclose alternatives to elite rule. By thinking alongside movements that seek to delegitimize the status quo in service of transformation, we reject the status quo orientation of much of the legal scholarly project. Precisely because of law's entanglement with hierarchal power relations, it is essential that we pay attention to the grassroots.").

34. MOVEMENT FOR BLACK LIVES, *supra* note 20.

history.[35] This was also the origin story — though I did not know it at the time — of the Detroit Justice Center ("DJC") and our "defense, offense, and dreaming" approach.[36] I will discuss what that work has looked like, focusing on some of the practices we have used to remain nimble as a team — that is, the ways we have tried our best to keep listening for freedom dreams. Detroit is home to some of the most visionary organizing on the planet, as I will describe in more detail. I will share some of the values, practices, and questions our team is using to help us support Detroiters' visions and longstanding efforts to build beloved community.

I. Law and Power: Lessons from Detroit

The same summer that a jury acquitted George Zimmerman of all charges after he killed 17-year-old Trayvon Martin[37] and Patrisse Cullors tweeted out "Black Lives Matter,"[38] I finished law school and moved back home to Michigan. Living in Detroit — a city where legal systems have fundamentally failed long-time residents — has deepened my understanding of the ways that the law does and does not shape people's lives, and the limits of legal strategies. It has also reaffirmed for me that when Black lives are made to matter in Detroit, Flint, and other cities ravaged by capitalism and criminalization, it is because people have organized and fought to make it so.

What has law meant in the lives of Detroiters, and particularly the city's Black majority, in recent years? When I moved here in 2013, Governor Rick Snyder had just appointed an emergency financial manager for the city of Detroit.[39] This meant that I was moving to a zone where democracy had been suspended.[40] I could vote for City

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35. Our work in Detroit has grown alongside the powerful work of movement lawyers and organizers elsewhere, including the Community Justice Project in Miami, Amistad Law Project in Philadelphia, Baltimore Action Legal Team, Law for Black Lives, Arch City Defenders in St. Louis, Movement Law Lab, and others.

36. *Our Work*, Detroit Just. Ctr., https://www.detroitjustice.org/introduction (last visited Mar. 12, 2021).

37. Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. Times (July 13, 2013), https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html.

38. *See The Hashtag #BlackLivesMatter First Appears, Sparking a Movement*, History.com (July 10, 2020), https://www.history.com/this-day-in-history/blacklivesmatter-hashtag-first-appears-facebook-sparking-a-movement.

39. *See* Monica Davey, *Bankruptcy Lawyer Is Named to Manage an Ailing Detroit*, N.Y. Times (Mar. 14, 2013), https://www.nytimes.com/2013/03/15/us/gov-rick-snyder-kevyn-orr-emergency-manager-detroit.html.

40. *See generally* Local Financial Stability and Choice Act, Mich. Comp. Laws § 141.1549 (2012); *see also* Terry Gibb, *Understanding the 'Emergency Manager' Option in P.A. 436*, Mich. State Univ. Extension (July 29, 2013), https://www.canr.msu.edu/news/understanding_the_emergency_manager_option_in_p.a._436.

Council members, but they had no power aside from those granted to them by the emergency manager, attorney Kevyn Orr. Essentially, one non-elected official had full power to decide on city assets, negotiate union contracts, and more.[41] Orr authorized the Mayor and City Council to carry out day-to-day operations, but all orders, ordinances, contracts, resolutions, permits, and other actions were invalid unless approved by the emergency manager.[42] This was a dizzying context in which to study for the bar exam.

When Detroit filed for the largest ever municipal bankruptcy that year,[43] it seemed that people could not decide whether Detroit was fifty years ahead or fifty years behind the rest of the country. It became clear to me that the city is fifty years ahead — many Detroiters don't hold any illusions about U.S. capitalism. Elders have told me stories about the old days when you could get fired from Ford Motor Company and walk across the street and get an even better job at General Motors. They have also told me stories about decades of unemployment, losing their homes to foreclosure, and getting swept up in the criminal legal system. I say that we are fifty years ahead not because every city is destined to go through the bottoming out of U.S. capitalism in the way Detroit has, but because that experience has provided certain insights and forced people to build alternatives that may be useful in other cities. Detroiters have forged creative solutions out of necessity.

What are Detroiters up against? After decades of economic decline, prison expansion, and intensified segregation, Detroit, a city

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41. *See generally* Local Financial Stability and Choice Act, Mich. Comp. Laws § 141.1552 (2012).

42. *See* Emergency Manager: City of Detroit, Authorization for the Detroit Mayor and City Council to Conduct the Day-to-Day Business of the city (Apr. 11, 2013), https://detroitmi.gov/sites/detroitmi.localhost/files/migrated_docs/emergency-manager-reports/Order%203.pdf ("Any orders, ordinances, resolutions, appointments, approvals, terminations, appropriations, contracts, permits or other related action of the Detroit Mayor and City Council from and after March 28, 2013, shall be submitted to the Emergency Manager for consideration, but will not be valid or effective unless and until approved by the Emergency Manager or his designee in writing."). The Benton Harbor Emergency Manager went even further, issuing an order making it impossible for the city authorities to do anything other than open or close meetings. *See* Chris Savage, *The Scandal of Michigan's Emergency Managers*, The Nation (Feb. 15, 2012), https://www.thenation.com/article/archive/scandal-michigans-emergency-managers/ ("[N]o City Board, Commission or Authority shall take any action for or on behalf of the City whatsoever other than: i) Call a meeting to order, ii) Approve of meeting minutes, iii) Adjourn a meeting.").

43. Michael A. Fletcher, *Detroit Files Largest Municipal Bankruptcy in U.S. History*, Wash. Post (Jul. 18, 2013), https://www.washingtonpost.com/business/economy/2013/07/18/a8db3f0e-efe6-11e2-bed3-b9b6fe264871_story.html.

that's nearly eighty percent Black,[44] is the second poorest major city in the US.[45] Nearly fifty-five percent of Detroit children live in poverty.[46] The city has shut off water to 141,000 homes since 2014; people live without running water in this city.[47] We are one of the unhealthiest cities in the country,[48] with sky-high asthma rates in many neighborhoods.[49] Forty percent of Detroiters do not have access to the Internet.[50] Large telecom companies did not think it was worth investing in the infrastructure.[51] Detroiters lived through the largest tax foreclosure crisis since the Great Depression — between 2011 and 2015, Wayne County foreclosed on one quarter of Detroit properties for nonpayment of property taxes.[52] And to be clear, these are often Detroiters who own their family homes outright, but are not paid up on property taxes.[53] In many cases, these families were eligible for a poverty tax exemption and so should not have owed taxes in the first place.[54] Detroit police killed seven people in 2020,[55] including several Black people with mental health issues.[56] Some of these killings made national news, while others did not.[57]

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44. *See* U.S. Census Bureau, *QuickFacts: Detroit City, Michigan*; *United States* https://www.census.gov/quickfacts/fact/table/detroitcitymichigan,US/PST045219 (last visited Sept. 19, 2020).

45. *See Cleveland Overtakes Detroit as Poorest Big City in U.S., Census Finds*, Detroit News (Sept. 17, 2020, 9:56 AM), https://www.detroitnews.com/story/news/local/detroit-city/2020/09/17/cleveland-overtakes-detroit-poorest-big-city-u-s-census/3476269001/.

46. *See State of the Detroit Child*, Data Driven Detroit (last visited Sept. 19, 2020), https://sdc.datadrivendetroit.org/profiles/06000US2616322000-detroit-city-wayne-county-mi/.

47. *See* Kurth & Wilkinson, *supra* note 1.

48. Adam McCann, *2021's Healthiest & Unhealthiest Cities in America*, WalletHub (Feb. 8, 2021), https://wallethub.com/edu/healthiest-cities/31072/.

49. *See generally* DeGuire et al., *supra* note 3.

50. *See* U.S. Census Bureau, *supra* note 44.

51. Kaleigh Rogers, *Ignored by Big Telecom, Detroit's Marginalized Communities Are Building Their Own Internet*, VICE (Nov. 16, 2017, 10:50 AM), https://www.vice.com/en/article/kz3xyz/detroit-mesh-network.

52. *See* Atuahene & Berry, *supra* note 2.

53. *See, e.g.,* Alexa Eisenberg et al., Univ. of Mich. Poverty Sols., Preventing Owner-Occupied Property Tax Foreclosures in Detroit: Improving Access To The Property Tax Exemption 4 (2018).

54. *See id.* at 5.

55. *See* City of Detroit, 2020 Part 1 Crimes 20, https://detroitmi.gov/sites/detroitmi.localhost/files/2021-01/2020%20Year%20End%20Stats.pdf.

56. *See* George Hunter, *Man Killed in Police Shootout Reportedly Begged for Mental Health Care*, Detroit News (Nov. 4, 2020, 4:43 PM), https://www.detroitnews.com/story/news/local/detroit-city/2020/11/04/man-killed-police-shootout-reportedly-begged-mental-health-care/6164538002/ ("Detroit police chief James Craig called the case "tragic" and said the incident is the third time in recent months police have had to fatally shoot a mentally-ill suspect.").

57. *See, e.g.,* George Hunter, *Sword-Wielding Man Killed by Detroit Police Had Been Released From Mental Care*, Detroit News (Aug. 6, 2020 1:11 PM), https://www.detroitnews.com/story/news/local/detroit-city/2020/08/06/sword-wielding-man-killed-by-detroit-police-mental-health/3307456001/; Victor Williams, *'Detroit Will Breathe' Reacts to Body Cam Footage of Hakim Littleton's Death*, Click on Detroit (July 11, 2020, 6:19 PM), https://www.clickondetroit.com/news/local/2020/07/11/detroit-will-breathe-reacts-to-body-cam-footage-of-hakim-littletons-death/.

So, what is going on here? One of the underlying issues is that we have experienced an extreme retraction of the state in Detroit.[58] It is part of a broader national trend over the past several decades,[59] but we have seen the extreme end of its logic here. We have seen the state all but disappear when it comes to core welfare functions such as providing public education,[60] keeping streetlights on,[61] providing access to safe drinking water,[62] indigent legal services,[63] and maintaining parks.[64] And yet, at the same time, we have seen an expansion of state functions that punish — state functions that criminalize, prosecute, and cage people.[65] So, if you are looking to the state in terms of its positive welfare functions, it can be difficult to find. But if police want to serve you a warrant or if Child Protective Services wants to take your children away, the state will find you.[66]

The city has only doubled down on this trajectory in recent years. There has been rapid redevelopment in about seven square miles downtown, but it is a 139 square mile city.[67] City leadership, often in

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58. *See* Sarah Reckhow et al., *Governing Without Government: Nonprofit Governance in Detroit and Flint*, 56 Urb. Affs. Rev. 1473, 1474 (2019) ("In Detroit and Flint, city governments are operating at *less than half* of the administrative capacity at which they operated in 2000.").

59. *See* Lester K. Spence, Knocking the Hustle: Against the Neoliberal Turn in Black Politics 10 (2015); David Harvey, A Brief History of Neoliberalism 76 (2005); Cathy J. Cohen, *From Ferguson to Flint: Race, Neoliberalism and Black Politics Today*, Princeton Univ. Dep't of Afr. Am. Studs. (Apr. 5, 2016, 5:30 PM), https://aas.princeton.edu/academics/aas-lecture-series/reflections-african-american-studies.

60. *See* Jennifer Chambers, *Court Weighs Detroit Literacy Battle: 'Is This Really Education?'*, Detroit News (Oct. 22, 2019, 11:00 PM), https://www.detroitnews.com/story/news/education/2019/10/23/students-allege-lack-books-classrooms-without-teachers-deplorable-building-conditions-deprived-them/3908847002/.

61. *See* Reckhow et al., *supra* note 58, at 1473; *see also* J.C. Reindl, *Why Detroit's Lights Went Out*, USA Today (Nov. 17, 2013, 8:04 PM), https://www.usatoday.com/story/news/nation/2013/11/17/detroit-finances-dark-streetlights/3622205/.

62. *See* Poppy Noor, *Detroit Families Still Without Clean Water Despite Shutoffs Being Lifted*, Guardian (May 20, 2020), https://www.theguardian.com/us-news/2020/may/20/detroit-water-shutoffs-covid-coronavirus; *see also* Lori Higgins, *After a Year, Safe Drinking Water is Flowing Again at Detroit Schools*, Bridge Mich. (Aug. 30, 2019), https://www.bridgemi.com/urban-affairs/after-year-safe-drinking-water-flowing-again-detroit-schools.

63. *See* Eli Hager, *One Lawyer. Five Years. 3,802 Cases.*, Marshall Project (Aug. 1, 2019, 6:00 AM), https://www.themarshallproject.org/2019/08/01/one-lawyer-five-years-3-802-cases.

64. *See* Reckhow et al., *supra* note 58, at 1492.

65. *Michigan Profile*, Prison Pol'y Initiative, https://www.prisonpolicy.org/profiles/MI.html (last visited Sept. 20, 2020).

66. *See* Justin A. Hinkley, *Parents Outgunned in Child Welfare Cases*, Lansing State. J. (Feb. 25, 2016, 7:00 AM), https://www.lansingstatejournal.com/story/news/local/watchdog/2016/02/25/parents-outgunned-child-welfare-cases/76572142/.

67. *See* Erica Pandey, *Detroit's Uneven Comeback*, Axios (Nov. 20, 2019), https://www.axios.com/comeback-detroit-downtown-rust-belt-michigan-84ddf203-98a4-4033-aceb-2c48c5d61220.html; *see also,* Laura A. Reese et al., *'It's Safe to Come, We've Got Lattes': Development Disparities in Detroit*, 60 Cities 367, 367 (2017) ("The large-scale purchase, refurbishment and upgrading by Dan Gilbert. . .stands in contrast to the decay that continues to dominate the post-apocalyptic neighborhood landscape, inhabited by long-time Detroit residents that are

lock step with local billionaire Dan Gilbert, have built up an infra-structure of security and surveillance.[68] Since 2016, the city has spent over $1.4 billion on the police budget — far more than any other portion of our general fund.[69] It spent $12 million on a Real Time Crime Center, including Project Green Light, which is a partnership with local businesses that installs cameras throughout neighborhoods and streams live footage back to police headquarters.[70] And the city has spent $1 million on facial recognition software.[71] Over opposition, Wayne County is also building a new $533 million jail; more on that fight later.[72] This focus on security and surveillance has shown up in the way leaders talk about downtown Detroit; partnerships between city and Wayne State University campus police have been framed in terms of making midtown "safe" for (often white[73]) entrepreneurs to open businesses.[74]

As in many other cities, policing and courts have played a fundamental role in perpetuating racist segregation, gender-based violence, wealth extraction, poverty, and social control.[75] In 2015, the U.S. De-

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not partaking in this highly-limited but growing prosperity."); Hudson-Webber Found. et al., 7.2 SQ MI: A Report on Greater Downtown Detroit (2d ed. 2015).

68. *See* Bill Wylie-Kellermann, *Tracked but Not Seen: The Fight Against Racist Surveillance*, Sojourners (Mar. 2020), https://sojo.net/magazine/march-2020/tracked-not-seen-fight-against-racist-surveillance.

69. *See generally* Clare Hendrickson, *Fact-Checking Rashida Tlaib's Claim on Detroit's Police Spending vs. Health Care*, Detroit Free Press (Jun. 16, 2020, 8:00 AM), https://www.freep.com/story/news/local/michigan/detroit/2020/06/16/fact-check-detroits-police-vs-health-spending-gap/3194086001/.

70. *See* Taylor Johnson & Dave Maass, *A Primer on Detroit's Real-Time Crime Center*, Electronic Frontier Found. (Aug. 5, 2020), https://www.metrotimes.com/detroit/a-primer-on-detroits-real-time-crime-center/Content?oid=25065692; *See also* Violet Ikonomova, *2020 Recap: What Defunding Police Could Look Like in Detroit*, Deadline Detroit (Dec. 27, 2020, 6:49 AM), https://www.deadlinedetroit.com/articles/25592/what_defunding_police_could_look_like_in_detroit.

71. *See* Sarah Rahal & Christine Ferretti, *Metro Detroiter Battling 'Flawed' Facial Recognition Software*, Detroit News (June 24, 2020, 11:00 PM), https://www.detroitnews.com/story/news/local/detroit-city/2020/06/25/wrongfully-accused-detroit-facial-recognition-software-michigan-aclu/3214958001/; *see generally* Eric T. Campbell et al., *Detroiters Want to Be Seen, Not Watched,* Riverwise special surveillance issue (Aug. 2019), https://detroitcommunitytech.org/system/tdf/librarypdfs/2019-2206_Riverwise-Surveillance.pdf?file=1&type=node&id=80&force=.

72. *See* Oralandar Brand-Williams, *Wayne County Takes a Second Swing at Building New Jail*, Detroit News (June 25, 2019, 10:45 PM), https://www.detroitnews.com/story/news/local/detroit-city/2019/06/25/wayne-county-takes-second-swing-building-new-jail/1271683001/.

73. The *Howard Human and Civil Rights Law Review* has granted the author's request for a style convention exception. [hereinafter the "w" in "white" will be lowercase].

74. *See* Kim Kozlowski, *WSU Police's Reach Helps Cut Into Midtown Crime*, Detroit News (Dec. 26, 2016, 11:14 PM), https://www.detroitnews.com/story/news/local/detroit-city/2016/12/26/wayne-state-police/95864014/.

75. *See generally* Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. Rev. 650 (2020); Andrea Ritchie, Invisible No More: Police Violence Against Black Women and Women of Color (2017); Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff,* 134 Harv. L. Rev. F. 213 (2021); *see also* Jade Chowning et al., Detroit Just.

partment of Justice released the Ferguson report, exposing financial incentives and a regime of municipal fines and fees that helped drive aggressive policing.[76] That same year, the American Civil Liberties Union ("ACLU") of Michigan launched an investigation of the city of Eastpointe, near Detroit, and found that eleven percent of its budget came from court fines and fees.[77] As a new attorney working with parents and families involved in the criminal legal system as director of the University of Michigan Law School's Prison & Family Justice Project, I fielded calls from colleagues at the time who were worried that their clients would get locked up on "pay or stay" sentences and possibly lose their children as a result.

In one case, a single mother owed a $455 fine for failure to license her dog. My colleagues wanted to know what power of attorney forms she should fill out to ensure that her children's grandmother could care for her kids if she was jailed. If their client was locked up without taking these types of precautions, her children might end up in the foster care system and she risked losing her kids permanently — over a "dog ticket." So many Detroiters are caught up in this cycle of jail and court involvement, and they stand to lose their children, housing, and jobs as a result.[78] Back then, these were the types of cases that got me thinking about what would become some of the Detroit Justice Center's direct services work — assisting people with clearing warrants, addressing court debt, reinstating suspended driver's licenses, expunging criminal records, and more.

Ultimately, seeing the ways that policing, surveillance, and courts shaped many Black Detroiters' lives made it clear that it all came down to power — the power to make decisions that determine who

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CTR., HIGHWAY ROBBERY: HOW METRO DETROIT COPS & COURTS STEER SEGREGATION AND DRIVE INCARCERATION 2, 24 (2020), https://www.detroitjustice.org/highwayrobbery.

76. *See* U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 3, 10 (2015). A key finding of the Ferguson Report was the regime of municipal fines and fees that drove aggressive policing. It showed that cities like Ferguson were using their poorest residents as a cash register — ticketing for petty offenses such as a barking dog, broken taillight, driving on a suspended license, or providing the short form of a legal first name. *Id.* These fines spiral into hundreds or thousands of dollars of criminal justice debt. In Ferguson, court fines and fees were the city's second biggest source of revenue. *See* Joseph Shapiro, *In Ferguson, Court Fines and Fees Fuel Anger*, NPR (Aug. 25, 2014, 5:56 PM), https://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger. In 2013, the municipal court in Ferguson — a city of 21,135 people — issued 32,975 arrest warrants for nonviolent offenses, mostly driving violations. *See id.*; *see also* MUNICIPAL DIVISION, FY 2013 WARRANTS ISSUED AND WARRANTS OUTSTANDING, https://www.courts.mo.gov/file.jsp?id=68845.

77. Sofia Nelson, *Why Eastpointe, Michigan, Looks So Much Like Ferguson, Missouri*, ACLU OF MICH. (Nov. 2, 2015, 3:00 AM), https://www.aclumich.org/en/news/why-eastpointe-michigan-looks-so-much-ferguson-missouri.

78. *See* CHOWNING ET AL., *supra* note 75, at 33 (for more on this cycle and its consequences for Detroiters).

can be part of the city's future, and who will be caged, dispossessed, and cast out. In the face of all of this, many Detroit residents and organizers understood that creating the conditions for Black people to thrive in Detroit would require far more than "police reform" or "access to justice" in the courts. It would require continuing to build power for self-determination — the power to create a city where people can move freely and have what they need. Alicia Garza has defined power in this way:

> For me, power means getting to make decisions over your own life. Power means being able to determine where resources go, who they go to, where they don't go, and who they don't go to. For me, power is about the ability to shape the narrative of what is right, what is wrong, what is just, what is unjust. But most importantly for me, power is about making sure that there are consequences when you're disappointed. When the people who you elect don't carry out the agenda that you elected them to carry out.[79]

Once we recognize the underlying problem as one of powerlessness, what do we do next?

In Detroit and nearby Flint, organizers have built community power and created organizations that have confronted challenge after challenge.[80] We know about the water shutoffs in Detroit and the lead in the water in Flint because of community organizers. Tens of thousands of people being shut off from water in Detroit was not a national or international news story until groups like Detroiters Resisting Emergency Management, We the People of Detroit, and the People's Water Board Coalition got people in the streets and appealed to the United Nations Special Rapporteur on the Right to Water to investigate.[81] In Flint, while officials were still insisting the water was safe, Nayyirah Shariff and members of the Flint Democracy Defense League tested their own water, reached out to journalists, filed grievances, and called protests. The Democracy Defense League

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79. *See* Leah Fessler, *How the Leader of Black Lives Matter Defines 'Power'*, QUARTZ (Sept. 16, 2018), https://qz.com/1391762/black-lives-matter-co-founder-alicia-garzas-definition-of-power/; *see also Vision for Black Lives*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms ("Black life and dignity require Black political will and power").

80. Including, among many others: African Bureau of Immigration and Social Affairs; Coalition for Property Tax Justice; Detroit Action; Detroit Disability Power; Detroit Community Technology Project; Detroit Eviction Defense; Detroit Independent Freedom Schools Movement; Detroit People's Platform; Detroiters Resisting Emergency Management; Dream of Detroit; East Michigan Environmental Action Committee; Feedom Freedom; Michigan Environmental Justice Coalition; Michigan Welfare Rights Organization; We the People of Detroit; We the People of Michigan; Trans Sistas of Color Project; and more.

81. *See* Kristian Davis Bailey, *Detroit Fights Back: Residents Battle for Water, Democracy and Human Rights*, EBONY (Aug. 19, 2014), https://www.ebony.com/news/detroit-fights-back-405/.

and Flint Rising remained far ahead of the government and attorneys in addressing the problem.[82] In the early days of the Flint water crisis, the city engaged in terrible practices, including requiring people to show ID in order to get bottled water, which presented a barrier for undocumented people or people who just lacked ID.[83] Lawyers could have challenged these practices and probably would have won, but the organizers got the job done first. Nayyirah Shariff tweeted a viral video of a mother denied water because she did not have her ID.[84] Public outrage escalated and activists pressured the city to change the policy. Within hours, the city issued a press release saying that ID was not required.[85]

Since then, many attorneys have filed lawsuits regarding the Flint water crisis, but in terms of actually making people's lives better and building power for the future, that is the work of Flint Rising and their allies. Flint Rising ran a water delivery service and canvassed door to door to find out where elderly people, pregnant people, and housebound people lived who needed water delivered.[86] They also trained people to advocate for change in D.C. and at the Michigan state capitol,[87] and attracted and sustained the media's attention.[88] With organizing tools, they developed a shared analysis and vision, forged relationships and organizational structures, and cultivated residents' capacity to tackle the water crisis and whatever problems they face next. Same goes for the Coalition for Property Tax Justice and their fight against tax foreclosures in Detroit.[89] And the fights against

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82. *See* Molly Lambert, *Flint Rising Director Nayyirah Shariff On the Crisis In Flint And How Resource Privatization Is Like Dune*, Medium (Jan. 9, 2020), https://medium.com/@molly-lambert_73149/flint-rising-director-nayyirah-shariff-on-the-crisis-in-flint-and-how-resource-privatization-is-1c208d180ef.

83. *See* Dara Lind, *A Barrier to Clean Water in Flint, Michigan: A Government-Issued ID*, Vox (Jan. 25, 2016, 1:40 PM), https://www.vox.com/2016/1/25/10827734/flint-water-immigrants.

84. Nayyirah Shariff (@nayyirahshariff), Twitter (Jan. 22, 2016, 11:24 AM), https://twitter.com/nayyirahshariff/status/690616072505036801.

85. *See* Amanda Emery, *ID Not Required for Residents to Get Free Resources During Flint Water Crisis*, M Live (Jan. 23, 2016), https://www.mlive.com/news/flint/2016/01/id_not_required_for_residents.html.

86. *See* Flint Rising, *Why Are We Walking Door to Door in Flint?*, YouTube (Mar. 1, 2016), https://www.youtube.com/watch?v=BK4JtocZCxA; *see also* Democracy Now, *'Thirsty for Democracy: The Poisoning of An American City': Special Report on Flint's Water Crisis* (Feb. 17, 2016), https://www.democracynow.org/2016/2/17/thirsty_for_democracy_the_poisoning_of. *See generally* Dean Spade, Mutual Aid: Building Solidarity During This Crisis (and the Next) (Verso 2020) (for more on power of mutual aid).

87. *See Fighting Back in Flint*, Ctr. for Popular Democracy (Mar. 8, 2016), https://www.populardemocracy.org/blog/fighting-back-flint.

88. *See* Benjamin J. Pauli, Flint Fights Back: Environmental Justice and Democracy in the Flint Water Crisis 239 (2019).

89. *See* Christine MacDonald, *Activists Propose Detroit Fund for Overtaxed Homeowners*, Detroit News (July 27, 2020, 12:01 AM), https://www.detroitnews.com/story/news/local/detroit-

the Marathon Oil refinery,[90] the Detroit Renewable Energy incinerator,[91] the new Wayne County Jail,[92] deportations,[93] school funding,[94] and more — organizers have consistently led these fights.

II. BUILDING POWER: ORGANIZING, VISIONARY ORGANIZING, AND FREEDOM DREAMS

The lesson here is to pay attention to organizing. The law does not have the answers, but organizers often do — they recognize the full scope of problems and locate the roots of those problems in powerlessness. As lawyers, we may have a role to play. However, that role requires decentering legal tactics and moving with humility, paying attention to organizers' freedom dreams, and realizing how sustainable change really happens. Organizing is so central because it is all about getting to the roots of power imbalance.[95] Organizing builds power. And visionary organizing focuses not just on what we are fighting against but offers a vision of what we are fighting for.[96] Visionary organizers fight to make freedom dreams real. In the context of the Black Lives Matter era, organizers have not focused on "getting police to stop shooting us." Instead, they have asked each other, "what do we need to thrive?" And they have fought for those visions.

city/2020/07/27/activists-propose-detroit-fund-overtaxed-homeowners/5482828002/; *Our Demands*, COAL. FOR PROPERTY TAX JUST., https://illegalforeclosures.org/.

90. *See* Charles E. Ramirez, *Group Protests Marathon Refinery in Wake of Oil Vapor Cloud*, DETROIT NEWS (Sept. 13, 2019, 1:49 PM), https://www.detroitnews.com/story/news/local/detroit-city/2019/09/13/group-protests-marathon-refinery-wake-oil-vapor-cloud/2309776001/.

91. *See* Kianga Moore, *'We Won': Environmental Activists Claim Victory After Detroit Incinerator Closes*, ENERGY NEWS NETWORK (July 9, 2019), https://energynews.us/2019/07/09/midwest/we-won-environmental-activists-claim-victory-after-detroit-incinerator-closes/.

92. *See* Dana Afana, *Group to Protest Construction of New Wayne County Jail*, MLIVE (Apr. 21, 2017), https://www.mlive.com/news/detroit/2017/04/group_to_protest_jail_construc.html.

93. *See* Rachael Janfaza, *Cosecha Movement Activists Went After Biden at Detroit Democratic Debate*, TEEN VOGUE (Aug. 1, 2019), https://www.teenvogue.com/story/chant-biden-detroit-democratic-debate-cosecha-movement.

94. *See* Steve Carmody, *Teachers Lead Early Morning Rallies for More Public School Funding*, MICH. RADIO (Oct. 6, 2016), https://www.michiganradio.org/post/teachers-lead-early-morning-rallies-more-public-school-funding; Michigan Education Justice Coalition, *Babies Over Billionaires*, https://www.babiesoverbillionaires.org/.

95. *See* Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 34 (2011). This provides a longer definition of organizing and its relationship to movement lawyering. *See also* Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797 (1990); Hung, *supra* note 32; Quigley, *Reflections, supra* note 31; Quigley, *Lawyering for Empowerment of Community Organizations*, *supra* note 31.

96. *See generally* GRACE LEE BOGGS & SCOTT KURASHIGE, THE NEXT AMERICAN REVOLUTION: SUSTAINABLE ACTIVISM FOR THE TWENTY-FIRST CENTURY (2011). In her conception of visionary organizing, Boggs emphasized the value of place-based organizing rooted in deep community, and the value of building human connections that put technology in service of human needs, rather than the other way around.

