Lemonade: A Racial Justice Reframing of The Roberts Court's Criminal Jurisprudence

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The saying goes, when life gives you lemons, make lemonade. When it comes to the Supreme Court's criminal jurisprudence and its relationship to racial (in)equity, progressive scholars often focus on the tartness of the lemons. In particular, they have studied how the Court often ignores race in its criminal decisions, a move that in turn reifies a racially subordinating criminalization system.

However, the Court has recently issued a series of decisions addressing racism in the criminal legal system: Buck v. Davis*,* Peña-Rodriguez v. Colorado*,* Timbs v. Indiana*,* Flowers v. Mississippi*, and* Ramos v. Louisiana*. On their face, the cases teach that history matters. Government actors who discriminate must be held to account. Accepted institutional practices can no longer perpetuate racism. And courts must assume an active role in addressing the racism endemic to the criminal legal system. At least tonally, these cases are a marked shift for the notoriously post-racial Roberts Court.*

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But if you dig a little deeper, it is clear that the cases have severe shortcomings. The cases reflect that the Court acknowledges only the most egregious examples of racism, and it fails to see the invidious ways race taints the criminal legal system. The cases also demonstrate the Court's failure to connect past racial practices with present racial disparities, a failure that in turn paints a false picture of discontinuity of the past from the present. When viewed critically, these seemingly race-aware cases fall neatly in line with the post-racial critiques of the Roberts Court. From a racial justice perspective, the cases could be viewed as lemons.

Even so, this Article attempts to make lemonade. The Article shifts the narrative about the Court's criminal jurisprudence by arguing that these recent cases can be helpful tools in the fight for racial justice. This Article asserts that the cases can be deployed not only to make specific antiracist legal arguments, but also to push for policy changes and to encourage more open discussions about racism in the criminal legal system. In the end, the Article urges a reclaiming of the case law to help unwind the corrosive relationship between race, crime, and punishment in America. This intervention is necessary now, for the millions of Black and Brown people shuffled through the system each year.

INTRODUCTION

In the past few years, the Supreme Court has handed down several criminal law opinions with racial justice underpinnings. Starting with *Buck v. Davis* in 2017,[1] through *Ramos v. Louisiana* in 2020,[2] the Court issued opinions that denounced racism in the administration of justice,[3] explored the history of criminal laws being used as tools of racial subordination,[4] rejected harmful racial stereotypes,[5] took a prosecutor to task for discriminatorily wielding his power,[6] and emphasized courts' duty to combat the influence of race in criminal adjudications.[7]

These recent opinions were a marked tonal shift for the notoriously colorblind Roberts Court.[8] Before the October 2016 Term, the Roberts Court did not address claims of racial discrimination or even discuss race in the criminal context save for a handful of *Batson* cases.[9] Even then, the Court's analyses were sanitized to the point where one would be excused for forgetting *Batson* is supposedly a critical tool for solving the entrenched problem of prosecutors discriminating against Black[10] people during jury selection.[11] That the Roberts

1. *See* Buck v. Davis, 137 S. Ct. 759 (2017).
2. *See* Ramos v. Louisiana, 140 S. Ct. 1390 (2020).
3. *See Buck*, 137 S. Ct. at 778; Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 870 (2017).
4. *See Ramos*, 140 S. Ct. at 1394; Timbs v. Indiana, 139 S. Ct. 682, 688–89 (2019).
5. *See Buck*, 137 S. Ct. at 765–66.
6. *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019).
7. *See Buck*, 137 S. Ct. at 855.
8. *See generally* Mario L. Barnes, *"The More Things Change . . .": New Moves for Legitimizing Racial Discrimination in a "Post-Race" World*, 100 MINN. L. REV. 2043, 2046–47 (2016) (discussing the Roberts Court's post-racialism); Girardeau A. Spann, *Postracial Discrimination*, 5 MOD. AM. 26 (2009) (same); Jeremiah Chin, *What a Load of Hope: The Post-Racial Mixtape*, 48 CAL. W. L. REV. 369, 384 (2012) (same). I use the moniker Roberts Court to signify the period after John Roberts became Chief Justice, understanding that the composition of the Roberts Court has changed over time and will likely continue to change.
9. *See* Batson v. Kentucky, 476 U.S. 79, 79 (1986); Rice v. Collins, 546 U.S. 333 (2006); Snyder v. Louisiana, 552 U.S. 472 (2008); Felkner v. Jackson, 562 U.S. 594 (2011) (per curiam); Davis v. Ayala, 576 U.S. 257 (2015); Foster v. Chatman, 136 S. Ct. 1737 (2016) (discussing race in the context of *Batson* claims).
10. The Article focuses largely on anti-Black bias and discrimination given the unique history of anti-Black discrimination in the criminal legal system and the current overrepresentation of Black people in the system. This in no way minimizes or erases the discrimination that Indigenous people and other people of color have faced in the criminal legal system both historically and still today.
11. *See Flowers*, 139 S. Ct. at 2242–43 (claiming *Batson* "ended the widespread practice in which prosecutors could (and often would) routinely strike all [B]lack prospective jurors in cases involving [B]lack defendants" and "immediately revolutionized the jury selection process that takes place every day in federal and state criminal courtrooms throughout the United States"). *But see* Andrew

Court issued five opinions addressing racism in the criminal legal system in a three-year span is remarkable.

Before this rash of decisions, the Supreme Court consistently erased race in criminal cases—a practice predating the Roberts Court.[12] And while the Roberts Court has advanced a muscular vision of post-racialism across other jurisprudential areas,[13] it has cultivated its post-racial criminal jurisprudence by pretending race does not exist. Scholars have long criticized the Court for ignoring race and have explored the doctrinal and real-world harms that flow from this colorblind jurisprudence. They have explained that, by ignoring race, the Court has crafted doctrine that benefits White people while burdening people of color, expanding police power over Black and Brown communities, and fueling our carceral state.[14] And they have documented the consequences of the Court's colorblindness, including that the decisions "facilitate[] racial profiling,"[15] lead to "dramatic inequalities in police attention and harassment of minorities,"[16] and "promote police use of implicit bias to discriminate against those living in disadvantaged [B]lack neighborhoods."[17] As poignantly put by Professor Devon Carbado, the Supreme Court's jurisprudence "enables police violence against African Americans (at the front end) and makes it difficult for

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Cohen, *New Report Shows Ongoing Discrimination in CA Jury Selection*, BERKELEY L. (June 14, 2020), https://www.law.berkeley.edu/article/new-report-shows-ongoing-racial-discrimination-in-ca-jury-selection/ [https://perma.cc/QMS9-NP9N] (discussing widespread racial disparities in how prosecutors use peremptory strikes in California); EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4 (2010), [https://perma.cc/JQD6-PQAM] (identifying counties in the South "where prosecutors have excluded nearly 80% of African Americans qualified for jury service"); Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System Is Racist. Here's the Proof*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/#section4 [https://perma.cc/YRH9-HAX6] ("Though the Supreme Court made it illegal for prosecutors to exclude prospective jurors because of race in the 1986 case *Batson v Kentucky*, that ruling has largely gone unenforced.").

12. *See* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 969 (2002).

13. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Shelby County v. Holder, 570 U.S. 529 (2013). As Professor Cedric Powell put it, the Court has "actively engaged in promoting a post-racial view of society that embraces [W]hite privilege and ignores structural inequality." Cedric Merlin Powell, *The Rhetorical Allure of Post-Racial Process Discourse and the Democratic Myth*, 2018 UTAH L. REV. 523, 523.

14. *See* Carbado, *supra* note 12, at 969; Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 246–47 (2010); I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 654 (2018); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 33 (1998); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1145 (2012).

15. Frank Rudy Cooper, *Post-Racialism and Searches Incident to Arrest*, 44 ARIZ. ST. L.J. 113, 149 (2012).

16. Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1592 (2019).

17. Diana R. Donahoe, *Not-So-Great Expectations: Implicit Racial Bias in the Supreme Court's Consent to Search Doctrine*, 55 AM. CRIM. L. REV. 619, 621 (2018).

them to challenge state violence when it has occurred (at the back end)."[18] This, scholars contend, stems from the Court's silence on issues of race in criminal law.

Rather than focusing on how the Court has erased race in its criminal cases, this Article explores the implications of the Roberts Court's newfound racial awareness in five recent cases:

- *Buck v. Davis*, where the Court granted relief to a Black man sentenced to death in part because his own expert testified that Black people are more likely to be dangerous.[19]
- *Peña-Rodriguez v. Colorado*, where the Court held that defendants can probe jury deliberations for evidence of racial bias despite jury deliberations generally being secret.[20]
- *Timbs v. Indiana*, where the Court held that the Eighth Amendment's Excessive Fines Clause is incorporated against the States, and in so holding, explained how financial punishment was used post-slavery to subjugate Black Americans.[21]
- *Flowers v. Mississippi*, where the Court granted a new trial after finding that the prosecutor discriminated during jury selection by striking forty-one of forty-two Black prospective jurors over the course of six trials.[22]
- *Ramos v. Louisiana*, where the Court held that the Sixth Amendment requires guilty verdicts for state criminal trials to be unanimous, and in the process, explored the racist history of nonunanimous jury provisions.[23]

While racial justice advocates can rightly take a negative view of this line of cases, viewing them as lemons, this Article recasts the cases as tools in the fight for racial justice, exploring how these lemons can be turned into lemonade.

Start with how the cases are lemons. First, when the Court discusses historical racism, it only tells half the story. In its opinions, the Court does not try to connect past racist practices to present racial disparities.[24] This oversight

18. Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio's *Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1510 (2017) (emphasis omitted). *See also* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 142 (2017) (asserting that the Supreme Court's colorblind jurisprudence "legitimizes and renders invisible a particular kind of precarity: racial insecurity," meaning "a racial sense of exposure, anxiety, and vulnerability that some people experience in the context of police encounters").

19. Buck v. Davis, 137 S. Ct. 759, 775 (2017).

20. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

21. Timbs v. Indiana, 139 S. Ct. 682, 687–88 (2019).

22. Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019).

23. Ramos v. Louisiana, 140 S. Ct. 1390, 1391, 1417 (2020).

24. *See* Nadia Woods, *The Presence of Racial Disparities at Every Decisional Phase of the Criminal Legal System*, 26 PUB. INT. L. REP. 1, 1 (2020) ("Racial disparity, in the context of the criminal legal system, refers to the phenomena of a racial or ethnic group's proportion within the control of the

risks leaving the false impression that racism is a relic and hinders the fight for racial justice because addressing racism requires a reckoning with its roots.[25] Second, by adjudicating race-based claims only when the racism is explicit rather than addressing claims with subtle or more nuanced forms of racism,[26] the Court is making clear what actionable racism is, and by implication, what actionable racism *isn't*.[27] These cases demonstrate that the Court has not grappled with systemic racism. It has not fully acknowledged the role of implicit bias in the criminal legal system.[28] In short, the Court has not adapted its doctrine to account for the run-of-the-mill yet equally noxious racism that exists today.[29] By only dealing with the most grotesque racism, the Court seems to hew to a post-racial worldview, where society has mostly moved past race save for a few bad apples.[30] To a critical thinker, the cases could be discarded as window-dressing.

But these lemons might also be made into lemonade. While it is true that the Court's more recent cases addressing race have their shortcomings, the Court's openly talking about racism in the criminal context can be by itself important. Remember, the Roberts Court declared early on that it was adopting a minimalist role in the fight against race-based discrimination when it proclaimed that "the way to stop discriminating on the basis of race is to stop discriminating on the basis of race."[31] This same Court's more candid

system being greater than the proportion of such groups in the general population. These disparities, such as Black people only making up approximately 13% of the U.S. population but comprising nearly half the population of currently incarcerated people, have long infected every step of the criminal justice process.").

25. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that to address racial discrimination claims, it's important to consider social and historical context).

26. *See* IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 129 (2014) ("The once pervasive use of epithets has morphed into the coded transmission of racial messages through references to culture, behavior, and class.").

27. *See generally*, Kathryn Stanchi, *The Rhetoric of Racism in the United States Supreme Court*, 62 B.C. L. REV. 1251, 1253–54 (2021) (citation omitted) (arguing that "because language can reframe, reconstruct, and otherwise revise our very conception of reality, the way a powerful entity like the Court uses terms [like racism or white supremacy] has a significant impact on our perception of reality"); Vanessa Baird & Tonja Jacobi, *Judicial Agenda Setting Through Signaling and Strategic Litigant Responses*, 29 WASH. U. J. L. & POL'Y 215, 217–19 (2009) (explaining that litigants and lower courts adjust their approaches to legal issues based on signals from the Supreme Court).

28. According to Professor Stanchi, the Supreme Court has referred "explicitly to unconscious racism only four times." *See* Stanchi, *supra* note 27, at 1283.

29. Although, as Professor Jessica Clarke argues, courts aren't great at dealing with even more explicit bias. *See* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 523–47 (2018).

30. Some scholars have critiqued these cases individually. *See generally* Paul Butler, *Mississippi Goddamn:* Flowers v. Mississippi*'s Cheap Racial Justice*, 2019 SUP. CT. REV. 73 (2020) (critiquing *Flowers v. Mississippi*); Daniel S. Harawa, *The False Promise of* Peña-Rodriguez, 109 CALIF. L. REV. 2121 (2021) (critiquing *Peña-Rodriguez v. Colorado*); Sheri Lynn Johnson, Buck v. Davis *from the Left*, 15 OHIO ST. J. CRIM. L. 247, 247–48 (2017) (critiquing *Buck v. Davis*). These critiques are explored more fully in Part II.

31. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

discussions of racism and its claimed commitment to addressing it have to mean something.

Rather than dismissing these recent cases as having limited use, racial justice advocates, especially those forced to operate in the criminal legal system as it stands, should take the Court at its word. The cases teach that history and context matter. Those with power must be held to account. Long-standing traditions must fall in the face of racism. There is a need to be vigilant against racial stereotypes influencing the criminal process. And critically, courts and other powerful actors must play a vital role in rooting out and eradicating racism in the criminal legal system.

The Article makes this argument over four parts.

Part I not only describes the Court's recent race-aware cases, but also contextualizes them. It explains that these decisions coincide with the rise of the Black Lives Matter Movement and come on the heels of Justice Sotomayor publicly calling out her colleagues for ignoring race.[32] While there may not be a direct causal link between the rise of Black Lives Matter and the Court's recent cases, this context can be useful in framing the narrative around these decisions.

Part II then looks at how these cases should rightly be viewed as lemons. It explores how the cases are confined to classic racism and therefore can reasonably be dismissed as being of limited use to any meaningful progress. The limited nature of the cases is only reinforced after taking a broader look at the Court's aggressively post-racial docket.

Part III then turns the lemons into lemonade, recasting the cases as helpful tools in the fight for racial justice. It proposes three uses of the case law. One proposal is litigation based, suggesting specific arguments that defendants in other criminal law contexts can make based on this line of cases. The next is policy focused, repurposing the cases as tools for the racial justice movement, where advocates can wield the cases as they push courts, prosecutors, and policymakers to reevaluate how the criminal legal system perpetuates racial subordination. The final proposal is discourse based, harnessing the rhetorical power of this line of cases and maintaining that they can be used as a springboard to more robust discussions about race in the courtroom and beyond, a necessary prerequisite to a more racially conscious criminal jurisprudence.