Young organizers with Black Youth Project 100 ("BYP100"), the Movement for Black Lives, Fearless Leading by the Youth, Greenlight Black Futures, Assata's Daughters, and more have been organizing around demands to divest/invest and "Fund Black Futures."[97] And now, "defund police" is in the mainstream consciousness.[98] These are not straightforward demands for something that seems politically palatable or winnable — they are visionary demands. I find hope in these organizers who see the roots of the problem, who are using radical imagination in addressing those problems, and finding a better way for all of us. These young people are fighting to do more than breathe or to reform; from grief and pain, they are offering a dream of something more.

The example of Fearless Leading by the Youth ("FLY")'s fight for a trauma center in Chicago is a powerful illustration of this vision. Several years ago, FLY won a multi-year battle with the University of Chicago to open a trauma center in their neighborhood on the south side.[99] These young people were tired of people dying of gunshot wounds because the nearest trauma center was too far away.[100] People were dying en route.[101] The University of Chicago has world-class facilities right there, but none that served the local population in this way, so the young people demanded what they needed. And they got it through organizing.[102]

Think about this example for a moment. These young people focused on the harm their community was facing — they framed it not just as a problem of gun violence but of a lack of healthcare infrastructure. They were being abandoned to die. They could have called for a

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97. *See* Black Youth Project 100, Agenda To Build Black Futures 12 (2016); *see also*; *Invest-Divest*, Movement for Black Lives, https://m4bl.org/policy-platforms/invest-divest/ (last visited Oct. 3, 2020); Interview with Victoria Crider, Organizer, transcribed in *Fearless Leading by the Youth: An Interview*, Area Chicago Archive (Mar. 4, 2019), https://areachicagoarchive.wordpress.com/2019/03/04/fearless-leading-by-the-youth-an-interview/;
Green Light Black Futures, (@greenlightblackfutures), Instagram, https://www.instagram.com/greenlightblackfutures (last visited Oct. 3, 2020); *#FundBlackFutures Action Shuts Down International Association of Chief of Police (IACP) Conference*, Assata's Daughters, https://www.assatasdaughters.org/statements#iacp (last visited Mar. 12, 2021).

98. *See* Levin, *supra* note 15; *see generally* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 Calif. L. Rev. 1781 (2020); Mariame Kaba, *Yes, We Mean Literally Abolish the Police,* N.Y. Times (Jun. 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html.

99. *See* Claire Bushey & Kristen Schorsch, *Part 1: The Rumble: How Protestors Became Too Loud to Ignore*, Crain's Chi. Bus. (Apr. 11, 2016), https://www.chicagobusiness.com/static/section/trauma-protest.html.

100. *Id.*

101. *Id.*

102. *See* Claire Bushey & Kristen Schorsch, *Part 2: The Reversal: The Financial and Political Calculus That Finally Tipped the Scales*, Crain's Chi. Bus. (Apr. 11, 2016), https://www.chicagobusiness.com/static/section/trauma-power.html.

punitive solution: more police to patrol the neighborhood, more prisons to cage young people who carry guns, or longer sentences for gun crimes. Instead, they called for a trauma center; *they called for care.* And they won a multi-million-dollar trauma center after years of organizing.[103] The lesson here is that there's always a punitive response. And there is also a response rooted in transformative justice, healing, and community restoration — but that requires more imagination.

This example is enormously instructive when it comes to the power of how we frame problems, decide on demands, and go about achieving them. Once they identified the need for healthcare, the question then became: how do we marshal resources — either from the state or large private institutions like the University of Chicago, in this case — toward our own care, and the care of those who are most vulnerable and abandoned?

Let's think about the next step after this trauma center. What is the impact of having this center? Imagine the difference it makes as a teenager to live near a health center that people have fought for, to care for you. Imagine the rippling effects of a fight for radical care. What this might do is open up a new set of questions and next steps. Once organizers win such a victory, that rush can lead people to ask, "What can we do next with this power we've built? What else do we deserve and what else can we organize for?" That is a question worth dreaming on.

This sort of visionary organizing has especially deep roots in Detroit. In spite of the bleak indicators, lifelong activist, philosopher, and Detroit icon Grace Lee Boggs said in 2014, "I feel sorry for people who don't live in Detroit."[104] Detroiters have been forced to forge a different future and different ways of relating — ones that she hoped, and that I hope, will benefit many people far beyond Detroit.[105] Because of the scale of devastation in this city due to the level

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103. *See* Daniel A. Gross, *Chicago's South Side Finally Has An Adult Trauma Center Again*, New Yorker (May 1, 2018), https://www.newyorker.com/news/dispatch/chicagos-south-side-finally-has-an-adult-trauma-center-again.

104. American Revolutionary: The Evolution of Grace Lee Boggs (Center for Asian American Media 2014).

105. As Boggs put it: "I rejoice in the energy being unleashed in the community by our human-scale programs that involve bringing the country back into the city and removing the walls between schools and communities, between generations, and between ethnic groups. And I am confident just as in the early twentieth century people came from around the world to marvel at the mass production lines pioneered by Henry Ford, in the twenty-first century they will also be coming to marvel at the thriving neighborhoods that are the fruit of our visionary programs. . . . My hope is that as more and different layers of the American people are subjected to economic and political strains and as recurrent disasters force us to recognize our role in begetting these disasters, a growing number of Americans will begin to recognize we are at one of those great turning points in history. Both for our livelihood and for our humanity we need to

of organized abandonment by the state, many Detroiters have expanded their imaginations to think outside and beyond capitalism.[106] Detroiters have been reimagining the future of post-industrial cities.

Detroiters are using their full imaginations. They are asking very high stakes questions like, "how can we be healthy people so that we can create healthy communities?" Not only are these organizers meeting essential needs through mutual aid, but they are also offering theories based on those practices. For example, in response to the reality that forty percent of Detroiters do not have access to the Internet, the Detroit Community Technology Project has built their own community mesh networks to deliver free internet based on principles of digital democracy.[107] They train residents on digital stewardship and communication as a human right and justice issue.[108] When asked why they do this work, one of the organizers said, "Justice."[109]

When the grocery stores left the city, many residents did not want to leave, so they devised ways to feed themselves and create a sustainable local food economy. The Detroit Black Community Food Security Network ("DBCFSN") has been leading a movement for Black food sovereignty and will open a cooperatively owned grocery store in the next couple of years.[110] Since 2008, DBCFSN has operated a seven-acre organic farm called D-Town Farm, the largest of thousands of gardens and farms in Detroit.[111] D-Town Farm uses a fully off-grid solar power generation plant that is the first of its kind in Detroit, developed by Ali Dirul of worker-owned Ryter Cooperative Indus-

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see progress not in terms of "having more" but in terms of growing our souls by creating community, mutual self-sufficiency, and cooperative relations with one another." GRACE LEE BOGGS & SCOTT KURASHIGE, THE NEXT AMERICAN REVOLUTION: SUSTAINABLE ACTIVISM FOR THE TWENTY-FIRST CENTURY 133-34 (2012).

106. On organized abandonment, *see* The Humanities Institute at UCSC, *Ruth Wilson Gilmore: Organized Abandonment and Organized Violence: Devolution and the Police*, VIMEO (Nov. 9, 2015), https://vimeo.com/146450686; RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS AND OPPOSITION IN GLOBALIZING CALIFORNIA (Earl Lewis et al., eds., 2007).

107. *Our Work*, DETROIT CMTY. TECH. PROJECT, https://detroitcommunitytech.org/?q=projects (last visited Oct. 4, 2020).

108. *See Technology Rooted in Community Needs*, DETROIT CMTY. TECH. PROJECT, https://detroitcommunitytech.org/ (last visited Mar. 2, 2021); *see also Principles*, DETROIT DIGITAL JUST. COAL., http://detroitdjc.org/principles/ (last visited Mar. 2, 2021).

109. Motherboard, *Meet the People Building Their Own Internet in Detroit*, YOUTUBE (Nov. 16, 2017), https://www.youtube.com/watch?v=1B0u6nvcTsI.

110. *About Us*, DETROIT BLACK CMTY. FOOD SEC. NETWORK, https://www.dbcfsn.org/about-us (last visited Oct. 3, 2020).

111. *D-Town Farm*, DETROIT BLACK CMTY. FOOD SEC. NETWORK, https://www.dbcfsn.org/educational-youth-programs (last visited Mar. 27, 2021); Keep Growing Detroit provides support to thousands of growers in the city. *Our Impact,* KEEP GROWING DETROIT, http://detroitagriculture.net/about/our-impact/ (last visited Mar. 27, 2021).

tries.[112] D-Town Farm's energy station is the first fully off-grid solar power generation plant in the city.[113]

And there are Detroit's Water Warriors.[114] As the city has shut off people's water because they are too poor to pay, Detroiters have linked arms with our people in Flint, and have fought together to make sure we will *all* have access to clean, affordable water as a human right in the decades to come.[115] If U.S. cities continue to have affordable water in the years ahead, it will be because of water warriors like Monica Lewis-Patrick, who are currently fighting this battle for a water affordability plan in Detroit.[116] This fight is coming to your city and the contours of that resistance are being worked out right now in Detroit.[117]

As lawyers, we must recognize — deeply recognize — the ways in which these are questions of life and death, of neglect and organized abandonment, as Ruth Wilson Gilmore puts it,[118] and of power and freedom. Lawyers can transform these into questions of rights and figure out who to sue over pieces of the problem. But that is something that should be done consciously and carefully, and a skill that is not appropriate or necessary in every case. I think if we are honest, we know that these frames are inadequate. If what you learned before law school or what you know about the world is telling you that this framing of a problem seems too easy, or that the problems are more complicated than that, listen to that wisdom. While legal strategies might prove useful as part of a larger campaign, we must be careful not to take up too much space with partial answers. We should admit the law offers some useful half-truths, but then encourage people to keep building power for real change.

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112. *See* David Sands, *Solar to the People: This Detroiter is Making Solar Technology Accessible to All*, Model D (June 5, 2018), https://www.modeldmedia.com/features/ali-dirul-solar-060518.aspx.

113. *See id.*

114. *See* Martina Guzmán, *Water Warriors*, Sojourners (May 25, 2016), https://sojo.net/articles/water-warriors.

115. *Id.*

116. *See* Monica Lewis-Patrick, *Opinion: Water Shutoffs in Detroit Linked to Increase in COVID-19 Cases*, Bridge Detroit (Aug. 14, 2020), https://www.bridgedetroit.com/opinion-water-shutoffs-in-detroit-linked-to-increase-in-covid-19-cases/.

117. *See generally* Nsikan Akpan, *Affordable Water May Soon Dry Up, Especially if You Live Here*, PBS News Hour (Jan. 25, 2017, 5:24 PM), https://www.pbs.org/newshour/science/affordable-water-may-soon-dry-especially-live (It is estimated that one third of people in the U.S. will not be able to afford their water in the coming years); Anna Clark, *The Future of the Great Lakes*, Belt Magazine (Dec. 20, 2018), https://beltmag.com/future-great-lakes-management// (Southeast Michigan sits on nearly a quarter of the world's fresh water and we are on the front lines of the water wars).

118. Intercepted with Jeremy Scahill, *Ruth Wilson Gilmore Makes the Case for Abolition (Part 1)*, Intercept (June 10, 2020), https://theintercept.com/2020/06/10/ruth-wilson-gilmore-makes-the-case-for-abolition/.

A. *A Movement Lawyering Theory of Change*

The idea that organizers and movements are the real force behind transformative change is part of a theory of social change — it is one way of understanding history and how change comes about.[119] It is a premise that underpins many approaches to movement lawyering. But before I had ever heard of movement lawyering or considered becoming a lawyer, I read a passage by Frederick Douglass and it felt deeply right to me: "Power concedes nothing without a demand."[120] As a teenager, it fit with everything I had already come to know about the world. Change requires bold demands and sustained pressure to enact it.

Purvi Shah, of Movement Law Lab, offers us a succinct movement lawyering theory of change: "Sustainable social change occurs when directly-impacted individuals take *collective* action, *lead* their own struggles, and gain *power* to change the conditions of oppression."[121] You need not share this exact theory of change to practice movement lawyering; the important part is that you are conscious of how you think change will come about and that you are working to build the power of movements. A theory of change helps us approach problems with a clear plan, a set of values, a sense of whom we are accountable to in our work, and metrics for success. Understanding your own theory of change — and that of the other lawyers, organizers, and clients you are working with — can help guide decisions and provide a broader strategy from which tactics will flow. Without this understanding, you are likely to be ineffective and throw different tactics at a problem without a clear plan for how change will come about.

How can you develop a theory of change? You already have one, whether you realize it or not. It is your answer to the question of how sustainable social change happens. When I teach law students, I ask them to write a political autobiography about what has shaped them and their thinking about social change.[122] This assignment asks them to reflect on the people, books, experiences, family dynamics, mentors, and other forces that made them who they are and shaped their thinking, values, and commitments. How did you come to care about

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119. *See* Hung, *supra* note 32.

120. Frederick Douglass, *West India Emancipation, Speech Delivered at Canandaigua, New York, August 3, 1857*, *in* Frederick Douglass: Selected Speeches and Writings 358, 367 (Philip S. Foner & Yuval Taylor eds., Lawrence Hill Books 1999) (1950 – 1975).

121. Purvi Shah, Founder and Exec. Dir., Movement Law Lab, Movement Lawyering 101 Training at the Center for Constitutional Rights, Bertha Justice Institute (Aug. 2013).

122. Adapted from an assignment that Lani Guinier and Gerald Torres have given in their Law & Social Movements course.

the problems you care about? What is your vision of the world you want to live in, and what would need to change to bring that world about? Why do you want to be a lawyer? What in your experience has made you think that law is the tool you need or want? Who are you responsible to in this work, and how are you taking your cues from them? How will you all measure success? Grappling with these sorts of questions and learning about previous campaigns through study and discussion can help us develop a theory of change and a set of values to guide our work.

In Detroit, taking our cues from movement organizers in the early days of the Black Lives Matter movement meant coming back from the Law for Black Lives conference in July 2015, meeting with local organizers who had gone to the Movement for Black Lives National Convening in Cleveland the weekend before, and discussing their most pressing needs and how lawyers could be of assistance. We met for hours and decided together on how we, as attorneys, could support the organizing plans. The activists had two asks.

First, they wanted us to provide legal support to combat the criminalization of people who were being prosecuted for turning water back on. Residents were concerned that people who had been disconnected from water were also facing criminal prosecution under state law, which made it a felony to reconnect your water.[123] In the face of dehydration and a public health crisis, people were being criminalized for trying to turn their water back on or assisting their neighbors in doing so.[124] The activists with Detroiters Resisting Emergency Management wanted us to analyze the law, provide a statement from the legal community making the case that no one should be prosecuted under this unjust law, and argue that the *actual criminal act here was turning off people's water.*

We produced that statement, but that was only the beginning. After that point, it became an organizing story. There was a press conference with lawyers and organizers, followed by a community teach-in about the water crises in Detroit and Flint, and a People's Water Tribunal where activists and residents put the emergency manager, the mayor, and the Governor on trial for their actions.[125] This was all

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123. *See* MICH. Comp. Laws § 750.383(a) (2009); *see also Wayne County Prosecutor is Prosecuting Detroit City Residents Who Are Found to Have Illegal Water Hook-Ups*, DETROIT & MICH. CHAPTER OF THE NAT'L LAWYERS GUILD, https://www.michigannlg.org/seeking-contacts-re-water-shut-off-felony-prosecutions/ (last visited Feb. 2, 2021) (discussing how Detroit City residents are being prosecuted under Michigan law.).

124. *See id.*

125. Sharon Howell et al., *Detroit to Flint and Back Again: Solidarity Forever*, 45 CRITICAL SOCIO. 63, 74-76.

happening alongside other life-saving service work, media efforts, and political organizing.

The organizers' second ask of lawyers was a training in legal observing and jail support for movement organizers. So, we put that on as well. Our National Conference of Black Lawyers ("NCBL") chapter hosted a training with the Black Movement Law Project that was specifically focused on how to do legal observing as a person of color who is also disproportionately the target of police violence.[126] Most useful was the relationship building that happened that day. Eighty organizers came from over thirty different organizations who had never been in the same room before — some very radical, others more liberal or progressive. At the end of the day, one of the community organizers said that it would be harder now for politicians to play these groups off of each other because they were not just faceless organizations anymore. They had broken bread together.

More broadly, taking cues from organizers means that lawyers build relationships with organizers, sit in on meetings, and can offer our unique skills, while understanding that legal skills are not necessarily more important than other skills. We are no more important to a movement or a campaign's success than a graphic designer, a communications person, a street medic, a childcare provider, a data scientist, a cook, or a musician. There is work for everyone, with many essential roles. Our job is to sit in the meeting and if people express questions like, "I wonder what the law is on that?" or "I wonder if there's a legal angle here?" we say, "I can find out! I can look that up."

III.   The Detroit Justice Center's Approach: Defense, Offense, and Dreaming

How can lawyers match the power and vision of organizers in Detroit? What role do lawyers play in this type of reimagining and transformation? The model that we have landed on at DJC is "defense, offense, and dreaming."[127] This is our way of meeting immediate needs, supporting solidarity economy efforts, holding space for imagination, and practicing ways of being in community and addressing harm that do not rely on the existing criminal punishment system.

Our approach came about through five years of listening, relationship building, and showing up for organizers in the city. It also

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126. *Black Movement Law Project Training to Support Detroit Movements*, Black Bottom Archives, http://www.blackbottomarchives.com/calendar/2016/1/30/black-movement-law-project-training-to-support-detroit-movements (last visited Mar. 3, 2021).

127. *Our Work*, *supra* note 36.

built upon a long legacy of the National Conference of Black Lawyers ("NCBL") chapter in Detroit.[128] We spent years working to build close, trusting relationships between lawyers and organizers. This involved asking people what they needed, delivering, and repeating, over and over again. We built the relationships and community first, and then built the organization to help hold and support it.

Here, I will not focus on the *what* of the work, or the day-to-day activities — you can read our website for that.[129] This is not about how we went about setting up referral partnerships, creating client intake and file systems, or creating an organizational handbook. Just know, there is an enormous amount of labor that went into that. Those details are less helpful, however, than the *why* and the *how*. I want to convey the animating energy, since that is what has really driven it. I want to convey the spirit of the work.

DJC uses a three-pronged approach to serve individual clients, build power, and catalyze systemic change. The work shifts as our communities' needs shift. Here is what these buckets of work have looked like since the onset of the COVID-19 pandemic and the movement uprisings last summer:

1. **Legal Services & Advocacy Practice (Defense):** Many Detroiters — and, by extension, their families — are shut out of the formal economy because of a suspended driver's license, outstanding warrant, or court debt.[130] Our attorneys remove these types of barriers — helping clients remain out of jail, hold onto jobs and housing, and keep their families intact. We have now served over 1,000 clients.

   Since the start of the pandemic, we have focused on winning the release of people from jails, fighting for eviction moratoriums, co-coordinating legal defense to protect the rights of protestors, and more. LSAP attorneys have also supported the Coalition for Police Transparency and Accountability, formed by community members in response to the police killing of Hakim Littleton on July 10.[131] We also house a bail fund, in partnership with The Bail Project, that has bailed out more than 150 people from the Wayne County Jail since March 2020.

128. *See generally NCBL Detroit Chapter*, https://www.ncbl.org/chapter-detroit (last visited Mar. 3, 2021).

129. *See Our Work*, *supra* note 36.

130. *See* Jade Chowning et al., Detroit Just. Ctr., Highway Robbery: How Metro Detroit Cops & Courts Steer Segregation and Drive Incarceration 2-3 (2020), https://www.detroitjustice.org/highwayrobbery.

131. *See* Violet Ikonomova, *Hakim Littleton Was Killed for Shooting at Police. Detroit Was His Undoing,* Deadline Detroit (Sept. 14, 2020, 6:30 AM), https://www.deadlinedetroit.com/articles/26194/hakim_littleton_was_killed_for_shooting_at_police_detroit_was_his_undoing.

LSAP also houses our Community Legal Advocate ("CLA") program, which trains community members to help Detroiters understand, use, and shape the laws that impact them. As part of our effort to democratize access to the law, the CLAs help build the power of residents to navigate legal processes and government systems. Since 2018, in close partnership with the Coalition for Property Tax Justice, they have helped low-income Detroiters appeal their inflated property taxes — an early intervention to help people avoid tax foreclosure.[132] During the pandemic, the CLAs also implemented a program to regrant $194,750 to returning citizens to help them transition safely back into the community when it was especially difficult to find employment and housing.[133]

2. **Economic Equity Practice (Offense):** Against enormous odds, longtime Detroiters have forged a new path for post-industrial cities. In the face of a devastated economy, Detroiters have kept small businesses going, established urban farms, nurtured local food systems, and created alternative sharing economies. Our Economic Equity Practice works closely with community organizations to strengthen these solutions, providing support for community land trusts, cooperatives, and enterprises led by returning citizens. We have supported the launch of Detroit's first contiguous community land trust and have formed three land trusts to date. Our attorneys partner with organizations like the Detroit Community Wealth Fund to offer trainings on establishing a worker-owned co-op. And we are supporting the launch of cooperatively-owned affordable housing and small business corridors to combat displacement in neighborhoods faced with large incoming developments.[134]

3. **Just Cities Lab (Dreaming):** Our Just Cities Lab is where we focus not just on what we are tearing down, but what we need to build up in our communities to make policing and incarceration

132. *See* Ken Coleman, *Detroit Nonprofit Vows to Continue Fight Against 'Illegal' Tax Foreclosures,* MICH. ADVANCE (Jan. 30, 2019), https://www.michiganadvance.com/2019/01/30/detroit-nonprofit-vows-to-continue-fight-against-illegal-tax-foreclosures/; *see also Detroit Justice Center Pilots Program to Fight Illegal Tax Foreclosures*, DETROIT JUST. CTR. (Jan. 17, 2019), https://www.detroitjustice.org/legal-services-news/communitylegalworkers.

133. Angie Jackson, *Nonprofits Offer Stimulus to Detroiters Returning Home from Prison, Jail During COVID-19*, DETROIT FREE PRESS (July 31, 2020, 6:00 AM), https://www.freep.com/story/news/local/michigan/2020/07/31/stimulus-helps-formerly-incarcerated-people-coronavirus-pandemic/5540577002/; *see also Fall Newsletter*, DETROIT JUST. CTR. (Nov. 10, 2020), https://www.detroitjustice.org/blog/fall2020newsletter.

134. *See Economic Equity*, DETROIT JUST. CTR., https://www.detroitjustice.org/economic-equity (last visited Mar. 3, 2021); *see also Fall Newsletter*, *supra* note 133; *Co-ops for Community-Economic Developers*, DETROIT JUST. CTR., https://www.detroitjustice.org/coops-for-econ-devo (last visited Mar. 3, 2021).

> obsolete. We convene people from Detroit and elsewhere who are, for example, experimenting with approaches for realigning our budgets with what truly makes us safe. We have brought Detroiters together for workshops and design summits to determine what they would build instead of a new jail. In 2020, we launched the Metro Detroit Restorative Justice Network, which is bringing together dozens of community members to build a local hub for restorative justice and increase community capacity to prevent and address harm outside of the criminal punishment system.[135]

We are also an explicitly abolitionist organization. What does that mean? That means we believe in the fundamental dignity of human beings and the earth. That means we are committed to the idea that no human being is disposable. We are committed to the seemingly radical notion that human beings do not belong in cages. It means we invite people to dream with us about the elements of a just city beyond jails, criminalization, and prisons, and we try our best to hold our people's freedom dreams as sacred. Our approach is deeply indebted to the work of Ruth Wilson Gilmore, who emphasizes that abolition is not about the absence of policing, jails, and prisons, but about a presence — the presence of everything we need to make prisons obsolete.[136]

I see the visionary organizing that Detroiters have been doing as abolition work. It is meeting people's needs and building the sort of communities that are safe, where people have what they need to thrive. It is creating forms of safety that depend, not on surveillance and armed patrols, but on communication, beloved community, and making sure we are meeting each other's needs. As Myrtle Thompson-Curtis of Feedom Freedom Growers puts it, "While it's important to create jobs for returning citizens, it's critical that we create communities that no longer create returning citizens."[137]

A. *Our Values*

The legal field is built upon values and norms that maintain existing power dynamics and reinforce white supremacist, capitalist,

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135. *See Just Cities Lab*, DETROIT JUST. CTR., https://www.detroitjustice.org/just-cities-lab (last visited Mar. 3, 2021); *see also About Us*, METRO DETROIT RESTORATIVE JUST. NETWORK, https://metrodetroitrj.org/ (last visited Mar. 3, 2021).

136. *The Case for Prison Abolition: Ruth Wilson Gilmore on COVID-19, Racial Capitalism & Decarceration*, DEMOCRACY NOW (May 5, 2020), https://www.democracynow.org/2020/5/5/ruth_wilson_gilmore_abolition_coronavirus; *see generally* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE (Tamara K. Nopper ed., 2021).

137. Communication on file with the author.

ableist, heteronormative, and patriarchal culture.[138] Every dehumanizing interaction with the courts reminds us of what matters to 'the law' and the legal profession — following rules without regard for human consequences; cruel efficiency; demanding payment in order to be heard, etc. As part of our attempt to break with this culture as much as we could at DJC, we tasked ourselves with developing our own values over the course of our first eight months. As a team, we could not predict what situations might arise or what community members might ask of us on any given day, but we could decide together how we want to show up and who we want to be in the world and in this work. We face dozens of decisions each day, and our values can serve as a north star as we move.

We began developing our values by reflecting on several questions together:

1) Why are you here? Why is this work important to you?
2) What do you want to make sure is valued in our work with clients and in this organization?
3) What do you want to see us achieve?

From our answers and subsequent discussion, we developed a draft of shared values that we revised over two more sessions, several months apart. Our debates over our values were some of the most exciting and rigorous conversations I have ever had. Our discussions about the economic system we wanted to live within and how we wanted to deal with conflict, for example, were not abstractions — we were wrestling with what we were willing to commit to and fight for. The stakes were clear. Our choices had real implications for how we would relate to each other, our clients, and others in our communities. We landed on the following values to guide us:

- We are committed to individual and collective liberation — and recognize the two as inseparable.
- We come to this work with a sense of responsibility, and a deep desire to use our training and talents to serve our community.

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138. *See generally The Characteristics of White Supremacy Culture*, Showing up for Racial Just., https://www.showingupforracialjustice.org/white-supremacy-culture-characteristics.html (last visited Feb. 5, 2021), adapted from Kenneth Jones & Tema Okun, Dismantling Racism: A Workbook for Social Change Groups (2001) (on how elements of white supremacist culture show up in social change organizations).

- We work with our clients in a way that cultivates dignity and autonomy. We respect and honor each person's humanity, we seek to understand their stories and circumstances, and we hold their freedom dreams as sacred.
- We are committed to democratizing access to the law. We regard clients as partners in our mission. Rather than serving as gatekeepers, we aim to share tools so that people can understand, navigate, and transform disempowering systems.
- We approach our work with a sense of joy, creativity, and purpose. We are nimble problem-solvers who look for innovative ways to respond to our community's needs and expand our collective understanding of what is possible.
- We value our relationships above all. We work at a pace that allows us to build deep trust with our partners and clients. We reach out to others for support and direction, and we communicate with self-awareness, empathy, and humility. Should conflicts arise, we are committed to calling each other in using practices that restore rather than punish.
- We are hopeful; we believe that the best possible outcome is attainable, and we work toward it.
- We help our clients gain economic independence, and work to redistribute power and wealth. We work toward a society in which abundance is shared for the collective good.
- We take our cues from movements that are fighting for racial justice and economic equity.
- We are committed to cultivating the leadership of marginalized individuals and groups, including Black people, people of color, indigenous people, immigrants, women, LGBTQ people, people with disabilities, people involved in the criminal legal system, and people who have loved ones currently or formerly in the criminal legal system.
- We value the collective wisdom of intergenerational experiences and harness the power it brings to our work.
- We seek a balance of "defense, offense, and dreaming." We must do what we can to alleviate present suffering. We are also committed to transformational change and building a template for a more just society. It is not enough to focus on what we are fighting against; we must focus on what we are

fighting for. We invite people to dream of a better future and to work toward it with us.[139]

At our first staff meeting of the year in 2019, we read our agreed upon values aloud and talked in pairs about these questions:

1) Which of these values comes most easily for you? How do you envision living it out this year?
2) Which of these values seems most challenging or complicated for you? How do you envision living it out this year?

This opened up a powerful conversation as it became clear that some values, such as "we are hopeful," come easy to some (or, more likely, they have developed a regular practice around it) and are harder for others. With this awareness, people could think back on that discussion later and know who they might turn to when they are struggling to put particular values into practice.

All of these values are hard to live out, especially within a society and profession that reinforces the opposite. How can we keep these values present? We have started to come up with questions we can ask ourselves to help us live into and practice these values, for example:

- We value the collective wisdom of intergenerational experiences and harness the power it brings to our work. *What can elders teach us? Who has done this thing before? What can younger activists or lawyers teach us? What can they tell us about the urgency of this moment and what it requires?*
- We value our relationships above all. We work at a pace that allows us to build deep trust with our partners and clients. *Am I valuing efficiency over relationships? Before plowing ahead, who should I check in with? Do I know the person I am talking to? Do I know enough about what drives them that I would be able to speak to their heart? If not, are they truly a partner?*
- We are committed to democratizing access to the law. We regard clients as partners in our mission. Rather than serving as gatekeepers, we aim to share tools so that people can under-

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139. Law for Black Lives and People in Education have been sources of inspiration as we define and refine the values that guide our work. *See generally* Law for Black Lives, http://www.law4blacklives.org/ (last visited Dec. 11, 2020); People in Educ., https://www.peopleineducation.org/ (last visited Dec. 11, 2020).

stand, navigate, and transform disempowering systems. *Am I gatekeeping here? Could we train people up to wield this legal tool themselves?*
- We approach our work with a sense of joy, creativity, and purpose. *When I feel a sense of joy during the day, how can I make it contagious so that my colleagues feel it too? Are there ways I could change my approach or go about this situation more creatively?*

It is one thing to describe a utopian set of values and quite another to figure out how to make them real in our society. They require constant practice and self-reflection. It helps to keep them present — on the wall next to my desk, for example, where I can look at them when I am about to make a phone call or send an email, and I can be reminded of how I want to show up. Better yet, we can use them as a shared language, as guiding questions in our meetings, and to help each other think through our next moves.

B.   Our Approach in Practice

Rather than walk through the work of each practice area, I will tell some stories. Over time, we realized that "defense, offense, and dreaming" does not map neatly onto different practice areas with certain teams only engaging in one mode. It is more fractal in nature — it is not that one team does "defense" while others go on "offense," but rather that we all need to apply elements of each to tackle problems.[140]

1.   Fighting Back Against the New Wayne County Jail

When we opened our doors in April 2018, we quickly joined with organizers in a longstanding fight against a new Wayne County jail complex. Within months, we were representing clients in federal court, suing Wayne County over its plans to build a new jail.[141] We

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140. *See generally* Adrienne Maree Brown, Emergent Strategy: Shaping Change, Changing Worlds (2017) ("When we speak of systemic change, we need to be fractal. Fractals—a way to speak of the patterns we see—move from the micro to macro level. The same spirals on sea shells can be found in the shape of galaxies. We must create patterns that cycle upwards. We are microsystems."). *Id.* at 59.

141. *See* Nicquel Terry Ellis, *Lawsuit: Wayne Co. Didn't Give Voters Fair Notice of Jail Bond Issuance,* Detroit News (Jul. 19, 2018, 1:56 PM), https://www.detroitnews.com/story/news/local/wayne-county/2018/07/19/lawsuit-says-wayne-co-didnt-give-fair-notice-jail-bond-plans/796570002/; Press Release, Detroit Just. Ctr., Detroit Justice Center Sues Wayne County in Federal Court to Defend Public's Right to Referendum on New Jail (July 18, 2018), https://www.detroitjustice.org/blog/2018/7/18/h3bpress-releasebh3detroit-justice-center-sues-wayne-county-in-federal-court-to-defend-publics-right-to-referendum-on-new-jail.

did not anticipate doing litigation work that soon, but organizers and community members who had been attending County Commission meetings and speaking out against the new jail were shocked when the Commission moved to issue $425 million in bonds to finance the project.[142] They asked us to investigate public notice requirements, as they thought they still had the right to seek a public referendum on the project before the bonds could be issued.

When we investigated, it appeared that the county had violated people's due process rights by not providing meaningful notice of its plans to issue the jail bonds. We wrote to Wayne County Executive Warren Evans and the Wayne County Commissioners on behalf of citizens, community advocates, and attorneys who were alarmed by the revelation that the County intended to proceed with issuing the bonds.[143] When the County declined to meet with us or publish meaningful notice, we filed the lawsuit on behalf of three plaintiffs.[144] Had our clients won, they and others could have gathered petition signatures to put the jail project up for a public vote, rather than having fifteen county commissioners make that decision.[145]

The lawsuit was just one means by which we partnered with organizers around the jail fight that summer. In June, we co-hosted a Juneteenth event at the Charles H. Wright Museum of African American History where people ate delicious food, kids put on dance performances, elders talked about the significance of Juneteenth, and people connected the meaning of the holiday to the current fight against the new jail. DJC attorneys helped people apply to have their criminal records expunged. Complex Movements, a movement-building artist collective, held a workshop where people divided into two groups — one group drew their visions of what Detroit could build instead of a new jail, and the other sat in a circle and spoke their dreams of what we could build. Complex Movements combined the

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142. *See* Nicquel Terry, *Wayne Co. Commission Oks Land Swap for Gilbert Jail*, Detroit News (Apr. 5, 2018, 9:30 AM), https://www.detroitnews.com/story/news/local/wayne-county/2018/04/05/gilbert-land-swap-jail-deal/33567101/.

143. *See* Detroit. Just. Ctr., *supra* note 134 (signatories included American Friends Service Committee's Michigan Criminal Justice Program, Black Youth Project (BYP 100), Civil Rights Corps, Detroit Action Commonwealth, Detroit Nation Outside, Detroit People's Platform, Good Jobs Now, JustLeadershipUSA, the Michigan chapters of the National Conference of Black Lawyers and the National Lawyers' Guild, Street Democracy, the Wayne County Criminal Defense Bar Association, and others.).

144. Complaint, Buni v. Wayne Cty., No. 18-cv-12243, (E.D. Mich. July 17, 2018), ECF No. 1.

145. The defendants' motion to dismiss was eventually granted in 2019, after the court denied the request for injunctive relief, and the Sixth Circuit affirmed on appeal. *See* Buni v. Cty. of Wayne, No. 18-CV-12243, 2019 WL 1570820, at *1 (E.D. Mich. 2019).

two into a powerful video with Detroiters' visions for all of the things we need and could build.[146]

That summer, we also partnered with The Bail Project to launch a revolving bail fund to get people out of the Wayne County Jail who were there pre-trial and could not afford bail — as is the case for over half of people in the jail.[147] We also created a fact sheet with information about the proposed jail and data that showed how jails *cause* poverty, joblessness, and housing instability, and make families and communities less safe.[148] Later, we crunched the numbers and produced an infographic on what we could build with $533 million.[149] For example, we showed that we could renovate and modernize all DPSCD schools ($500 million) or house every person without shelter in Detroit in $90,000 homes and give $5,000 tax credit to 64,000 homes facing tax foreclosure.[150]

In September, our Just Cities Lab partnered with youth organizers from 482Forward, Detroit Summer, Teen H.Y.P.E., and architects from Designing Justice + Designing Spaces to host a Restorative Justice Youth Design Summit where teens answered the question, "How could we spend half a billion dollars in your community to make you feel safe, valued, and empowered?"[151] Not a single person said we needed a new jail or more police. One girl said, "Let's build a mental health spa." She explained that this would be a place where people could go and talk through whatever is weighing them down or making them anxious. There would be individual therapy on the second floor and group therapy on the third floor, and you could go up to the roof and look out at the Detroit River. The teens had it planned down to what paint colors would be most soothing for the walls. One boy said, "If I had that money, I'd give it away to my neighbors. Because I'd know that if they felt OK and safe, I would be safe too." Another girl said, "I wish there were a building where you could go and if you really needed money, like *really needed it*, you could get what you needed, without filling out a lot of paperwork."

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146. Detroit Justice Center, What Should We Build Instead of Jails*?,* YOUTUBE (June 26, 2018), https://www.youtube.com/watch?v=QCd9AVZyGSc.

147. *See Detroit Justice Center and The Bail Project Team up for First Bail Out*, DETROIT JUST. CTR. (July 9, 2018), https://www.detroitjustice.org/blog/2018/7/9/h3bblogbh3detroit-justice-center-and-the-bail-project-team-up-for-first-bail-out.

148. *New Wayne County Jail Fact Sheet*, DETROIT JUST. CTR, https://static1.squarespace.com/static/5a413ae949fc2b12a2cb973f/t/5b3a20cef950b774336a7f7a/1530536142781/Fact+Sheet+6.29+%281%29.pdf (last visited Oct. 3, 2020).

149. Detroit Justice Center (@justcitydetroit), TWITTER (June 4, 2020, 12:12 PM), https://twitter.com/justcitydetroit/status/1268576255655514112?s=20.

150. *Id.*

151. *See Report,* DETROIT JUST. CTR., https://www.detroitjustice.org/blog/2019/8/29/report (for video and full report from the summit).

They said: pay our teachers; fix the water pipes in our schools; create affordable and accessible housing; build transit that will get us from one side of the city to the other; and create restorative justice centers. The *Metro Times* covered the summit[152] and the teens' ideas reverberated; we have heard from people from DC to Seattle who say, "look at Detroit's young people, showing us the world beyond jails."

The fight continues against the jail, criminalization, and incarceration, and *for* radical care, true safety, and well-being. The upshot here is that the federal lawsuit was not the main story. It was one small piece — one tactic — in a larger, ongoing fight. And I have offered just one small slice of this narrative. People were fighting a new jail for years before 2018 and have continued to pursue varied strategies on many fronts. Today, we continue to work alongside groups like Michigan Liberation[153] and others who are waging divest/invest fights, challenging cash bail, and who have come up with a community-driven agenda for safety. Our work as lawyers over the past couple years has not been to figure out the next federal lawsuit to file,[154] but instead has involved ongoing relationship building, representing organizers who needed legal assistance, producing research and fact sheets to help equip organizers in their fights, partnering on their events and campaigns when asked, and more.

2. *Legal Support for a Solidarity Economy*

Our Economic Equity Practice ("EEP") provides legal support to help communities realize their goals for neighborhoods that are healthy, beautiful, affordable, and sustainable — where long-time Detroiters are cherished and belong. Many of the organizations I described in the visionary organizing section above have worked for years to build viable urban farms and worker-owned cooperatives, to fight for community benefits agreements, and more. Our EEP attorneys have established relationships with these organizations and support them in moving some of their visions along. This has involved

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152. *See* Samuel Corey, *Detroit Teens Reimagine Criminal Justice with Alternative to New Jail*, Detroit Metro Times (Oct. 5, 2018, 9:58 AM), https://www.metrotimes.com/news-hits/archives/2018/10/05/detroit-teens-reimagine-criminal-justice-with-alternative-to-new-jail.

153. *See generally Home*, Mich. Liberation, https://miliberation.org/ (last visited Mar. 3, 2021).

154. However, we did partner with Michigan Liberation, Civil Rights Corps, the Advancement Project, and others to sue Wayne County Jail officials in May 2020 over their COVID-19 response, calling for the immediate release of medically vulnerable people, *see generally* Russell v. Wayne Cty., No. 2:20-cv-11094 (E.D. Mich. 2020); Angie Jackson, *Inmates, Advocacy Groups Sue Wayne County Sheriff Over COVID-19 Response in Jails,* Detroit Free Press (May 5, 2020, 9:46 AM), https://www.freep.com/story/news/local/michigan/2020/05/05/wayne-county-jail-coronavirus-lawsuit-medically-vulnerable-inmates/3076656001/.

providing legal services and workshops with the Detroit Community Wealth Fund,[155] holding community teach-ins on what a community land trust is to help people determine whether it is a useful path for their neighborhood, and partnering with Detroit People's Platform[156] to create a toolkit for residents who want to serve on Neighborhood Advisory Councils and wield more influence in negotiations with developers.

Our Economic Equity Practice is one of the key ways that we help our clients translate their freedom dreams into reality. What does that mean in practice? One of our clients is a community organization that quietly bought up fourteen homes around their community center. They came to us because they wanted to figure out some sort of legal entity to keep the houses and the neighborhood affordable for generations; perhaps a community land trust. They said that they wanted to turn one of the homes into transitional housing for men coming back from prison. And they want to outfit the entire neighborhood with community solar. And they want to create a small business corridor. *That is a freedom dream.* That is the power of a community coming together to decide what they want. They are combining solutions for neighborhood affordability, re-entry housing, and climate justice. And it is far better than anything that a think tank or attorneys working in isolation could come up with. It is our job as movement lawyers to help them translate it into reality.

That charge has meant needing to adapt and become creative problem-solvers. Our attorneys have needed to figure out how to do what is being asked of us. We do not get straightforward legal asks; more often we are approached with big, beautiful visions and complicated, exciting puzzles. We are also trying to learn as we go and make our lessons available to other groups across the city, and other parts of the country, who might want to try something similar. In early 2020, we supported the launch of Detroit's first contiguous community land trust, and our Economic Equity Practice has formed three community land trusts to date. Now, we are in the process of figuring out how to support these clients in the next stages of their community development work. And we are also working to reverse-engineer some of their successes so that we can help other community organizations that are in earlier stages prepare to acquire land and become ready for cooperative governance.

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155. *See generally About DCWF*, DETROIT CMTY. WEALTH FUND, https://www.detroitcommunitywealth.org/about-dcwf-1 (last visited Mar. 3, 2021).

156. *See generally About*, DETROIT PEOPLE'S PLATFORM, https://www.detroitpeoplesplatform.org/about/ (last visited Mar. 3, 2021).

3. *Fighting for Individual Clients and Structural Change*

From the start, the Legal Services & Advocacy Practice ("LSAP") has faced the challenge of striking a balance between individual client representation and systemic change. Our attorneys are committed to solving underlying problems, rather than just moving people through unjust systems one by one. They also try to ensure that our clients are truly in a better position after engaging with us. For example, our attorneys quickly realized that while they could get court fines and fees reduced from $4,000 to $400, that $400 might as well have been $4,000, since our clients could not afford it either way. The team worked with Detroit's National Lawyers Guild chapter to establish a Barrier Relief Fund, where local attorneys could apply on behalf of their clients for funds that would make a material difference in the clients' lives. This means, for example, that people can receive several hundred dollars to resolve their court obligations and get their driver's license reinstated so that they can drive to work.

About a year into our work, the LSAP team decided to tackle the underlying issues behind our individual clients' experiences and, toward that end, they produced a white paper titled "Highway Robbery: How Metro Detroit Cops and Courts Steer Segregation and Drive Incarceration."[157] The white paper details how low-income and predominately Black drivers are disproportionately saddled with excessive fines and fees, and are criminalized for minor traffic offenses.[158] The purpose of the paper was to illustrate this systemic problem and help catalyze a larger advocacy campaign for legislative and structural changes. The LSAP team was instrumental in getting legislation passed that will end driver's license suspensions in Michigan for failure to pay fines and fees.[159] In 2019, Michigan suspended over 365,000 driver's licenses for unpaid tickets or failure to appear in court,[160] so this is welcome relief for our clients and many others. Yet, there is far more work to be done, and LSAP attorneys will continue to fight alongside our movement partners for more widespread change.[161]

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157. CHOWNING ET AL., *supra* note 74.

158. *Id.* at 2-3.

159. *See* Angie Jackson, *Whitmer Signs Bills to Curb License Suspensions, Dozens of Criminal Justice Reforms*, DETROIT FREE PRESS (Jan. 4, 2021, 8:18 PM), https://www.freep.com/story/news/local/michigan/2021/01/04/michigan-whitmer-criminal-justice-law-2021/4133842001/.

160. *See* Angie Jackson, *Michigan Lawmakers Pass Bills to Curb License Suspensions for Unpaid Fines and Fees*, DETROIT FREE PRESS (Dec. 10, 2020, 7:28 PM), https://www.freep.com/story/news/local/michigan/2020/12/10/bills-end-drivers-license-suspensions-unpaid-fines-fees/3880138001/.

161. *See Statement on the MI Jails Task Force Bills*, DETROIT. JUST. CTR. (Dec. 22, 2020), https://www.detroitjustice.org/blog/statementtaskforcebills.

The Community Legal Advocate ("CLA") team is grappling with similar questions when it comes to approaching individual client work with the aim of achieving systemic change. In 2019, they identified eighty-seven clients at risk of losing their homes to tax foreclosure. They assisted residents in preparing tax appeals, accompanying residents to the Board of Review, and guided residents through the complicated appeals process. The CLAs had a 100% success rate during the appeals process, successfully lowering property taxes for low-income residents by $426,300 collectively. They have also been deeply involved in the work of the Coalition for Property Tax Justice, which is fighting to stop unconstitutional property tax assessments, compensate Detroiters who lost their homes, and stop all foreclosures of owner-occupied homes until systemic over-assessments are fixed.[162] The CLAs have been exploring ways to partner with other movements as well. They, like their attorney counterparts, must ask themselves: How do we make sure we are truly building the power of movements, and not just trying to serve as many people as possible? This question may sound straightforward, but it becomes difficult in the face of such enormous and immediate need.

4. *Moving Forward: Some Practices and Questions to Guide Our Work*

We are still figuring out how to move together through rapid growth and change; in the course of two years, we grew from a team of two people to more than twenty. After our first several months, we filed a federal lawsuit, housed a bail fund, served clients, and hosted a national gathering for lawyers who wanted to infuse their work with more joy and creativity.[163] We were adding new people every few weeks. Around three months in, a wise friend pointed out to me that we had experienced years' worth of growth already, so it was no wonder that it felt hard to digest it all. In that moment, and in many others, I turned to adrienne maree brown's *Emergent Strategy*, and in particular her passages on emergence and adaptation:

> Birds don't make a plan to migrate, raising resources to fund their way, packing for scarce times, mapping out their pit stops. They feel a call in their bodies that they must go, and they follow it, responding to each other, each bringing their adaptations. There is an art to

162. *See Our Demands,* COAL. FOR PROP. TAX JUST., https://illegalforeclosures.org/ (last visited Feb. 1, 2021).

163. *See Movement Lawyering at the 2018 Allied Media Conference,* DETROIT JUST. CTR. https://www.detroitjustice.org/blog/2018/3/18/h3beventbh3-movement-lawyering-at-the-2018-allied-media-conference (Last visited Mar. 15, 2021).

flocking: staying separate enough not to crowd each other, aligned enough to maintain a shared direction, and cohesive enough to always move towards each other. (Responding to destiny together.) Destiny is a calling that creates a beautiful journey. Emergence is beyond what the sum of its parts could even imagine.[164]

adrienne describes what we can learn from resilience and adaption strategies that we observe in the natural world.[165] Because our organizations and movements are in a constant state of change, our strength and resilience comes in our critical, deep, and authentic connections. Flocking works, she shows, because each bird knows its relative distance to the six birds around it and moves, responds, and glides in relation to them. And the flock gets to where it is going.[166]

With this guiding spirit, I developed an exercise for our next staff meeting. We began with a three-minute video of starlings' murmuration; we watched hundreds of birds swirling in formation, creating giant shape-shifting clouds. It is miraculous that they do not bang into each other — somehow each knows just how to move, adjust, and adapt together. I asked the team how they felt watching it, and people talked about being struck by their beauty. One staff attorney had tears in their eyes. "I wish they could see themselves," they said.

I read them the passage from *Emergent Strategy* and then asked them to journal about three questions: 1) What is one thing you are most proud of about your work at DJC so far? 2) What is one way that you have been stretched? 3) What is something you have appreciated about how someone else has shown up in their work here? The first two questions were just for ourselves — we did not share our answers. For the last one, people wrote notes to each person and gave them to each other. These questions were a way of helping us be attuned to our purpose and to each other. Reflecting on them helped us understand how we are showing up and what we bring, how we are changing and how our needs are changing, and how our teammates are showing up. This self-awareness allows us to locate and orient ourselves within a team.

Part of being in this work means being changed by the work and by each other.[167] This type of reflection — though we do not do enough of it — can help us process the changes we are undergoing,

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164. BROWN, *supra* note 140, at 13.

165. *See id.*

166. *Id.* at 71.

167. As Mary Hooks put it beautifully, "The mandate for our people is to avenge the suffering of our ancestors, to earn the respect of future generations, and to be transformed in the service of the work." *See* MOVEMENT 4 BLACK LIVES, REPARATIONS NOW TOOLKIT 3 (2020), https://m4bl.org/wp-content/uploads/2020/05/Reparations-Now-Toolkit-FINAL.pdf.

and help us understand and communicate our shifting needs, capacities, and desires. What we will be called upon to do is not always clear ahead of time and may call for quick shifts, so this helps us stay in formation and ready to move together and lean on and support each other in new ways.

Because the work will change so often, I will close with some questions that may be useful in your practice. When it comes to truly transformative work, it is not about having all the answers, it is about asking better questions. Often, that means listening to those who are asking better questions about what our communities truly need and deserve — listening for freedom dreams.

1) **Who am I accountable to? How do I know I am accountable?**[168] *How do I know I am accountable is key.* If the legal team is not delivering, which organizer is going to call you up and tell you so? Maybe you know you are accountable because you will need to report back at weekly coalition meetings. You should have very specific faces, conversations, relationships, and agreements in mind when thinking about accountability and responsibility. You might also ask the basic questions: "Why am I doing this? Who asked me to do this?"

2) **Am I building power or creating dependency?**[169] **What would allow people to more effectively take on the next fight?** If my organization or I were not here two years from now, would community members be more equipped to take on the next fight? Because there is always a next fight.

3) **Five generations from now, what will Black people thank *us* for?** Vince Warren of the Center for Constitutional Rights posed this question at the 2015 Law for Black Lives conference. [170] It helps me remain focused on what is truly important. Instead of narrowly focusing on what seems 'winnable' this year, it pushes me to think about what I can do right now to seed more possibilities for those who will come after me. What is the work that will reverberate across generations? I am thankful to Black people five generations ago who were obsessed with getting free and refused to settle for

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168. *See* PURVI SHAH, CENTER FOR CONSTITUTIONAL RIGHTS, BERTHA JUSTICE INSTITUTE HANDOUT (on file with author); *see also,* Hung, *supra* note 32 at 24.

169. *See* Quigley, *Reflections, supra* note 31 at 457-58, 464.

170. Center for Constitutional Rights, *RadTalks: Vince Warren*, YOUTUBE (Aug. 11, 2015), https://www.youtube.com/watch?v=GDWUAEgvK-c&t=31s.

> less. We are indebted to those people. And today, we can be those people for future generations. What kind of ancestor do you want to be?

My hope is that questions like these help us match the energy and vision of movement organizers. When we allow ourselves to be guided by curiosity, relationships, and collective visions, we can be more nimble and responsive in our legal practice and remain open to a fuller range of possibilities. Hopefully, that way we stay in the practice of using our full imaginations and open hearts, not just our well-trained legal minds. Organizers are posing fundamental questions of power and freedom, offering dazzling visions and examples of what is possible when we fight for the full dignity of *everyone* in our communities — and our collective future depends on us listening to and supporting those demands and dreams.

Racial Preferences in COVID-19 Vaccination: Legal and Practical Implications

Michael Conklin[*]

I don't think we should ask doctors to remedy past discrimination. They can't do it, except haphazardly. And it's not their job. A doctor ought to consider a patient's present medical needs and nothing else: not her sex, not her race, not her long-term disabilities, not whether her mother loves her, not any fact about her, save as relevant to her medical condition.[1]

Abstract

The severity of COVID-19 and the limited supply of vaccines poses a pressing question: Who should receive priority for the vaccine? Many experts support the controversial plan to prioritize Black and Hispanic people. For justification, they point to the highly disparate health outcomes minorities experience from COVID-19 that are rooted in historical racial injustice. However, such racial classifications implicate the Equal Protection Clause of the Fourteenth Amendment.

This Article analyzes the potential outcome of such an equal protection challenge. It explains why "strict scrutiny" would be the controlling legal standard, even though the issue has never been adjudicated by the Supreme Court in a health care context. Next, it considers how the existence of alternative vaccine distribution policies violate the narrowly tailored requirement. It considers the analogous case law of affirmative action in college admissions, in which the use of racial preference is well established. It also consid-

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ers alternative vaccine distribution plans that do not utilize racial preferences and how even they are susceptible to legal challenges.

This Article further addresses pragmatic implications that would tangentially affect the legal determinations. These implications include potential counterproductive results of racial preferences, such as increased skepticism among the most vulnerable that they are being used as guinea pigs, a stigmatizing effect that could be used by white supremacist groups to promote a perceived martyrdom status, and the dangerous conflation of disparate health outcomes with genetic superiority and inferiority. These issues are considered against the backdrop of a changing Supreme Court, which has shown a willingness to diverge from established precedent regarding racial preferences.

INTRODUCTION

In 2020, the COVID-19 pandemic affected every aspect of American life. Schools were closed,[2] curfews were implemented,[3] restaurants were forced to shut down,[4] face mask mandates were established,[5] and even the Supreme Court temporarily closed.[6] The COVID-19 pandemic killed approximately 350,000 Americans in 2020, and the rate of death is increasing.[7] An unprecedented effort to create a vaccine resulted in two being approved for distribution in December of 2020,[8] but the process of administering them has been much slower than expected.[9] The limited number of vaccine doses available

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2. *See* Erin Richards, *Trump: States Can Cancel Standardized Tests*, USA TODAY (Mar. 24, 2020, 12:33 PM), https://www.usatoday.com/story/news/education/2020/03/20/coronavirus-trump-standardized-tests-canceled-school-closing/2885842001/ [https://perma.cc/WN95-DKSW].

3. Ronn Blitzer, *Curfews, Closures and More: What the Government Can and Can't Do in a Health Emergency*, FOX NEWS (Mar. 19, 2020), https://www.foxnews.com/politics/curfews-closures-and-more-what-the-government-can-and-cant-do-in-a-health-emergency [https://perma.cc/Q9WK-B25S].

4. Anna Wiederkehr, *Coronavirus Is Hitting Restaurants Hard, Even in States That Haven't Shut Them Down*, FIVETHIRTYEIGHT (Mar. 19, 2020, 2:58 PM), https://fivethirtyeight.com/features/coronavirus-is-hitting-restaurants-hard-even-in-states-that-havent-shut-them-down/ [https://perma.cc/6S9P-CSFQ].

5. Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP (Mar. 8, 2021), https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus/.

6. Katie Bart & Kalvis Golde, *Supreme Court's Closure Could be First Disease-Related Shuttering in a Century (Updated)*, SCOTUSBLOG (Mar. 12, 2020, 5:27 PM), https://www.scotusblog.com/2020/03/supreme-courts-closure-could-be-first-disease-related-shuttering-in-a-century/ [https://perma.cc/AFE5-7BQ7].

7. *Covid-19 Coronavirus Pandemic*, WORLDOMETER (last updated March 2, 2021), https://www.worldometers.info/coronavirus/country/us/. January 6th and 7th of 2021 were record-setting days for both new infections and deaths. *See id.*

8. Heidi Ledford, *Moderna COVID Vaccine Becomes Second to Get US Authorization*, NATURE PORTFOLIO (Dec. 19, 2020), https://www.nature.com/articles/d41586-020-03593-7.

9. Richard Harris, *Why the COVID-19 Vaccine Distribution Has Gotten Off to a Slow Start*, NPR (Jan. 1, 2021, 7:02 AM), https://www.npr.org/2021/01/01/952652202/why-the-covid-19-vaccine-distribution-has-gotten-off-to-a-slow-start (discussing how experts forecasted 20 million

and the life-or-death nature of vaccinating people has led to a variety of proposals regarding who should be prioritized for vaccinations.[10] Other factors, such as the threat of a new strain of the virus[11] and expiring unemployment benefits,[12] exacerbate the importance of priority order.

Many experts support the controversial plan to prioritize people based on race.[13] For justification, they point to documented, disparate health outcomes minorities faced historically and currently face during the COVID-19 pandemic.[14] These advocates also point to the underlying root causes of these disparate outcomes as support for racial preferences in vaccination.[15] Some experts say this reality means we are "required" to prioritize certain races,[16] while other experts say such a policy would be unethical, unconstitutional, and counterproductive.[17] One thing is clear: regardless of the virtuous intentions of those who advocate for them, racial classifications implicate the Equal Protection Clause of the Fourteenth Amendment.[18]

This Article analyzes the potential outcome of an equal protection challenge of racial preferences in vaccine distribution. First, it explains why "strict scrutiny" would be the controlling legal standard, even though the issue has never been adjudicated by the Supreme Court in a health care context. Next, it considers how the existence of alternative vaccine distribution policies violate the narrowly tailored requirement of strict scrutiny. It then considers the analogous case law of affirmative action in college admissions, in which the use of racial preferences is well established.

This Article also considers alternative vaccine distribution plans that do not expressly prioritize on the basis of race. It concludes that,

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Americans would be vaccinated by the end of 2020 but instead only 3 million had been vaccinated).

10. *See Infra* notes 64–71 and accompanying text.

11. Noah Higgins-Dunn, *New York Gov. Cuomo Warns Covid Variant Discovered in UK Could Strain Hospitals, Force Shutdown*, CNBC (Jan. 7, 2021, 7:12 PM), https://www.cnbc.com/ 2021/01/07/new-york-gov-cuomo-warns-covid-variant-discovered-in-uk-could-strain-hospitals-force-shutdown-.html.

12. Oscar Gonzalez, *$300 Bonus Unemployment Checks: Will You Have to Pay Taxes? What you Should Know*, CNET (Feb 27, 2021, 1:00 AM), https://www.cnet.com/personal-finance/ extra-weekly-unemployment-benefit-how-long-the-300-checks-will-last-qualifications-and-more/.

13. *See infra* notes 72–84 and accompanying text.

14. *See infra* notes 21–41 and accompanying text.

15. *See infra* notes 72–84 and accompanying text.

16. Walter Olson, *Government Must Not Assign a Coronavirus Vaccine by Race*, CATO INST. (Aug. 19, 2020), https://www.cato.org/publications/commentary/government-must-not-assign-coronavirus-vaccine-race.

17. *Id.*

18. *See infra* note 112 and accompanying text.

while not as susceptible to legal challenges as the explicit racial preferences, these alternatives are not immune to legal challenges. Namely, racially disproportionate impact can be used as evidence of racially discriminatory intent.[19]

This Article further looks at pragmatic implications that would tangentially affect the legal determinations. These implications include potential counterproductive results of racial preferences, such as increased skepticism among the most vulnerable that they are being used as guinea pigs, a stigmatizing effect that could be used by white supremacist groups to promote a perceived martyrdom status, the lack of objective criteria for determining racial classifications, and the dangerous conflation of disparate health outcomes with genetic superiority and inferiority. These issues are considered against the backdrop of a changing Supreme Court, which has shown a willingness to diverge from established precedent regarding racial preferences.