Finally, Part IV grapples with the important question of why bother to make lemonade? Progressive legal scholarship has largely given up on the courts' (especially the Supreme Court's) ability to address the racism endemic to the

32. Utah v. Strieff, 136 S. Ct. 2056, 2069–71 (2016) (Sotomayor, J., dissenting).

carceral system.[33] In the tradition of resistance lawyering,[34] this Article breaks this trend, insisting that there is mileage to gain from this recent line of cases for those interested in racial equity. That is not to downplay the need for a more radical reimagination of the system.[35] But it *is* to say that, in addition to big-picture rethinking, the millions of Black and Brown people who are arrested each year need some solutions *now*.[36] Given the legal community's,[37] including the courts',[38] recent commitments to addressing racism in the criminal legal system in the wake of George Floyd's murder,[39] the Supreme Court's recent race-awareness can provide a jurisprudential opening for judges, prosecutors, and advocates looking to actualize that commitment. In the spirit of Professor Derrick Bell, even if the interventions proposed in the Article may ultimately prove futile, this Article is grounded in "the unbelievable conviction that something must be done, that action must be taken."[40]

In the end, this Article seeks to shift the narrative and find hope in a body of jurisprudence that, for racial justice advocates, has been perpetually filled with misery. The Article looks to find a crack in the Roberts Court's post-racial jurisprudence to exploit, and hopefully widen, as the struggle for racial equity

33. *See, e.g.*, Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1647 (2017) ("[P]rogressive scholars have produced a rich new literature that places social movements at the center of legal and political transformation, pushing aside a focus on courts and lawyers that has long dominated scholarly analysis."); Ruth Colker, *The White Supremacist Constitution*, 2022 UTAH L. REV. (forthcoming) (arguing change cannot come from the courts and that courts "stand in the way" of the Black Lives Matter movement). *But see* Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 9 (2019) (arguing in favor of an "abolition constitutionalism"—a "constitutional paradigm that supports prison abolitionists' goals, strategies and vision").

34. Professor Daniel Farbman explains that resistance lawyering uses "tools of a system in order to oppose or dismantle that system." Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1943 (2019).

35. For a summary of the scholarly debate between abolition and reform, see Marina Bell, *Abolition: A New Paradigm for Reform*, 46 LAW & SOC. INQUIRY 32, 45–46 (2021).

36. The FBI reported that 1,815,144 Black people were arrested in 2019—26.6 percent of all arrests. 1,126,806 Hispanic or Latinx people were arrested—19.1 percent of all arrests. *See* FED. BUREAU INVESTIGATION, CRIME IN THE UNITED STATES TABLE 43 (2019), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-43 [https://perma.cc/Q7SK-JEZW].

37. *See* Patrick Smith, *Over 125 Firms Have Joined the Law Firm Antiracism Alliance*, AM. LAWYER (June 24, 2020), https://www.law.com/americanlawyer/2020/06/24/over-125-firms-have-joined-the-law-firm-antiracism-alliance/ [https://perma.cc/77MQ-47RF] (noting the number of law firms that have committed to advancing racial equality and tackling issues of systemic bias); Keith L. Alexander, *32 Black Federal Prosecutors in Washington Have a Plan to Make the Criminal Justice System More Fair*, WASH. POST (Sept. 5, 2020), https://www.washingtonpost.com/local/public-safety/32-black-federal-prosecutors-in-washington-have-a-plan-to-make-the-criminal-justice-system-more-fair/2020/09/05/1774d646-ed4b-11ea-ab4e-581edb849379_story.html [https://perma.cc/52V2-2FTL] (outlining a memo written by Black federal prosecutors on steps to address racial inequities).

38. *See* Harawa, *supra* note 30, at 2159 (noting that supreme courts or their chief justices of twenty-four states issued statements committing to address racial bias after George Floyd's murder).

39. *See* Nate Cohn & Kevin Quealy, *How Public Opinion Has Moved on Black Lives Matter*, N.Y. TIMES (June 10, 2020), https://www.nytimes.com/interactive/2020/06/10/upshot/black-lives-matter-attitudes.html [https://perma.cc/KY5G-KLFM].

40. Derrick Bell, *Racism is Here to Stay: Now What?*, 35 HOW. L.J. 79, 91 (1991).

continues. In so doing, the Article is grounded in the reality that advocates within the legal system often have to work with what they've got.

For too long, the Supreme Court's criminal jurisprudence has perpetuated a system of racialized injustice. This Article reclaims the case law and uses it in the fight for racial justice and equity.

I.
THE RACIAL AWAKENING OF THE ROBERTS COURT?

The Supreme Court has long been criticized for its erasure of race in its criminal jurisprudence.[41] This erasure harms Black and Brown Americans who bear the brunt of criminal enforcement. Yet outside the criminal law context, the Roberts Court has been known for its vocal post-racialism and its insistence that the law must be colorblind. Together, then, this has led to the Roberts Court not saying much about race in its early criminal jurisprudence. This changed starting in 2017, when, over three years, the Court issued a series of opinions either discussing racism in the criminal legal system or addressing directly a claim of race-based discrimination—at what was then the height of the Black Lives Matter Movement. It is important to critically examine this change in tune before exploring what it may portend for the fight for racial justice.

A. Race (or its absence) in the Early Roberts Court's Criminal Cases

When Chief Justice John Roberts took the helm in 2005, he set the tone early. In his first year on the bench, he expressed his view that we should move past race. As he explained in dissent in a racial gerrymandering case, "It is a sordid business, this divvying us up by race."[42] Roberts proclaimed that the law should be post-racial, and that he would be taking an "immediatist" approach to post-racialism, meaning "that in order to make race irrelevant, one must make it irrelevant now."[43] If there was doubt about the Chief Justice's views on race and its legal relevance, he resolved them the next year in *Parents Involved*, where he infamously declared (this time for a plurality) that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[44]

Consistent with this post-racial ideology, the Court has adopted a limited role for itself, and government more broadly, in addressing the deep structural

41. *See* Carbado, *supra* note 12, at 969.

42. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006) (Roberts, C.J., dissenting).

43. Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1, 2 (2013). Professor Kennedy contrasts this with the "gradualist" approach supported by Justice Blackmun: that "[i]n order to get beyond racism, we must first take account of race.'" *Id.* (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring)).

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

racism that permeates many important social institutions.[45] The Court struck down a plan designed by the Seattle School District to better integrate their schools in *Parents Involved*.[46] The Court invalidated the New Haven Fire Department's decision to alter its promotion criterion to ensure racial diversity in leadership positions in *Ricci v. DeStefano*.[47] And the Court held in *Shelby County v. Holder* that Section 4(b) of the Voting Rights Act—the coverage formula that triggered the preclearance requirement—is unconstitutional because the formula glossed over the alleged racial progress in America.[48] As the Chief Justice claimed in *Shelby County*, "things have changed dramatically" when it comes to racism in America.[49] Thus, it seemed it was in the areas most important to racial equity—voting rights, employment, education—that the Court most forcefully advanced its post-racial view of the law.

That said, one area in which race is most salient, criminal law, is one context where the Roberts Court has not espoused the same post-racial rhetoric.[50] Instead, the Court largely followed Chief Justice Robert's advice in *Parents Involved* and avoided race altogether. Starting with the ascendance of Chief Justice Roberts through the October 2015 Term, the Supreme Court addressed racism or dealt with a claim of race-based discrimination in the majority opinion of a criminal case just five times.[51] And all five cases involved *Batson* claims,

45. Some commentators believe this push for post-racialism has been a decades-long project of Chief Justice Roberts. *See, e.g.*, Joan Biskupic, *Where John Roberts is Unlikely to Compromise*, CNN (Mar. 26, 2019), https://www.cnn.com/2019/03/26/politics/john-roberts-race-the-chief/index.html [https://perma.cc/2CRH-BYY3]; Ari Berman, *Inside John Roberts' Decades-Long Crusade Against the Voting Rights Act*, POLITICO MAG. (Aug. 10, 2015), https://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222 [https://perma.cc/3XQ3-5AFN].

46. *Parents Involved*, 551 U.S. at 748 (plurality opinion).

47. Ricci v. DeStefano, 557 U.S. 557, 563 (2009). For a penetrating critique of *Ricci*, see Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73 (2010).

48. Shelby County v. Holder, 570 U.S. 529, 549–57 (2013).

49. *Id.* at 547.

50. For purposes of this discussion, § 1983 cases arising from the criminal punishment process are not included.

51. Other than these five cases, the Court referenced race in a majority opinion in a criminal case five other times, mentioning the race of a suspect or victim without any broader analysis. *See* Bailey v. United States, 568 U.S. 186, 190 (2013) (mentioning suspect's race in the context of a Fourth Amendment claim); Andrus v. Texas, 140 S. Ct. 1875, 1885 (2020) (mentioning suspect's race in context of a habeas claim); Smith v. Cain, 565 U.S. 73, 74 (2012) (mentioning suspect's race in context of a *Brady* claim); Perry v. New Hampshire, 565 U.S. 228, 233, 234, 238 (2012) (mentioning suspect's race in context of due process eyewitness identification claim); Smith v. Spisak, 558 U.S. 139, 151–52 (2010) (mentioning victims' race in context of a habeas claim).

Professor Justin Driver has interrogated judges' seemingly random decision to mention race and asserted that judges "often make seemingly small decisions about whose race to recognize within their larger judicial decisions. But it would be deeply mistaken to dismiss these race-based decisions as trivial." Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 408–09 (2012). In the essay, Driver explores some of the reasons why a judge may choose to invoke race when it is not necessary to resolving the case. *Id.* at 419–26. This Article does not ascribe a motive to the Court's decision to invoke race in

where a defendant of color objected to the prosecution striking jurors of color from his jury in violation of his Sixth Amendment rights.[52]

One might say that five *Batson* cases over ten years is nothing to scoff at. But in three of the five cases, the Court *reversed* a lower court decision in which a Black or Latino defendant had at first prevailed.[53] The three cases were strikingly similar. They all originated in California state court, where the defendants alleged the prosecutor discriminatorily struck jurors of their same race.[54] The Ninth Circuit held in each case that the Black or Latino defendant was entitled to habeas relief.[55] Then the Court took each case (despite none raising a circuit split) and reversed,[56] correcting what it believed to be the Ninth

these cases, nor does it seek to answer the conundrum that Driver identifies of when exactly judges should invoke race. *Id.* at 426–39.

52. *See* Rice v. Collins, 546 U.S. 333 (2006); Snyder v. Louisiana, 552 U.S. 472 (2008); Felkner v. Jackson, 562 U.S. 594 (2011) (per curiam); Davis v. Ayala, 576 U.S. 257 (2015); Foster v. Chatman, 136 S. Ct. 1737 (2016). *Batson* claims proceed in three steps. First, a defendant must make a prima facie showing that the prosecution used its peremptory strikes against potential jurors in a discriminatory fashion. Then, the prosecution must provide a race-neutral reason for the strikes. Finally, a defendant has the ability to show the reasons were pretextual. *See* Miller-El v. Dretke, 545 U.S. 231, 267 (2005). While Justice Thurgood Marshall commended the Court in *Batson* for taking "a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries," he still believed that the decision would "not end the racial discrimination that peremptories inject into the jury-selection process." Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring). Justice Marshall predicted correctly because, as Justice Breyer noted forty years later, prosecutors still disproportionately use their strikes against jurors of color. *See Miller-El*, 545 U.S. at 266–75 (Breyer, J., concurring).

53. *See Collins*, 546 U.S. at 336; *Jackson*, 562 U.S. at 594; *Ayala* 576 U.S. at 259–61; Collins v. Rice, 365 F.3d 667, 670 (9th Cir. 2004) (Bea, J., dissenting from denial of rehearing en banc) (explaining that the defendant was African American); Jackson v. Felkner, No. CIV 07-0555RJB, 2009 WL 426651, at *3 (E.D. Cal. Feb. 20, 2009) (same).

Interestingly, the race of the defendant does not make it into two of three Supreme Court opinions. This is curious given that the logic behind *Batson* is that the prosecutor struck the minority juror out of the belief that the juror would be predisposed to be favorable to the minority defendant. *See* Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 39 (1993) ("The prosecutor struck the [B]lack juror and the defense objected to that strike because *both* sides were convinced that a [B]lack juror would be more favorable to the defendant."). As thought of by Driver, *see supra* note 51, this seems to be the exact scenario where the Court *should* have invoked the race of the defendants "to alert readers to a problem that [at least potentially] demanded judicial intervention." *Id.* at 419.

54. *Collins*, 546 U.S. at 336 (alleging the prosecutor discriminatorily struck Black jurors because of their race); *Jackson*, 562 U.S. at 594–96 (same); *Ayala*, 576 U.S. at 261–62 (alleging the prosecutor discriminatorily struck Hispanic and Black jurors). An aside: a recent study out of Berkeley found that California prosecutors used their peremptory strikes disproportionately against Black and Latinx people, striking Black potential jurors in 72 percent of cases and Latinx potential jurors in 28 percent of cases, compared to Asian American potential jurors in less than 3.5 percent of cases and White potential jurors in only 0.5 percent of cases. ELISABETH SEMEL, DAGEN DOWNARD, EMMA TOLMAN, ANNE WEIS, DANIELLE CRAIG & CHELSEA HANLOCK, WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS vi (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf [https://perma.cc/W3KV-QABF]. Given these statistics, the Ninth Circuit was likely on to something.

55. *Collins*, 546 U.S. at 337; *Jackson*, 562 U.S. at 597; *Ayala*, 576 U.S. at 265–66.

56. *Collins*, 546 U.S. at 338; *Jackson*, 562 U.S. at 598; *Ayala*, 576 U.S. at 286.

Circuit's errors.[57] These cases were an ominous sign for advocates seeking to vindicate a race-based discrimination claim in the Supreme Court or for lower federal courts that took a more enterprising view of their ability to redress racial discrimination in state criminal trials.

The first bright spot in the early Roberts Court's cases addressing racism in the criminal legal system was *Snyder v. Louisiana*.[58] Allen Snyder was a Black man accused of stabbing his estranged wife and killing her paramour.[59] During jury selection, the prosecutor used his peremptory strikes to remove all five of the Black potential jurors who survived for-cause challenges.[60] The defense raised a *Batson* challenge, which the Louisiana courts rejected.[61] When the case first made its way to the Supreme Court, the Court vacated the judgment and remanded for the Louisiana Supreme Court to reconsider its decision in light of *Miller-El v. Dretke*,[62] a *Batson* case decided at the end of the October 2004 Term.[63] On remand, the Louisiana Supreme Court once again rejected Snyder's *Batson* claim.[64]

The case made its way back to the Supreme Court a second time.[65] The Court reversed again.[66] This time, the Court seized on the two reasons the State gave that purportedly justified the removal of one of the Black potential jurors.[67] The Court found one of the justifications "highly speculative" and, applying a comparative juror analysis, found the other to be outright "implausibl[e]."[68] The *Snyder* Court emphasized that while it will usually defer to the trial court, even

57. As explained by Professor Aziz Huq, the Supreme Court's habeas cases reveal a propensity for the Court to engage in error correction to reverse a grant of habeas relief despite its own rules stating that error correction is not ordinarily a ground for the Court to grant review. *See* Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 523–24 (2014) ("That is, the justices' views about the contents of the habeas playbook are so propinquitous that they are able routinely to jettison their own prohibition against treating the writ of certiorari as an exercise in mere error correction.").