Part I of this Article catalogues the historical medical mistreatment of Black people in America. Part II looks at the heightened rate of skepticism for the COVID-19 vaccine in the Black community and provides potential explanations. Part III documents the disparate health outcomes from COVID-19 experienced by Black people and other minority groups. Part IV considers three broad categories of proposed vaccine distribution that include explicit racial preferences, facially race-neutral plans with intentionally racially disparate outcomes, and completely race-neutral plans. Part V applies legal precedent to determine the most likely outcome of a legal challenge to each of the three vaccine distribution plans. Part VI analyzes non-legal, pragmatic implications of a potential explicit racial preference plan. This article concludes by explaining how the importance of these considerations extends far beyond just the current COVID-19 pandemic.

I.   Historical Medical Mistreatment of Black People in America

America has a long, troubled history involving medical care and Black Americans. The following is a brief sample of some of the more noteworthy atrocities and disparities Black Americans faced — and in some instances, still face — in the U.S. medical system.

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19. *See infra* note 151 and accompanying text.

- The "father of modern gynecology," J. Marion Sims, experimented on female slaves.[20] One slave was forced to undergo thirty gynecological surgeries without anesthesia.[21]
- In 1932, the infamous Tuskegee Syphilis Study began.[22] Participants in the study — who never provided informed consent — were denied access to penicillin to treat their syphilis.[23]
- During World War II, a secret experiment singled out Black participants to test the effects of chemical agents, such as mustard gas.[24]
- A 1990s study of the now banned fenfluramine consisted of entirely Black and Hispanic subjects who were deemed "at risk" of criminal behavior based solely on family history.[25] The parental consent form for the experiment was misleading.[26]
- Black people are underrepresented in medical trials.[27] One study found that in twenty-four of thirty-one cancer drug trials, Black people made up five percent or less of participants.[28]
- Black people are significantly more likely to die in childbirth than White people.[29]
- Black people are less likely to be referred for testing given equal symptoms.[30]
- Black people are less likely to receive treatment given similar symptoms.[31]

20. Sarah Zhang, *The Surgeon Who Experimented on Slaves*, ATLANTIC (Apr. 18, 2018), https://www.theatlantic.com/health/archive/2018/04/j-marion-sims/558248/.

21. *Id.*

22. Elizabeth Nix, *Tuskegee Experiment: The Infamous Syphilis Study*, HISTORY (Dec. 15, 2020), https://www.history.com/news/the-infamous-40-year-tuskegee-study.

23. *Id.*

24. Caitlin Dickerson, *Secret World War II Chemical Experiments Tested Troops Based on Race*, NPR (June 22, 2015, 4:59 AM), https://www.npr.org/2015/06/22/415194765/u-s-troops-tested-by-race-in-secret-world-war-ii-chemical-experiments.

25. Mark Schoofs, *Half-Truths and Consequences*, VILL. VOICE (May 5, 1998), https://www.villagevoice.com/1998/05/05/half-truths-and-consequences/.

26. *Id.*

27. Ada Stewart, *Minorities Are Underrepresented in Clinical Trials*, AM. ACAD. OF FAM. PHYSICIANS (Dec. 4, 2018, 2:03 PM), https://www.aafp.org/news/blogs/leadervoices/entry/2018 1204lv-clinicaltrials.html.

28. *Id.*

29. Press Release, Ctrs. for Disease Control, Racial and Ethnic Disparities Continue in Pregnancy-Related Deaths, (Sept. 5, 2019), https://www.cdc.gov/media/releases/2019/p0905-racial-ethnic-disparities-pregnancy-deaths.html.

30. Ziad Obermeyer et. al., *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 SCIENCE 447, 447 (2019).

31. *See, e.g.*, Richard D. Moore et al., *Racial Differences in the Use of Drug Therapy for HIV Disease in an Urban Community*, 330 NEW ENG. J. MED. 763 (1994) (finding that based on the same eligibility from patients' CD4+ cell counts, Black people were 31% less likely than

- Black patients are more likely to be refused pain medications than White patients with similar ailments.[32]

- Black people are less likely than similarly situated White people to receive an organ transplant.[33]

- Black people are more likely than White people to be diagnosed with mental illness despite similar symptoms.[34]

- Black people are less likely than White people to receive preventative medicine.[35]

- Black people are less likely than White people to receive more aggressive therapies for current ailments.[36]

- Black people are more likely than White people to be refused pain medication.[37]

- Black people are less likely than White people to receive a flu vaccine.[38]

- Black people are more likely than White people to be accused of being personally blameworthy for their health problems.[39]

- Black people are more likely than White people to report an experience in which a doctor or other health care provider did not believe they were telling the truth.[40]

- Black people are less likely than White people to have health insurance.[41]

White people to receive antiretroviral therapy and 41% less likely than whites to receive prophylactic therapy); *see also* Beth A. Hahn, *Children's Health: Racial and Ethnic Differences in the Use of Prescription Medications*, 95 PEDIATRICS 727, 729 tbl.1 (1995) (finding that Black children visiting the doctor are less likely than White children to receive a prescription).

32. Liz Hamel et al., *KFF/The Undefeated Survey on Race and Health*, KAISER HEALTH NEWS (Oct. 13, 2020), https://www.kff.org/report-section/kff-the-undefeated-survey-on-race-and-health-main-findings/.

33. Raja B. Khauli, *Issues and Controversies Surrounding Organ Donation and Transplantation: The Need for Laws That Ensure Equity and Optimal Utility of a Scarce Resource*, 27 SUFFOLK U. L. REV. 1225, 1231 (1993).

34. *See, e.g.*, Jay C. Wade, *Institutional Racism: An Analysis of the Mental Health System*, 63 AM. J. ORTHOPSYCHIATRY 536, 541 (1993).

35. *See, e.g.*, Marian E. Gornick et al., *Effects of Race and Income on Mortality and Use of Services Among Medicare Beneficiaries*, 335 NEW ENG. J. MED. 791, 797 (1996) (finding that Black women are 25% less likely than White women to receive a mammogram).

36. *Id.*

37. Hamel et al., *supra* note 32.

38. *Id.*

39. *Id.*

40. *Id.*

41. Samantha Artiga, et al., *Changes in Health Coverage by Race and Ethnicity Since the ACA, 2010–2018*, KEISER FAM. FOUND. (Mar. 5, 2020), https://www.kff.org/racial-equity-and-health-policy/issue-brief/changes-in-health-coverage-by-race-and-ethnicity-since-the-aca-2010-2018.

II.   Black Skepticism of the COVID-19 Vaccine

Polls show that Black Americans are the most hesitant group regarding COVID-19 vaccination. A Kaiser Family Foundation poll found that 35% of Black adults say they would definitely or probably not get vaccinated.[42] This poll revealed that Black Americans are also more likely to be concerned about side effects.[43] A Pew Research Center poll found that only 42% of Black Americans would consider taking the vaccine, while 61% of White Americans would.[44] The percentage of Black people who believe race-based discrimination in health care happens very or somewhat often has been increasing. In 1999, the number was 56%, and in 2020, the number was 70%.[45]

Focus groups conducted to better understand the skepticism of Black Americans toward a COVID-19 vaccine, revealed that many cite systemic racism and the Tuskegee Syphilis Study as rationales.[46] Former President Barack Obama identified the Tuskegee Syphilis Study as the reason why many Black people today are skeptical about being vaccinated.[47] This vaccine skepticism naturally leads to disparate enrollment rates in COVID-19 vaccine trials, which could in turn result in more skepticism in the Black community as to the safety of the vaccine.[48] With the percentage of people needing to be vaccinated in order to reach herd immunity estimated to be around 80%,[49] this skepticism from a group that makes up over 13% of the U.S. population is highly problematic.

When analyzing the levels of skepticism in the Black community regarding the medical establishment, it is important not to make the mistake of viewing Black people as a homogenous group. When analyzed at the sub-demographic level, a more nuanced picture emerges.

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42. Dezimey Kum, *Fueled by a History of Mistreatment, Black Americans Distrust the New COVID-19 Vaccines*, Time (Dec. 28, 2020, 8:30 AM), https://time.com/5925074/black-americans-covid-19-vaccine-distrust.

43. Liz Hamel et al., *KFF COVID-19 Vaccine Monitor: December 2020*, Keiser Fam. Found. (Dec. 15, 2020), https://www.kff.org/coronavirus-covid-19/report/kff-covid-19-vaccine-monitor-december-2020.

44. Cary Funk & Alec Tyson, *Intent to Get a COVID-19 Vaccine Rises to 60% as Confidence in Research and Development Process Increases*, Pew Rsch. Ctr. (Dec. 3, 2020), https://www.pewresearch.org/science/2020/12/03/intent-to-get-a-covid-19-vaccine-rises-to-60-as-confidence-in-research-and-development-process-increases.

45. Hamel et al., *supra* note 32.

46. Kum, *supra* note 42.

47. Jon Brown, *'I Trust This Science': Obama Plans to Take COVID-19 Vaccine, Open to Televising It*, Daily Wire (Dec. 2, 2020), https://www.dailywire.com/news/i-trust-this-science-obama-plans-to-take-covid-19-vaccine-open-to-televising-it.

48. Stewart, *supra* note 27.

49. Kum, *supra* note 42 ("Dr. Anthony Fauci, the director of the National Institute of Allergy and Infectious Diseases, predicted at a recent Harvard event that the number will need to be somewhere between 75 to 85%.").

For example, given the timing of past atrocities such as the Tuskegee Syphilis Study, which occurred from 1932–1972, one might expect that older Black Americans would be more skeptical than younger Black Americans. However, studies report just the opposite. About 70% of Black people age 50 and older say they trust doctors almost all or most of the time, while only 50% of Black people under the age of 50 do.[50]

III. COVID-19 Disparate Health Outcomes

COVID-19 has had a significant effect on nearly every American, whether economically or through the negative health outcomes of loved ones. By the end of 2020, approximately 350,000 Americans had died from COVID-19.[51] But the negative health effects from the virus are not evenly distributed. The age-adjusted COVID-19 mortality rate for Black people is 3.4 times greater than it is for non-Hispanic White people;[52] among Indigenous and Latino people, it is 3.3 times higher;[53] among Pacific Islanders it is 2.9 times higher;[54] and among Asians it is 1.3 times higher.[55]

An American Heart Association study found that Black and Hispanic people make up almost 60% of COVID-19 hospitalizations despite making up only 21% of the population in the areas studied.[56] Access to ventilators and intensive care unit ("ICU") beds are also not evenly distributed. Scarcity involving these resources has disproportionately occurred in areas with more minority residents.[57] Ventilator shortages are particularly prevalent in minority communities because the Sequential Organ Failure Assessment Score, which is used to determine who receives a ventilator, disadvantages minority patients.[58]

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50. Hamel et al., *supra* note 32.

51. *United States*, Worldometer, https://www.worldometers.info/coronavirus/country/us (last visited Jan. 11, 2021).

52. Harald Schmidt et al., *Is It Lawful and Ethical to Prioritize Racial Minorities for COVID-19 Vaccines?*, 324 JAMA: J. Am. Med. Ass'n 2023, 2023 (2020).

53. *Id.*

54. *Id.*

55. *Id.*

56. Thor Christensen, *Black, Hispanic People Hospitalized for COVID-19 at Disproportionately High Rates*, Am. Heart Ass'n (Nov. 17, 2020), https://www.heart.org/en/news/2020/11/17/black-hispanic-people-hospitalized-for-covid-19-at-disproportionately-high-rates.

57. George Aumoithe, *The Racist History that Explains Why Some Communities Don't Have Enough ICU Beds*, Wash. Post (Sept. 16, 2020, 6:07 AM), https://www.washingtonpost.com/outlook/2020/09/16/racist-history-that-explains-why-some-communities-dont-have-enough-icu-beds.

58. Michael Menconi, *COVID-19 Ventilator Allocation Protocols Are Poised to Disadvantage African Americans*, Voices in Bioethics (May 30, 2020), https://journals.library.columbia.edu/index.php/bioethics/article/view/6210.

It is important to note that despite these vast disparities, there is nothing genetically inherent in Black and Hispanic people that makes them more susceptible to contract or die from COVID-19.[59] Rather, Black and Hispanic people are more susceptible due to their environments. They are disproportionately likely to work in the service industry (in which they are in close contact with others and are unable to work from home),[60] live in multigenerational homes, lack access to health care, and have pre-existing conditions — all factors that increase the risk of contracting and/or dying from COVID-19.[61] The understanding of this important distinction that the disparities are not due to genetic differences has become somewhat blurred by advocates attempting to emphasize the effects of race. For example, the dean of George Washington University Law School and consultant for the Advisory Committee on Immunization Practices stated that racial inequality ". . . produced the underlying diseases."[62]

It should also be noted that hardships related to the COVID-19 pandemic, which disproportionately affect minority communities, are not limited to health outcomes. For example, Black people are also more likely to experience employment disruptions and financial hardships related to COVID-19.[63]

IV.   Proposed Vaccination Distribution Methods

There is widespread agreement that frontline healthcare workers should be prioritized for the first vaccines,[64] but a wide variety of proposals exist suggesting who should be prioritized next. Some say that

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59. Eugene Volokh, *Vaccination by Race, and Why It's Unconstitutional*, Reason Found. (Dec. 10, 2020, 2:58 PM), https://reason.com/volokh/2020/12/10/vaccination-by-race-and-why-its-unconstitutional (quoting Sally Satel, *Race for the Vaccine*, Persuasion (Nov. 16, 2020), https://www.persuasion.community/p/race-for-the-vaccine) ("[A] person's race, per se, does not put him or her at greater risk for becoming infected or dying from Covid-19. Race is a correlate but risk is the cause.").

60. Kum, *supra* note 42.

61. Robert Hart, *Black and Asian People More Likely to Catch COVID-19 in U.S. and U.K., Study Finds*, Forbes (Nov. 12, 2020, 1:40 PM), https://www.forbes.com/sites/roberthart/2020/11/12/black-and-asian-people-more-likely-to-catch-covid-19-in-us-and-uk-study-finds/?sh=328b87703ca7.

62. Megan Twohey, *Who Gets a Vaccine First? U.S. Considers Race in Coronavirus Plans*, N.Y. Times (Dec. 15, 2020), https://www.nytimes.com/2020/07/09/us/coronavirus-vaccine.html.

63. Hamel et al., *supra* note 32.

64. Abby Goodnough & Jan Hoffman, *The Elderly vs. Essential Workers: Who Should Get the Coronavirus Vaccine First?*, N.Y. Times (Dec. 20, 2020), https://www.nytimes.com/2020/12/05/health/covid-vaccine-first.html ("[A]ll voting members [of the Advisory Committee on Immunization Practices] indicated support for putting essential workers ahead of people 65 and older and those with high-risk health conditions.").

the elderly should be prioritized.[65] Others say that younger people should be prioritized.[66] Some want essential workers to be prioritized.[67] Some want people with learning disabilities to be prioritized.[68] Others call for people to be prioritized based on race.[69] Some prefer to use geography based on the areas that were hit the hardest. Still, others want to prioritize based on socioeconomic status.[70] And some have even posited that the "least unjust" way to allocate vaccines is by lottery, ignoring any effects on net lives or net life-years saved.[71] This Article limits the scope of proposed plans by analyzing only the following three: explicit racial preferences, a facially race-neutral plan with intentionally racially disparate outcomes, and completely race-neutral policies.

A. *Explicit Racial Preferences*

Plans that prioritize certain racial groups for the vaccine have been put forth by many prominent experts. Vaccine planning documents for Veterans Affairs hospitals explicitly state that race and ethnicity will be used to determine who receives priority for the vaccine.[72]

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65. Kylie Quinn, *Why We Should Prioritize Older People When We Get a COVID Vaccine*, THE CONVERSATION (Nov. 15, 2020, 1:53 PM), https://theconversation.com/why-we-should-prioritise-older-people-when-we-get-a-covid-vaccine-148432.

66. Dana Goldman et al., *Why COVID-19 Vaccines Should Prioritize 'Superspreader' People*, THE WORLD (Sept. 4, 2020, 1:45 PM), https://www.pri.org/stories/2020-09-04/why-covid-19-vaccines-should-prioritize-superspreader-people (reasoning that younger people are more likely to be superspreaders of the virus and therefore should be prioritized for the vaccine).

67. Kinanti Pinta Karana, *COVID-19: Young People Should be Prioritized in Recovery Efforts*, UNICEF (Jul. 28, 2020), https://www.unicef.org/indonesia/press-releases/covid-19-young-people-should-be-prioritized-recovery-efforts.

68. Gus Alexiou, *Covid-19 Vaccine Plans Must Prioritize People With Learning Disabilities*, FORBES (Nov. 29, 2020, 3:00 AM), https://www.forbes.com/sites/gusalexiou/2020/11/29/covid-19-vaccine-plans-must-prioritize-people-with-learning-disabilities/?sh=33d28af14d47.

69. *See generally infra* notes 72–84 and accompanying text.

70. Associated Press, *In Vaccine Priority Recommendations, U.S. Panel Touches on Race, Poverty*, NBC NEWS (Oct. 2, 2020, 4:01 PM), https://www.nbcnews.com/health/health-news/vaccine-priority-recommendations-u-s-panel-touches-race-poverty-n1241889.

71. *See generally* Diego S. Silva, *Ventilators by Lottery: The Least Unjust Form of Allocation in the Coronavirus Disease 2019 Pandemic*, 158 CHEST 890 (2020) (making the characterization in the context of ventilator rationing).

72. *COVID-19 Vaccine Planning Frequently Asked Questions for Veterans*, U.S. DEP'T OF VETERANS AFFS. (Dec. 2, 2020), https://content.govdelivery.com/attachments/USVHA/2020/12/08/file_attachments/1620107/3_VeteranFAQs_Chapter3_COVID-19VaccineAwareness_120220_Approved%20and%20Final.pdf. The document implies that "Black, Hispanic, and Native Americans" will receive preference. *Id*. "What criteria will VA use to decide which Veterans get the COVID-19 vaccine first? . . . Race and ethnicity. Data shows that some groups of people have been disproportionately affected by COVID-19. These include Black, Hispanic, and Native American communities." *Id.*

The Advisory Committee on Immunization Practices ("ACIP") is considering racial preferences in vaccine distribution.[73] Dr. José R. Romero, who chairs the ACIP, stated that certain racial minorities "are groups that need to be moved to the forefront, in my opinion."[74] Dayna Bowen Matthew, George Washington University Law School dean and consultant for ACIP, stated that social inequality "produced the underlying diseases" and that therefore "it's that inequality that requires us to prioritize by race and ethnicity."[75]

The Centers for Disease Control and Prevention ("CDC") and the National Institutes of Health ("NIH") jointly commissioned the National Academies of Sciences, Engineering, and Medicine ("NASEM") to recommend vaccine distribution strategies.[76] NASEM recommended the prioritization of racial minorities for the vaccine.[77] The CDC advises planners at the state level to use this NASEM framework, which includes racial preferences for vaccine distribution.[78]

Professor of Global Health Law, Lawrence Gostin, explained his position: "Having a racial preference for a Covid-19 Vaccine is not only ethically permissible, but I think it's an ethical imperative."[79] Melinda Gates explicitly stated that she wants to prioritize Black people for the vaccine.[80] President-elect Joe Biden's COVID-19 advisory board has voiced support for using inequality and race as a factor in prioritizing vaccine distribution.[81]

Some advocates for racial preferences in vaccine distribution explicitly state their willingness to trade off the overall number of lives

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73. Olson, *supra* note 16.

74. *Id.*

75. *Id.*

76. Schmidt et al., *supra* note 52, at 2023.

77. *Id.*

78. *Id.*; *See also* Goodnough & Hoffman, *supra* note 64 (noting that it should be noted that the CDC can only provide suggested guidelines regarding the prioritization of vaccine distribution; it is the governors and other state officials who are ultimately tasked with deciding whether to follow the guidelines or not).

79. Nicholas St. Fleur, *Health Experts Want to Prioritize People of Color for a Vocid-19 Vaccine. But How Should It Be Done?*, STAT (Nov. 9, 2020), https://www.statnews.com/2020/11/09/health-experts-want-to-prioritize-people-of-color-for-covid19-vaccine-but-how-should-it-be-done/.

80. Jamie Ducharme, *Melinda Gates Lays Out Her Biggest Concern for the Next Phase of the COVID-19 Pandemic*, TIME (June 4, 2020, 11:30 AM), https://time.com/5847483/melinda-gates-covid-19/.

81. Ariana Eunjung Cha, *Biden Makes Tackline Racial, Ethnic Inequities During Coronavirus Pandemic a Priority*, WASH. POST (Dec. 15, 2020, 8:00 AM), https://www.washingtonpost.com/politics/2020/12/15/biden-covid-racial-inequities/; After becoming president, the Biden administration has targeted underserved areas for increased vaccine distribution but has not implemented any explicit racial preferences. *See* Sheryl Gay Stolberg, *As Biden Pushes for Racial Equity in Vaccination, Data Is Lagging*, N.Y. TIMES (Feb. 9, 2021), https://www.nytimes.com/2021/02/09/us/politics/biden-vaccination-race-data.html.

saved for the saving of more Black and Hispanic lives. This emphasis on equality against overall health outcomes is succinctly summed up by bioethicist, Lynette Reid, when she explains, "We should modify critical care resource triage on the basis of considerations of justice, even at the cost of saving fewer lives."[82] Another bioethicist, Angela Ballantyne, explains:

> These values are direct trade-offs. We can save more lives or we [can] save a more diverse group of lives . . . . [W]e should err on the side of broader rather than stricter clinical criteria; meaning a wider range of patients get a shot at ICU, even where this is less likely to be efficient overall.[83]

A driving force behind the willingness to make such a tradeoff is that "[t]he easy lives to save will be those of people who already enjoy social privilege."[84]

B.   *Facially Race-Neutral Plan with Intentionally Racially Disparate Outcomes*

Some have explicitly stated that the implementation of a facially race-neutral vaccine distribution policy is a good strategy for avoiding legal challenges that would follow from explicit racial preferences, while still resulting in minority groups receiving early vaccination. For example, co-chair of the Committee on Equitable Allocation of Vaccine for the Novel Coronavirus, Helene Gayle explained:

> "There's real concern about whether there would be legal challenges to something that is [explicitly] race-specific . . . . In our laws, there are ways in which you can and cannot specifically address a racial group to give them preference."[85] Professor Gostin explains how this is a way to "defacto give preference to racial minorities."[86]

Another way to prioritize racial minorities without an explicit preference is the prioritizing of essential workers over the elderly. Some have favored this approach on the basis that the elderly are disproportionately White and essential workers are disproportionately Black and Hispanic. One ACIP committee member stated that ethics

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82. Lynette Reid, *Triage of Critical Care Resources in COVID-19: A Stronger Role for Justice*, 46 J. Med. Ethics 526, 528 (2020).

83. Angela Ballantyne, *ICU Triage: How Many Lives or Whose Lives?*, J. Med. Ethics Blog (Apr. 7, 2020), https://blogs.bmj.com/medical-ethics/2020/04/07/icu-triage-how-many-lives-or-whose-lives/.

84. *Id.*

85. Sigal Samuel, *Should People of Color Get Access to the COVID-19 Vaccine Before Others?*, Vox (Oct. 28, 2020, 10:55 AM), https://www.vox.com/future-perfect/2020/10/2/21493933/covid-19-vaccine-black-latino-priority-access.

86. *Prioritizing Minorities for Coronavirus Vaccination*, Am. Med. Ass'n: JN Learning (Oct. 16, 2020), https://edhub.ama-assn.org/jn-learning/video-player/18551637.

"clearly favors [the prioritization of] the essential worker group because of the high proportion of minority, low-income and low-education workers among essential workers."[87]   Another health expert advocated for the prioritizing of essential workers ahead of the elderly because "[o]lder populations are whiter."[88]

A group of legal and medical scholars from Harvard, Georgetown, and the University of Pennsylvania have promoted the following alternatives to explicit racial preferences, with the same end goal in mind:

> A vaccine distribution formula . . . could lawfully prioritize populations based on factors like geography, socioeconomic status, and housing density that would favor racial minorities de facto, but not explicitly include race."[89] Another advocate demonstrates the racial preference intention behind using geography as follows: "I think [a geographic standard] could be a good idea, because the history of segregation and redlining means that, frankly, place is not a bad proxy for race.[90]

Distributing the vaccine based on the Social Vulnerability Index ("SVI") has been suggested as an alternative to explicit racial preferences in vaccine distribution. At least eighteen states plan to apply the SVI in their vaccine prioritization plans.[91] NASEM has considered using the SVI to target distribution of the vaccine to the most vulnerable.[92] The SVI is administered through the CDC and measures potential negative effects on communities caused by external stresses on human health, such as from natural disasters, terrorist attacks, or disease outbreaks.[93] However, using the SVI in an effort to avoid the legal challenges that would inevitably follow from an explicit racial preference is risky. This is because the SVI uses minority status as one of its fifteen factors in determining the overall vulnerability of an area and is therefore more susceptible to an equal protection cause of action.[94] The overall effect of this one factor on the SVI is likely minimal because the other, facially race-neutral factors are highly correlated to minority status. These include living below the

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87. Goodnough & Hoffman, *supra* note 64.

88. *Id.*

89. Schmidt et. al., *supra* note 52, at 2024.

90. Samuel, *supra* note 85.

91. Goodnough & Hoffman, *supra* note 64.

92. Kum, *supra* note 42.

93. *CDC Social Vulnerability Index*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, https://www.atsdr.cdc.gov/placeandhealth/svi/index.html (last visited Jan. 11, 2021).

94. Barry E. Flanagan et al., *Measuring Community Vulnerability to Natural and Anthropogenic Hazards: The Centers for Disease Control and Prevention's Social Vulnerability Index*, 80 J. ENV'T HEALTH 34, 35 (2018).

poverty line, being unemployed, not possessing a high school diploma, living in a single-parent household, not owning a vehicle, and living in a multiunit structure.[95]

Noting the potential problem with using the SVI to avoid equal protection challenges, some have suggested using the Area Deprivation Index ("ADI") instead.[96] The ADI is similar to the SVI in that it measures geographic populations based on disadvantages that affect health outcomes.[97] However, unlike the SVI, the ADI does not use race as an embedded variable.[98] The ADI also provides the additional benefit over the SVI of being administered at the Census block level for more targeted results.[99]

C. Completely Race-Neutral

The distinction between the previously discussed — facially race-neutral policy with intentionally racially disparate outcomes — and a completely race-neutral policy contains some inherent ambiguity. This is because the distinction between the two largely lies in the intentions of those who promote the policies. Someone who explicitly states that his or her reason for promoting a facially race-neutral policy is to reach a racially disparate result, is clearly in the former category. But if someone promotes a facially race-neutral policy without expressly stating any racially disparate intent, then without more information, it is ultimately unknowable which of these two categories applies. For the purposes of this Article, it is assumed that when someone posits a facially race-neutral plan without any express intent to reach racially disparate outcomes, that his or her intent is race-neutral.[100] This is not to say that this category, completely race-neutral, does not produce any disparate outcomes.[101]

V. Legal Analysis

This section analyzes the strengths and weaknesses of a potential equal protection lawsuit against each of the three vaccine distribution

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95. *Id.*

96. Schmidt, et al., *supra* note 52, at 2024 ("An example of such a legally permissible approach would be to use a measure called the Area Deprivation Index (ADI), which is similar to the SVU, but does not explicitly prioritize on the basis of race.").

97. *About the Neighborhood Atlas®*, Univ. of Wis. Sch. of Med., https://www.neighborhoodatlas.medicine.wisc.edu/ (last visited Jan. 11, 2021).

98. Schmidt, et al., *supra* note 52, at 2024.

99. *About the Neighborhood Atlas®*, *supra* note 97.

100. This does not per se mean that such a plan is immune from an equal protection challenge, however.

101. Depending on how disparity is defined, every vaccine distribution plan could be said to produce disparities. *See infra* notes 165–168 and accompanying text.

plans considered. While they are each susceptible to equal protection challenges in their own way, they are far from equally vulnerable.

A. *Explicit Racial Preferences*

Case law does not provide any direct precedent as to the potential constitutionality of explicit racial preferences in the allocation of scarce health care resources.[102] In order to determine how the Supreme Court is likely to rule in such a case, this section looks at the applicable legal standard to be applied, whether an explicit racial preference would survive scrutiny under the applicable standard, and whether affirmative action in college admissions is an analogous precedent.

1. *Applicable Legal Standard*

Governmental policies that explicitly single out racial groups for disparate treatment are "inherently suspect" and therefore face the daunting legal standard[103] of "strict scrutiny."[104] This standard requires the policy to be "narrowly tailored to further compelling governmental interests."[105] This standard is so stringently applied, that it is frequently referred to as "strict in theory, fatal in fact."[106] Strict scrutiny applies even when race was just one of many factors considered by the government.[107] Case law further establishes that the existence of an emergency situation does not allow for the rigor of strict scrutiny to be lessened.[108]

While the Supreme Court has never heard a case involving the application of strict scrutiny to racial preferences in the allocation of medical treatment, the precedent of applying strict scrutiny is well established.[109] In a variety of scenarios, when a state actor treats people differently based explicitly on race, the strict scrutiny standard is applied.[110] Strict scrutiny is applied regardless of the intentions for the

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102. Schmidt, et al., *supra* note 52, at 2023.

103. Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 310 (2013) (quoting Fullilove v. Klutznick, 448 U.S. 448, 523 (1980) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect.").

104. Johnson v. California, 543 U.S. 499, 505 (2005).

105. *Fisher I*, 570 U.S. at 310 (quoting Grutter v. Bollinger, 539 U.S. 306, 326 (2003)).

106. However, some courts have explicitly rebuked this popular saying. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting Fullilove, 448 U.S. at 519)).

107. *Fisher I*, 570 U.S. at 310–11.

108. *Johnson,* 543 U.S. at 512 (applying strict scrutiny to assess a prison policy that placed inmates with cellmates of the same race in order to minimize gang-related violence).

109. Mitchell v. Washington, 818 F.3d 436, 444 (9th Cir. 2016).

110. *Johnson*, 543 U.S. at 505; *Adarand Constructors*, 515 U.S. at 227.

racial classification.[111] The benign nature of the racial classification in question does not function to alleviate this standard.[112] The Supreme Court has held that the direction in which the racial preferences are aimed is also irrelevant.[113] Accordingly, strict scrutiny is applied with the same exacting rigor regardless of whether it gives a preference to a disadvantaged class over a class with privilege or vice versa. "[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."[114]

Having established that the strict scrutiny standard would be applied to a vaccine distribution plan that utilized explicit racial preferences, this article next addresses whether such a policy would satisfy the high standard of this "most exacting scrutiny."[115]

2. *Narrowly Tailored to Further Compelling Governmental Interests*

Strict scrutiny requires that the government policy be "narrowly tailored to further compelling governmental interests."[116] In the present case, there are numerous alternatives to an explicit racial preference that would not utilize suspect racial classifications. Therefore, such explicit racial preference plans are not narrowly tailored and subsequently do not satisfy the strict scrutiny standard.

An example of an alternative that does not utilize suspect classifications is that of a facially race-neutral vaccine distribution strategy supplemented with an advertising campaign targeted at select minority groups. Such an alternative would almost certainly be allowed. One may attempt to argue that if this is allowed, then explicit racial preferences in vaccine distribution should be allowed as well since both utilize finite government resources — money and vaccines — to target a given racial group. This is misguided, as there are significant differences between the two plans. While it is true that government funds are technically limited resources in the same way that a vaccine is a limited resource, funds spent on public health messages targeted at a minority group do not exclude other racial groups in the same way that vaccine distribution does. Targeted advertising campaigns

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111. *Mitchell*, 818 F.3d at 444.

112. *Johnson*, 543 U.S. at 505 ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation." (citations omitted)).

113. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986).

114. *Id.* at 271.

115. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

116. *Fisher I*, 570 U.S. at 310 (quoting Grutter v. Bollinger, 539 U.S. 306, 326 (2003)).

are better thought of as a preference for certain geographic areas, not individuals. People of all races in a given location can avail themselves of the information communicated.[117]

Aware of the existing skepticism in the Black community, the nation's top health experts have already made efforts to target the Black community with information about the benefits and safety of vaccination.[118] President and CEO of Trinity Health of New England, Dr. Reginald Eadie — a Black man himself — has successfully conducted meetings with leaders of the Black community to address concerns regarding the virus.[119]

Other examples of available vaccine distribution plans that do not use suspect classifications include prioritizing based on geography or socioeconomic status. People could also be prioritized based on their status as an essential worker or having comorbidities. Many of the structural inequalities that are a driving force behind advocacy for explicit racial preferences would be addressed in these facially race-neutral plans.[120] This further supports the notion that explicit racial preferences are not narrowly tailored.

Explicit racial preferences not only fail strict scrutiny due to the existence of numerous nondiscriminatory alternatives, but there is also a second, distinct reason why they would fail. Race-based preferences are generally only allowed when implemented by the public entity that was initially responsible for the racial discrimination being remedied.[121] "It is true that 'reverse discrimination' . . . is not unlawful per se, at least when it is intended to remedy past misconduct *by the reverse discriminator*."[122] Also, " [a] law that grants preferential treatment on the basis of race or ethnicity does not deny the equal protection of the laws if it is . . . committed by the public entity that is according the preferential treatment."[123]

One could certainly make a strong argument that modern governmental practices have indirectly contributed to the disparate COVID-

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117. For a detailed discussion of race-based outreach in the medical context, see Erik Lillquist & Charles A. Sullivan, *The Law and Genetics of Racial profiling in Medicine*, 39 Harv. C.R.-C.L. L. Rev. 391, 454–55 (2004) ("In general, . . . courts have classified efforts to increase minority participation in employment and housing as race-neutral, and therefore constitutionally permissible.").

118. *See, e.g.*, The National Urban League, *Making It Plain: A Conversation with Dr. Fauci*, Facebook (Dec. 8, 2020), https://www.facebook.com/53797383417/videos/3025163154377952/./ .

119. Kum, *supra* note 42.

120. *See infra* notes 170–186 and accompanying text.

121. *See* People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 111 F.3d 528, 535 (1997).

122. *Id.* (emphasis added).

123. Builders Ass'n of Greater Chi. v. Cnty. of Cook, 256 F.3d 642, 643–44 (7th Cir. 2001).

19 health outcomes minorities experience,[124] but these policies do not directly cause the health disparities. For example, the Tuskegee Syphilis Study could be given as an example of a governmental action that directly caused disparate health outcomes among a racial minority. However, this is likely not sufficiently recent or systemic to justify a racial preference in 2021 that affects the lives of millions of people. The Tuskegee Syphilis Study concluded almost fifty years ago[125] and involved less than 400 people.[126] Courts have held that governmental practices more than twenty years ago are too old to qualify for explicit preferences.[127]

The claim of general, societal discrimination as the cause of existing COVID-19 health disparities is strikingly similar to the rationale provided in *City of Richmond v. J.A. Croson Co.*, which was explicitly struck down by the Supreme Court as a justification for suspect racial classifications:

> The city's argument that it is attempting to remedy various forms of past societal discrimination that are alleged to be responsible for the small number of minority entrepreneurs in the local contracting industry fails, since the city also lists a host of nonracial factors which would seem to face a member of any racial group seeking to establish a new business enterprise . . .[128]

Some may attempt to use the following quote from Justice Powell in *Regents of University of California v. Bakke*, as support for racial preferences in vaccine distribution: "It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification."[129] However, this quote creates only the possibility of satisfying strict scrutiny, thus confirming the principle that most racial classifications do not.[130] Further, it is inapplicable in the current context be-

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124. *See, e.g.*, Yasmin Tayag, *The Long History of Redlining Makes Covid-19 Worse for Black Americans*, MEDIUM CORONAVIRUS BLOG (Sept. 10, 2020), https://coronavirus.medium.com/the-long-history-of-redlining-makes-covid-19-worse-for-black-americans-efd520f8221c (providing the example of how the racist history of redlining has contributed to COVID-19 disparate health outcomes for African Americans).

125. Nix, *supra* note 22.

126. *Id.* (This number refers to the 399 Black men in the study who had syphilis. *Id.* The study also included 201 other Black men in the control group who did not have syphilis). *Id.*

127. *See, e.g.*, Brunet v. City of Columbus, 1 F.3d 390, 408–09 (6th Cir. 1993) (citing examples of racial preferences that were allowed to remedy discrimination that occurred eight years before the preferences were instituted but not after fourteen years had passed); Hammon v. Barry, 826 F.2d 73, 76–77 (D.C. Cir. 1987) (holding that a time period of eighteen year between the discriminatory conduct and the institution of the preferences was too remote).

128. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 470 (1989).

129. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978).

130. Lillquist & Sullivan, *supra* note 117, at 444 ("[V]ery few governmental interests have been found by the Supreme Court to be compelling enough to validate a racial classification.").

cause it was made in response to the defendants' claim that racial preferences in medical school admissions are necessary to "improv[e] the delivery of health-care services to communities currently underserved."[131] The inability of Justice Powell to provide a concrete example is also telling. He was likely aware of the disparate health outcomes that existed at the time and did not provide an example of giving racial preferences to limited medical resources to counteract inequalities in health outcomes.

Put simply, racial classifications are permitted only "as a last resort."[132] Given the existence of numerous, alternative vaccination plans that do not use racial classifications, the use of race is not narrowly tailored. Therefore, explicit racial preferences do not satisfy strict scrutiny and thus, violate the Equal Protection Clause.

3. *Affirmative Action in College Admissions Comparison*

The strongest legal argument in support of distributing the vaccine based on some form of explicit racial preference likely involves comparing the action to the accepted practice of affirmative action in college admissions. Indeed, some supporters of racial preferences in vaccine distribution have even labeled it "a form of affirmative action of medical resources . . . ."[133] Much like enrollment slots at elite colleges, the vaccine is a finite resource in which demand far exceeds supply.

A closer look at affirmative action case law, however, demonstrates that such a comparison is largely ineffective. The Supreme Court has acknowledged that higher education is a "unique context" that serves more as an exception to the generally accepted standards for when racial preferences are allowed.[134] It is even an outlier when compared to similar racial preferences in education at other levels. In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court applied strict scrutiny and struck down a policy that implemented racial classifications in high school enrollment.[135]

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131. *Bakke*, 438 U.S. at 310.

132. Bartlett v. Strickland, 556 U.S. 1, 21 (2009) (quoting *Croson*, 488 U.S. at 518 (1989) (Kennedy, J., concurring in part and concurring in judgment)).

133. Hannah McLane, *A Disturbing Medical Consensus Is Growing: Here's What It Could Mean for Black Patients with Coronavirus*, WHYY (Apr. 10, 2020), https://whyy.org/articles/a-disturbing-medical-consensus-is-growing-heres-what-it-could-mean-for-black-patients-with-coronavirus/.

134. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 7250 (2007) [hereinafter *Parents Involved*].

135. *Id.* at 728–48.

The affirmative action in college admissions analogy is also inapplicable due to the inherent differences between vaccines and college admissions. Namely, the compelling interest that justifies racial classifications is not that of enrolling more minority students. Rather, it is one of obtaining "the educational benefits that flow from student body diversity."[136] Therefore, properly understood, the practice does not help minority students to the detriment of non-minority students. Rather, it provides the benefit of diversity to all college students. For example, a White student who was not admitted to Harvard due to affirmative action preferences and attends Columbia instead, still benefits from the diverse student body at Columbia, which is a product of affirmative action. Studies even show that this student attending Columbia — where he is more likely to be in the top half of his class — is preferable to attending Harvard, where he is more likely to be in the bottom half of his class.[137] This outcome is distinct from that of racial preferences in vaccine distribution, in which the early access to the vaccine afforded to members of one race is per se to the detriment of members of another race who would have otherwise received the vaccine.[138] An additional distinction is that delayed inoculation can result in death, while attending a "lesser" college is not only far less harmful, but can even be beneficial.[139]

The severe time constraint present in vaccine distribution also functions to differentiate it from affirmative action in college admissions due to the necessity of first attempting race-neutral alternatives to meet the strict scrutiny standard. For example, in *Fisher v. University of Texas*, the University of Texas at Austin attempted to achieve its compelling interest of student diversity through race-neutral, holistic review for seven years before determining that it was insufficient

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136. Fisher v. Univ. of Tex. (Fisher II), 136 S. Ct. 2198, 2210 (2016). [hereinafter *Fisher II*] (quoting *Fisher I*).

137. This prediction, regarding the hypothetical student, is based on the fact that if his race was the deciding factor in not being accepted to Harvard, then he would likely have been at the lower end of the entering class (as to ability) had he been entered. *See* Michael Hemesath, *Avoiding the College Mismatch*, St. Cloud Times (June 21, 2019, 5:00 PM), https://www.sctimes.com/story/opinion/2019/06/21/avoid-college-mismatch/1502979001/ (explaining that attending the most prestigious school that accepts you is often not a good idea).

138. It would, however, be possible to claim there are benefits to a white person who was excluded due to racial preferences of receiving a vaccination at an early phase — assuming this delay did not result in his death. This could include the psychic benefit of alleviating racial guilt and a general good feeling arising from helping those less fortunate. Of course, these occurrences and the possible benefits that may accompany them are far more tenuous than the classroom diversity that is produced from affirmative action in college admissions. And finally, anyone who dies from COVID-19 due to being deprioritized for the vaccine would not be alive to experience any of these potential benefits.

139. *See* Hemesath, *supra* note 137.

and that affirmative action in admissions was necessary.[140] In the present case, it would be impossible for racial preference advocates to show that they first tried a race-neutral approach that was inadequate. By the time data would be gathered and analyzed from the race-neutral plan, the issue would largely be moot.

Attempting to use the precedent of affirmative action in college admissions as support for racial preferences in vaccine distribution is also disanalogous because it is unclear if the current makeup of the Court would even uphold the existing affirmative action precedent.[141] Chief Justice Roberts's position on affirmative action in college admissions in *Parents Involved* is telling. He stated that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[142] One could easily imagine similar rhetoric applied to a racial preference for vaccines: "The way to stop treating people differently in medicine based on race is to stop treating people differently in medicine based on race."

The unique nature of affirmative action in college admissions and the stark differences between it and the administration of a life-saving vaccine render any attempted comparisons largely ineffective. Additionally, the current Court may not even agree with existing affirmative action college admissions precedent.

4. *Facially Race-Neutral Plan with Intentionally Racially Disparate Outcomes*

Under existing case law, the implementation of a facially race-neutral plan that was expressly implemented for its disproportionately positive impact on Black and Hispanic Americans is on safer ground than an explicit racial preference plan. However, it would still be susceptible to legal challenges, assuming that the intent to create racially disparate outcomes was expressly made and documented.

The following analogy could be used to argue against the legality of such a policy: Imagine if politicians decided to ration ventilators for COVID-19 patients based on average expected life-years saved. Further imagine that these politicians explicitly stated that the reason they are implementing such a standard is because it would dispropor-

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140. *Fisher II*, 136 S. Ct. at 2213.

141. Vinay Harpalani, *The Supreme Court and the Future of Affirmative Action*, Am. Const. Soc'y: Expert F. (Oct. 28, 2019), https://www.acslaw.org/expertforum/the-supreme-court-and-the-future-of-affirmative-action/ (explaining that, even before Amy Coney Barrett replaced Ruth Bader Ginsburg, Justices John Roberts, Samuel Alito, Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh would likely vote to strike down affirmative action in college admissions as currently implemented).

142. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. at 701, 748. (2007).

tionately benefit White people (who have a higher average life expectancy)[143] to the detriment of Black and Hispanic people. Here, the implemented policy is facially race-neutral, and expected years saved would be a permissible standard for rationing ventilators. However, because the policy makers are explicitly using this standard as a means to reach the ends of saving White lives at the cost of Black and Hispanic lives, it is at risk of being struck down. In some contexts, courts have been willing to look past the government's proffered reason for a challenged action and look at extrinsic evidence of the government's true intent in order to find an otherwise constitutional action unconstitutional.[144]

The proposed plan to distribute the vaccine based on the demographic of geography as an intentional proxy for targeting certain racial groups for vaccine priority[145] is likely to sustain a legal challenge because equal protection is for individuals, not geographic groups.[146] For example, federal attention explicitly directed to environmental and human health conditions in minority communities does not implicate equal protection, because it focuses on a community and not individuals.[147] The Supreme Court has explicitly recognized that "the Equal Protection Clause relates to equal protection of the laws 'between persons as such rather than between areas.'"[148] Similarly, the Supreme Court refused to apply strict scrutiny to "review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence."[149] Simply put, the justification that a governmental racial preference "is attempting to remedy various forms of past societal discrimination that [is responsible for the current disparity attempting to be remedied] fails."[150]

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143. Rosemary Carlson, *The Racial Life Expectancy Gap in the U.S.*, THE BALANCE (Dec. 20, 2020), https://www.thebalance.com/the-racial-life-expectancy-gap-in-the-u-s-4588898.

144. *See, e.g.*, Int'l Refugees Assistance Project v. Trump, 857 F.3d 554, 591–92 (4th Cir. 2017) (looking at statements made by Former President Trump regarding Muslims instead of focusing solely on the Trump administration's stated reasons for restricting immigration from certain countries in finding the challenged executive order to be unconstitutional). The Supreme Court subsequently vacated the Fourth Circuit's opinion due to the underlying executive order having expired. Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353 (2017).

145. *See In Vaccine Priority Recommendations*, *supra* note 70.

146. For a more detailed rationale regarding the individual–group distinction, see, for example, David F. Coursen, *Equal Protection, Strict Scrutiny, and Actions to Promote Environmental Justice*, 39 ENV'T L. REP. 10201, 10205–06 (2009).

147. *Id.* at 10205.

148. *See* Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 230 (1964) (quoting Salsburg v. Maryland, 346 U.S. 545, 551 (1954)); *see also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 235 (1995) (referencing "the fundamental principle of equal protection as a personal right").

149. San Antonio Indep. Sch. Dist., v. Rodriguez, 411 U.S. 1, 28. (1973).

150. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989).

There is Supreme Court precedent for using racially dispropor-
tionate impact as evidence of a discriminatory intent. In *Village of
Arlington Heights v. Metropolitan Housing Development Corp.*, the
Court explained that "[a] racially discriminatory intent [may be] evi-
denced by such factors as disproportionate impact . . . ."[151] But gov-
ernment actions "will not be held unconstitutional solely because it
results in a racially disproportionate impact."[152] Discriminatory intent
must be proven to show a violation of the Equal Protection Clause.[153]

Proving such intent could be challenging, even with the existence
of documented quotes explicitly stating the intent. The Supreme
Court is hesitant to undergo the task of delving into the psyche of
policymakers to ascertain their exact motivations for the policies they
pass.[154] And while direct quotes would be considered "direct evi-
dence of intent,"[155] the Supreme Court has also recognized that what
politicians publicly state as their driving rationale for a policy may not
actually be the real rationale.[156] And, of course, people may simply
lie about their underlying motivations in order to maintain their en-
acted policy. The case of *Korematsu v. United States* serves as a warn-
ing for such behavior.[157] It was argued, and the Supreme Court
believed, that "[Fred] Korematsu was not excluded from the Military
Area because of hostility to him or his race."[158] Over forty years
later, Congress acknowledged that the Japanese American internment

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151. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 253 (1977).

152. *Id.* at 264–65.

153. *Id.* at 265.

154. *See* United States v. O'Brien, 391 U.S. 367, 383–84 (1968) ("Inquiries into congressional
motives or purposes are a hazardous matter. When the issue is simply the interpretation of
legislation, the Court will look to statements by legislators for guidance as to the purpose of the
legislature, because the benefit to sound decision-making in this circumstance is thought suffi-
cient to risk the possibility of misreading Congress' purpose. It is entirely a different matter
when we are asked to void a statute that is, under well-settled criteria, constitutional on its face,
on the basis of what fewer than a handful of Congressmen said about it. What motivates one
legislator to make a speech about a statute is not necessarily what motivates scores of others to
enact it, and the stakes are sufficiently high for us to eschew guesswork.").

155. *Arlington Heights*, 429 U.S. at 266.

156. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019) ("We are presented, in
other words, with an explanation for agency action that is incongruent with what the record
reveals about the agency's priorities and decision-making process."); *see also* Trump v. Hawaii,
138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting) ("The Court's decision today . . . leaves
undisturbed a policy first advertised openly and unequivocally as a 'total and complete shutdown
of Muslims entering the United States' because the policy now masquerades behind a facade of
national-security concerns. But this repackaging does little to cleanse Presidential Proclamation
No. 9645 of the appearance of discrimination that the President's words have created. Based on
the evidence in the record, a reasonable observer would conclude that the Proclamation was
motivated by anti-Muslim animus."); *supra* note 144 and accompanying text.

157. *See generally* Korematsu v. United States, 323 U.S. 214 (1944).

158. *Id.* at 223.

camps upheld in *Korematsu* were in fact "motivated largely by racial prejudice . . . ."[159]

The Supreme Court has recognized that proof of intent can be found in "a clear pattern, unexplainable on grounds other than race . . . ."[160] Based on the context of this standard, it would likely favor a plaintiff attempting to overturn such a vaccine distribution policy. The Court provides the example of housing zoning regulations that were suddenly altered once integrated housing was brought up.[161] Just as such a sequence of events would be evidence of discriminatory intent,[162] the deviation from standard procedures of allocating limited medical resources would also serve as evidence of discriminatory intent.

The optics of people dying due to not receiving a vaccine may be persuasive in a Supreme Court case. As one legal scholar explains, "within the category of formally race-neutral actions intended to improve the position of disadvantaged racial groups, equal protection doctrine may well distinguish between those that have visible victims and those whose costs are more diffuse."[163] However, with respect to the present issue, this could serve to influence the Supreme Court either way. Prioritizing the elderly would lead to more dead racial minorities and prioritizing racial minorities would lead to more dead elderly.

Even the advocates for using either the ADI or SVI as a way to reach the goal of favoring certain races in receiving the vaccine without explicit racial preferences admit that such a practice might be struck down by the Supreme Court.[164]

5. *Completely Race-Neutral Policies*

Vaccine distribution policies that focus exclusively on race-neutral factors, such as age, expected life-years saved, occupation, and geography — to the exclusion of considering race in any way — are the most likely to avoid a successful legal challenge. However, even such a policy could be challenged in the courts on the ground that they nevertheless have a racially disparate impact. For example, the current policy implemented in many states explicitly prioritizes the eld-

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159. Civil Liberties Act of 1988, Pub. L. 100-383, § 2(a), 102 Stat. 903–04 (1988).
160. *Arlington Heights*, 429 U.S. at 266.
161. *Id.* at 267.
162. *Id.*
163. Richard A. Primus, *The Future of Disparate Impact*, 108 Mich. L. Rev. 1341, 1345 (2010).
164. Schmidt et al., *supra* note 52, at 2024 ("It is not clear how the Supreme Court would rule on vaccine distribution based on either the ADI or SVI . . . .").

erly for the vaccine.[165] There are 4.6 million White people age eighty-five and older[166] and only 389,000 Black people age eighty-five and older.[167] So while there are about 4.5 times as many White people as Black people overall, in the age 85 and older cohort there are about twelve times as many White people.[168] This results in a disproportionate number of White people receiving the vaccine. But such disparate outcomes are inevitable when making medical decisions that affect different age cohorts differently.[169] As discussed above, as long as the proponents of this vaccine distribution plan do not give any indication that their intentions are to save White lives at the cost of Black and Hispanic lives, it would be difficult to mount a successful legal challenge to such a policy.

6.   *Summary of Three Potential Policies*

As shown in this section, none of the three potential policies considered are immune from legal challenges. However, they are not equally vulnerable either. They each pose their own unique legal questions, which vary in their likelihoods of success. Implementing explicit racial preferences is the most susceptible to being overturned in the courts. In this scenario, the exacting standard of strict scrutiny would apply, there are multiple alternatives available that do not use racial classifications, affirmative action comparisons are largely inapplicable, and the current makeup of the Supreme Court all point to such a proposal being struck down. The facially race-neutral policy is likely a distant second for being struck down, with the completely race-neutral policy in third, due to the explicit intention to prioritize

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165. Isaac Stanley-Becker, *Some States Buck Federal Vaccine Recommendations and Prioritize the Elderly over Essential Workers*, WASH. POST (Dec. 29, 2020, 6:00 PM), https://www.washingtonpost.com/health/2020/12/29/covid-vaccine-priority-group-elderly/.

166. *Sex by Age (White Alone)*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?y=2010&tid=DECENNIALSF22010.PCT3&t=002%20-%20White%20alone%3AAge%20and%20Sex&vintage=2010&hidePreview=false (last visited Jan. 11, 2021). Note that only the "White alone" category was utilized. People identifying as multiple races were excluded.

167. *Sex by Age (Black or African American Alone)*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?y=2010&t=age%20and%20Sex%3ABlack%20or%20African-%20American&tid=ACSDT1Y2010.B01001B&hidePreview=false (last visited Jan. 11, 2021). Note that only the "Black alone" category was utilized. People identifying as multiple races were excluded.

168. Census estimates as of 2019 show 13.4% of the overall population to be Black and 60.1% to be White. *See Quick Facts United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045219 (last visited Jan. 11, 2021).

169. Any policy that spends money on the elderly out of the general treasury — such as social security, for example — indirectly favors races that have longer life expectancies over races that do not.

some races over others in the former and the lack of any express intent in the latter.

VI. Non-Legal, Pragmatic Implications of Explicit Racial Preferences

This section considers the additional problems with implementing racial preferences in vaccine distribution. While these issues are not discussed in the legal analysis section, there is some overlap in that the existence of significant non-legal problems to implementing a plan can serve as evidence that other non-racial alternatives should be used instead.

Many potential problems stem from the counterproductive nature of prioritizing Black and Hispanic people. Co-chairperson of the NASEM committee Helene Gayle explains:

> It's not hard to imagine that if you put Black and Brown people first in the line, there's going to be some real mistrust about whether or not people are being used as guinea pigs, because in the past they have been . . . [s]o I think it would probably be counterproductive.[170]

Skepticism in the Black community about the vaccine is already dangerously high.[171] Increased skepticism resulting from the prioritization of Black people could prove disastrous not only for the Black community, but for everyone. With the necessary vaccination rate for herd immunity at around eighty percent,[172] large populations refusing to be vaccinated would be highly detrimental. As one expert explained, "We can make a great vaccine, but if we don't have the community buy-in — people willing to take that vaccine — we actually don't have a great vaccine."[173]

Advocating for racial preferences may be interpreted by some as implicitly treating race as a disability. For example, racial-preference advocate Emily Cleveland Manchanda refers to proposed racial preferences in vaccine distribution as "race- or ability-based adjustments."[174] The use of such language blurs the line as to whether the COVID-19 disparate health outcomes are the result of systemic ra-

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170. Samuel, *supra* note 85.

171. *See supra* notes 43–45 and accompanying text.

172. Kum, *supra* note 42 ("Dr. Anthony Fauci, the director of the National Institute of Allergy and Infectious Diseases, predicted at a recent Harvard event that the number will need to be somewhere between 75 to 85%.").

173. Meera Jagannathan, *Should Black and Latino People Get Priority Access to a COVID-19 Vaccine?*, MarketWatch (Sept. 7, 2020, 7:50 AM) https://www.marketwatch.com/story/should-black-and-latino-people-get-priority-access-to-a-covid-19-vaccine-2020-07-16.

174. Emily Cleveland Manchanda et al., *Inequity in Crisis Standards of Care*, 383 New Eng. J. Med. e16(1), e16(2) (2020).

cism (which there is evidence for) or genetic shortcomings (which there is no evidence for).[175] The equating of certain races with the possession of a genetic disability could lead to the propagation of harmful stereotypes of racial inferiority.

Some might misinterpret such a vaccination prioritization strategy as evidence that races are not only different based on aggregate averages but also significantly different at the genetic level. A belief in inherent racial differences at this fundamental level could lead to dangerous beliefs in inherent racial inferiority and superiority. The dangerous outcome of people interpreting racial preferences in medical care to be implicit admissions of significant genetic differences between races may already be occurring. A 2020 study found that over twenty-five percent of Black people believe that their worse health outcomes are due to genetic differences.[176]

It is also harmful to promote the practice of having doctors consider the race of their patients and use that as a basis for different treatment. This can lead to suboptimal health diagnoses from stereotyping, whether consciously or otherwise.[177] Some medical professionals even rely on treatment algorithms that are based on data that distinguishes between different population groups.[178] Such treatment algorithms result in focusing resources on White patients at the expense of minority patients.[179]

The executive director of the American Public Health Association, Georges Benjamin, warns that fast-tracking vaccine access on the basis of race and ethnicity could be "stigmatizing."[180] This potential stigmatization is not just a pragmatic consideration; it can also be relevant to legal considerations. The Supreme Court has reiterated the "cardinal principle that racial classifications that stigmatize . . . are invalid without more."[181] However, any potential stigmatization from a racial preference scheme in COVID-19 vaccine distribution likely does not rise to the level of stigma that the Supreme Court had in

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175. *See supra* notes 59–61.

176. Hamel et al., *supra* note 32.

177. David E. Bernstein, *Two Decades Ago, the FDA and NIH Mandated the Use of Race to Categorize Subjects and Report Results in Medical and Scientific Research They Oversee. It was a Huge Mistake*, YALE J. ON REG. (July 27, 2020), https://www.yalejreg.com/nc/two-decades-ago-the-fda-and-nih-mandated-the-use-of-race-to-categorize-subjects-and-report-results-in-medical-and-scientific-research-they-oversee-it-was-a-huge-mistake-by-david-e-bernstein/.

178. *Id.*

179. *Id.*

180. Jagannathan, *supra* note 173.

181. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 358 (1978) (Brennan, J., concurring).

mind in the preceding quote.[182] Regardless, this precedent serves to illustrate that a policy's potential for creating racial stigma is viewed with increased skepticism by the courts.

Implementing racial preferences could also be counterproductive to the goal of combating the underlying race-based causes of the existing health disparity. Such racial preferences may result in the net effect of breeding greater racial animosity overall. It is easy to imagine a White person whose family member was deprioritized for the vaccine and therefore died, becoming enraged and focusing on the racially motivated plan that ultimately resulted in the death.[183] Such occurrences could become a strong recruiting tool for white supremacy groups who attempt to promote a martyrdom status to justify their cause. Depending on the breadth of such animosity, this attempt to combat the negative health outcomes resulting from a racist system could produce even worse health outcomes from an increasingly racist system.

Racial preferences in vaccine distribution may also be detrimental to racial progress in a more general sense. Namely, it implicitly promotes the mindset that instead of treating the root causes of disparate health outcomes (housing redlining, employment discrimination, limited access to healthcare, poor education, higher incarceration rates, lack of transportation, etc.), we should instead focus efforts on ameliorating the end result through preferential policies. This is a harmful mindset because attempting to mitigate symptoms while ignoring the root causes only perpetuates the status quo and does not break the chain of causation.[184]

A more general critique of racial preference policies is the problem of defining successful outcomes with a ratio. The explicit goal of some racial preference advocates is to reduce the ratio of COVID-19 deaths between Black people and White people, regardless of the ef-

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182. *Id.* The context of the quote refers to racial classifications that stigmatize due to being "drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism." *Id.* at 357-58.

183. This would likely be similar to the link between affirmative action in college admissions and white resentment, except the severity of losing a loved one would likely exacerbate the potential for resentment. *See, e.g.*, Vann R. Newkirk II, *The Myth of Reverse Racism: The Idea of White Victimhood is Increasingly Central to the Debate over Affirmative Action*, ATLANTIC (Aug. 5, 2017), https://www.theatlantic.com/education/archive/2017/08/myth-of-reverse-racism/535689/ (discussing "white resentment that's surrounded the use of race in job and university application processes since the 1960s").

184. *Root Cause Analysis Principles*, TONEX, https://www.tonex.com/root-cause-analysis-principles/ (last visited Jan. 11, 2021) ("The logic behind [root cause analysis] is that correcting or completely removing root causes, rather than addressing the surface symptom is the best way to solve problems.").

fects on overall deaths.[185] This is problematic because such a goal can be achieved in one of two ways. Namely, through a decrease in the number of COVID-19 deaths in the Black community or through an increase of COVID-19 deaths in the White community. Advocates who are focusing on this ratio appear to have the former outcome in mind, but the latter outcome would equally result in the goal of decreasing the ratio. The fact that an increase in White COVID-19 deaths with no corresponding change in Black deaths would not be desirable is a strong indication that this ratio is not the ideal goal to be pursued.

One final problem with racial preferences in vaccine distribution is the effects of the inevitable litigation that would follow. Even ardent proponents for racial preferences in vaccination, such as Lawrence Gostin, acknowledge such a plan would "be at great risk of being overturned by the Supreme Court . . . ."[186] This is itself an argument against the implementation of such a plan because the uncertainty of litigation and the difficulties of changing vaccination priorities in the middle of the process would be disruptive. Furthermore, these legal uncertainties could easily be misinterpreted by lay people as uncertainties regarding the vaccine's efficacy or safety.

A.   *Racial Determination Impracticability*

Instituting a policy with racial preferences not only risks incurring the counterproductive results discussed in the section immediately above, but it also poses significant implementation difficulties. This is because the notion of race is far from an agreed-upon objective measure. Rather, it is ultimately an "arbitrary biological fiction."[187] Even DNA evidence is insufficient to determine race. Georgetown [L]aw professor Sheryll Chain explains, "You cannot rely on DNA evidence alone to decide what is really a socially constructed concept."[188] This has led some experts to posit that allowing the government to make racial classification judgements "should be dismissed out of hand if for no other reason than the government has no scientific or other reasonable basis for determining who qualifies as African American or Hispanic/Latino."[189] Problems with accurately classifying millions of

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185. *See supra* notes 82–83 and accompanying text.
186. St. Fleur, *supra* note 79.
187. Ritchie Witzig, *The Medicalization of Race: Scientific Legitimization of a Flawed Social Construct*, 125 Annals Internal Med. 675, 675 (1996).
188. Sarah Zhang, *A Man Says His DNA Test Proves He's Black, and He's Suing*, Atlantic (Sept. 19, 2018), https://www.theatlantic.com/science/archive/2018/09/dna-test-race-lawsuit/570250/.
189. Bernstein, *supra* note 177.

Americans by race is further complicated by the immense time constraints required to administer a vaccine to curb the death of thousands every day.

Some Native American tribes have a detailed classification system whereby tribal members receive identification cards.[190] But making determinations regarding who is classified as Black and/or Hispanic would be more difficult. There is currently no universal standard for race classification. Sometimes the same person would be classified as a different race depending on what governmental agency was making the determination.[191] One judge explained the extreme inconsistency in the government's racial classifications by pointing out that "one group [African Americans] is defined by race, another [Hispanics] by culture, another [Asians] by country of origin and another [Native Americans] by blood."[192] The amorphous nature of racial classifications also leads to governmental agencies sometimes changing their mind and revoking a previously made racial determination.[193]

Not only do governmental entities have wildly divergent standards for who may be classified as what race, but they also have different standards of proof for making these determinations.[194] Some governmental agencies require written essays regarding how the applicant for minority status behaves like a member of the minority group, how the applicant is viewed by other members of the minority group, and how the applicant has experienced economic and social disadvantage.[195] And even within a given governmental agency, there is often no documented procedure for how to make racial classifications.[196]

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190. Zhang, *supra* note 188 (stating that "[u]nlike racial categories of black or white, tribal-enrollment criteria is actually quite clear. Each tribe gets to determine who belongs, and membership is often based on tracing direct ancestry to other members of the tribe.").

191. David E. Bernstein, *The Modern American Law of Race*, Geo. Mason Univ. Legal Stud. Rsch. Paper Series LS 20-09, May 2020, at 2–3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3592850 (providing the example of mixed-race George Zimmerman, who would be classified as different races depending on which entity is doing the classifying). For a detailed explanation of the differences between states and governmental agencies in how race is determined, see *id.* at 37–43.

192. Concrete Works of Colo., Inc. v. City & Cnty. of Denver, 86 F. Supp. 2d 1042, 1069 (D. Colo. 2000), *rev'd*, 321 F.3d 950 (10th Cir. 2003).

193. Bernstein, *supra* note 191, at 48 (explaining the example of Jana-Rock Constr., Inc. v. New York State Dep't of Econ. Dev., 438 F.3d 195 (2d Cir. 2006)).

194. *Id.*

195. *Id.*

196. David Bernstein, *May an Individual Claim Minority Status Based on a DNA Test Showing a Small Amount of African Heritage?*, Reason Found. (Jan. 8, 2020, 12:14 PM), https://reason.com/volokh/2020/01/08/may-an-individual-claim-minority-status-based-on-a-dna-test-showing-a-small-amount-of-african-heritage/.

Another problem arises when one considers the arbitrary practice of designating a minimum percentage of ancestry needed to qualify as a certain race. There is no agreement as to what this number should be. Under the rule of "hypodescent," or the "one-drop rule," any amount of African ancestry classifies a person as Black.[197] For Cherokee Native Americans, people with only 1/256 blood quantum are entitled to receive a Certificate Degree of Indian Blood card and the government benefits that come from this minority status.[198] A 1987 case held that someone who was twenty-five percent Hispanic did not count as Hispanic for a New York Minority Business Enterprise program.[199] In 1985, a Louisiana court held that someone could not identify as White on her passport because her great-great-great-great-grandmother was Black.[200]

The unscientific nature of assigning racial classifications is particularly troublesome in the present case. This is because there already exists conspiracy theories and misinformation that are harming efforts to minimize the spread of COVID-19.[201] The governmental implementation of non-scientific classifications would likely only fuel such conspiracies. One final issue is that existing proposals for the implementation of racial preferences in vaccine distribution seem to ignore the fact that many White people are also members of minority groups with a history of being victimized in America. These include Italians, Portuguese, Jews, Israelis, and Iranians.[202]

CONCLUSION

This Article provides detailed legal analysis regarding potential COVID-19 vaccine distribution plans. It details why an explicit racial preference is unlikely to meet the demanding requirements of strict scrutiny, and why alternative plans — although susceptible to legal challenges in their own right — are significantly less likely to be overturned. This Article also gives pragmatic reasons for why explicit racial preferences would produce counterproductive results.

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197. *Hypodescent: The "One-Drop" Rule*, Vassar Coll., http://pages.vassar.edu/passingbeyondpassing/hypodescent-the-one-drop-rule/ (last visited Jan 11, 2021).

198. *Frequently Asked Questions, How Much Cherokee Am I?*, Cherokee Nation, https://www.cherokee.org/about-the-nation/frequently-asked-questions/miscellaneous/ (last visited Jan. 11, 2021).

199. Major Concrete Constr., Inc. v. Erie, 521 N.Y.S.2d 959 (NY. App. Div. 1987).

200. *See* Steve Bradt, *'One-Drop Rule' Persists*, Harv. Gazette (Dec. 9, 2010), https://news.harvard.edu/gazette/story/2010/12/one-drop-rule-persists/; *see also* Doe v. State, 479 So.2d 369, 372 (1985).

201. Bernstein, *supra* note 177.

202. Bernstein, *supra* note 191, at 47.

The importance of vaccinating people expediently means that discussions regarding the topic of this Article are of utmost importance. The implementation of ill-advised vaccination priorities could result in legal challenges and increased skepticism, both of which would delay inoculation efforts, resulting in the unnecessary deaths of tens of thousands of Americans.[203] Additionally, existing delays in vaccine distribution[204] serve to exacerbate the importance of priority order. A better understanding of these issues is of paramount importance not only for the current COVID-19 crisis but also for future pandemics and the rationing of other limited medical resources, such as organ transplants and ICU beds.

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203. At the rate of death experienced in early January 2021 (over 3,000 daily deaths), a delay of only ten days could lead to an extra 30,000 deaths. *See Covid-19 Coronavirus Pandemic*, *supra* note 7.

204. Harris, *supra* note 9.

A Feminist Response to
A Feminist Critique of Police Stops
and an Imagined Dialogue

I. Bennett Capers*

Introduction

It is not surprising that when we think of aggressive policing, including the aggressive use of police stops, we tend to think of Black and Brown victims. Part of this has to do with sheer numbers. When it comes to police violence, the simple fact is that Black people are disproportionately the victims. Even though Black people make up about twelve percent of the population, they constitute almost a third of all civilians killed by the police.[1] Furthermore, Black people comprise forty percent of all *unarmed* individuals shot by police.[2] Some more numbers? According to one study, if you just focus on the youth between the ages of 15-19, the risk of a Black youth being killed by the police in the country is twenty-one times greater than the risk of a White youth being killed by the police.[3] Indeed, police violence is so omnipresent in the lives of many Black Americans that there is a "talk" parents give their Black children, especially their Black sons, about how to appear submissive and passive so that they do not become victims of blue-on-black violence. The "talk" is so well known

that Justice Sotomayor referred to it in *Utah v. Strieff*.[4] Indeed, many Black people know intimately what many other Americans are just beginning to realize: That if you're Black or Brown, a police stop can be fatal.

But this only brings us to the problem of police stops. Consider New York City as an example. Over a span of eight years, members of the New York City Police Department made over 4.4 million forcible stops, with eighty-three percent of those stopped being a Black or Brown person.[5] Although the Court in *Terry v. Ohio*[6] permitted stops on the mere showing of articulable reasonable suspicion that "criminal activity may be afoot,"[7] it bears noting that for every twenty individuals stopped in New York City, a full nineteen were found *not* to be engaged in criminal behavior warranting arrest.[8] Even this statistic understates the rate of unjustified police stops since, of the individuals who were arrested, nearly half of the arrests were eventually thrown out or dismissed.[9] And of course, disproportionate targeting of Black and Brown people has been found in other cities as well, from Atlanta to Washington to Baltimore to Detroit to Los Angeles, just to name a few.[10] Add to this the disparities we see in traffic stops, which Black people sometimes call the crime of "Driving While Black,"[11] and many Latinx people call the crime of "Driving While Brown."[12] Speaking of "Driving While Black" and "Driving While Brown," there is a reason why many South Asians and Middle Easterners speak of the crime of "Flying While Brown."[13] They have also experienced disproportionate targeting along lines of race. While Black

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4. 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) ("For generations, black and brown parents have given their children 'the talk'—instructing them to never run down the street; . . .keep your hands where they can be seen; do not even think of talking back . . . all out of fear of how an officer with a gun will react. . ."). For another example of the "talk," *see* I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 696-97 (2018).

5. Floyd v. City of New York, 959 F. Supp. 2d 554, 558-59 (S.D.N.Y. 2013).

6. 392 U.S. 1 (1968).

7. *Id*. at 30.

8. Floyd, 959 F. Supp. at 558.

9. *See* ERIC T. SCHNEIDERMAN, N.Y. STATE OFFICE OF THE ATTORNEY GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES 3, 10 fig.7 (2013), http://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRAC TICES_NOV_2013.pdf [http://perma.cc/X2ES-K9HY] (analyzing the efficacy of stop-and-frisk by looking at the dispositions of the arrests made under the program).

10. *See* I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1255-56 (2017) (discussing studies).

11. *See generally* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999).

12. *See generally* Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1 (2005).

13. *See* Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1577 (2002); *see also* Sherri Sharma, *Beyond "Driving While Black" and "Flying While Brown": Using Intersec-*

and Brown people in general experience the brunt of police violence and police stops, Black and Brown men are particularly vulnerable. In addition, while aggressive policing is not normally associated with cis women, there is the phenomenon of "Walking While Trans," which describes the harassment and over-policing of non-cis women.

All of this makes Josephine Ross's book all the more thought-provoking. Does feminism have something to say about the Court's interpretation of the Fourth, Fifth, and Sixth Amendments — our de facto "code of criminal procedure"?[14] More specifically, is there a feminist critique of police stops? As indicated by the title of her book, *A Feminist Critique of Police Stops*,[15] for Ross the answer is clearly yes.

Part I of this Review provides a brief overview of Ross's terrific book, focusing in particular on the feminist critique she offers on a range of police-civilian interactions. As reviews go, convention would dictate that I follow Part I by offering my critique. However, the problem with convention is, well, it is conventional. Instead, in Part II, I imagine a discussion between Ross and four scholars who, by race and by gender, are the prototypical targets of police stops. Specifically, I imagine a dialogue between Ross and four Black male law professors: Paul Butler, Devon Carbado, Trevor Gardner, and myself. At least three of us speak not only as criminal procedure scholars, but also as Black men who have been the victims of race-based policing.[16] Finally, in Part III, I return to Ross's feminist critique and put forth some of the additional feminist arguments I wish Ross had made.

I. Ross's Critique

Ross uses much of her book to expose the chasm between the law on the books and the law on the streets when it comes to police-civilian interactions, which she exposes through the disconnect between the cases she teaches and the lessons she learns from her Black students at Howard University School of Law, and from the *Know Your Rights* sessions they conduct with Black middle-schoolers. She also exposes what she terms the hidden logic — I think of it as the hidden agenda — of seminal Court decisions. For example, she probes the

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tionality to Uncover the Gendered Aspects of Racial Profiling, 12 Colum. J. Gender & L. 275 (2003).

14. *See generally* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929 (1965).

15. *See generally* Josephine Ross, A Feminist Critique of Police Stops (2021).

16. *See* Paul Butler, *Walking While Black: Encounters with the Police on My Street*, Legal Times, Nov. 10, 1997, at 23; *see also* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 Mich. L. Rev. 946 (2002); Bennett Capers, The Prosecutor's Turn (forthcoming 2021).

Court's decision in *Terry v. Ohio* to reveal the hidden logic there: because *Terry* states that "the person stopped is not obliged to answer . . . and refusal to answer furnishes no basis for arrest."[17] Accordingly, *Terry*'s benefit to police officers can only rest on consent, i.e., consent to answer or consent to search.[18] In other words, *Terry* only "works" if civilians "waive or give up their rights."[19] The benefit to the police depends on the surrender of rights.

However, Ross's main intervention is offering a feminist critique of these interactions, especially since, as she puts it, "consent runs through it."[20] To be clear, Ross is not the first scholar to point out the inconsistency in how courts treat consent in sexual assault cases and how courts treat the same issue of consent when it comes to police-civilian interactions (never mind how different we treat consent in the medical context). But she may be the first to take the comparison a step further by pointing out the inconsistency in how we treat consent in sexual assault cases involving police suspects, and how we otherwise treat consent in police-civilian encounters. She perceptively writes:

> For the most part, our country recognizes that it's difficult for civilians to refuse an officer's request for sex. But when it comes to searches, the courts call them "consensual," and when it comes to statements, courts call them "voluntary."[21]

She notes that New York recently became one of several states to criminalize sexual activity between a law enforcement officer and a person in custody, concluding that consent in such circumstances is by definition coercive and therefore can never be truly "voluntary."[22] In short, we are willing to recognize that a police officer's apparent authority — when coupled with custody — is enough to render consent invalid, yet we reach the opposite conclusion outside of a sexual context. We tell ourselves the "fiction"[23] that a person in custody can voluntarily consent to a search, or voluntarily consent to give a statement, or voluntarily consent to speak to the police. And yet, as Ross persuasively points out, "the same power imbalance" is at play.[24] She adds that just as states "now recognize that it is wrong to allow police to claim consent when they have sex with someone in their custody,"

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17. Ross, *supra* note 15, at 32.
18. *See id.*
19. *Id.*
20. *Id.* at 6.
21. *Id.* at 37.
22. Luis Sanchez, *New York Lawmakers Pass Bill Banning Police from Having Sex with People in Custody*, THE HILL (Mar. 31, 2018, 9:43 AM), https://thehill.com/homenews/state-watch/381093-new-york-closes-loophole-allowing-police-to-have-sex-with-people-in.
23. Ross, *supra* note 15, at 37.
24. *Id.* at 75.

we should "recognize that the consent doctrine within Fourth Amendment law is also a cruel loophole that must be closed."[25] Not holding back, she concludes it is time to recognize that the "consent doctrine is a sham."[26]

For me, her turn to sexual consent issues involving police officers is just one of the many "aha" moments in the book.   Indeed, one of the pleasures of Ross's book is the sustained feminist critique that runs throughout. As she notes early on, there are three lessons from feminism that can help us both see through the fictions of police-civilian interactions, and reconceptualize them:

1. **Bodily integrity**. Feminism places a high value on people's right to control their own bodies and helps readers to recognize the ways that police stops can interfere with an intimate sense of self.

2. **Victims' perspective**. Many feminist successes to date began with consciousness-raising methods that illuminated the ways that the law failed to adequately address women's lived experiences.

3. **Consent runs through it**. Feminists have long critiqued laws that blame women for not resisting an aggressor. When a person cooperates with someone who wields power, feminists call that submission, not consent.[27]

Ross uses these lessons to explore a host of issues from our indifference to the sexual harm of frisks to all persons, not just women; to the continued refusal of the Court to consider seriously the perspective of civilians in police-civilian interactions; to how the Court's jurisprudence "renders police power invisible" and "camouflages aggression."[28] All of this builds to her ultimate argument: a call to abolish stop-and-frisk. She writes, "It is simply not safe for vulnerable civilians to say no to police. We must toss out the consent doctrine. And once we get rid of the consent doctrine, *Terry v. Ohio* and *Utah v. Strieff* must fall with it."[29]

Having briefly sketched out some of Ross's arguments and hoping to continue the long tradition in Critical Race Theory of imagined dialogues,[30] I next turn to an imagined conversation between Ross and four Black male criminal procedure scholars.

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25. *Id.* at 77.
26. *Id.* at 166.
27. *Id.* at 6.
28. *Id.* at 153, 154.
29. *Id.* at 166.
30. For some standout examples, *See* Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987) (engaging in dialogues with his fictional creation Geneva Crenshaw); *see also* Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 Harv. L. Rev.

II. An Imagined Dialogue

Prof. Capers:

Professor Ross, can I just begin by saying how readable your book is, and that I'm looking forward to incorporating your feminist critique the next time I teach Criminal Procedure? I also love how you intersperse the stories of cases with the experiences of your students, especially as you help them conduct *Know Your Rights* sessions for middle schoolers. And how these interactions with students were also a learning experience for you.

Prof. Ross:

[Absolutely. For example], I thought that we should include "free to leave" as one of the rights we teach teenagers in Youth Court . . . . My Howard law students saw things differently.[31]

Prof. Capers:

You also discuss "The Talk" parents give their Black children.[32] You know, to be exceedingly deferential. I was just reading something Professor Trevor Gardner wrote about this. He was saying that one problem with "The Talk" is that it may be —

Prof. Gardner:

[T]he race-based stop becomes a tidy and efficient exercise, the ease of which is likely to raise the rate at which African Americans are stopped, broadening their exposure to police violence. This is a process by which collective conformity creates a deleterious feedback loop for the targeted racial cohort.[33]

Prof. Capers:

Exactly. Which is why Professor Gardner goes on to argue that Black people should instead adopt a nonconformist protocol "that includes a request for the name and badge number of the seizing officer(s) fol-

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4, 13-83 (1985) (introducing Geneva Crenshaw); *see generally* Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) (engaging in dialogue with his creation Rodrigo, an African-American and half-brother of Bell's creation Geneva Crenshaw.); Jerome McCristal Culp, Jr., *The Michael Jackson Pill: Equality, Race, and Culture*, 92 MICH. L. REV. 2613 (reintroducing the interlocutor Crenshaw). Derrick Bell discussed his creation Geneva Crenshaw in the pages of the *Howard Law Journal. See* Derrick Bell, *Racism is Here to Stay: Now What?*, 35 HOW. L.J. 79, 88 (1991). Of course, one difference is the discussants, I have gathered, are flesh and blood, and their words are taken from their scholarship. It's discussion as collage.

31. Ross, *supra* note 15, at 40.

32. *Id.* at 47.

33. Trevor George Gardner, *Police Violence and the African American Procedural Habitus*, 100 B.U. L. REV. 849, 856 (2020).

lowed by the filing of a formal complaint."[34] What was interesting for me in reading *A Feminist Critique*, is that parts of it were practically in dialogue with Professor Gardner's article. I suspect your students would give us all a lesson about what really happens on the street when Black youths try to exercise their "rights." I think you have a passage in your book about the supposed right to walk away and what your Howard students had to say about it, no?

Prof. Ross:

They explained that in their neighborhood, if you walk away, "you can get arrested . . . or shot." Most chilling was a comment from the former police officer in the class: "It would be irresponsible for us to tell young people they can walk away from police." The ex-cop was not speaking lightly. To teach these boys and girls the actual law would set them up for an arrest or physical retaliation.[35]

Prof. Capers:

I wonder if there's a middle ground? At least with respect to being free to leave.

Prof. Ross:

Instead of telling teenagers that they have a right to leave when an officer approaches them, we teach them to ask, "Am I free to leave?" The question forces the officer to make a choice. If the officer has reasonable suspicion, he will tell the teen she can't leave. But if the officer lacks reasonable suspicion, he either violates the Constitution by keeping the teen against her will (and she can complain later) or ideally, the officer follows the law and tells her she may go.[36]

Prof. Capers:

Ideally? I have to admit I'm a grown a** man and a former federal prosecutor, and yet I would be nervous about asking an officer if I'm free to leave for fear of getting an a** whipping. Especially since in your book, you talk about "contempt of cop" tickets and "attitude arrests."[37] I've watched enough TV to know that when White people say, "Am I free to leave?" or "Maybe you should speak to my attorney," cops back down. But if I said it, my guess is it would just trigger the kind of masculinity contests Professor Frank Rudy Cooper talks

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34. *Id*. at 885.
35. Ross, *supra* note 15, at 40.
36. *Id.* at 47.
37. *Id.* at 78-79.

about.[38] Professor Cooper! I should have invited him to this imaginary conversation! Anyway, you mention that it's hard for civilians to tell what's an order or not. But for me this raises a whole other issue. If you know you can get arrested — or a beat down — for failing to obey a police order, and yet you can't tell whether what the police officer is saying is an order or not without risking life and limb, you're really screwed. Beyond this, you won't be surprised I think the Court's criminal procedure opinions also discipline us — here I'm thinking of Black people in particular — into a particular kind of subordinate citizenship.[39] I can't help but think what Professor Paul Butler would say to all of this. Professor Butler?

Prof. Butler:

The system is working the way it's supposed to.[40] [The problems you're talking about] are not actually problems, but are instead, integral features of policing and punishment in the United States. This is how the system is supposed to work.[41]

Prof. Capers:

I think you also tie this to race, no?

Prof. Butler:

My modest suggestion is that the Court has a different point of view about the kind of policing that is reasonable for Black people than is reasonable for White people.[42]   I explain [that] granting the police this kind of power is an explicitly racial project by the Court.[43]

Prof. Capers:

I think Professor Devon Carbado wants to add something.

Prof. Carbado:

Over the past four decades, the Supreme Court has interpreted the Fourth Amendment to enable and sometimes expressly legalize racial profiling. By racial profiling, I mean, borrowing from Randall Kennedy, a process in which police officers use "'race as a factor in deciding who to place under suspicion and/or surveillance.' . . . [T]he

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38. *See generally* Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies, Terry Stops, and Police Training*, 18 Colum. J. Gender & L. 671 (2009).

39. *See* Capers, *supra* note 4, at 657.

40. *See* Paul Butler, *The System is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 Geo. L.J. 1419, 1425-27 (2016).

41. *Id.* at 1425.

42. *Id.* at 1452.

43. *Id.* at 1426.

Court's legalization of racial profiling exposes African Americans not only to the violence of ongoing police surveillance and contact, but also to the violence of serious bodily injury and death."[44] Put another way, the legalization of racial profiling facilitates the precarious line between stopping Black people and killing Black people.[45]

Prof. Capers:

None of this leaves me optimistic about reform. It actually makes me understand Afropessimism more,[46] even though my own recent work is much more optimistic.[47] Professor Ross, it also adds support to your argument that we should bypass the Court if we want to see real change by abolishing stop-and-frisk. You mention legislation, ballot-initiatives, even a role for progressive prosecutors.[48] I hear you. Returning to your feminist critique of police stops — again, brilliant! You also argue for getting feminists on board in supporting your reforms. But there I have even more questions. But I don't want to take up any more time from Professors Butler, Carbado, and Gardner, especially since Black professors in particular have been overextended during this year of racial reconciliation. So, I'll say a figurative good-bye to them. My brothers, hopefully we'll catch up at the next John Mercer Langston conference for Black male professors. I think the last time I saw you all might have been when we gathered in person at Howard U School of Law! There are still pictures on Twitter![49] Anyway, until next time!

III.   A FEMINIST RESPONSE

Early on, Ross notes that feminists "of all racial and ethnic backgrounds should be natural allies in the movement to end racist police practices."[50] She continues:

> Fifty years ago, police raided gay bars and harassed the male and female patrons almost as regularly as they now harass young men like Jamal. Today, people of color within the LGBTQ community continue to face excessive policing and stop-and-frisk. Most femi-

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44. Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Violence*, 105 CALIF. L. REV. 125, 129 (2017) (quoting Randall Kennedy, *Suspect Policy*, THE NEW REPUBLIC (Sept. 13, 1999), https://newrepublic.com/article/63137/suspect-policy.).

45. *Id.*

46. *See generally* FRANK B. WILDERSON, III, AFROPESSIMISM (2020).

47. *See generally* I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1 (2019).

48. *See* ROSS, *supra* note 15, at 166-73.

49. *See* Howard University (@HowardU), TWITTER (July 19, 2019, 2:44 PM), https://twitter.com/howardu/status/1152288048215932928?lang=en.

50. ROSS, *supra* note 15, at 14.

nist groups now embrace LGBTQ equality. In her classic book of essays, *Women, Race, & Class*, activist and scholar Angela Y. Davis explains how "racism nourishes sexism" and laments how white women came late to the cause of protecting black women from rape and not seeing how lynch mobs ultimately reinforced white women's inequality as well. *A Feminist Critique of Police Stops* invites readers, feminist or not, to support the abolition of stop-and-frisk. Let's not miss the opportunity to build coalitions this time.[51]

Ross is right, of course. Feminists *should* be allies in the movement to end racist police practices. But this is also where I'm hoping Ross might take me next time: to an exploration of why White women, including White feminists, have, to date, not been allies in the fight, and how we can enlist them beyond simply saying, "You should join us." I raise this point because I am painfully aware of the long history of White women, including White feminists, being participants in racial subordination and participants in racialized policing. With respect to participating in and benefiting from racial subordination, one has only to think of the many White women who actively participated in and benefited from the slave trade.[52] Or the white "feminists," such as Elizabeth Cady Stanton, who were more than happy to segregate Black feminists in the suffrage movement; in the very book Ross cites, Angela Y. Davis devotes an entire chapter to the topic.[53] Or, indeed, the forty-seven percent of White women who voted for Trump in 2016,[54] "a grab-'em-by-the-pussy candidate, despite his sexist, racist, and derogatory behavior on the campaign trail . . . a dark reminder that some women were still more interested in protecting their privilege than fighting for equality."[55] Indeed, more White women voted for Trump than for Clinton.[56] Or that some exit polling suggests Trump's percentage of the white women vote *increased* in 2020.[57]

White feminists' long history of throwing Black people under the bus extends to the criminal arena. Since I also write in the area of sexual assault, allow me to focus there for a moment. The racializa-

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51. *Id.*

52. *See generally* STEPHANIE E. JONES-ROGERS, THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH (2019).

53. ANGELA Y. DAVIS, WOMEN, RACE, AND CLASS 70-86 (1981).

54. PEW RSCH. CTR, FOR MOST TRUMP SUPPORTERS, 'VERY WARM' FEELINGS FOR HIM ENDURED 22 (2018).

55. Angelina Chapin, *Of Course White Women Voted for Trump Again*, THE CUT (Nov. 17, 2020), https://www.thecut.com/2020/11/many-white-women-still-voted-for-trump-in-2020.html.