58. Snyder v. Louisiana, 552 U.S. 472 (2008). For more debate around the effects of *Snyder*, see John P. Bringewatt, Snyder v. Louisiana*: Continuing the Historical Trend Towards Increased Scrutiny of Peremptory Challenges*, 108 MICH. L. REV. 1283, 1304 (2010); Bidish J. Sarma, *Response to "*Snyder v. Louisiana*: Continuing the Historical Trend Towards Increased Scrutiny of Peremptory Challenges*,"* 109 MICH. L. REV. FIRST IMPRESSIONS 42, 45 (2010).

59. *Snyder*, 552 U.S. at 474–75.

60. *Id.* at 475–76. One of these strikes was a "backstrike," a Louisiana oddity that allows a prosecutor to strike a juror who has already been seated. *Id.*; Bruce Hamilton, *Bias,* Batson*, and "Backstrikes":* Snyder v. Louisiana *Through a Glass, Starkly*, 70 LA. L. REV. 963, 977 (2010) (explaining "backstrikes" under Louisiana law).

61. *Snyder*, 552 U.S. at 474–75.

62. Miller-El v. Dretke, 545 U.S. 231, 241 (2005) (endorsing comparative juror analysis for *Batson* claims, where one compares the characteristics of the struck potential minority jurors to the seated non-minority jurors to see if there is an indication that the minority jurors may have been removed for pretextual reasons).

63. Snyder v. Louisiana, 545 U.S. 1137 (2005).

64. *See* State v. Snyder, 942 So. 2d 484, 486 (La. 2008).

65. Snyder v. Louisiana, 551 U.S. 1144 (2007) (order granting certiorari).

66. *See Snyder*, 552 U.S. at 474.

67. *Id.* at 478.

68. *Id.* at 482–83.

applying a "highly deferential standard of review" it was still compelled to reverse.[69]

The only other bright spot in the early Roberts Court's cases addressing racism in the criminal context came shortly after *Snyder*, in the 2016 *Foster v. Chatman* decision.[70] In *Foster*, the prosecutor "exercised peremptory strikes against all four [B]lack prospective jurors qualified to serve" in the capital trial of a Black eighteen-year-old defendant.[71] When the *Batson* claim was litigated on post-conviction review, Foster gained access to the prosecution's files.[72] The prosecutors' notes revealed that they specially highlighted all of the Black prospective jurors on the venire list.[73] There was also a draft affidavit from an investigator comparing Black prospective jurors and identifying which of the prospective Black jurors the prosecution should pick "[i]f it comes down to having to pick one of the[m]."[74] Still, the Georgia courts rejected Foster's *Batson* claim, holding that he did not prove purposeful discrimination.[75]

The Supreme Court reversed. The Court's analysis focused on the prosecutors' strikes of two Black prospective jurors.[76] It found the prosecutors' reasons for the strikes were all contradicted by the facts or suspicious compared to accepted White jurors who had the same characteristics.[77] As in *Snyder*, the Court focused on whether the given reasons made sense or were backed by the record.[78] While the Court did note that "the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep [B]lack prospective jurors off the jury," it did not substantially engage with the blatant racism in that file.[79]

The Court's analyses in *Snyder* and *Foster* are fact-bound if not perfunctory. There are no grand statements reflecting a broader commitment to guarding against racial discrimination in the jury system.[80] Indeed, as other scholars have noted, the Court purposefully sidestepped other more systemic racial issues lurking in both cases.[81] Still, *Snyder* and *Foster* stand out as the two

69. *Id.* at 479.

70. Foster v. Chatman, 136 S. Ct. 1737, 1748 (2016).

71. *Id.* at 1742. *See* Petition for a Writ of Certiorari at 12, Foster v. Humphrey, 575 U.S. 1025 (2015) (No. 14-8349), 2015 WL 2457657, at *2. The Court's opinion elides the fact that Foster was a Black teenager.

72. *Foster*, 136 S. Ct. at 1743–44.

73. *Id.* at 1744.

74. *Id.*

75. *Id.* at 1745.

76. *Id.* at 1748.

77. *Id.* at 1750.

78. *See id.* at 1750–51.

79. *Id.* at 1755.

80. Compare this to the Court's decision in *Flowers*. *See* discussion *infra* Part I.C.

81. *See* Camille A. Nelson, Batson*,* O.J.*., and* Snyder*: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1689 (2008) (noting that *Snyder* was a case "with a deep racial history" that the Court ignored, and that the Court would rather "whitewash its *Batson* analysis than engage in a robust examination of the racialized circumstances and issues of racism present in, and revealed by, such a case"); Patrick C. Brayer, Foster v. Chatman *and the Failings of* Batson, 102 IOWA L. REV. ONLINE 53, 54 (2016) (lamenting that the Court in *Foster* failed to engage with "the new face of exclusion"—i.e.,

cases in which the Roberts Court provided redress for claims of race-based discrimination in a criminal case. Aside from the few *Batson* cases that the Court handed down in its first decade, the Roberts Court's criminal jurisprudence paid race little mind.[82]

B. The Rise of the Black Lives Matter Movement and Justice Sotomayor's Calling Out of Her Colleagues

While the Supreme Court continued its push toward post-racialism, the world around it started to shift., The Black Lives Matter movement, which started in 2013 after the killing of Trayvon Martin and became nationally recognized after the killings of Michael Brown and Eric Garner in 2014, rapidly gained steam in 2015, ten years into the Chief Justice's tenure.[83] As *Time Magazine* put it: "In 2015, Black Lives Matter blossomed from a protest cry into a genuine political force."[84] Unfortunately, the catalyst for this blossoming was several high-profile police killings of Black people. In April 2015, a Charleston, South Carolina, police officer shot Walter Scott in the back after pulling him over for a broken taillight.[85] That same month, Baltimore, Maryland police killed Freddie Gray after taking him on a "rough ride."[86] Sandra Bland was found hanging in a jail cell after a Texas Trooper arrested her following a pretextual

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the "more nuanced, implicit, and rationalized" reasons that prosecutors give for excluding Black jurors—instead choosing to engage in "the relatively simple task (aided by a cache of records) of combating a detectable case of intentional racism in jury selection").

82. *See* Alice Ristroph, *What Is Remembered*, 118 MICH. L. REV. 1157, 1178 (2020) ("Throughout his *Shelby County* opinion and in other cases addressing racial inequality, the Chief Justice has emphasized discontinuity between past and present to put the Constitution in the way of efforts to achieve greater racial equality."). *See also* Yankah, *supra* note 16, at 1585 (arguing that "[t]he last fifteen years have seen the Supreme Court deepen its willful blindness to the role of race in policing," and describing a number of Fourth Amendment cases that even a "minimally attentive" Court would have recognized were about race).

83. *See Black Lives Matter Founders: We Fought to Change History and We Won*, BBC (Nov. 30, 2020), https://www.bbc.com/news/world-us-canada-55106268 [https://perma.cc/37QD-AE9Z].

84. Alex Altman, *Black Lives Matter: A New Civil Rights Movement is Turing a Protest Cry into a Political Force*, TIME (2015) https://time.com/time-person-of-the-year-2015-runner-up-black-lives-matter/#:~:text=In%202015%2C%20Black%20Lives%20Matter,into%20cauldrons%20of%20social%20ferment [https://perma.cc/DP83-8TUJ].

85. *See* Alan Blinder, *Michael Slager, Officer in Walter Scott Shooting, Gets 20-Year Sentence*, N.Y. TIMES (Dec. 7, 2017), https://www.nytimes.com/2017/12/07/us/michael-slager-sentence-walter-scott.html [https://perma.cc/E7HP-DV6G].

86. *See* Jess Bidgood, *Officer's Murder Trial in Freddie Gray Death Turns on 'Rough Ride*,' N.Y. TIMES (June 17, 2016), https://www.nytimes.com/2016/06/18/us/officers-murder-trial-in-freddie-gray-death-turns-on-rough-ride.html [https://perma.cc/8Z6J-8GJ7].

traffic stop.[87] Protests took place across the country to mourn this tragic loss of Black life and to demand change.[88]

2016 proved equally painful, with more high-profile police killings triggering more widespread protest.[89] That year, Baton Rouge police officers shot and killed Alton Sterling at pointblank range.[90] The very next day in Minnesota, a St. Anthony officer shot and killed Philando Castile during a traffic stop live-streamed on Facebook for the world to see.[91] In August, Baltimore County police shot and killed Korryn Gaines as she cradled her child in her arms.[92] The next month in Oklahoma and North Carolina, Tulsa police shot and killed Terrence Crutcher and Charlotte police killed Keith Lamont Scott.[93] By the end of the summer, the Movement for Black Lives formally released a set of policy demands and priorities.[94] The Black Lives Matter movement took mainstage, and it was not to be ignored.[95]

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87. *See* David Montgomery, *Sandra Bland, It Turns Out, Filmed Traffic Stop Confrontation Herself*, N.Y. TIMES (May 2, 2019), https://www.nytimes.com/2019/05/07/us/sandra-bland-video-brian-encinia.html [https://perma.cc/4SKL-58KQ].

88. *See, e.g.*, Clare Foran, *A Year of Black Lives Matter*, ATLANTIC (Dec. 31, 2015), https://www.theatlantic.com/politics/archive/2015/12/black-lives-matter/421839/ [https://perma.cc/X3VD-PQUW].

89. *See, e.g.*, Julia Jacobo, *Protesters Gather in U.S. Cities Following Shooting Deaths of Alton Sterling and Philando Castile*, ABC NEWS (July 7, 2016), https://abcnews.go.com/US/crowds-gather-us-cities-protest-shooting-deaths-alton/story?id=40420595 [https://perma.cc/SP8B-V4FL].

90. *See* Richard Fausset, Richard Pérez-Peña & Campbell Robertson, *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, N.Y. TIMES (July 6, 2016), https://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html [https://perma.cc/NV96-7SKB].

91. *See* Megan Specia & Yara Bishara, *Deadly Police Shooting in Minnesota*, N.Y. TIMES (July 7, 2016), https://www.nytimes.com/video/us/100000004517374/deadly-police-shooting-in-minnesota.html?searchResultPosition=33 [https://perma.cc/T8EA-WXZL].

92. *See* Wesley Lowery, *Korryn Gaines, Cradling Child and Shotgun, is Fatally Shot by Police*, WASH. POST (Aug. 2, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/08/02/korryn-gaines-is-the-ninth-black-woman-shot-and-killed-by-police-this-year/ [https://perma.cc/LN9R-HVAD].

93. *See* Peter Holley & Katie Zezima, *White Tulsa Officer Charged in Death of Unarmed Black Man, Freed on Bond*, WASH. POST (Sept. 23, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/09/22/tulsa-officer-who-fatally-shot-terrence-crutcher-charged-with-first-degree-manslaughter/ [https://perma.cc/X8ZZ-WCZG]; German Lopez, *Charlotte Police Officer Who Shot and Killed Keith Lamont Scott Will Not Face Charges*, VOX (Nov. 30, 2016), https://www.vox.com/2016/9/21/12999366/keith-lamont-scott-north-carolina-police-shooting [https://perma.cc/DA3W-D5SS]; Gary O'Donoghue, *Charlotte Shooting: State of Emergency Amid Protests*, BBC (Sept. 22, 2016), https://www.bbc.com/news/world-us-canada-37436676 [https://perma.cc/EL3D-YFVZ].

94. *See* Victoria M. Massie, *The Movement for Black Lives Agenda Shows Racial Justice is Bigger than Police Brutality*, VOX (Aug. 2, 2016), https://www.vox.com/2016/8/2/12341708/black-lives-matter-policy-platform [perma.cc/48ZY-MHGL].

95. That same year, Black Lives Matter organizers were invited to the White House to discuss criminal justice reform. *See* Maya Rhodan, *Black Lives Matter Activist Snubs White House Invite*, TIME (Feb. 16, 2016), https://time.com/4229329/black-lives-matter-activist-snubs-white-house-invite/ [https://perma.cc/Q5U6-C8BT]. Professional athletes joined the movement by kneeling during the national anthem to protest police brutality and the inhumane treatment of Black people. *See* Jane Coaston, *2 Years of NFL Protests, Explained*, VOX (Sept. 4, 2018),

In the midst of it all, the Supreme Court issued yet another criminal opinion ignoring the racial implications of its decisions surrounding policing. *Utah v. Strieff* concerned the reach of the exclusionary rule,[96] which generally prevents the government from introducing evidence at trial that was gathered in violation of the Fourth Amendment.[97] The case had important racial justice implications given that "the exclusionary rule is designed to deter police misconduct," and in a moment of mass protest about police killing unarmed Black people, deterring police misconduct was at the front of the national consciousness.[98] The facts were straightforward. Police stopped Strieff without valid justification, and the State conceded the stop was unconstitutional.[99] During the stop, the officer learned that Strieff had an outstanding arrest warrant for a traffic violation.[100] As the officer searched Strieff before placing him under arrest, he discovered some drugs.[101] The question facing the Court was whether the drugs should be excluded given that the stop was unconstitutional at its inception.[102] The Court held that "the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant," thus exclusion of the drugs was not required.[103] Here, the Court found that the deterrent benefits of the exclusionary rule were not outweighed by the rule's substantial social costs, given that this seemed to be at most "an isolated instance of negligence" and there was "no indication that this unlawful stop was part of any systemic or recurrent police misconduct."[104]

Justice Sotomayor had enough. In a dissent that could be read as an homage to the Black Lives Matter movement,[105] citing James Baldwin, W. E. B. Du Bois,

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https://www.vox.com/2018/8/15/17619122/kaepernick-trump-nfl-protests-2018 [https://perma.cc/ETF7-FDP2]. The co-founders of Black Lives Matter were named *Glamour*'s Women of the Year. *See* Suyin Haynes, *#BlackLivesMatter Founders are Honored by* Glamour *Magazine*, TIME (Nov. 15, 2016), https://time.com/4571437/black-lives-matter-founders-glamour-awards/ [https://perma.cc/TJ9W-F48F]. And the indomitable Beyoncé paid tribute to the movement in her Super Bowl halftime show. *See* Deena Zaru, *Beyonce Gets Political at Super Bowl, Pays Tribute to 'Black Lives Matter,'* CNN (Feb. 8, 2016), https://www.cnn.com/2016/02/08/politics/beyonce-super-bowl-black-lives-matter/index.html [https://perma.cc/3RCU-PBRR].

96. 136 S. Ct. 2056, 2056 (2016).

97. Mapp v. Ohio, 367 U.S. 643, 651 (1961).

98. United States v. Leon, 468 U.S. 897, 916 (1984). *See also* Davis v. United States, 564 U.S. 229, 236–37 (2011) ("The [exclusionary] rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.").

99. *Strieff*, 136 S. Ct. at 2060.

100. *Id.*

101. *Id.*

102. *Id.* at 2059.

103. *Id.* at 2063.