56. PEW RSCH. CTR, *supra* note 54, at 11.

57. *Trump's Increased 2020 Votes from White Women Analyzed by Experts*, MSNBC.COM, Nov. 14, 2020, https://www.msnbc.com/am-joy/watch/trump-s-increased-2020-votes-from-white-women-analyzed-by-experts-95932997905.

tion of rape, including the many lynchings of Black men accused of raping White women,[58] was only possible with the complicity of White women. Furthermore, note too that the feminist agitators for change in the 1970s — or at least the ones that had the power and privilege to be heard — were "largely monolithic, and they achieved a result that disproportionately benefit[ed] white women."[59] Indeed, the feminist turn to revising rape laws in the 1970s and even today reveals, at best a "racial solipsism," if I may borrow from Adrienne Rich;[60] at worse, a racial indifference.[61] White feminists who spout that no one deserves to be raped have certainly been indifferent to the rape of men, often men of color, in prisons, a problem that is endemic.[62] If anything, feminist activism has contributed to mass incarceration. Scholars have even given names to the alliance between feminist groups and the punitive state: "Governance feminism"[63] and "Carceral feminism."[64] Quite simply, the question must be asked, when have White feminists ever done anything good for Black men? And if we were to put on a scale what White feminists have done to benefit Black men, and weigh that against what White feminists have done to harm Black men, which would weigh more? Considered in this way, Ross's suggestion that we should all be "natural allies," while laudatory, begs for elaboration.

My other question is even simpler. Ross provocatively argues for the "abolition" of the practice of stop-and-frisk and suggests that feminists of all stripes should join this abolitionist project. But throughout Ross's book I kept asking a different question. In this time when there is a movement to abolish the entire carceral state, including calls from Angela Y. Davis,[65] why is Ross's call so narrow? Of course, it

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58. *See generally* Ida B. Wells-Barnett, Southern Horrors: Lynch Law in All Its Phases (1892).

59. I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. Rev. 826, 868 (2013).

60. Adrienne Rich, *Disloyal to Civilization: Feminism, Racism, Gynephobia, in* On Lies, Secrets, and Silence: Selected Prose 1966-1978, 275, 299 (1979).

61. Capers, *supra* note 59, at 868-69.

62. Bennett Capers, *Real Rape Too*, 99 Calif. L. Rev. 1259, 1266-72 (2011).

63. Janet Halley, Split Decisions: How and Why to Take a Break from Feminism 20-22 (2006).

64. *See* Janet Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 Melb. J. Int'l L. 78, 79 (2008) (describing "carceral feminism" as the "turn of Western feminism to criminal law as its preferred mode of deploying their power in policy- and law-making" and as "intent on criminalising, indicting, convicting, and punishing perpetrators of sexual violence in numerous domains of domestic law"); *see also* Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism"*, 18 differences: J. Feminist Cultural Stud. 128, 143 (2007).

65. *See generally* Angela Y. Davis, Are Prisons Obsolete? (2003); Angela Y. Davis et al., Abolition. Feminism. Now. (2021); Maureen Mansfield, *What is Abolitionist Feminism, and Why Does it Matter?*, IPPR (June 13, 2018), https://www.ippr.org/juncture-item/what-is-abolitionist-feminism-and-why-does-it-matter (discussing more on abolition feminism).

may be that Ross is focusing on what she believes is achievable over what is ideal. Or it may be something else. But it is a question I wish she had explored and answered.

Conclusion

It is not uncommon for book reviews in law reviews to be critical. But while I've mentioned a few criticisms here and there, really, I admire Ross's book terribly. It's accessible. Perceptive. Perhaps more importantly, it gets one thinking. And isn't that the mark of a good book?

A Broken PATTERN: A Look at the Flawed Risk and Needs Assessment Tool of the First Step Act

Candice N. Jones*

Introduction

"*The majority of people who are in prison are there because society has failed them.*"

— Angela Y. Davis[1]

Incarceration is a primary form of punishment for criminal offenders in the United States.[2] The United States incarcerates individuals at a rate of 698 per 100,000 residents; more per capita than any other nation.[3] "The American criminal justice system holds almost 2.3 million people in 1,833 state prisons, 110 federal prisons, 1,772 juvenile correctional facilities, 3,134 local jails, 218 immigration detention facilities, and 80 Indian Country jails as well as [numerous other commitment centers, hospitals,] and prisons in the [United States] territories."[4] Mass incarceration is the result of excessive punitive measures taken towards crime over the last thirty years, and now more than ever, it requires a broad and intentional strategy to reverse the effects of these harsh measures.

The movement towards correcting the American criminal justice system has once again gained momentum under the Trump adminis-

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1. Angela Y. Davis, Freedom is a Constant Struggle: Ferguson, Palestine, and the Foundations of a Movement 138 (2019).

2. *See* Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, Prison Pol'y Initiative (June 2018), https://www.prisonpolicy.org/global/2018.html.

3. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020,* Prison Pol'y Initiative (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html.

4. *Id.*

tration. The latest attempt at federal criminal justice reform, the First Step Act of 2018 (First Step Act), was signed into law on December 21, 2018, by former President Donald Trump.[5] The First Step Act was the work of many years of advocacy, negotiations, and compromise, but does not provide the "systemic change necessary to [undo] the harm caused by decades of mass incarceration at the federal level fueled by mandatory minimums and federal prosecutors' focus on extreme punishments for street-level crime."[6] The Trump administration hailed the First Step Act as the most significant criminal justice reform of our generation, and President Trump used this legislation to boost his claim of doing more for the Black community than any past president.[7] The First Step Act does not feature a comprehensive reform approach, and without more changes to sentencing laws and a more equitable outlook on the recidivism reduction programs, the First Step Act alone will have minimal impact. To make a more significant dent in the nation's prison population, we must dismantle the entire criminal justice system and focus on the roots of over-incarceration — changing the mindset of politicians and Americans alike.

One of the most important provisions in the First Step Act is Title I – Recidivism Reduction. The recidivism provision of the bill features a requirement for the Attorney General to develop and release a risk and needs assessment system for use in the federal prison system.[8] The Attorney General, along with other criminal justice experts, developed the Prisoner Assessment Tool Targeting Estimated Risk and Need ("PATTERN"), the risk and needs assessment system, which was required under the Act.[9] Even further, PATTERN was updated in January 2020 after receiving feedback and comments from policy and legal criminology experts during a brief comment period.[10] Despite how this provision looks on paper, it is no more than blind reliance on a skewed risk assessment algorithm that most severely impacts Black people and other people of color. The lack of resources

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5. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

6. Kara Gotsch, *One Year After the First Step Act: Mixed Outcomes*, THE SENT'G PROJECT (Dec. 17, 2019), https://www.sentencingproject.org/publications/one-year-after-the-first-step-act/.

7. *Trump: I've Done More for Black People than Anyone, Maybe Lincoln*, NBC NEWS (July 22, 2020) https://www.nbcnews.com/now/video/trump-says-he-has-done-more-for-black-people-than-anyone-with-possible-exception-of-lincoln-88141381811.

8. *See* 18 U.S.C. § 3632.

9. U.S. DEP'T OF JUST., THE FIRST STEP ACT OF 2018: RISK AND NEEDS ASSESSMENT SYSTEM 43 (2019) (on file with author).

10. U.S. DEP'T OF JUST., THE FIRST STEP ACT OF 2018: RISK AND NEEDS ASSESSMENT SYSTEM - UPDATE 1 (2020), https://www.bop.gov/inmates/fsa/docs/the-first-step-act-of-2018-risk-and-needs-assessment-system-updated.pdf.

to combat recidivism rates and excessive sentencing are the two most important causes of over-incarceration in the federal prison system. To correct the over-incarceration problem in the United States, there must be reform efforts that directly shift the culture of the system of punishment and considers rehabilitation in different and innovative ways.

This note seeks to analyze the Department of Justice's ("DOJ") Risk and Needs Assessment System, PATTERN, and offers proposals for fostering a more equitable and effective system for all individuals incarcerated within the Federal Bureau of Prisons ("BOP"). Part I will discuss the past efforts of criminal justice reform directed at reducing recidivism — or the lack thereof — and the details of the First Step Act of 2018, focusing on the Recidivism Reduction provision. Part II will begin with an analysis of the problems with the earned time credits eligibility criteria of Title I of the First Step Act. Next, Part II will analyze the racial disparities and systemic biases within the data used to develop the PATTERN Risk and Needs Assessment System, including the January 2020 update to the system, and discuss the lack of transparency in the implementation and validation of the assessment tool. Part III will offer various alternatives to assessment and implementation for the provisions within Title I, and more specifically, within the PATTERN assessment tool.

I. How Did We Get Here?

The American criminal justice system has been seeking meaningful "reform" for decades. The disparities within the system were brought on by the implementation of stricter punishment; the "War on Drugs" era that focused on cleaning up the streets; and decades of racial inequality and the punishment of poverty.[11] Legislation has come and gone but none of it has truly focused on rehabilitation of the formerly incarcerated and righting the centuries-long wrongs of this country.[12] To understand how important a focus on recidivism is for effective criminal justice reform, it is imperative to look at the systemic biases that influenced sentencing policies and "reform" acts leading to a modern carceral state of America.

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11. *See generally* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (10th Anniversary ed. 2020).

12. *See* discussion *infra* Part I, Section A.

A. *The First Steps of Criminal Justice Reform*

Criminal justice reform has been a slow-moving legislative movement from the Anti-Drug Abuse Act of 1986 ("ADAA") to the Fair Sentencing Act of 2010.[13] "The federal prison population . . . has risen by more than 700 percent since 1980, and federal prison spending has increased by nearly 600 percent."[14] Many credit the beginning of mass incarceration to the "War on Drugs," particularly as a response to the crack cocaine epidemic back in the 1980s.[15] Congress determined that the solution was to enact a firm hand by implementing stricter sentencing penalties for drug crimes that a judge or jury could not circumvent.[16] The goal was to decrease the crime rate through harsher penalties in hopes of deterring individuals from committing crimes.[17] Consequently, the majority of those affected by the harsher penalties were those of impoverished backgrounds — mainly, Black and Hispanic people.[18]

During the time that the ADAA was passed, criminal activity in poor neighborhoods and predominant communities of color was the backdrop of these strict policies.[19] One of the most disproportionate and prominent sentencing guidelines under this law was the crack cocaine and powder cocaine distinction.[20] Under the ADAA, the 100 to 1 sentencing ratio for crack versus powder cocaine was introduced.[21] This ratio meant that it took "one hundred times more powder cocaine than crack cocaine to trigger the same mandatory minimum sentence."[22] The law assigned the strictest prison sentences to offenses involving drugs more frequently associated with Black people and other minorities.[23] Furthermore, the 1994 Crime Bill, passed by a

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13. Jelani Jefferson Exum & Philip J. McElroy, *What's the Point? The Missing Piece of Criminal Justice Reform Through Consensus and Compromise*, 32 Fed. Sent'g Rep. 65, 65 (2019).

14. Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law – and What Happens Next*, Brennan Ctr. for Just. (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next.

15. Molly Connor, *From First Steps to Second Chances: Addressing Mass Incarceration in State Prisons*, 95 Notre Dame L. Rev. 1699, 1702 (2020).

16. RED Inc., *The First Step Act: What and Why*, https://stoprecidivism.org/the-first-step-act-what-why/ (last visited Mar. 8, 2021).

17. *Id.*

18. *See* Nayely Esparza Flores, *Contributing Factors to Mass Incarceration and Recidivism*, 6 Themis: Rsch. J. Just. Stud. & Forensic Sci. 56, 58 (2018).

19. *See* Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev 811, 819 (2017).

20. *See* Jelani Jefferson Exum, *Forget Sentencing Equality: Moving From The "Cracked" Cocaine Debate Toward Particular Purpose Sentencing*, 18 Lewis & Clark L. Rev. 95, 101-04 (2014).

21. *See* Exum & McElroy, *supra* note 13, at 65.

22. *Id.*

23. *See* Exum, *supra* note 20, at 105-06.

democrat-led Congress, "created new crimes, increase[d] mandatory minimum[s], penalties, and end[ed] Pell grants for those in federal prison."[24] "In 2001, despite people of color making up only 37 percent of [America's] population, they made up 67 percent of the prison population."[25] Efforts to rectify the racial disparities of the prison population through criminal justice reform, which were the result of expanded crime legislation and mandatory minimum sentencing laws, began to stagnantly stretch over the next few decades.

Modern-day political pressure began to reinvigorate the demand for serious criminal reform legislation leading to the passage of the Second Chance Act of 2007 ("SCA").[26] The purpose of the SCA was to reduce recidivism, increase public safety, and assist states and communities in addressing the growing population of inmates returning to communities.[27] The SCA was also enacted to help state and local governments navigate the reentry process for offenders transitioning back into their communities, and to attempt to reduce recidivism and corrections for state and local governments.[28] The SCA "authorize[d] the awarding of federal grants to government agencies and nonprofit organizations to provide reentry services and programs, including employment and housing assistance, victim support, and substance abuse treatment."[29] However, the SCA largely focused on supporting research to identify best practices in correctional education programming, leaving the gap of actually putting the best approaches into practice. Accordingly, after the passage of the SCA, the National Institute of Justice ("NIJ") supported two independent evaluations of SCA adult offender reentry demonstration projects and learned that there was no significant reduction of the likelihood of recidivism.[30] Once again, the fight to rectify the American criminal justice system and lower the high rate of recidivism remained a work in progress.

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24. Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. 791, 792 (2019).

25. Rebecca Wasif, *Reforming Expansive Crime Control & Sentencing Legislation in an Era of Mass Incarceration: A National and Cross-National Study*, 27 U. MIAMI INT'L & COMP. L. REV. 174, 182 (2019).

26. *See* Jesselyn McCurdy, *The First Step is Actually the "Next Step" After Fifteen Years of Successful Reforms to the Federal Criminal Justice System,* 41 CARDOZO L. REV. 189, 216 (2019).

27. *See* Brandon L. Garrett & Megan Stevenson, *Open Risk Assessment* 8-9 (Behav. Sci. & The L., Duke L. Sch. Pub. L. & Legal Theory Rsch. Paper Series No. 2020-41, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3615742#.

28. *See id.* at 217.

29. NAT'L INST. OF JUST., LESSONS LEARNED FROM THE SECOND CHANCE ACT: MOVING FORWARD TO STRENGTHEN OFFENDER REENTRY (June 2018), https://www.ojp.gov/pdffiles1/nij/251704.pdf.

30. *See id.*

With majority bipartisan support and in an attempt to correct the enormous sentencing disparity created by the ADAA, Congress passed and former President, Barack Obama, signed into law the Fair Sentencing Act.[31] Under the old law, a person convicted of selling five grams of crack cocaine would receive a five-year mandatory minimum sentence, but those who sold 500 grams of powder cocaine would receive the same sentence.[32] The Fair Sentencing Act reduced the disparity, which resulted in punishments that fell disproportionately on offenders of color.[33] As a result of legislative compromise, the Fair Sentencing Act decreased the powder cocaine to crack cocaine ratio to almost eighteen to one.[34] According to President Obama, this bill "demonstrated that it was possible for Congress to come together on a bipartisan basis and pass reforms that reduced excessive federal sentences and gave additional support to the efforts of the Department of Justice and the U.S. Sentencing Commission to do the same."[35] Arguably, although the bill was the first semi-successful attempt at legislation intended to rectify the racial disparities as a result of mandatory minimum drug sentences, there remained a lack of true reform to the sentencing landscape. This bill was simply a public show of legislative compromise.

Further displaying the political tug of war on the issue of criminal justice reform, in 2015, Congress failed to pass the Sentencing Reform and Corrections Act ("SRCA").[36] The bill stalled in the Senate[37], which was the beginning of numerous reforms dying in the process of being introduced in House or Senate committees. Despite Congress's numerous attempts at enacting "reform" legislation, the shortcoming of the countless bipartisan compromises over the span of thirty years never "fundamentally change[d] . . . the main characteristics of American criminal punishment — over-incarceration and extreme racial disparities."[38] The attempts to reform the American criminal justice system were not completely redirected to focus on rehabilitative justice. High rates of recidivism have been a problem within the United States for decades. When prisoners are released, many of them lack the social, occupational, and economic skills necessary to succeed outside of the prison walls. To improve the American criminal justice

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31. *See* Obama, *supra* note 19, at 826.
32. *See* McCurdy, *supra* note 26, at 219.
33. *See* Obama, *supra* note 19, at 826.
34. *See* Exum & McElroy, *supra* note 13, at 65.
35. Obama, *supra* note 19, at 827.
36. *See* Grawert & Lau, *supra* note 14.
37. *See id.*
38. Exum & McElroy, *supra* note 13, at 66.

and penal system, it was time to begin to look towards effective alternative theories that emphasize the individual and aim to correct the undesirable behavior of convicted criminals.

B.　The Next Step: The First Step Act

Almost miraculously, Congress passed, and former President Trump signed the First Step Act of 2018 into law as an attempt to take the first serious step towards criminal justice reform in more than a decade. First Step stands for "Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person."[39] The primary focus of the First Step Act is recidivism and prison conditions while featuring relatively surface-level provisions on sentencing reform. The First Step Act features provisions that lessen the "three strikes" rule by issuing a twenty-five-year sentence instead of a life sentence for three or more convictions,[40] shortening mandatory minimum sentences for nonviolent drug offenses and giving judges more discretion to deviate from mandatory minimum sentences for non-violent drug offenses, making the Fair Sentencing Act retroactive,[41] and reauthorizing the Second Chance Act, which provides grants on the state and local level for prisoner reentry programming.[42]

One of the most important provisions of the First Step Act increases "good time credit" for federal prisoners, allowing prisoners to earn the initial fifty-four days plus seven, potentially totaling sixty-one days per year off their sentences.[43] The First Step Act also places a great task on the shoulders of the DOJ and its counterparts: "[e]valuate the risk and needs of every federal prisoner, design a program for each prisoner to enhance his chances of success, and re-evaluate the prisoner each year to see whether he has demonstrated improvement and is not eligible for early release based on his risk factors."[44] The BOP also has several responsibilities under the Act: "placing prisoners within 500 driving miles of their families; increasing federal good-time by seven days . . . ; allocating 50 million dollars each year for five years to create rehabilitative programming; improving

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39.　RED Inc., *supra* note 16.

40.　*See* First Step Act § 401(a)(2)(A)(ii), Pub. L. 115–391, 132 Stat. 5220 (codified as amended at 21 U.S.C. § 841(b)(1)(A)).

41.　*See id.* § 404, Pub. L. 115–391, 132 Stat. 5222 (codified as amended at 21 U.S.C. § 841).

42.　*See* Second Chance Reauthorization Act of 2018 § 502, Pub. L. 115–391, 132 Stat. 5222 (codified as amended at 34 U.S.C. § 10101).

43.　*See* Wasif, *supra* note 25, at 193.

44.　CHARLES D. STIMSON, THE HERITAGE FOUND., THE FIRST STEP ACT'S RISK AND NEEDS ASSESSMENT PROGRAM: A WORK IN PROGRESS 10 (2020), https://www.heritage.org/crime-and-justice/report/the-first-step-acts-risk-and-needs-assessment-program-work-progress.

accountability in the BOP's use of compassionate release; and prohibiting the shackling of pregnant women."[45]

C. Recidivism Reduction

One of the pivotal provisions of the First Step Act is Title I. Title I focuses on reforms to reduce recidivism, and the majority of the reforms under this title are contingent on the creation of a risk and needs assessment system.[46] The BOP has a focus on reducing recidivism by targeting behavioral issues, intending to reduce the likelihood that inmates re-offend either while incarcerated or after their release.[47] Recidivism "refers to a person's relapse into criminal behavior, often after the person receives sanctions or undergoes intervention for a previous crime."[48] It is also defined as "a return to BOP custody or a re-arrest within three years of release from BOP custody, including DUI and DWI, but excludes other traffic offenses."[49] The First Step Act authorizes the Attorney General to develop and release a risk and needs assessment system for use in the BOP.[50] The risk and needs assessment system is to be used to "determine the recidivism risk of each prisoner as part of the intake process, and classify each prisoner as having a minimum, low, medium, or high risk for recidivism [and] assess and determine, to the extent practicable, the risk of violent or serious misconduct of each prisoner."[51] The risk and needs assessment system was to be released by the Attorney General no later than 210 days after the enactment of the First Step Act.[52]

In July of 2019, the Attorney General announced a new risk and needs assessment system, PATTERN.[53] PATTERN is based on the existing BOP BRAVO-R (Bureau Risk and Verification Observation – Recidivism) assessment system, which was developed by the BOP's Office of Research and Evaluation and designed to predict recidi-

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45. Hopwood, *supra* note 24, at 795.

46. *See* U.S. DEP'T OF JUST., *supra* note 9, at 1.

47. *See* U.S. Dep't of Just., *Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons*, JUSTICE.GOV, https://www.justice.gov/archives/prison-reform (last updated Mar. 6, 2017).

48. KIM STEVEN HUNT ET AL., U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL VIOLENT OFFENDERS 4 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf.

49. U.S. DEP'T OF JUST., FIRST STEP ACT IMPLEMENTATION FISCAL YEAR 2020 90-DAY REPORT 7 (June 2, 2020), https://www.ncjrs.gov/pdffiles1/nij/254799.pdf.

50. First Step Act § 101, Pub. L. No. 115-391, 132 Stat. 5196 (codified as amended at 18 U.S.C. 3632).

51. U.S. DEP'T OF JUST., *supra* note 9, at 6.

52. *See id.*

53. *See generally* U.S. DEP'T OF JUST., *supra* note 10, at 1.

vism.[54] The PATTERN assessment instrument is designed to predict the likelihood of general and violent recidivism for all federal inmates over a three-year period.[55] It contains both static risk factors and dynamic items associated with increases and decreases in recidivism.[56] The NIJ hired two consultants to develop PATTERN and used re-arrest data, containing "data for 278,940 BOP inmates who were released between 2009 and 2015."[57]

The First Step Act further required that the Attorney General implement the Risk and Needs Assessment System through the BOP, identify effective recidivism reduction programs and productive activities for prisoners, and ensure that all prisoners are granted access to such programs by January 2020.[58] After the release of the initial PATTERN, the DOJ continued to work with the Independent Review Committee ("IRC") and experts, while seeking and receiving feedback from criminal justice stakeholders, advocates, and interested citizens, to be able to implement the most equitable and effective predictive tool possible.[59] After considering the input and feedback received from the stakeholders, the DOJ made numerous changes to PATTERN and released an update to the system on January 15, 2020.[60]

II.   THE HIDDEN PATTERNS

Built on the backs of the various previous criminal justice reform efforts above, the First Step Act serves as the Federal Government's latest *widespread* attempt to address recidivism in the BOP. Despite the outward appearance of hope and lasting change, the First Step Act has proven to be a mere steppingstone in the realm of recidivism reduction. PATTERN, the risk and needs assessment tool, is not only the provision of the First Step Act that can have the greatest impact on the federal prison population, but it is also the provision that may present the greatest area of concern for Congress and the DOJ. PATTERN is expected to consider various factors in ensuring "that the recidivism rate of prisoners released back into society is effectively reduced by considering the risk of recidivism and misconduct of particular prisoners."[61]

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54. *See* STIMSON, *supra* note 44, at 13.
55. *See* U.S. DEP'T OF JUST., *supra* note 9, at 43.
56. *See id.*
57. STIMSON, *supra* note 44, at 13.
58. *See id.* at 10.
59. *See* U.S. DEP'T OF JUST., *supra* note 10.
60. *See* U.S. DEP'T OF JUST., *supra* note 9.
61. STIMSON, *supra* note 44, at 7.

PATTERN appears to aim for specificity in analyzing each individual inmate, focusing on those who have shown to be at heightened risk for recidivism, while promising rehabilitative change. However, Title I of the First Step Act features a large list of ineligible prisoners who can earn time credits under the PATTERN assessment tool;[62] the assessment tool's algorithm features hidden racial biases; and the design and validation of the assessment tool lacks transparency. Ironically, the January 2020 PATTERN update claimed to feature several changes the DOJ and the IRC felt necessary to improve transparency, effectiveness, and fairness after receiving feedback from criminal justice stakeholders during a comment period that began after the initial 2019 release of the PATTERN tool.[63] This enhanced version of PATTERN contains adjustments and improvements that unfortunately do nothing to correct the disparities and lack of transparency within the assessment tool.

A.   A PATTERN of Exclusion

An initial concern of Title I of the First Step Act is its categorization of eligible prisoners who may earn time credits. Two conditions must be met for an inmate to use their earned time credits: (1) "[I]f they're seeking a transfer to a halfway house, there must be a bed available and [(2)] an incarcerated person must demonstrate that their risk of committing a new crime is low, as calculated by PATTERN."[64] Despite the earned time credit incentive being one of the bill's major components, which is one of the most critical aspects of PATTERN program participation for prisoners, many prisoners will not have the ability to complete recidivism reduction programming and productive activities to earn time credits. The effectiveness of PATTERN centers around the idea that prisoners can earn time credits for their successful participation and completion in programs for which the prisoners may be eligible.[65]

Title I features a rather lengthy list of exclusions as to who is eligible to receive time credits for participating in rehabilitative programs authorized by the bill. There are sixty-eight crimes in total that make a prisoner ineligible to receive time credits under the Recidi-

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62. *See infra* note 64.

63. *See* U.S. DEP'T OF JUST., *supra* note 10.

64. Ames Grawert, *What is the First Step Act-And What's Happening With it?*, BRENNAN CTR. FOR JUST. (June 23, 2020), https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it.

65. *See* STIMSON, *supra* note 44, at 7.

vism Reduction provision of the bill.[66] Offenses generally categorized as "violent, terrorism, espionage, human trafficking, sex, and sexual exploitation, repeat felon in possession of firearm, certain fraud, or high-level drug offenses" are the crimes that make prisoners unable to earn additional time credits.[67] Immigration and drug offenses account for 53.3 percent of the total prison population and the majority of those held in the BOP for immigration and drug offenses are people of color.[68]

Moreover, PATTERN focuses particularly on minimum and low-risk category prisoners, not on medium and high-risk prisoners who are more in need of the incentives to complete programs. Furthermore, the risk designations of high, medium, low, or minimum "affect who is eligible to participate in certain aspects of [First Step] . . . ."[69] Only minimum and low-risk category prisoners can use their earned time credits, and these categories of prisoners are also able to earn more time credits than medium and high-risk category prisoners.[70] The likelihood of high and medium-risk categorized prisoners to reduce their risk levels to one day transition to home confinement, a halfway house, or community supervision is limited. Additionally, one of the key features of the "time credits" is that prisoners will not receive actual time off of their sentences under the program.

Besides, the decision to limit time credit incentives for successfully completing and participating in recidivism reduction programming authorized by PATTERN to only minimum and low-risk category prisoners is not backed by empirical evidence. For Congress to exclude some prisoners from being eligible to earn time credits effectuates its belief that the excluded prisoners are not able to ever attain status as unlikely to recidivate.[71] Research has "demonstrated that effectively reducing recidivism requires focusing programs, jobs, and real and meaningful incentives on those most likely, not least likely, to re-offend."[72] Previous reports from the United States Sentencing Commission showed the following:

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66. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5196 (codified as amended at 18 U.S.C. § 3632(d)(4)(D)).

67. Nathan James, Cong. Rsch. Serv., The First Step Act of 2018: An Overview 5 (Mar. 4, 2019), https://fas.org/sgp/crs/misc/R45558.pdf.

68. Letter from the Leadership Conf. on Civ. and Hum. Rts. to House Judiciary Comm. Member, Vote "No" on The FIRST STEP Act 2 (May 8, 2018) (on file with author).

69. *FIRST STEP's Rough First Year*, Vera, https://www.vera.org/state-of-justice-reform/2019/first-step (last visited Nov. 21, 2020).

70. *See supra* note 68.

71. *See* Madeleine Dolan, *Comment: The First Step Act's Misstep: Why the First Step Act Violates Prisoners' Rights to Equal Protection*, 69 Am. U. L. Rev. 233, 263 (2020).

72. Letter from The Leadership Conf. on Civ. and Hum. Rts. to House Judiciary Comm. Member, *supra* note 68, at 3.

> [C]areer offenders who committed a violent instant offense or vio-
> lent prior offense generally have a more serious and extensive crim-
> inal history, recidivate at a higher rate, and are more likely to
> commit another violent offense in the future compared to career
> offenders who received the designation based solely on drug traf-
> ficking convictions.[73]

According to an internal assessment conducted by the DOJ in 2019,
only seven percent of Black men in the BOP would be considered low
risk enough to be released from prison using PATTERN, compared
with thirty percent of White men.[74] "[I]t is virtually impossible for a
male inmate below the age of thirty to receive a minimum risk classifi-
cation in PATTERN" and if the male inmate has past convictions, it
would be "unlikely for that male inmate to receive a minimum risk
classification unless he is over the age of forty."[75]

The concern with the eligibility requirements for earned time
credits under the First Step Act is that the tool can be too stringent: it
leaves a minimum number of prisoners being released under the bill,
while also resulting in good candidates for early release sitting in
prison instead of being able to recommit themselves as productive citi-
zens outside of confinement. These exclusions are too broad and dis-
qualify a much larger portion of inmates than Congress intended. To
have serious change to mass incarceration, criminal justice reform
must deal with those categorized as violent and high-level offenders.
All criminal justice reforms should present any prisoner that may one
day return to the community with the ability to earn time credit incen-
tives for successfully completing and participating in recidivism reduc-
tion programming.

Prisoners who successfully complete recidivism reduction pro-
gramming are eligible to receive up to ten days of time credits for
every thirty days of program participation. Minimum and low-risk
prisoners who successfully complete recidivism reduction program-
ming or productive activities and whose assessed risk of recidivism has
not increased over two consecutive assessments, are eligible to earn
up to an additional five days of time credits for every thirty days of
successful participation. The time credit program allows prisoners to

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73. HUNT, *supra* note 48, at 2.