104. *Id.*

105. *See, e.g.*, Matt Ford, *Justice Sotomayor's Ringing Dissent*, ATLANTIC (June 20, 2016), https://www.theatlantic.com/politics/archive/2016/06/utah-streiff-sotomayor/487922/ [https://perma.cc/2XND-TBGL]; Meghan Daum, *My White Privilege Meets Sonia Sotomayor's Scathing Attack on Police Power*, L.A. TIMES (June 23, 2016), https://www.latimes.com/opinion/op-ed/la-oe-daum-sotomayor-dissent-20160623-snap-story.html [https://perma.cc/5AYP-H3GM]; Mark Joseph Stern, *Read Sotomayor's Atomic Bomb of a Dissent Slamming Racial Profiling and Mass*

Michelle Alexander, and Ta-Nehisi Coates, and writing for herself only,[106] Sotomayor laid bare the reality that the Court's jurisprudence has legitimized the over-policing of people of color.[107] It did not matter that the case involved a White defendant, Sotomayor explained, as that just showed "anyone's dignity can be violated."[108] But, in Justice Sotomayor's view, it was clear that people of color would bear the brunt of the decision. She told her colleagues that they can no longer "pretend that the countless people who are routinely targeted by police are 'isolated.'"[109] Rather, invoking Professors Lani Guinier and Gerald Torres, Sotomayor said, they are "the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere."[110] Sotomayor closed her dissent with this: "Until their voices matter too, our justice system will continue to be anything but."[111] Thus, "[a]t the height of the Black Lives Matter movement, the Court fortified two distinct policing regimes—one for poor people of color and one for everyone else."[112]

C. A Seeming Change in Tune

The Roberts Court changed its tune in 2017.[113] Recall that this was the Court that had never even dealt with race in the criminal context save for a few anesthetized *Batson* opinions (a majority of which were resolved against the Black or Latino defendant). Moreover, in other areas of the law, the Court was transparent about its post-racial worldview. Yet at a time of growing clamor for racial justice, and in the face of a public rebuke from one of their own, the Roberts Court broke its silence on race when it issued two opinions in 2017 forcefully denouncing the influence of race in the criminal legal system. And in

Imprisonment, SLATE (June 20, 2016), https://slate.com/news-and-politics/2016/06/sonia-sotomayor-dissent-in-utah-v-strieff-takes-on-police-misconduct.html [https://perma.cc/CZ55-RL7Y].

106. While Justice Ginsburg joined most of Justice Sotomayor's dissent, she did not join this section. *See Strieff*, 136 S. Ct. at 2064 (noting Justice Ginsburg only joined Parts I–III of Justice Sotomayor's dissent, and the rebuke came in Part IV). Justice Kagan, joined by Justice Ginsburg, dissented separately. *See id.* at 2071–74 (Kagan, J., dissenting).

107. *Id.* at 2070 (Sotomayor, J., dissenting) (citing W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (1903); JAMES BALDWIN, THE FIRE NEXT TIME (1963); TA-NEHISI COATES, BETWEEN THE WORLD AND ME (2015); MICHELLE ALEXANDER, THE NEW JIM CROW (2015)).

108. *Strieff*, 136 S. Ct. at 2070.

109. *Id.* at 2071.

110. *Id.* (citing LANI GUINIER & GERALD TORRES, THE MINER'S CANARY (2002)).

111. *Id.*

112. Yankah, *supra* note 16, at 1553.

113. It is also important to note that Donald Trump was elected President in 2016, and given the racism that featured in his campaign, his general uncivility, and the fact he made the Court a centerpiece of his platform, this may also have been at the back of the Court's mind in 2017. *See, e.g.*, Nia-Malika Henderson, *Race and Racism in the 2016 Campaign*, CNN (Sept. 1, 2016), https://www.cnn.com/2016/08/31/politics/2016-election-donald-trump-hillary-clinton-race/index.html [https://perma.cc/8XNF-WXGE]; Jane Coaston, *Polling Data Shows Republicans Turned Out for Trump in 2016 Because of the Supreme Court*, VOX (June 29, 2018), https://www.vox.com/2018/6/29/17511088/scotus-2016-election-poll-trump-republicans-kennedy-retire [https://perma.cc/78AJ-D6R8].

the few years since, the Court has issued three other opinions calling out the history of racism in criminal law even when the case did not necessarily demand it and has declared itself as a guard against racism by embracing its "duty to confront racial animus in the justice system."[114] Each case warrants its own brief discussion.

1. Buck v. Davis

Duane Buck was convicted of capital murder in Texas.[115] The jury was allowed to impose the death penalty "only if it found unanimously and beyond a reasonable doubt that Buck was likely to commit acts of violence in the future."[116] At the penalty phase of trial—where the jury had to decide whether to sentence Mr. Buck to life in prison or condemn him to death—Mr. Buck's *own lawyer* called to the stand a psychologist who testified that Mr. Buck was statistically more likely to be violent in the future because he is Black.[117] The psychologist's report, and his testimony, stated that Black defendants have an "[i]ncreased probability" of future violent behavior because "[t]here is an over-representation of Blacks among the violent offenders."[118] The prosecutor referenced this testimony in his closing argument, and the jury requested the psychologist's report before returning a death sentence.[119] In post-conviction proceedings, Mr. Buck argued that his lawyer was ineffective for calling this expert.[120]

The Supreme Court held that Mr. Buck was entitled to relief. Chief Justice Roberts wrote for the Court that Buck's "counsel's performance fell outside the bounds of competent representation" because his counsel called the psychologist to the stand knowing the "report said, in effect, that the color of Buck's skin made him more deserving of execution."[121] Roberts described this bias as "a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are."[122]

In *Buck*, the Court emphasized the fact that the "odious" nature of the racial discrimination at issue made the case "extraordinary."[123] Therefore, the Court took the opportunity to rectify a shameful miscarriage of justice, remarking that "[r]elying on race to impose a criminal sanction 'poisons public confidence' in the judicial process."[124]

114. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 867 (2017).
115. Buck v. Davis, 137 S. Ct. 759, 767 (2017).
116. *Id.* at 764.
117. *Id.* at 767.
118. *Id.* at 768.
119. *Id.* at 769.
120. *Id.* at 771–72.
121. *Id*. at 775.
122. *Id.* at 778.
123. *Id.*
124. *Id.* (quoting Davis v. Ayala, 135 S. Ct. 2187, 2208 (2015)).

2. Peña-Rodriguez v. Colorado

Peña-Rodriguez dealt with whether there should be a racial bias exception to the general rule that jury deliberations must remain secret.[125] During deliberations in Miguel Peña-Rodriguez's trial, a juror made several racist statements. In a case concerning allegations of sexual assault, the juror said that he believed Mr. Peña-Rodriguez was guilty because "in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women."[126] This same juror said that Mr. Peña-Rodriguez was likely guilty because "he's Mexican and Mexican men take whatever they want," and that "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."[127] And the juror said he did not believe Mr. Peña-Rodriguez's alibi witness because he was "an illegal"—despite the witness actually being a lawful resident.[128]

Generally, courts cannot hear evidence of what is said during deliberations because of an evidentiary rule known as the no-impeachment rule.[129] In *Peña-Rodriguez*, however, the Court held that the Constitution compels an exception to the rule "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant."[130] The Court emphasized that not every comment will qualify; the statement must exhibit "overt racial bias" and the "statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict."[131]

In *Peña-Rodriguez*, there was no doubt that the standard was satisfied. The juror "deploy[ed] a dangerous racial stereotype to conclude [Mr. Peña-Rodriguez] was guilty and his alibi witness should not be believed."[132] Thus, the Court opined that "the alleged statements by [the] juror were egregious and unmistakable in their reliance on racial bias," or as Justice Kagan remarked at oral argument, this was "the best smoking-gun evidence you're ever going to see about race bias in the jury room."[133]

In the opinion, the Court made many grand pronouncements about overcoming racism in the criminal legal system. Said the Court: "The Nation must continue to make strides to overcome race-based discrimination. The progress that has already been made underlies the Court's insistence that blatant racial prejudice is antithetical to the functioning of the jury system . . . ."[134] The

125. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 858 (2017).
126. *Id.* at 862.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 869.
131. *Id.*
132. *Id.* at 870.
133. *Id.*; Oral Argument at 45:20, Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (No. 15-606), https://www.oyez.org/cases/2016/15-606 [https://perma.cc/86B4-4PWX].
134. *Peña-Rodriguez*, 137 S. Ct. at 871.

Court urged us to "understand and to implement the lessons of history."[135] The Court's mandate was clear: "It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons."[136] Positioning itself as a guard against racism, the Court emphasized that the "duty to confront racial animus in the justice system is not the legislature's alone."[137]

3. Timbs v. Indiana

Although *Timbs v. Indiana* did not involve a claim of racial discrimination, its discussion of racism in the imposition of punishment is noteworthy. In *Timbs*, the Court held that the Eighth Amendment's Excessive Fines Clause is incorporated against the states.[138] The incorporation inquiry required the Court to examine the history of excessive fines prohibitions to decide if the protection was '"fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'"[139] The Court held that it was. The Court traced the lineage of the Excessive Fines Clause back to the Magna Carta and noted that excessive fines prohibitions were adopted by most early American colonies.[140] And by the time the Fourteenth Amendment was ratified, "the constitutions of 35 of the 37 States . . . expressly prohibited excessive fines."[141] Thus, the "historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause [was] overwhelming."[142]

In recognizing there has long been a consensus among the states that the right to be free from excessive fines was fundamental, the Court also pointed out that historically, the rights of Black people went unprotected.[143] "Notwithstanding the States' apparent agreement that the right guaranteed by the Excessive Fines Clause was fundamental, abuses [against Black Americans] continued."[144] The Court recounted that history in one paragraph: "[f]ollowing the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy."[145] When formerly enslaved Black people could not pay the fines for "dubious offenses" like vagrancy, "States often demanded involuntary labor instead."[146] The Court noted that "[c]ongressional debates over . . . the Fourteenth Amendment . . . repeatedly

135. *Id.*
136. *Id.* at 867.
137. *Id.*
138. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).
139. *Id.* (emphasis omitted) (quoting McDonald v. Chicago, 561 U.S. 742, 767 (2010)).
140. *Id.* at 687–88.
141. *Id.* at 688.
142. *Id.* at 689.
143. *Id.* at 688–89.
144. *Id*. at 688.
145. *Id.*
146. *Id.* at 688–89.

mentioned the use of fines to coerce involuntary labor."[147] Though not necessary to deciding the incorporation question presented in *Timbs*, the Court made sure to fold into its opinion the racist history of fining practices around the time the Fourteenth Amendment was ratified.

That the Court went out of the way to detail the racist history of U.S. fining practices is notable. One might think the Court had to address this history given that an incorporation inquiry necessarily requires an analysis of the state of the law at the time the Fourteenth Amendment was ratified. However, many of the Court's incorporation cases do not discuss race at all.[148] The Court could have certainly followed that more traditional path and ignored race when resolving *Timbs*. Its acknowledgement of race and how criminal punishment was used as a tool of racial subjugation is therefore an important break from the Court's usual practice in incorporation cases.

4. Flowers v. Mississippi

Curtis Flowers's plight gained national attention following the release of a popular podcast chronicling his saga.[149] In 1996, District Attorney Doug Evans charged Mr. Flowers with capital murder in relation to the killing of four people in a small-town Mississippi furniture store.[150] Evans tried Mr. Flowers six times for this same crime.[151] During jury selection in the first trial, Evans struck all five Black potential jurors.[152] The Mississippi Supreme Court reversed the conviction due to prosecutorial misconduct.[153] During jury selection in the second trial, Evans struck all five Black potential jurors, but one was seated after the trial court granted the defense's *Batson* motion.[154] Again, the Mississippi Supreme Court overturned the conviction due to Evans's misconduct.[155] At the third trial, Evans used all fifteen of his peremptory challenges to remove Black jurors; one Black person made it onto the jury.[156] This time, the Mississippi Supreme Court reversed after finding that Evans discriminated against Black

147. *Id.* at 689.

148. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating the Fourth Amendment without mentioning race); Benton v. Maryland, 395 U.S. 784 (1969) (incorporating the Fifth Amendment protection against Double Jeopardy without mentioning race); Griffin v. California, 380 U.S. 609 (1965) (incorporating the Fifth Amendment right against self-incrimination without mentioning race); Duncan v. Louisiana, 391 U.S. 145 (1968) (incorporating the Sixth Amendment right to jury trial without mentioning race).

149. *See* Alissa Zhu, *How an Investigative Podcast Helped Free Curtis Flowers*, MISS. CLARION LEDGER (Sept. 10, 2020), https://www.clarionledger.com/story/news/2020/09/10/how-investigative-podcast-in-dark-helped-free-curtis-flowers/5747054002/ [https://perma.cc/X9T9-3FPZ].

150. *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2236 (2019).

151. *Id.* at 2234.

152. *Id.* at 2236.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 2236–37 (2019).

people during jury selection.[157] Evans did not let up. In the fourth trial he used all eleven of his peremptory strikes to remove Black potential jurors, but because of the large number of Black people in the jury pool, five Black people made it onto the jury.[158] Three Black people made it onto the jury in the fifth trial.[159] These diverse juries both led to mistrials.[160] An appeal from the sixth trial made it to the Supreme Court.

In the sixth trial, Evans accepted the first Black juror and then used five out of his six peremptory strikes against the other Black prospective jurors.[161] During jury selection, Evans "asked an average of one question to each seated [W]hite juror," compared to "29 questions to each struck [B]lack prospective juror."[162] The Mississippi courts rejected Mr. Flowers's *Batson* claim.[163] The Supreme Court reversed.

The Court held the trial court erred in finding there was no discriminatory intent in Evans's peremptory strikes of Black prospective jurors.[164] Justice Kavanaugh, writing for the Court, declared that "[e]qual justice under law requires a criminal trial free from racial discrimination in the jury selection process."[165] Yet here, the Court summarized, "in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 [B]lack prospective jurors that it could have struck."[166] And to mask his bias, Evans "engaged in dramatically disparate questioning of [B]lack and [W]hite prospective jurors."[167]

In finding a *Batson* violation, the *Flowers* Court recited the history of exclusion of Black Americans from juries, from the passage of the Fourteenth Amendment through *Batson v. Kentucky*. The Court explained how, over time, "the exclusion of [B]lack jurors became more covert and less overt."[168] The Court described *Batson* as an attempt to "eradicate racial discrimination from the jury selection process," a case designed to "protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system."[169] Given the momentousness of these goals and the importance of

157. *Id.* at 2237.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 2247.
163. *Id.* at 2237–38. The Court first granted certiorari, vacated the judgment, and remanded to the Mississippi Supreme Court to reconsider its decision in light of *Foster v. Chatman*, 136 S. Ct. 1737 (2016), which had been recently decided. *Id.* at 2237. The Mississippi Supreme Court reached the same result. *Id.* at 2238.
164. *Id.* at 2251.
165. *Id.* at 2242.
166. *Id.* at 2235.
167. *Id.*
168. *Id.* at 2240.
169. *Id.* at 2242.

Batson, the Court claimed that it has vigorously enforced the decision and will "guard[] against any backsliding."[170]

5. Ramos v. Louisiana

Like *Timbs*, *Ramos v. Louisiana* also did not involve a claim of race-based discrimination.[171] Rather, the Court addressed the racist history of Louisiana's nonunanimous jury provision in deciding whether the Sixth Amendment requires guilty verdicts in state criminal trials to be unanimous for serious offenses.[172] Previously, the Court had held that the Sixth Amendment requires unanimity in federal jury trials, but not state jury trials.[173] In *Ramos*, the Court overruled its precedent and held that the Sixth Amendment requires unanimity in state jury trials too.[174]

Only two states had nonunanimous jury provisions: Louisiana and Oregon.[175] Justice Gorsuch, writing for a splintered majority, decided to explicate the racist origins of those states' provisions. The Court explained that Louisiana's nonunanimity rule dated to a state constitutional convention in 1898, where a committee chair said the purpose of the convention was to "establish the supremacy of the [W]hite race."[176] After the U.S. Senate expressed concern that Louisiana was "systemically excluding African-Americans from juries," the state passed a "facially race-neutral" rule to thwart federal oversight that all but ensured "African-American jury service would be meaningless."[177] The story of Oregon's nonunanimous jury provision is just as odious. Oregon's nonunanimous jury law dates to the 1930s and the rise of the Ku Klux Klan in the state.[178] The law was rooted in rank anti-Semitism and expressly designed to "dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'"[179] While the Court could not say for certain "why these laws persist," the Court thought it important enough to point out the fact that their racist "origins are clear."[180] It is unclear what weight the majority in *Ramos* gave to the fact that Louisiana's and Oregon's nonunanimous jury provisions had racist and

170. *Id.* at 2243.

171. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1393–94 (2020).

172. *See id.* at 1394.

173. *See* Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (plurality opinion.); Andres v. United States, 333 U.S. 740, 748 (1948) (requiring unanimity in federal criminal trials).

174. *See Ramos*, 140 S. Ct. at 1397. *See also id.* at 1410 (Sotomayor, J., concurring) (noting that the Court was overruling *Apodaca*); (Kavanaugh, J., concurring) (same).

175. *See id.* at 1394. Louisiana repealed its nonunanimous jury provision in 2018. *See* Ben Myers and John Simerman, *This Pending Supreme Court Decision Inspires Dread and Hope in Louisiana*, ADVOCATE (Mar. 27, 2021), https://www.theadvocate.com/baton_rouge/news/courts/article_66703b1c-8e5b-11eb-8e99-97088be64dfc.html [https://perma.cc/C9AM-WCGP].

176. *Ramos*, 140 S. Ct. at 1394.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

anti-Semitic histories when holding that the Sixth Amendment requires unanimity, or whether in fact that history was relevant at all to the ultimate legal question the Court decided.[181]

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The Roberts Court issuing five opinions openly addressing racism in the criminal legal system in such a short period seems remarkable for this iteration of the Court. This is especially true given that, at times, the Court's meditation on issues of race was not necessary to deciding the case. This is not to say that the current iteration of the Roberts Court is always sensitive to issues of race (it certainly is not).[182] But the Court's discussions of racism and its claimed commitment to addressing racial bias could perhaps be an important change in tone. The next two sections grapple with what to make of the race-conscious decisions. Part II explains how this line of cases could (and should) be viewed as lemons, as the cases have serious shortcomings that can limit their use in the fight for racial justice. But then Part III describes how racial justice advocates can nevertheless make lemonade, and use this line of cases in the fight for racial justice *despite* their shortcomings.

II.
THE LEMONS

While the Roberts Court's more open discussions about racial bias in the criminal legal system on its face seem like a positive development, there are two interrelated criticisms of the Court's recent race-aware cases that greatly dim their shine. One, the cases discussing the history of racism in the criminal legal system fall into the trap of treating racism as a relic. In *Timbs* and *Ramos*, the Court acknowledged the racist history of the laws and practices in those cases but did not identify how that racism still manifests today. So, one can read them as relegating racism to the dustbin of history, removing any incentive to think critically about once legally endorsed racism's present-day effects. Two, the cases that adjudicate race-based discrimination claims all deal with in-your-face Jim Crow-styled racism.[183] Think *Buck*, *Peña-Rodriguez*, and *Flowers*. The facts

181. *See* W. Kerrell Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1246–47 (2022). Justice Kavanaugh argued that the racist history was relevant to the *stare decisis* analysis. *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring).

182. *See, e.g.*, Neil S. Siegel, *The Supreme Court Is Avoiding Talking About Race*, ATLANTIC (Aug. 7, 2020), https://www.theatlantic.com/ideas/archive/2020/08/supreme-court-doesnt-like-talk-about-race/614944/ [https://perma.cc/WQ78-B9RV] (discussing Fourth Amendment case *Kansas v. Glover*, 140 S. Ct. 1183, 1197 (2020), which appears to involve police racial profiling, yet only Justice Sotomayor in dissent noted that, in effect, the majority's decision condones police pulling people over "based on nothing more than a demographic profile").

183. By Jim Crow racism, I mean racism that is crude, explicit, obvious, and motivated by individual bias. Robert L. Nelson, Ellen C. Berrey & Laura Beth Nielsen, *Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social Sciences*, 4 ANN. REV. L. & SOC. SCI. 103, 108 (2008) (quotation marks omitted). *See also* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 3 (3rd. ed.

of those cases are so egregious that they're unlikely to repeat. Without addressing more subtle or nuanced forms of racism, one can read these cases as exclusively delineating the form of racism actionable under law. This in turn can impair how lawyers litigate and how courts handle race. From a critical perch, as a group, the cases appear unlikely to advance efforts to mitigate the influence of race in the criminal legal system. In fact, one can view these cases as simpatico with the Roberts Court's push towards post-racialism, or worse, as "performing" racial justice to mask the harms to racial equity the Court is perpetuating both in this line of cases and in other areas of its jurisprudence.

A. Treating Racism as a Relic

Timbs and *Ramos* both contain important discussions on how criminal law has historically been used to subordinate Black people, but both treat racism as a problem of the past. In *Timbs*, the discussion centered on financial punishment and how fines were used as a tool of racial subordination after the Civil War.[184] Specifically, Southern States passed Black Codes—laws that "employed economic sanctions to consign [Black people] to a form of debt slavery that coerced them into onerous involuntary labor."[185] The laws were "designed to replicate, as closely as possible, the pre-war suppression and exploitation of [Black people]."[186] As a result, "[i]n the decades after Reconstruction, fines kept many formerly enslaved people in forced servitude to [W]hite landowners."[187] The *Timbs* Court expressly recognized that while across the country the protection against excessive fines was near-universally accepted, these same protections often did not extend to Black people at the time of the Fourteenth Amendment's ratification.[188]

What the Court noticeably omitted from the opinion in *Timbs* is how fines are used in a subordinating way today.[189] If the history of racism was important

2017) (noting the shift from "Jim Crow racism," which was overt, to "new racism," which is "subtle, institutional, and apparently nonracial"); Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96 DENV. L. REV. 309, 337 (2019) (noting the shift from "'Jim Crow' racism based on explicit racial stereotypes and slurs linked to claims of nonwhite biological inferiority to modern forms of 'colorblind' and 'post-racial' racism based on race-neutral statements sounding in economic liberalism and cultural deficiency").

184. *See* Timbs v. Indiana, 139 S. Ct. 682, 688–89 (2019).

185. *See* Roberts, *supra* note 33, at 31.

186. Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 389, 402 (2004). *See also* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.–C.L. L. REV. 1, 12 n.62 (1995) ("The Black Codes represented a legalized form of slavery in which each southern state perpetuated the master-slave relationship by passing apprenticeship laws, labor contract laws, vagrancy laws, and restrictive travel laws . . . denying African Americans civil rights and due process of law.").

187. *See* Roberts, *supra* note 33, at 31.

188. *See Timbs*, 139 S. Ct. at 688.

189. In a single sentence, the Court did give a slight nod to the way in which financial punishment is ubiquitously used today by citing an amicus brief from the ACLU that noted, "State and local

to highlight in the Fourteenth Amendment's ratification story, then present-day racial disparities should have featured in the Excessive Fines Clause's incorporation story. Indeed, that States still disproportionately punish Black people using fines, and the devastating effects that this practice has on Black lives, only underscores why incorporation of the Excessive Fines Clause was necessary.

Take, for example, the Justice Department's 2015 Ferguson Report.[190] While ostensibly commissioned to investigate the killing of Michael Brown by Ferguson, Missouri, police officer Darren Wilson, a real bombshell of the report was how the municipality was using financial punishment against its Black residents.[191] The report revealed that Ferguson was generating "a significant and increasing amount of revenue" from fines, and its law enforcement practices were driven by an effort to maximize profit.[192] And Black people in Ferguson were the targets of this practice. While Black people comprised only 67 percent of Ferguson's population, they accounted for over 90 percent of the people Ferguson Police Department ticketed, many unfairly so.[193] The Ferguson Report led to broader discussions about how governments were meting out financial punishment in jurisdictions across the country.[194] And it quickly surfaced that Ferguson was not alone in its use of financial punishment as a critical source of revenue.[195] Nor was Ferguson alone in its targeting of Black people.[196]

governments nationwide increasingly depend heavily on fines and fees as a source of general revenue." *See id.* at 689.

190. C.R. DIV., U.S. DEP'T JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 3–4 (2015), http://www.justice.gov/crt/about/spl/documents/ferguson_findings_3-4-15.pdf [https://perma.cc/CQS3-U5E2] [hereinafter FERGUSON REPORT]. *See generally* Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171 (2017) (discussing the Ferguson Report in greater detail).

191. Ta-Nehisi Coates, *The Gangsters of Ferguson*, ATLANTIC (Mar. 5, 2015), https://www.theatlantic.com/politics/archive/2015/03/The-Gangsters-Of-Ferguson/386893/ [https://perma.cc/798N-QKJR] (noting that the investigation "revealed African Americans making extraordinary efforts to pay off expensive tickets for minor, often unfairly charged, violations, despite systemic obstacles to resolving those tickets").

192. FERGUSON REPORT, *supra* note 190, at 9.

193. *Id.* at 64.

194. *See* Daniel S. Harawa, *How Much Is Too Much? A Test to Protect Against Excessive Fine*s, 81 OHIO ST. L.J. 65, 74 (2020) (recounting various studies on how financial punishment is used across jurisdictions).

195. *See, e.g.*, Beth A. Colgan, *Fines, Fees, and Forfeitures*, 18 CRIMINOLOGY, CRIM. JUST. L. & SOC'Y 22, 22 (2017) ("The use of fines, fees, and forfeitures of cash and property are long-standing practices that have boomed in recent years as lawmakers have sought to fund an expanding criminal justice system without raising taxes" (citations omitted)).

196. *See, e.g.*, ELIZABETH TSAI BISHOP, BROOK HOPKINS, CHIJINDU OBIOFUMA & FELIX OWUSU, RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM (2020), https://hls.harvard.edu/content/uploads/2020/11/Massachusetts-Racial-Disparity-Report-FINAL.pdf [https://perma.cc/3472-GV7W] (detailing the racial disparities in fines in Massachusetts); Vidhi S. Joshi, *Sentenced to Debt, the True Cost of Raising Revenue Through Tennessee's Criminal Courts*, 53 TENN. BAR J. 18, 20 (2017) (detailing the racial disparities in Tennessee); Melissa Toback Levin, *Driver's License Suspensions for Nonpayments: A Discriminatory and Counterproductive Policy*, 48 HASTINGS CONST. L. Q. 73, 80–86 (2020) (detailing discriminatory fining practices in various

As the *Timbs* Court recounted, fines were used to "subjugate" Black Americans after the Civil War and maintain a "racial hierarchy."[197] But modern fining practices also work to subjugate Black Americans. When a person cannot pay a fine, the debt compounds, allowing jurisdictions to earn more money off of (disproportionately Black) people's backs.[198] Black people are disproportionately jailed for being unable to pay fines, which can set off a devastating chain of events ranging from unemployment, homelessness, revolving jail stays, and other consequences that sap a person's ability to subsist in society.[199] By not telling this part of the story, the *Timbs* Court failed to illuminate how practices with racist histories often have long-felt racialized effects.[200]

One can lob the same critique at the Court's discussion of racism in *Ramos*. There, the Court detailed the racist history of Louisiana's (and Oregon's) nonunanimous jury provision, including how it was designed to "establish the supremacy of the [W]hite race."[201] After Congress passed the Civil Rights Act of 1875, which granted Black men the right to serve on juries, White Louisianans were afraid that Black defendants "would simply not be convicted because of the African-American presence in the jury box."[202] White Louisianans also thought that Black people were not suitable for jury service because they were "ignorant, incapable of determining credibility, and susceptible to bribery."[203] First ratified at Louisiana's 1898 Constitutional Convention, the nonunanimous jury provision was a simple yet powerful tool in alleviating these concerns. Even though Louisiana was legally required to allow Black men to serve on juries, the provision allowed for Black jurors' votes to be nullified, in turn allowing predominately White juries to more easily convict Black defendants. Not only did the provision work to rob Black Louisianans of their ability to meaningfully

jurisdictions); ALABAMA APPLESEED CENTER FOR LAW AND JUSTICE, UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA'S RACIAL WEALTH DIVIDE (2018), https://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf [https://perma.cc/59HD-8KMG] (detailing the discriminatory fining practices in Alabama).

197. Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

198. *See* Harawa, *supra* note 194, at 76.

199. *Id.* at 76–78. *See also* Olivia C. Jerjian, *The Debtors' Prison Scheme: Yet Another Bar in the Birdcage of Mass Incarceration of Communities of Color*, 41 N.Y.U. REV. L. & SOC. CHANGE 235, 252 (2017) (explaining that criminal justice debt "creates additional barriers . . . in terms of housing, employment, public benefits, and even civil rights").

200. *See* Harawa, *supra* note 194, at 91 (noting that the Court failed to include the racialized modern-day realities of financial punishment in the *Timbs* opinion despite that information being before the Court in the form of multiple amicus briefs).

201. Ramos v. Louisiana, 140 S. Ct. 1390, 1417 (2020).

202. Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 376 (2012).

203. *Id.*

participate in the jury system, denying them an important badge of citizenship, it also deprived Black defendants of the prospects of a fair jury trial.[204]

This history is integral to understanding the various ways in which the criminal legal process has been manipulated to maintain a racial hierarchy in America. Missing from the majority opinion in *Ramos*, however, was the fact that while the law remained on the books, the nonunanimous jury provision worked exactly how the White supremacists who established it intended—it disproportionately nullified the votes of Black jurors and made it easier for White jurors to convict Black defendants.

Professor Thomas Frampton studied seven hundred nonunanimous jury verdicts rendered in Louisiana between 2011 and 2017.[205] Frampton found that when it came to nonunanimous guilty verdicts, Black jurors were two and a half times more likely to be in dissent than White jurors.[206] This meant that Black jurors were much more likely to have their vote nullified under Louisiana's nonunanimous jury system. Frampton also discovered that Black defendants were more likely to be convicted by nonunanimous juries; White defendants were overrepresented among unanimous convictions and underrepresented among nonunanimous convictions.[207] Thus, just as originally intended, Louisiana's nonunanimous jury provision over-empowered White jurors while disempowering Black jurors, while at the same time benefiting White defendants and disadvantaging Black ones.[208] This direct through line between the racist history of Louisiana's nonunanimous jury provision and the provision's modern-day workings did not feature in the *Ramos* majority's opinion.[209]

In both *Timbs* and *Ramos*, by detailing the historical racism without even mentioning its present manifestations, the Court paints a false picture of discontinuity with the past. Only telling half of the story in this way is dangerous because it fails to capture how racism is "adaptive"—it "morphs to avoid legal

204. *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019) (describing jury service as "the most substantial opportunity that most citizens have to participate in the democratic process").

205. Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1621 (2018).

206. *Id.* at 1637.

207. *Id.* at 1639.