74. *See* Eli Hager, *How Bill Barr's COVID-19 Prisoner Release Plan Could Favor White People*, THE MARSHALL PROJECT (Mar. 28, 2020), https://www.themarshallproject.org/2020/03/28/how-bill-barr-s-covid-19-prisoner-release-plan-could-favor-white-people.

75. Riccardo Fogliato et al., *Algorithmic Risk Assessment and COVID-19: Why PATTERN Should Not Be Used*, PARTNERSHIP ON AI 4 (Apr. 30, 2020), https://www.partnershiponai.org/why-pattern-should-not-be-used-the-perils-of-using-algorithmic-risk-assessment-tools-during-covid-19/.

be eligible "for more halfway house or home confinement time beyond the limits already in place: [twelve] months for halfway house and six months (or [ten] percent of the sentence) for home confinement."[76] Despite the positive outlook on how the time credit system was supposed to work, transfers of people out of federal prison to home confinement have proven to be slower than initially posed. A recent report by the DOJ suggests that inmates are being awarded "a specific number of 'hours' for each program" to make up a "day" of credit to earn time credits for completed programming.[77] The report shows that some programs are only held once a month, others are only offered at select BOP institutions, and others have no set schedule at all as to when the program may be available for an inmate.[78]

The earned time credits also present an inadequate incentive for participating in rehabilitative programs. Participating in PATTERN recidivism reduction programming only presents a prisoner with the ability to be moved to a halfway house or home confinement. This is problematic because there is already limited space in halfway houses, and the recent closure of residential reentry centers makes it unlikely that prisoners will be able to use all of their earned time authorized under the bill.[79] This means "an inmate can be released to more than a year of halfway house or home confinement after accumulating earned time credits."[80] As mentioned above, PATTERN was built off of the risk and needs assessment tool previously used by the BOP before the First Step Act was enacted. After an audit of the risk and needs assessment program in 2016, the DOJ's Office of Inspector General stated that "contrary to BOP policy, BOP guidance, and relevant research, BOP's residential reentry center and home confinement placement decisions are not based on inmate risk for recidivism or need for transitional services."[81] Results also showed that the BOP "was underutilizing direct home confinement for low-risk prisoners,

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76. Dale Chappell, *First Step Act Earned-Time Credits are Coming. . .Eventually and Only to Some Prisoners*, Criminal Legal News 23 (Mar. 2020), https://www.criminallegalnews.org/news/2020/feb/18/first-step-act-earned-time-credits-are-coming-eventually-and-only-some-prisoners/.

77. Grawert, *supra* note 64.

78. *See generally* U.S. Dep't of Just. Fed. Bureau of Prisons, Evidence-based Recidivism Reduction (EBRR) Programs and Productive Activities (PA), https://www.bop.gov/inmates/fsa/docs/evidence_based_recidivism_reduction_programs.pdf (last visited Nov. 21, 2020) (displaying the various programming offered in the BOP, along with the duration, frequency, hours, program location, and the needs addressed by each program).

79. Letter from The Leadership Conf. on Civ. and Hum. Rts. to House Judiciary Comm. Member, *supra* note 68, at 2.

80. Tom Root, *Earned Time Credits: The Devil's in the Details,* Fed. Prison Time Blog, (Jan. 22, 2020), https://www.federalprisontime.com/blog/earned-time-credits-the-devils-in-the-details.

81. *See* Garrett & Stevenson, *supra* note 27, at 9.

which also meant that there was not room in [residential reentry centers] for higher-needs and higher-risk prisoners before their release dates."[82]

The accessibility of home confinement has been a longstanding issue that will continue to be problematic without additional resources to accommodate more inmates. The First Step Act does not provide for any additional funding or resources for the BOP to increase the available number of halfway house beds for federal inmates.[83] The best way to achieve financial savings would be to structure the incentives that liken to an actual reduction off of a prisoner's sentence. "For example, if only one in nine individuals earned [sixty] days of credit in a year, $100 million in savings would be realized."[84]

B. A PATTERN of Bias

One of the largest concerns with the PATTERN assessment tool itself is its reliance on data that has been historically littered with racial bias and discrimination. To understand how the PATTERN tool features racial biases, it is crucial to understand how the risk and needs assessment tool measures an inmate's risk score. The PATTERN instrument is gender-specific, designed to predict the likelihood of general and violent recidivism over a three-year follow-up period.[85] The First Step Act requires PATTERN to feature static and dynamic risk factors, which provide a measurement for inmates to increase or decrease in risk score.[86] PATTERN was built off of the BRAVO-R tool, which served as an enhanced version of the existing classification system used by the BOP.[87] The BRAVO-R tool "contain[ed] initial and reclassification assessments, which [were] the same for males and females with different cut points."[88]

Initially, PATTERN used the following factors from the BRAVO-R tool: "criminal history score; history of violence; history of escapes;

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82. *Id.*

83. *See* Root, *supra* note 80.

84. Letter from The Leadership Conf. on Civ. and Hum. Rts. to House Judiciary Comm. Member, *supra* note 68, at 2.

85. *See* U.S. Dep't of Just., *supra* note 9, at 43.

86. *See id.*

87. *See id.* at 42.

88. *See generally*, U.S. Dep't of Just., *supra* note 9, at 42, 45-53. The cut points are set around the recidivism base rate which are approximately the average of the BOP development data set. The cut points were developed for both the general and violent models and the female and male genders separately. The cut point is set above or below the base rate to attempt "to set the appropriate balance between maximizing the number of inmates eligible to earn early release time credits and to participate in evidence-based programming that would reduce their recidivism risk to a low or minimum category, while also considering public safety and the risk of recidivism upon release." *Id.* at 51.

voluntary surrender; and education score."[89] PATTERN then added additional dynamic factors: infraction convictions (any); infraction convictions (serious and violent); number of programs completed (any); number of technical or vocational courses; federal industry employment; drug treatment while incarcerated; drug education while incarcerated; and non-compliance with financial responsibility.[90] The static factors included: "age at first conviction; age at the time of assessment; instant offense; and identification as a sex offender."[91]

Two PATTERN models were calculated to provide for outcome specificity: general recidivism and violent recidivism.[92] General recidivism refers to "any arrest or return to BOP custody following release."[93] Violent recidivism refers to "any violent arrest following release."[94] Risk level categories are identified via cut points, which place individual inmates into four risk categories for both the general and violent risk assessment: high, medium, low, or minimum.[95] Both PATTERN models share a common set of input factors but the measurement of weight is different, leaving an opportunity for an inmate to potentially receive two different scores and risk classifications.[96] The two different scores and risks classifications are combined as demonstrated below:

> [A]n individual must be identified as minimum risk of both general and violent recidivism to be classified as minimum in the final risk level categories. An individual that was identified as lower than medium risk in both the general and violent models was labeled as low risk in the final risk level category. Those individuals identified as high risk in either the general or violent models were classified as high risk in the final risk level categories. Finally, those not classified as minimum, low, or high risk were identified as medium risk in the final risk level categories.[97]

The point assignment algorithm within the PATTERN assessment tool is the first example of how the tool amplifies racial disparities. The DOJ reported that it measured PATTERN to ensure that the risk and needs assessment system's predictive performance was unbiased across all races and genders, while stating in the January 2020 update that "the risk assessment tool cannot correct for any outside biases

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89. U.S. DEP'T OF JUST., *supra* note 9, at 45.
90. *See id.* at 47-48.
91. *Id.* at 45.
92. *See id.* at 50.
93. *Id.*
94. *Id.*
95. *See id.*
96. *See* Fogliato et al., *supra* note 75, at 3.
97. U.S. DEP'T OF JUST., *supra* note 9, at 51.

that lead to higher recidivism."[98] The PATTERN tool now contains fifteen factors to assist in identifying an offender's programming and service needs. The eleven dynamic factors are: "Infraction convictions (any) current incarceration; Infraction convictions (serious and violent) current incarceration; Infraction-free (any) current incarceration; Infraction-free (serious and violent) current incarceration; Number of programs completed (any); Work programming; Drug treatment while incarcerated; Non-compliance with financial responsibility; History of violence; History of escapes; and Education score."[99] The four static factors are: "Age at the time of assessment; Instant violent offense; Sex offender (Walsh criteria); and Criminal history score."[100] In the 2020 update, the DOJ removed two factors from PATTERN that it considered being possibly associated with bias, particularly racial bias — age of first arrest and conviction and voluntary surrender.[101] According to the DOJ, this removal decreased "PATTERN's predictive accuracy by approximately one percent."[102]

Arguably, this removal does nothing to change the amplification of racial disparities the PATTERN tool demonstrates. Risk and needs assessment tools are only as good as the data the system uses. The experience of people of color in the criminal justice system is fraught with racial disparities and implicit bias. The information contained in the data used in the assessment tool is reliant upon "legal interpretation and decision-making, such as criminal history records" and "because people of color are disproportionately affected by the justice system, racial biases are likely built into the data and the risk assessment tool itself."[103] Age and criminal history are weighted the heaviest in the PATTERN risk score algorithm, leaving some inmates with a heavy burden to overcome at the time of assessment.[104] American policing has been riddled with decades of aggressive police tactics, leading to "'false positives' in real life — arrests of people who turn out to be innocent of any crime — as well as convictions that wouldn't have occurred in white neighborhoods."[105] Take New York City for example. The city announced that it will develop a new risk and needs

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98. U.S. DEP'T OF JUST, *supra* note 10, at 9.

99. *Id.* at 10-11.

100. *Id.* at 11.

101. *See id.* at 9.

102. *Id.*

103. Kelly Roberts Freeman & Mari McGilton, *The Problem is Not the Criminal Justice Risk Assessment Tool: It's Systemic Racism*, URBAN WIRE, (July 31, 2020), https://www.urban.org/urban-wire/problem-not-criminal-justice-risk-assessment-tool-its-systemic-racism.

104. *See* Fogliato et al., *supra* note 75, at 4.

105. Beth Schwartzapfel, *Can Racist Algorithms Be Fixed?*, THE MARSHALL PROJECT, (July 1, 2019), https://www.themarshallproject.org/2019/07/01/can-racist-algorithms-be-fixed.

assessment tool based on data from 2009 to 2015.[106] However, "the city's arrest practices during part of that period have been held as unconstitutional, meaning that data should not be a reliable legal or statistical guide as to future behavior."[107]

Risk assessment tools are not completely accurate predictors of whether a person will re-offend or engage in behavior that triggers the recidivism scorecard. They are predictions based on the data group used to develop the tool, and because these assessment tools "categorize risk scores, or likelihoods, into discrete risk categories, even a one-point difference in score can mean the difference between a medium- or high-risk label."[108] If the data is surrounded by inequality, then the algorithmic computations that result from the data will be flawed and will only reinforce those same inequalities. People of color have been known to have higher risk scores than White offenders, which serves as a reflection of the disparities and disadvantages in arrest records, adequate housing, and access to employment.[109] Whether the prediction is made manually or by computer algorithms, the prediction is predicated upon historical data and more Black people will likely be predicted to be categorized as medium or high risk. Napa County Superior Court Judge, Mark Boessenecker, who serves as an evidence-based sentencing consultant, cautioned fellow judges against being completely reliant upon risk scores:

> "A guy who has molested a small child every day for a year could still come out as a low risk because he probably has a job," Boessenecker said. "Meanwhile, a drunk guy will look high risk because he's homeless. These risk factors don't tell you whether the guy ought to go to prison or not; the risk factors tell you more about what the probation conditions ought to be."[110]

Court and arrest data "primarily reflect the past and present operations of the criminal justice system, recording who police chose to arrest, how judges choose to rule, and which people are granted longer or more lenient sentences."[111]

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106. *See* The Leadership Conf. on Civ. & Hum. Rts., Six Things to Know About Algorithm-Based Decision-Making Tools 2 (2020), http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-6Things.pdf.

107. *Id.*

108. Freeman & McGilton, *supra* note 103.

109. *See id.*

110. Julia Angwin et al., *Machine Bias*, ProPublica (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

111. Letter from The Leadership Conf. on Civ. & Hum. Rts. to Attorney General William P. Barr, RE: The use of the PATTERN risk assessment in prioritizing release in response to the COVID-19 pandemic, 2 (Apr. 3, 2020) (on file with author).

C. *A PATTERN of Ambiguity*

A final concern regarding the PATTERN assessment tool is the lack of transparency concerning the design and validation of the tool. The entire PATTERN system lacks transparency regarding available programming and how the needs-related elements of the system work — it is a rushed work-in-progress. The BOP's past evaluations of its recidivism-reduction programming, BRAVO-R, were inadequate and are too scarce to present quality information about the effectiveness of the programming. The lack of transparency "frustrates the ability of outside researchers, academics, and advocates to effectively test tools and advocate for incarcerated persons."[112] Several algorithm tools "are referred to as 'black box' because developers are unwilling to reveal how the tools are designed or developed . . . because the ways in which the algorithms make their predictions are inscrutable."[113] Releasing how the algorithm was developed, what assumptions were considered in its design, how the factors are weighted, what data was used to train it, and how frequently it is updated, can improve the assessment tool's credibility. In using algorithmic-based tools, they must be "designed and calibrated with input from the community and those who would be impacted by their use, rather than input from [a]dministration officials alone."[114]

As a response to the feedback received from the criminology experts, the January 2020 update to PATTERN features a pledge by the DOJ that seeks "to promote further transparency, the Department is reaffirming its commitment to publishing the annual validation data, as well as annual recidivism data."[115] The First Step Act requires the DOJ to submit a report to congressional committees that includes:

> A summary of the activities and accomplishments in carrying out the [First Step Act]; A summary and assessment of the types and effectiveness of the evidence-based recidivism reduction programs and productive activities in prisons operated by BOP; Rates of recidivism among individuals who have been released from federal prison; and the status of prison work programs at facilities operated by BOP.[116]

The IRC and other stakeholders who gave their feedback during the comment period suggested that the DOJ give recidivism data in real-

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112. Letter from The Leadership Conf. on Civ. and Hum. Rts. to David B. Muhlhausen, Director of the National Institute of Justice 2 (Sept. 3, 2019) (on file with author).

113. THE LEADERSHIP CONF. ON CIV. & HUM. RTS., *supra* note 106, at 1.

114. Letter from The Leadership Conf. on Civ. and Hum. Rts. to House Judiciary Comm. Member, *supra* note 68, at 4.

115. U.S. DEP'T OF JUST, *supra* note 10, at 15.

116. *Id.*

time.[117] However, the Department believed that producing monthly
reports on recidivism data would show random irregularities, leading
to confusion and inaccurate conclusions.[118] The most workable solu-
tion in the eyes of the DOJ was to develop a "pilot program to publish
recidivism data on a quarterly basis, beginning in or around April
2020, and will publish annual data in its report."[119]

One of the latest concerns with the lack of accountability and
transparency within the PATTERN assessment tool is the secret up-
date to the range of scores that fall into each category of the risk of
recidivism: high, medium, low, and minimum. In July of 2019, when
the PATTERN tool was released, the DOJ posted a chart detailing the
initial range of risk scores that went into each category.[120] To pro-
mote transparency, the report stated that the BOP will update federal
regulations and the BOP policy to reflect any changes in PAT-
TERN.[121] In two memos in the spring of 2020, due to the emerging
Coronavirus ("COVID-19") pandemic, former Attorney General Wil-
liam Barr directed the BOP to begin identifying prisoners who were
eligible for home confinement release and to grant priority release to
those prisoners identified as presenting "minimal risk to the pub-
lic."[122] Around the same time, ProPublica discovered a separate in-
ternal draft policy document that altered the same range of risk scores
initially published just a year ago in 2019.[123] These new ranges of risk
scores make it harder for an inmate to qualify as minimum risk. The
change to the risk scores was confirmed by Justin Long, a spokesman
for the BOP, substantiating the rumor that the BOP had changed the
range of risk scores without informing the public.[124]

Furthermore, there was no mention of the updated range of risk
scores within the PATTERN update report released in January
2020.[125] Long stated that the draft policy document was not author-
ized for release to the public.[126] This secret policy change was exam-
pled as a real-time experience through thirty-eight-year-old prisoner,
Blayne Davis, who is an inmate at Pollock Federal Correctional Com-

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117. *See id.* at 16.
118. *See id.*
119. *Id.*
120. *See* U.S. DEP'T OF JUST., *supra* note 9, at 58.
121. *See id.*
122. *See* Ian MacDougall, *Bill Barr Promised to Release Prisoners Threatened by
Coronavirus — Even as the Feds Secretly Made It Harder for Them to Get Out*, PROPUBLICA,
(May 26, 2020), https://www.propublica.org/article/bill-barr-promised-to-release-prisoners-
threatened-by-coronavirus-even-as-the-feds-secretly-made-it-harder-for-them-to-get-out.
123. *See id.*
124. *See id.*
125. *See generally* U.S. DEP'T OF JUST., *supra* note 9.
126. *See* MacDougall*, supra* note 122.

plex's minimum-security prison camp in Louisiana.[127] Initially, Davis qualified as minimal risk in April through the old risk scoring system and expected to be one of many prisoners released on home confinement due to the spread of COVID-19 within the facility.[128] When his name was not called during the listing of qualifying inmates, Davis checked with facility staff, who informed him that his risk score qualified him as low risk, not minimum.[129] Knowing that there had to be a mistake, Davis presented the 2019 risk scoring chart to the officer, who then presented him with the updated, more stringent scoring chart.[130] Under the initial 2019 scoring system, "a male inmate with a violent-recidivism score of 21 or lower fell into the minimum-risk category."[131] However, under the new scoring system, for a male inmate to be deemed a minimum risk prisoner, his score must be six or less, leaving Davis shy of one point.[132] Davis's score was a seven.[133]

These hidden changes leave prisoners like Davis unfairly behind bars, despite having successfully completed the correct number of recidivism reduction classes, being a model prisoner, and following the rules of the policy in place to qualify for home confinement. Such incidents further corroborate some of the leading factors of high recidivism rates in the United States; not every inmate is afforded legal representation to inform them of the many day-to-day policy changes that may affect their sentences. Prisoners should be informed of the opportunity to participate in recidivism reduction programming, the benefits of their risk categorization, as well as any changes that should occur with their risk score. Full transparency is needed to allow prisoners the ability "to challenge the scientific validity of the assessments and to avoid constitutional violations."[134]

As COVID-19 began to spread inside prisons, attorneys began to advocate for the release of their clients to prevent them from getting sick and dying inside the prison walls.[135] Attorney General William Barr "ordered officials running federal prisons to 'immediately maximize' the release of prisoners to home confinement to prevent the

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127. *See id.*
128. *See id.*
129. *See id.*
130. *See id.*
131. *Id.*
132. *See id.*
133. *See id.*
134. Rachel DiBenedetto, *Reducing Recidivism or Misclassifying Offenders?: How Implementing Risk and Needs Assessment in the Federal Prison System Will Perpetuate Racial Bias*, 27 J.L. & POL'Y 414, 451 (2019).
135. *See generally* Claire Trageser, *Lawyers Call For Release Of More Inmates To Prevent Coronavirus Spread*, KPBS PUB. MEDIA (Apr. 2, 2020), https://www.kpbs.org/news/2020/apr/02/lawyers-call-more-inmates-be-released-prevent-coro/.

spread of the virus."[136] However, soon after Barr made his order, there was immediate confusion between the BOP and the Attorney General's office as to how the implementation of the order should work, leaving inmates suffering in limbo.[137] The CARES Act stimulus bill granted expanded home confinement authority due to the pandemic.[138] Barr urged officials to prioritize those who were scored to be minimum and low risk under the PATTERN assessment tool.[139] Because of the hidden change to the risk assessment system mentioned above, federal prisoners who once thought they could be considered "priority" to be released on either home confinement or compassionate release, had their release petitions denied. We must ensure that we provide adequate programming and resources to support those who were unexpectantly transferred to home confinement, without the necessary tools to ensure those prisoners do not return to prison. Focus needs to also be placed on those prisoners who no longer qualify as minimum and low risk under the scoring system of PATTERN. A prisoner should have every opportunity to know and understand what factors are being considered to provide the prisoner with access to rehabilitative programming at any moment of their sentence.

In another effort to be transparent, the First Step Act states that the BOP, along with the advice of the IRC, "must review its own programs, scan correctional programming across the country, and determine how to modify and expand its program offerings."[140] To accomplish the mandates in Title I, PATTERN must be reviewed and revalidated on an annual basis for up to five years.[141] The NIJ has stated that it will assist the DOJ in completing this task. In February 2020, the NIJ began "seeking responses to support the annual review and revalidation of the risk assessment tool developed for the Bureau of Prisons (BOP) in accordance with the First Step Act (FSA)."[142] This "plan" is only as good as the consultants the NIJ chooses to participate in the review and revalidation program. After consultants

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136. Joseph Neff & Keri Blakinger, *Few Federal Prisoners Released Under COVID-19 Emergency Policies*, THE MARSHALL PROJECT, (Apr. 25, 2020), https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies.

137. *See id.*

138. *See id.*

139. *See id.*

140. JULIE SAMUELS ET AL., URBAN INST., NEXT STEPS IN FEDERAL CORRECTIONS REFORM 8 (2019), https://www.urban.org/sites/default/files/publication/100230/next_steps_in_federal_corrections_reform_1.pdf.

141. *See* U.S. DEP'T OF JUST., *supra* note 9 at 84.

142. NAT'L INST. OF JUST., CONSULTANT STATEMENT OF WORK: REVIEW AND REVALIDATION OF THE FIRST STEP ACT RISK ASSESSMENT TOOL 1 (2020), https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/NIJ-2020-FSA.pdf.

complete their research, any changes suggested for the PATTERN tool, will have to be submitted and reviewed by the Attorney General for consideration.[143] Despite these requirements, there is still too much power granted to the Attorney General regarding the implementation of the risk and needs assessment tool and its various provisions. Once again, "[t]ransparency about implementation activities would promote accountability and afford an opportunity for those outside the government to highlight instances where implantation choices deviate from the intent or spirit of the law."[144]

III. Redesigning PATTERN

Addressing the concerns with risk assessment tools means recognizing and addressing the systemic biases within the criminal justice system as a whole. To begin, the United States needs to change how the country looks at incarceration and punishment to improve the rate of recidivism in the BOP. Recidivism is a crucial component of the criminal justice system. An important connection exists between incapacitation, specific deterrence, rehabilitation, and the concept of recidivism. "Without changes to sentencing laws that (1) eliminate or greatly reduce mandatory minimums, (2) inform the use of judicial discretion, (3) intentionally develop strategies to reduce the national prison population, and (4) mitigate disparate impacts on communities of color and the economically disadvantaged," the past injustices which lead to over-incarceration in the United States will remain unremedied.[145]

Improved funding is one of the first considerations in improving programming for the BOP to successfully implement the provisions of the First Step Act and PATTERN. Best put by Malcolm Young:

> Congress will have to right this ship, with a 'system' that relies less on passive risk assessments inside prison walls and more on active support and assistance for returning citizens across agency lines and back into communities if it wants to ensure that individuals leaving prison will successfully return to those communities.[146]

Implementation will continue to be slow-moving if Congress does not formally authorize sufficient funds to the BOP to fund the bill for each year it is authorized. Initially, "Congress failed to appropriate

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143. *See id.* at 4.
144. Samuels et al., *supra* note 140, at 8.
145. Exum & McElroy, *supra* note 13, at 67.
146. Malcolm C. Young, How Much Credit Should Trump be Given for the First Step Act? 11 (Oct. 26, 2020) (on file with author), *available at* https://www.dropbox.com/s/i3mbloyo6kwd52a/Trump-FSA.pdf?dl=0.

anything at all, forcing the DOJ to use $75 million from elsewhere in its budget to cover the temporary shortfall."[147] In December 2019, the Consolidated Appropriations Act authorized $75 million in funding for the implantation of the First Step Act despite the BOP asking for $126 million.[148] This funding may still prove to not be enough. A member of the IRC stated, "after factoring in 'training, staff, [and] building things like classrooms, $75 million may not be enough," and the amount needed may be closer to $300 million.[149]

In considering the incentives for participation and completion of recidivism reduction programming, the bill's list of ineligible prisoners for earned time credits should be revisited. The First Step Act should be expanded to include the crimes that most would consider high risk or prisoners considered to not be able to benefit from rehabilitation programs. Research does not support the conclusion that a minimum risk offender is always more likely to benefit than a high-risk offender from recidivism reduction programming.[150] To truly affect widespread criminal justice reform that will have a lasting effect on the level of recidivism in the United States, all individual BOP prisoners should be allowed to participate in recidivism reduction programming or productive activities to earn time credits. Time credits should not be tied to an individual offender's risk category. Furthermore, the earned time credits should be authorized to be used to reduce the length of the prison sentence itself; not just to be transferred to a halfway house, supervised release, or home confinement. Earned time credits that lead to actual sentence reductions can "eliminate delays in prerelease, decrease court costs, and allow the BOP and courts to focus their time elsewhere."[151]

To begin dealing with the racial disparities and biases within the PATTERN assessment tool, researchers, policymakers, and practitioners must recognize that racial biases exist throughout the criminal justice system. Understanding how racial practices have affected the data being used within the assessment tool will allow legal officials to make more informed decisions and present a better plan for using an offender's risk information to satisfy the offender's criminogenic needs. Instead of only predicting criminal traits, the algorithm must

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147. Grawert & Lau, *supra* note 14.

148. *See* U.S. Dep't of Just., *supra* note 49, at 1.

149. Grawert & Lau, *supra* note 14.

150. *See generally Recidivism and Reentry*, Prison Pol'y Initiative, (Dec. 29, 2020), https://www.prisonpolicy.org/research/recidivism_and_reentry/, for various sources focused on what contributes to an individual's ability to succeed upon release.

151. Letter from The Leadership Conf. on Civ. and Hum. Rts. to House Judiciary Comm. Member, *supra* note 68, at 5.

be used as part of a larger decision-making framework that is considerate to issues of systemic racial bias. The quality of the data involved in these algorithmic risk assessment tools reflects the priorities of the people who collect the data. To understand the data behind the recidivism rates, legislators need to understand the differences within the recidivism data and assessment tool algorithms. "These differences matter because many criminal justice and corrections policies have disproportionate impact on different groups, even when statutes are written in broad strokes with no explicit discriminatory element (there is perhaps no better example of this phenomenon than the 100-to-1 crack vs. powder cocaine sentencing disparity)."[152] States such as California have begun to recognize the limitations with recidivism data. California has:

> [B]egun to use the rate at which individuals return to prison, rather than the rate of rearrest, as the primary measure of recidivism. One impact of this change is that recidivism now better tracks new felony convictions, whereas the previous recidivism definition included all felony arrests, misdemeanor arrests, and technical parole violations.[153]

Without proper context, recidivism rates can lead to faulty conclusions about the nature of the crime and the people who committed it. "Data collection must include a transparent and periodic examination of release rates, release conditions, technical violations or revocations, and performance outcomes by race to monitor for disparate impact within the system."[154] Improving the implementation and accuracy of the PATTERN assessment tool will require continuous years of research and oversight to ensure the evidence-based recidivism reduction programs are reducing the federal prison population. "Requesting periodic reports on the status of implementing assessment tools in federal prisons and specific data on the rate of recidivism amongst offenders urges legislators to address the implicit bias in current assessment tools."[155]

To enhance accountability and transparency, a standing oversight board or task force should be created to monitor the BOP and its implementation of PATTERN. A board or task force of this nature can:

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152. RESTORE JUST. FOUND., KNOW MORE: RECIDIVISM (2020), https://restorejustice.org/about-us/resources/know-more/know-more-recidivism/.

153. *Id.*

154. THE LEADERSHIP CONF. ON CIV. & HUM. RTS., THE USE OF PRETRIAL "RISK ASSESSMENT" INSTRUMENTS: A SHARED STATEMENT OF CIVIL RIGHTS CONCERNS 4 (2020), https://civilrights.org/edfund/pretrial-risk-assessments/.

155. DiBenedetto, *supra* note 134, at 442.

> [W]ork with BOP to develop and promulgate performance metrics; monitor development of new risk and needs assessment and implementation of newly earned time credits; oversee development and implementation of a comprehensive 10-year plan to restructure federal prison system; review BOP oversight, accreditation, auditing, and compliance mechanisms; and conduct special studies.[156]

The data used in the development of risk assessment instruments must be reviewed for accuracy and reliability. Using an algorithm in criminal justice decisions is risky and requires transparency. Transparency can help to establish trust and allows the interested party to understand how determinations are made. Releasing the data and methods used to build these algorithmic assessment tools allows scientists, policymakers, and other criminal justice stakeholders to candidly study the tools to ensure fairness.

Conclusion

To maximize the benefits of a risk and needs assessment tool, there needs to be great care placed into the design, development, and implementation of the assessment tool. Simply adopting a risk and needs assessment tool does not automatically bring benefits to prisoners. The DOJ should not have adopted an assessment instrument without ensuring the proper resources and devices were in place for PATTERN to be functional and beneficial to all federal prisoners. Many blind assumptions and political choices were made to enact the First Step Act, and it shows through the modest and short-reaching authorizations in Title I of the bill. Risk and needs assessment tools and algorithms may prove to be key to improving the recidivism rate in America, but unfortunately, the risk assessment effort of the First Step Act is plainly a misstep. We must build a system that does not reinforce the mistakes of our past.

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156. Samuels et al., *supra* note 140, at 14.