208. *See id.* at 1636–37 ("These cases demonstrate that the nonunanimous-decision rule operates today just as it was intended to 120 years ago—to dilute the influence of [B]lack jurors."). *See also* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1283–84 (2000) (asserting that nonunanimous jury verdicts risk suppressing the views of racial minorities).

209. Justice Sotomayor alluded to the modern-day realities of the provision in her concurrence. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring) (explaining that Louisiana "never truly grappled" with the racist history of the nonunanimous jury provision; therefore, it cannot be said that the "laws at issue" are "free of discriminatory taint."). Justice Kavanaugh went a little further. *See id.* at 1417–18 (Kavanaugh, J., concurring) ("In light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving [B]lack defendants, victims, or jurors . . . . Then and now, non-unanimous juries can silence the voices and negate the votes of [B]lack jurors, especially in cases with [B]lack defendants or [B]lack victims, and only one or two [B]lack jurors.").

and social sanction."[210] Indeed, both *Timbs* and *Ramos* prove just how adaptive racism is. Both cases feature instances in which, after the Civil War, recalcitrant Southern States enshrined into law means to subjugate Black people through the criminal legal system. Over a century later, racialized effects of these practices persist despite the recodification of such laws and the removal of expressly racial language.[211] By failing to connect the past to the present, the Court obscured "the connective relationships and dynamic interactions that reproduce racial disadvantage across our social landscape."[212]

In avoiding discussions of the long-felt effects of racist laws and practices, the Court, whether intentionally or not, rendered invisible the longitudinal effects of racism once sanctioned by law. Yet to understand how to best combat the racism endemic to the criminal legal system, we must interrogate its origins.[213] By not drawing the link between past and present, the Court missed the opportunity to impart that much-needed lesson to judges and advocates, who pay close attention to what the Court does, and importantly, does not say.[214] And to the extent the broader public cares about the Court,[215] the Court shirked its duty

210. Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1239 (2016).

211. *See* Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 834–35 (1983) ("Although American society has gradually moved away from the more blatant forms of racial injustice, the racist cause has generally sought to preserve or revive the abuses of the past and ensure their propagation into the future . . . . For sound practical reasons, therefore, discriminatory societies have adopted forms of discrimination that have enduring impacts.").

212. Boddie, *supra* note 210, at 1242. Professor Eric Schnapper made the point that "institutionalized discrimination"—like that which featured in *Timbs* and *Ramos*—continues to inflict harm "after, often long after, all government activity has ceased." Schnapper, *supra* note 211, at 856. Therefore, to remedy that discrimination, Schnapper argues that we must move beyond redressing "specific injuries" and instead work to "disestablish whatever ongoing state of affairs produced those injuries and threatens future harms." *Id.* at 858.

213. *See* Schnapper, *supra* note 211, at 840 (explaining that a "past act of racial discrimination may cause a present injury in several distinct ways," including creating "physical or social circumstances that endure and cause injuries in the future." As Schnapper goes on to argue, understanding history is "critical to determining the appropriate remedy for particular instances of causal perpetuation of past discrimination."). *See also* Eduardo R.C. Capulong, Andrew King-Ries & Monte Mills, *Antiracism, Reflection, and Professional Identity*, 18 HASTINGS RACE & POVERTY L.J. 3, 4 (2021) ("Uprooting racism professionally and structurally requires knowledge, action, and solidarity—consciousness, agency, and an internalized sense of duty.").

214. *See, e.g.*, Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 942–43 (2016) (discussing the "relatively unremarked-on phenomenon" of the "Court's habit of sending nonprecedential signals" in which "the Justices act in their official, adjudicatory capacities without establishing conventional precedent, but nonetheless indicate some aspect of how lower courts should decide cases").

215. *See, e.g.*, Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 781 (2012) (describing how Supreme Court Justices "send signals to different audiences: lower courts, Congress, the public, and other members of the Court").

to educate us all on how the evolution of criminal law has directly contributed to the racism that persists today.[216]

B. Addressing Only Jim Crow Racism

The second critique of the Court's recent racially conscious jurisprudence is that when it *does* decide to address racial bias in the criminal context, the cases all feature what can only be considered paradigmatic racism. In *Buck*, the defendant's own expert testified that the defendant, who is Black, was more likely to be dangerous in the future because of the color of his skin.[217] Turn to *Peña-Rodriguez*, where a juror contended that Mr. Peña-Rodriguez was guilty of sexual assault because (among other racist ideas) he is "Mexican and Mexican men take whatever they want."[218] Finally, in *Flowers*, the living caricature of a racist prosecutor used peremptory strikes against forty-one out of forty-two potential Black jurors over the course of six trials to pin a mass murder on an innocent Black man.[219] The Court could not be colorblind when faced with these facts.

While the racism in these cases was odious and deserving of the Court's repudiation, racial bias in the criminal legal system is often not so obvious. To begin with, we know that people often express racism in covert, rather than overt, ways. Racism has morphed from explicit epithets and is now more casually expressed through coded and nuanced language.[220] We also know that many people harbor implicit or subconscious racial bias that interferes with decision-making.[221] For that reason, when thinking about modern-day racism and how it is likely to be expressed, the types of cases the Court has taken are likely to be outliers.[222] But beyond that, the cases can leave the impression that the actors in these cases were bad apples, as the opinions skip over more systemic racial bias—a clear shortcoming given the nationwide discussions we are having about race and racism.

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216. *See* Boddie, *supra* note 210, at 1241 ("Understanding racial discrimination as a complex, adaptive system—rather than as aberrational or as a historical artifact unconnected to present disadvantage—alerts us to its multidimensionality and persistence across generations.").

217. Buck v. Davis, 137 S. Ct. 759, 768 (2017).

218. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 862 (2017).

219. Flowers v. Mississippi, 139 S. Ct. 2228, 2236–37 (2019).

220. *See* William Y. Chin, *The Age of Covert Racism in the Era of the Roberts Court During the Waning of Affirmative Action*, 16 RUTGERS RACE & L. REV. 1, 3 (2015).

221. *See generally* JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO (2019) (explaining how implicit bias works and the ways it affects decision making across all facets of life).

222. *But see* Clarke, *supra* note 29, at 510 (arguing that in equal protection cases "courts turn a blind eye to the obvious use of racial and religious stereotypes if those stereotypes serve other interests . . . . These cases deserve attention not only because they deny justice to individual victims of discrimination but also because the failure to confront explicit forms of discrimination may normalize prejudice.").

The Court's choice to discuss race in its criminal jurisprudence only when the racism is egregious can have cascading negative effects.

One is that the cases in which the Court does address claims of racial bias are unlikely to move the needle when it comes to addressing the pervasive racial disparities in the criminal legal system. Look at *Buck* and *Flowers*. The Court there addressed grave claims of racial bias. But the facts in both cases were so egregious that a comparable case is unlikely to emerge. Because neither decision dug new jurisprudential ground, one is left wondering if there is any broader benefit to them.

Other scholars have made this point. As Professor Sheri Lynn Johnson said of *Buck*: "I have no doubt that the outcome of *Buck* is correct. Nor do I doubt that in one sense, as . . . the majority opinion declares, the case is 'extraordinary.' But in several important senses, the injustices embodied in Buck's trial are all too ordinary, and *Buck* leaves untouched those ordinary injustices."[223] Indeed, Johnson explained, *Buck* "changes no doctrine."[224]

It's Johnson's critique about *Buck*'s treatment of race that is worth devoting more space to. First, she criticized the majority framing the case as "extraordinary," because while this case may be atypical, Johnson noted that even just when looking at express references to race, Mr. Buck's case was not a one-off.[225] Second, Johnson excoriated *Buck*'s claimed commitment to eradicating the influence of race in capital sentencing, calling the commitment "shallow[]" and pointing out that the Court ignored a case in which similarly racist testimony was given in another capital case and the Court let Texas execute that person without comment.[226] In fact, the Court did not take Mr. Buck's case the first time he petitioned for certiorari.[227] Finally, Johnson made the point that data show that race is salient in capital cases even without explicit references given that juries are statistically more likely to sentence a Black or Latino defendant to death than a White defendant.[228] Yet, said Johnson, the Court does not acknowledge this, instead retreating to its comfortable "colorblindness."[229]

Professor Paul Butler had similar criticisms of *Flowers*. Butler panned the decision as "extoll[ing] the virtues of colorblindness in a case where color meant everything."[230] While *Flowers* "intended to deliver a loud message that it will not tolerate racism in the criminal legal process," Butler said, "as a practical matter, the decision will have virtually no impact, other than as an abstract

223. Johnson, *supra* note 30, at 247–48.
224. *Id.* at 255.
225. *Id.* at 264–65.
226. *Id.* at 266–68 (pointing out that the same expert that testified that Mr. Buck was more likely to be dangerous because of his race testified almost exactly the same in the case of Juan Garcia, and yet the Court allowed Texas to execute Garcia).
227. *Id.* at 266.
228. *Id.* at 269.
229. Johnson, *supra* note 30, at 269.
230. Butler, *supra* note 30, at 75.

expression of the Court's commitment to racial justice."[231] Butler then asserted that *Flowers*'s holding "is so limited," that "even on its own terms, . . . it will not help other victims of discrimination" except for maybe in the "most overt, highly unusual circumstances."[232] Butler concluded that by not addressing the more systemic racial issues undergirding the case, the Court in *Flowers* "missed a key opportunity" to "reduce prosecutorial discrimination against prospective minority jurors."[233]

Another critique of *Buck* and *Flowers* and decisions like them that has gone underexplored in the scholarly discourse is that they may actually have a *chilling* effect on the litigation of racism in the criminal context. A couple of illustrations make this point.

Imagine you are a defense lawyer, and you are contemplating raising what you believe to be race-based discrimination or racism in your client's case. You open the Supreme Court Reporter for inspiration and see that the *only* recent cases in which the Court affirmatively addresses a claim of racial discrimination *and* the defendant wins are *Buck* and *Flowers* (put aside *Peña-Rodriguez* for a moment; that will come in a couple of paragraphs). The first thing you notice is that the Court calls the cases "extraordinary" and "unusual."[234] Already that sends the signal that it will take something special to win a claim of race-based discrimination. So, you read on to figure out what that something special is and are gobsmacked by the facts of both decisions. Now you hesitate, because the racism in your client's case is more mundane, nothing compared to the grotesque racism in *Flowers* and *Buck*. Then pile on top of that the fact that talking about race and racism is generally difficult and often polarizing[235]—which can be greatly exacerbated depending on the jurisdiction. You then remember a colleague telling you about a judge who banned all discussions of race in the courtroom.[236] Not to mention that, as a defender, you have limited capital, have

231. *Id.* at 79, 82.

232. *Id.* at 83.

233. *Id.* at 82, 86. For other critiques of *Flowers*, see Thomas Ward Frampton, *What Justice Thomas Gets Right About* Batson, 72 STAN. L. REV. ONLINE 1, 1–2 (2019) (exploring Justice Thomas's dissent in *Flowers* and arguing it "gets right many things about the *Batson* doctrine and race in the courtroom that the Court's liberal wing has proved loath to confront"); Roberts, *supra* note 33, at 93–105. For a helpful discussion of the various critiques of the *Batson* decision itself, see Jonathan Abel, Batson*'s Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 716–23 (2018).

234. *See* Buck v. Davis, 137 S. Ct. 759, 768, 77 (2017); Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019).

235. For example, there is much debate surrounding whether lawyers should voir dire about race except in the cases where the salience of race is most obvious. *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1592 (2013). *See also* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 160–61 (1989) (arguing against asking potential jurors questions about racial bias).

236. *See, e.g.*, Patrick C. Brayer, *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson*, 109 NW. U. L. REV. ONLINE 163, 166 (2015) ("Unfortunately, some judges prohibit any mention of race by litigators.").

to worry about angering the judge and how that will affect your client, and ultimately, have to do what is in your client's best interests.[237] Suddenly, bringing up the garden-variety racism in your client's case seems like an unwise strategy.

Next, put yourself in the judge's shoes. Some enterprising defense attorney, (hopefully with their client's blessing), raises a claim of race-based discrimination that in your view falls short of the "extraordinary" racism featured in *Buck* and *Flowers*. You have a choice: step out on a limb and chart new territory, or reject the claim. It is tempting to take the easy way out and reject the claim.[238] That temptation grows even stronger when you look back to the earlier Roberts Court's cases, and you see that the Court repeatedly reversed the Ninth Circuit when it had been too "aggressive" in addressing race-based discrimination in the habeas context.[239] Despite the Supreme Court's rhetoric, if you view these cases as an example to follow, then you may not see them as necessarily inspiring innovation.[240]

While *Buck* and *Flowers* both proudly proclaim a commitment to eradicating racial bias in the criminal legal process, in practice, they may deter litigants from raising and judges from redressing the more casual racism that features in the average criminal case. What happened in the wake of *Peña-Rodriguez* helps illuminate this potential phenomenon.

Peña-Rodriguez is much like *Buck* and *Flowers* in that it too involved racism of the in-your-face variety. That said, *Peña-Rodriguez* is different in one important respect: it broke new jurisprudential ground. For centuries, the secrecy of the jury room had been sacrosanct and the substance of deliberations off limits.[241] One way in which that secrecy is protected is through the no-impeachment rule—an evidentiary rule forbidding courts from receiving information about what was discussed during deliberations.[242] By holding that

237. *See, e.g.*, Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 953 (2000).

238. As Professor Oona Hathaway put it when applying path dependence theory to judicial decision-making, "once a court makes an initial decision, it is less costly to continue down the same path than it is to change to a different path." Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 607 (2001).

239. *See, e.g.*, Davis v. Ayala, 576 U.S. 257, 281 (2015) (summarily reversing the Ninth Circuit's grant of habeas relief on a *Batson* claim and criticizing the court's "flight of fancy").

240. The power of the Supreme Court's dicta over the lower courts helps illustrate this. *See* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 198–99 (2014) ("Many lower courts have described Supreme Court statements as entitled to deference even when those statements were made in dicta . . . . [L]ower courts also refer to Supreme Court dicta using words like 'respect,' 'great weight,' 'great deference,' and 'more appropriate . . . than any test we might fashion.'"

241. *See* Daniel S. Harawa, *Sacrificing Secrecy*, 55 GA. L. REV. 593, 600–02 (2021) (describing the history of secret jury deliberations).

242. *See id.* at 606–08. Every jurisdiction has some version of the rule in place. *Id.* at 613 & 613 n.131. One exception to the no-impeachment rule that the Court has carved out is allowing evidence indicating that outside information tainted the deliberations. *See* Mattox v. United States, 146 U.S. 140, 149 (1892); United States v. Reid, 53 U.S. 361, 366 (1851).

the Constitution demands a racial-bias exception to the no-impeachment rule, the Court broke from a centuries-old tradition.[243] In so doing, it highlighted the paramount importance of eradicating the influence of race in the administration of justice.[244] So far so good.

Then, however, the Court clarified that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry."[245] A defendant must show that the statements exhibited "overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict," meaning the racial bias was a "significant motivating factor in the juror's vote to convict."[246] The Court did not address the fact that many jurisdictions have procedures in place that prevent defense counsel from speaking with jurors—thus there is no way to get this evidence in the first place absent a juror coming forward of their own volition.[247] And the Court left explicitly open whether a new trial is required once a defendant makes this showing.[248]

As a result, assuming a defendant can even get information about what was said during deliberations (a big assumption), in a world where we know racism is not always "overt" or "explicit,"[249] and we know it is hard to pinpoint how exactly racial bias may influence one's actions,[250] the standard set by *Peña-Rodriguez* will be extremely hard to satisfy. The few years following the decision have proved this to be true, as courts have denied relief despite clear racial bias featuring in deliberations.

For instance, a court held that the *Peña-Rodriguez* standard was not satisfied where a White juror called a fellow juror a "n****r lover" for expressing sympathy towards the Black defendant, reasoning that the comment

243. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 874–75 (2017) (Alito, J., dissenting) ("For centuries, it has been the judgment of experienced judges, trial attorneys, scholars, and lawmakers that allowing jurors to testify after a trial about what took place in the jury room would undermine the system of trial by jury that is integral to our legal system . . . . Today, with the admirable intention of providing justice for one criminal defendant, the Court not only pries open the door; it rules that respecting the privacy of the jury room, as our legal system has done for centuries, violates the Constitution.").

244. By contrast, in a case where it was alleged that jurors were under the influence of drugs and alcohol during trial and deliberations, the Court held that the Constitution did not require the court to receive evidence of the jurors' misconduct. *See* Tanner v. United States, 483 U.S. 107, 127 (1987).

245. *Peña-Rodriguez*, 137 S. Ct. at 869.

246. *Id.*

247. *See* Harawa, *Sacrificing Secrecy*, *supra* note 241, at 634–35.

248. *See Peña-Rodriguez*, 137 S. Ct. at 870–71 (leaving open the question of what a defendant needs to show after overcoming the no-impeachment rule to be granted a new trial).

249. *See* William Y. Chin, *supra* note 220, at 3; Pat K. Chew, *Seeing Subtle Racism*, 6 STAN. J. C.R. & C.L. 183, 199–207 (2010). *See also* Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 995 (2010) (highlighting that discrimination can be "subtle, nuanced, and often unconscious").

250. *See, e.g.*, Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 77–88 (1993) (reviewing studies of jury decision-making).

was not directly linked to the defendant's guilt.[251] In a case where a White juror accused two Black jurors of trying to protect their "black brothers," calling them "colored women," simply because they expressed reservations about the defendants' guilt, the court held that the *Peña-Rodriguez* standard was not satisfied, reasoning that this was not an explicitly racist statement.[252] And a court held that *Peña-Rodriguez* did not compel reversal in a case where a juror suggested that the defendant was more likely to be guilty of murder because he was from El Salvador, reasoning that the statement did not sufficiently cast doubt on the fairness of the entire verdict.[253] The Court in *Peña-Rodriguez* claimed to be doing the hard work of eliminating racial bias in the jury system. However, as these examples show, because *Peña-Rodriguez* tethered its standard to the egregious facts of that case, the Court's work of eradicating racial bias from the jury system—assuming that was actually the Court's goal—has proved ineffectual.[254]

In the end, there is a price for the Court only addressing racial bias claims when the bias fits the mold of Jim Crow-era racism.[255] Because the Court has not updated its conception of legally cognizable racism to better fit the far broader understanding we have of racism today,[256] one would be forgiven for thinking that the Court's claimed commitment to ending the influence of race in the criminal legal system rings hollow.

C. Situating the Cynicism

As just explained, the Roberts Court's recent race-aware cases on their own terms breed cynicism because at times they feel sui generis and the conversations

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251. *See* Williams v. Price, No. 2:98cv1320, 2017 WL 6729978, at *2, *8–10 (W.D. Pa. Dec. 29, 2017).

252. *See, e.g.*, United States v. Robinson, 872 F.3d 760, 771, 778–81 (6th Cir. 2017).

253. People v. Hernandez-Delgado, No. H043755, 2018 WL 6503340, at *16–17 (Cal. Ct. App. Dec. 11, 2018).

254. Or even more pessimistically, the Court could be seen as "reform[ing] . . . nonconstitutional procedure" in a way that "further empowered the State to maintain racial norms." *See* Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1, 41 (2021). *See also* Cynthia Lee, Peña-Rodriguez v. Colorado*: The Court's New Racial Bias Exception to the No-Impeachment Rule*, GEO. WASH. L. REV. ON THE DOCKET (Mar. 20, 2017), https://www.gwlr.org/pena-rodriguez-v-colorado-the-courts-new-racial-bias-exception-to-the-no-impeachment-rule/ [https://perma.cc/WCJ4-H3CY] ("*Peña-Rodriguez* is an important decision. As a symbolic expression of the Court's position that racial bias in the jury system must not be tolerated, it is a positive step forward. As a vehicle for minimizing racial bias, however, the case may be of limited value in light of the fact that most bias today is implicit, not explicit.").

255. The Court's insistence on handling cases with the most egregious acts of racism reminiscent of a bygone era is particularly frustrating in light of the Court recognizing *decades ago* that "discrimination takes a form more subtle than before." Rose v. Mitchell, 443 U.S. 545, 559 (1979). It could also be argued that these are the only cases, with their narrow holdings, that could garner a majority vote. That just highlights the shortcomings of the Court as an institution when it comes to addressing racial bias in the criminal legal system.

256. I understand that not everyone has the same broad view of what racism entails or whether it even exists.

around race are underdeveloped. The cases that explored historical racism ignored how racism persists to the present. Two of the cases that claimed to reflect a commitment to addressing racial bias in the criminal legal system did so in the most extreme circumstances and broke no new jurisprudential ground. And the case that did break new jurisprudential ground is so riddled with shortcomings that thus far, it has been ineffectual at addressing racial bias. As a group, the cases look like a bunch of lemons.

This view would be reinforced because, even though the Court got it right in *Ramos*, it quickly got it wrong from a racial justice perspective in *Edwards v. Vannoy*.[257] *Edwards* was the inevitable sequel to *Ramos*. Recall that in *Ramos*, the Court held that the Sixth Amendment requires jury unanimity for serious criminal convictions, and therefore Louisiana's nonunanimous jury provision was unconstitutional.[258] But Louisianans repealed the provision in 2018, two years before the Court decided *Ramos*.[259] This raised the question of who exactly would benefit from the *Ramos* decision. The answer: only a handful of people.

In *Edwards*, the Court held that its ruling in *Ramos* would not apply retroactively on federal collateral review.[260] As Justice Kagan explained in her dissent, this means that "a prisoner whose appeals ran out before the decision can receive no aid from the change in law it made."[261] One amicus brief filed with the Court estimated that there are about 1,677 people in Louisiana with nonunanimous jury convictions; only 76 of those individuals were still in the direct appeal process when *Ramos* was decided.[262] Louisiana intermediate appellate courts have held that *Ramos* does not apply retroactively on state post-conviction review.[263] And if that ruling stands, 1,600 people may languish in prison even though they were convicted under a nonunanimous jury system that *Ramos* acknowledged was designed to "establish the supremacy of the [W]hite race,"[264] and despite statistics showing that consistent with this design, Black

257. *See* Edwards v. Vannoy, 141 S. Ct. 1547 (2021).

258. *See* Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

259. *See* German Lopez, *Louisiana Votes to Eliminate Jim Crow Jury Law with Amendment 2*, VOX (Nov. 6, 2018), https://www.vox.com/policy-and-politics/2018/11/6/18052540/election-results-louisiana-amendment-2-unanimous-jim-crow-jury-law [https://perma.cc/63LW-DD3G].

260. *Edwards*, 141 S. Ct. at 1551 ("The question in this case is whether the new rule of criminal procedure announced in *Ramos* applies retroactively to overturn final convictions on federal collateral review. Under this Court's retroactivity precedents, the answer is no.").

261. *Id.* at 1574 (Kagan, J., dissenting).

262. Brief of Amici Curiae the Promise of Justice Initiative, the Louisiana Association of Criminal Defense Lawyers, and the Orleans Public Defenders, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807), 2020 WL 4450431, at *7. In arguing against retroactivity, Oregon filed a brief stating that they had received "over 230 state post-conviction and federal-habeas petitions with *Ramos* claims." Brief of Amicus Curiae State of Oregon in Support of Respondent, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807), 2020 WL 6149857, at *22.

263. *See, e.g.*, State v. Robertson, No. 20-KH-440, 2021 WL 966135 (La. App. 5 Cir. 3/15/21); State v. Harvey, No. 20-KW-1347, 2021 WL 647132 (La. App. 1 Cir. 2/18/21). The Louisiana Supreme Court has yet to take up the question. *See* State v. Scales, 312 So. 3d 1096, 1097 (La. 3/23/21).

264. Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020).

people were those most likely to be convicted by nonunanimous juries in Louisiana, and Black jurors were more likely to be in dissent.[265] In the words of Justice Kagan, in *Ramos*, the Court "vindicated core principles of racial justice" given that "state laws countenancing nonunanimous verdicts originated in white supremacism and continued in our own time to have racially discriminatory effects."[266] Given *Ramos*'s "soaring rhetoric," said Kagan, you would think that the "rule should therefore apply not just forward but back, to all convictions rendered absent its protection."[267] Whatever good the Court did for racial justice in *Ramos*, it undermined much of it when it sharply curbed the decision in *Edwards*.[268]

It's also worth considering what a conservative court can do with arguments like that made in *Ramos* in other contexts that are seemingly far afield from its criminal law roots, including adopting a sweeping vision of the Free Exercise Clause or limiting access to abortion.

Start with free exercise. In *Espinoza v. Montana Department of Revenue*, the Court ruled that once a state chooses to subsidize private education, it cannot exclude religious schools under the Free Exercise Clause.[269] In a concurring opinion, Justice Alito deployed *Ramos* to argue that the "original motivation" behind Montana's no-aid provision was "prompted by virulent prejudice against . . . Catholic immigrants," which in his view provided further support for

265. *See* Frampton, *Jim Crow Jury*, *supra* note 205, at 1637–39.

266. *Edwards*, 141 S. Ct. at 1574 (Kagan, J., dissenting).

267. *Id.* at 1578.

268. If one were inclined to view the cases as lemons, they may view the Court as doing the opposite of what the Warren Court did during the criminal procedure revolution. Legal scholarship has largely coalesced around the idea that the Warren Court's criminal procedure revolution "had an unstated racial subtext in light of the substantial intersection of the criminal procedure revolution and the struggle for racial equality, especially in the South." Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 252 (2015) (quotation marks omitted). S*ee* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 62 (1996). In other words, in the era when the Supreme Court was issuing its most defendant-protective yet colorblind decisions, many believe that the Court was doing so in part to advance racial justice without announcing its intentions. *See, e.g.*, David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 316 (1997).

Perhaps the Roberts Court is a mirror-image of the Warren Court. It is boldly announcing its commitment to racial justice without doing the hard work of crafting doctrine that will help ameliorate the influence of race in the criminal legal process. Yet both the Roberts Court and the Warren Court might be motivated by similar concerns. Scholars maintain the reason race did not prominently feature in the Warren Court's criminal procedure jurisprudence despite the cases ostensibly being about race was the desire to avoid political blowback. *See, e.g.*, Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1157–58 (1998). One could accuse the Roberts Court of invoking race for the same effect; given the salience of race in the criminal legal process and the burgeoning racial justice movement focused on this very subject, the Court proclaimed its commitment to racial justice to not fall too far out of step with the political moment.

269. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

the Court's ruling.[270] Therefore, Justice Alito weaponized *Ramos* and its invocation of past historical discrimination to advance, as Justice Sotomayor worded it, an expansive "new theory of free exercise."[271]

Or take the way a history of racial discrimination can be levied in the abortion context. Professor Melissa Murray presciently explained that *Ramos* furthers the idea that "correcting racial wrongs . . . has on occasion provided the special justification necessary for the Court to depart from precedent."[272] And, as Murray points out, Justice Thomas has advanced a "racialized critique of abortion," which could furnish "new justifications for reconsidering – and overruling – [*Roe*]."[273] Murray neatly draws the "not obvious" line between how the invocation of a past history of discrimination in *Ramos* can be used to limit abortion access.[274] What seemed like a progressive victory in *Ramos* all of a sudden looks decidedly less so.

A broader look at the Court's docket would bolster this view that the Roberts Court is not *truly* doing any racial justice work in this recent line of cases. Being charitable, the Court's support for racial justice seems itinerant, or less charitable, purely aesthetic. For instance, the Roberts Court had many chances to revisit the doctrine of qualified immunity, which has proved a particularly effective tool in shielding (and perhaps as a result, perpetuating) police misconduct.[275] Yet the Court declined to revisit the doctrine despite the growing chorus among the bench and public of the harms of qualified immunity, instead choosing recently to reaffirm the doctrine in two cases involving police use of force.[276] The Court avoided addressing a startling claim of racial discrimination based on what some may call a procedural technicality in a case

270. *Id.* at 2268 (Alito, J., concurring).

271. *Id.* at 2297 (Sotomayor, J., dissenting).

272. Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2079 (2021).

273. *Id.* at 2084.

274. *Id.* at 2083.

275. *See generally* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 605 (2021) (finding that officers are often not notified of the facts of cases that "clearly establish the law" for qualified immunity and even if they were, it is unrealistic that officers would consider the facts of the cases to "analogize or distinguish situations rapidly unfolding"); Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 309 (2020) (discussing how the qualified immunity defense undermines accountability and offering predictions about what litigation would look like without qualified immunity).

276. *See* Nick Sibilla, *Supreme Court Refuses to Hear Challenges to Qualified Immunity, Only Clarence Thomas Dissents*, FORBES (June 15, 2020), https://www.forbes.com/sites/nicksibilla/2020/06/15/supreme-court-refuses-to-hear-challenges-to-qualified-immunity-only-clarence-thomas-dissents/?sh=6fffd3bb7fad [https://perma.cc/YL7F-DQ4G]; Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 9 (2021); City of Tahlequah v. Bond, 142 S. Ct. 9, 11 (2021). *See also* Becky Sullivan, *The U.S. Supreme Court Rules in Favor of Officers Accused of Excessive Force*, NPR (Oct. 18, 2021), https://www.npr.org/2021/10/18/1047085626/supreme-court-police-qualified-immunity-cases [https://perma.cc/HB2H-W6E8] (discussing two cases where the Court upheld the qualified immunity defense for officers accused of using excessive force when responding to domestic disturbances).

where a juror voted for a defendant's death because he was a "n****r," and this same racist juror wondered if "[B]lack people even have souls."[277] And to some, it may mean little that the Roberts Court has made a few statements claiming a commitment to racial justice when the stakes were arguably lowest, given that the same Court has, for example, decimated the Voting Rights Act, paving the way for states to introduce measures to limit Black and Brown political power.[278] It has limited the remedial power of other important civil rights legislation.[279] And it has upheld a travel ban from a number of majority-Muslim countries, in the process sidestepping the President's many statements evincing clear anti-Muslim animus.[280] A fuller account of the Court's precedents might lead one to conclude that we are in "a renewed period of rapid devolution for equal protection."[281]

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When the Court's recent race-aware criminal cases are placed in context, it is easy to see the through-line between this line of cases and the Court's broader post-racial philosophy, which often results in decisions that are antagonistic to racial justice.[282] The Court will address racism when it is flagrant, because that is out of step with its post-racial world view.[283] For this Court, it seems that all other racism is either invisible or unimportant. Nothing about the Court's recent, seemingly more race-conscious cases in the criminal law space truly complicate this narrative. Maybe, then, in the words of Butler, the Roberts Court's recent cases are nothing but "cheap racial justice" and we "should not expect the Roberts Court to issue any consequential opinions that will undermine white

277. Tharpe v. Ford, 139 S. Ct. 911, 913 (2019) (Sotomayor, J., statement respecting the denial of certiorari) (explaining that it was appropriate for the Court to deny cert on Tharpe's juror bias claims because it was not adequately preserved).

278. Shelby County v. Holder, 570 U.S. 529, 557 (2013) (declaring Section 4(b) of the Voting Rights Act unconstitutional); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2330 (2021) (limiting scope of § 2 of the Voting Rights Act).

279. *See, e.g.*, Comcast Corp. v. Nat'l Ass'n of African-American-Owned Media, 140 S. Ct. 1009, 1019 (2020) (requiring but-for causation for a § 1981 discrimination in contracting claim).

280. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (holding that President Trump's proclamation limiting travel from several majority-Muslim countries was constitutional).

281. Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. J. INT'L L. & POL. 1779, 1781 (2012). *See generally* Barnes, *supra* note 8, at 2043 (cataloging how the Court is hostile to the equality of minorities across various jurisprudential areas); Stephen E. Gottlieb, *The Roberts Court's Hostility to the Equality of Minorities*, 41 HUM. RTS. 16, 16 (2014) (same).

282. For a collection of scholarly critiques on post-racialism, see Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1, 4 n.29 (2010) (collecting sources).

283. *See* Cedric Merlin Powell, *The Rhetorical Allure of Post-Racial Process Discourse and the Democratic Myth*, 2018 UTAH L. REV. 523, 524 (2018) (arguing that the Supreme Court "misperceives racism as merely hateful individuals engaging in overtly racist acts"). It's worth noting that even when faced with the most flagrant racism, not all members of the Court are willing to provide redress. Justices Alito and Thomas dissented in *Buck*; they, joined by Chief Justice Roberts, dissented in *Peña-Rodriguez*; and Justices Thomas and Gorsuch dissented in *Flowers*.

supremacy."[284] Even if the Court's attempt to address racism in this line of cases was empty or performative, the next Section argues that the cases can still be used to further racial justice in at least three concrete ways.

III.
MAKING LEMONADE

While it may be true that the Supreme Court's recent criminal cases addressing race are examples of the Court conveniently picking the low hanging fruit, this Section argues that the cases can still be used to further racial justice. The Section imagines three specific interventions. First, the idea featured in *Ramos*—that a history of racism is worth considering even when resolving legal claims that don't directly assert race-based discrimination—can be deployed in challenges to other laws with racist origins still on the books. This could include challenges to public order offenses (e.g., loitering, trespass, and disorderly conduct), gun crimes, immigration-related crimes, and sex crimes. Second, the cases can serve as a springboard to push actors with power in the criminal legal system to reexamine the many institutions and practices that presently work to further racial inequity. Finally, the Court's discussion of racism throughout this line of cases can act as a conduit to broader discussions about race across the criminal legal field separate from specific legal claims or policy changes.

As this Section explains, part of the problem with the evolution of criminal jurisprudence is that it ignores race. But there is a chicken and egg problem, which has so far gone undertheorized by legal scholarship: advocates do not always center race in their legal claims (for understandable reasons), and the Court's silence on race only reinforces the difficulty of raising it.[285] To help break this cycle, advocates can use these cases to guide discussions of race, which will hopefully lead to more robust and conscientious decision-making.

A caveat before continuing, however. It's important to understand that racial justice advocates are not monolithic in their thinking about how and when to raise race, or even in their vision of what racial justice or equity looks like.[286] And importantly, a racial justice advocate can firmly believe that the Roberts Court is engaged in an *anti*-racial justice project and still find purchase in this Section. This Section does not depend on a belief in the Court's intent or even call for a singular approach to using the cases in the fight for racial justice.

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284. Butler, *Mississippi Goddamn:* Flowers v. Mississippi*'s Cheap Racial Justice*, *supra* note 30, at 108–09.

285. I plan to address this issue in more depth in a future project.

286. *See, e.g.*, Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 837–838 (2021) (exploring Derrick Bell's scholarship and its critique of the NAACP Legal Defense Fund's school desegregation litigation strategy as being detached from what some thought was needed on the ground). As these scholars demanded: "Legal scholars and practitioners have a responsibility to abate the violence of law and, in the most optimal cases, draw on movement struggle to transform the construction and governance of our polities." *Id.* at 883–84. This Article takes this demand seriously.

Instead, it treats the cases as artifacts to be used when able, and paints in broad strokes understanding that time and future work will be needed to fill in the lines.

A. Reexamining Laws with Racist Origins

If, following *Ramos* (and to a lesser extent *Timbs*), a law's racist history is somehow relevant to its legal status,[287] then legal scholarship can prove helpful in making arguments that highlight the racist origins of laws, which, when paired with other defendant-friendly arguments, can advance racial justice.[288] In 2011, Chief Justice Roberts criticized legal scholarship by asserting there is a "disconnect between the academy and the profession."[289] In this Section, there are four examples of crimes for which legal scholarship has already explored their explicitly racist origins: immigration offenses, gun crimes, sex crimes, and public order offenses. When possible, advocates should highlight the crimes' racist origins when defending against such charges, because not surfacing the racism allows it to persist unexamined and unabated.

1. Immigration Offenses

Immigration laws criminalizing unauthorized entry and reentry are rife with a history of racism.

Professor Ingrid Eagly recently recounted how "illegal entry and reentry laws were first deployed as part of an explicit policy of racial exclusion that resulted in the criminal prosecution of thousands of Mexican immigrants in the 1930s."[290] Drawing from the work of historian Kelly Lytle Hernandez, Eagly explained how the original law criminalizing unauthorized border crossing passed in 1929, derisively "called the Undesirable Aliens Act, was sponsored by

287. To the extent there is any question about whether a law's racist origins is relevant after *Ramos*, one need only recall Justice Alito's concurrence in *Espinoza v. Mont. Dep't of Revenue* for support. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring) (arguing that the original motivation for laws matters given precedent from Ramos v. Louisiana, 140 S. Ct. 1390 (2020)).

288. *See* Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1880 (2016) ("[T]he sociological connections between the legal academy, the courts, and the administrative state are close enough to enable a prescriptive theory of public law, under the right conditions, to move quickly from the law reviews and lecture halls to the *United States Reports* . . . .").

289. *See* Fourth Circuit Judicial Conference, *A Conversation with Chief Justice Roberts*, C-SPAN (June 25, 2011), http://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts [https://pema.cc/E4ML-WN28]. *See also Private: Law Prof. Ifill Challenges Chief Justice Roberts' Take on Academic Scholarship*, Am. Const. Soc'y (July 5, 2011), https://www.acslaw.org/expertforum/law-prof-ifill-challenges-chief-justice-roberts-take-on-academic-scholarship/ [https://perma.cc/JPL7-FYCW] (Sherrilyn Ifill responded to the Chief Justice's critique by asserting that legal scholarship is very helpful in that it often offers "muscular critiques on contemporary legal doctrine, alternative approaches to solving complex legal questions, and reflect[s] a deep concern with the practical effect of legal decision-making on how law develops in the courtroom").

290. Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 1981 (2020).

Senator Coleman Livingston Blease, a white supremacist who sought to exclude Mexicans from the United States."[291] Many lawmakers involved in passing the 1929 law shared Blease's racist nativist sentiments, supporting immigration laws to protect "American racial stock from further degradation or change through mongrelization."[292] Though the laws were recodified in 1952, the recodification only hardened rather than ameliorated the originally racist purpose, as the Act prioritized "similarity of . . . cultural background" (read White and western).[293] President Truman even vetoed the Act because he thought it discriminatory. Congress overrode him.[294]

Both government and the courts need to face this history in the prosecution of border crossings. Eagly and Hernandez along with historian Mae Ngai gave an example of how to do this in the amicus brief they filed in *United States v. Palomar-Santiago*.[295] The question in that case was how the Court should construe the statute allowing collateral attacks from removal orders.[296] In arguing the statute should be construed in favor of Mr. Palomar-Santiago and other similarly situated defendants, they explained to the Court that it could "alleviate some of the discriminatory impact flowing from the enforcement of the criminal reentry provision," and in so doing, follow the "imperative" announced in *Ramos* of "purg[ing] racial prejudice from the administration of justice."[297] Though the Court ultimately ruled against Mr. Palomar-Santiago, the brief provides a helpful example of how to push the sentiment underlying *Ramos* further.

Federal defenders have been more aggressive in the use of this history, and after some failures, have (at least for now[298]) successfully made lemonade. Defenders have argued for dismissal of cases brought under 8 U.S.C. § 1326, the statute criminalizing illegal reentry, because "[l]ike the law in *Ramos*," that law too "has an 'uncomfortable past' that must be examined."[299] Relying on scholarship that unearthed § 1326's racist underpinnings, they have argued the

291. *Id.*

292. Lupe S. Salinas, *Lawless Cops, Latino Injustice, and Revictimization by the Justice System*, 2018 MICH. ST. L. REV. 1095, 1115 (2018) (quotation marks omitted). *See also* Doug Keller, *Re-thinking Illegal Entry and Re-Entry*, 44 LOY. U. CHI. L.J. 65, 83–85 (2012) (describing the 1952 McCarran-Walter Act's illegal entry and re-entry provisions).

293. Marion T. Bennett, *The Immigration and Nationality (McCarran-Walter) Act of 1952, as Amended to 1965*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 130 (1966).

294. *The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, U.S. DEP'T STATE, OFF. HISTORIAN, FOREIGN SERV. INST., https://history.state.gov/milestones/1945-1952/immigration-act [https://perma.cc/CX2F-CCJR].

295. Brief for Professors Kelly Lytle Hernandez, Mae Ngai & Ingrid Eagly as Amici Curiae Supporting Respondent, United States v. Palomar-Santiago, 141 S. Ct. 1615 (2021) (No. 20-437), 2021 WL 1298527.

296. United States v. Palomar-Santiago, 141 S. Ct. 1615, 1618–19 (2021).

297. Hernandez et al., *supra* note 295 at *5.

298. The Department of Justice has appealed the district court in Nevada's ruling. *See* United States v. Carrillo-Lopez, No. 3:20-cr-00026-MMD-WGC, 2021 WL 3667330 (D. Nev. Aug. 18, 2021) (appeal pending).

299. Motion to Dismiss Because § 1326 Violates Equal Protection Under *Arlington Heights* at 2, *United States v. Carillo-Lopez*, No. 3:20-CR-00026-MMD-WGC (D. Nev. Oct. 19, 2020).

statute is "presumptively unconstitutional" because it "was enacted with a discriminatory purpose and disparately impacts Mexican and Latinx immigrants."[300] While these challenges were at first unsuccessful,[301] defenders did not relent, and finally, a judge in the District of Nevada dismissed an illegal reentry prosecution, holding that "Section 1326 was enacted with a discriminatory purpose and [that] the law has a disparate impact on Latinx persons."[302]

By presenting this history as part of a full-frontal challenge to the law itself (rather than in an amicus brief), these defenders have forced courts to grapple with the history and explain why it does or does not render the current law unconstitutional. These conversations surrounding this statute—under which hundreds of thousands of people are prosecuted each year[303]—weren't *even happening* in the courtroom before *Ramos*. At least now we are seeing judges wrestle with this sordid history. This has to be an upside for anyone who cares about the law's honest development. As the litigation surrounding the unlawful entry statute shows, while a history of racism may not be persuasive to some judges, if the arguments aren't raised at all, then a different judge with a different view of the importance of remedying a law's racist history could never someday reach the right result.[304]

2. Gun Crimes

Another area where a history of racism could have traction is in challenging laws regulating gun possession and the consequences that flow from loosening such restrictions.

Southern states used racialized disarmament both during slavery and post Reconstruction as a tool to oppress Black people.[305] Thus, much like the

300. United States v. Lucas-Hernandez, No. 19MJ24522-LL, 2020 WL 6161150, at *1 (S.D. Cal. Oct. 21, 2020). *See, e.g.*, United States v. Gutierrez-Barba, No. CR-19-01224-001-PHX-DJH, 2021 WL 2138801, at *5 (D. Ariz. May 25, 2021); United States v. Rios-Montano, No. 19-CR-2123-GPC, 2020 WL 7226441, at *4 (S.D. Cal. Dec. 8, 2020); United States v. Lazcano-Neria, No. 3:20-mj-04538-AHG, 2020 WL 6363685, at *8 (S.D. Cal. Oct. 29, 2020).

301. *See* cases cited *supra* note 300.

302. United States v. Carrillo-Lopez, No. 320CR00026MMDWGC, 2021 WL 3667330, at *1 (D. Nev. Aug. 18, 2021). I understand that this victory may be of little consolation to the people who have been successfully prosecuted under the statute.

303. *CBP Enforcement Statistics Year 2020*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics-fy2020 [https://perma.cc/KAY8-BBDM].

304. *See, e.g.*, Eric S. Fish, Race, History, and Immigration Crimes, IOWA L. REV. (forthcoming) (arguing the statutory progeny of the Undesirable Alien Act is unconstitutional because of its racist history).

305. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro–Americanist Reconsideration*, 80 GEO. L.J. 309, 338, 344 (1991) ("As further indication that the former slaves had not yet joined the ranks of free citizens, southern states passed legislation prohibiting [Black people] from carrying firearms without licenses, a requirement to which [White people] were not subjected."); Robert J. Cottrol & Raymond T. Diamond, "*Never Intended to Be Applied to White Population": Firearms Regulation and Racial Disparity – the Redeemed South's Legacy to a National*

Southern states' post-Reconstruction fining practices designed to "maintain the prewar racial hierarchy" discussed in *Timbs*,[306] limiting Black gun ownership was another piece to a widespread subjugation strategy. In *McDonald v. City of Chicago*, the Court decided whether the Fourteenth Amendment incorporates the Second Amendment against the states in a case raising a civil challenge to Chicago's handgun ordinance.[307] In holding that it does, the Court made sure to highlight this history of racism, explaining that one reason warranting incorporation of the Second Amendment was that the Framers of the Fourteenth Amendment were worried about leaving Black people otherwise unprotected from White violence.[308]

Professor Timothy Zick has since noted that gun rights advocates often invoke this "'ugly history' of gun control" and deploy a "civil rights frame" to argue that "all gun control is racist."[309] In his view, the Court's "embrace of the equality narrative may have encouraged or emboldened gun rights advocates to make these sorts of arguments."[310] We therefore see the racialized history of gun control laws being used to urge courts to find the laws unconstitutional.[311] To the extent gun laws are found unconstitutional, this will have some effect for Black and Brown people, as they are disproportionately prosecuted for violating such laws.[312]

But the use of history should go further, and should be relevant to what's next *after* loosening gun restrictions when it comes specifically to the policing of Black people, given that a fear of being armed—a racially-tinged fear that dates back to slavery—is often what leads to police disproportionately stopping and searching people of color.[313] It's often this same fear, with its deep-seated

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Jurisprudence?, 70 CHI.-KENT L. REV. 1307, 1318 (1995) ("Free [Black people] fared harshly under antebellum firearms controls, as they did generally under Southern regimes, in which they served as a threat to the system of racial oppression, both because they served as a bad example to slaves and because they might instigate or participate in a rebellion by their slave brethren."). *See generally* CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA (2021) (discussing how the Second Amendment was intended to further oppress Black people). It is also worth noting that some assert that firearms restrictions were passed after the Civil War to protect Black people from White Confederate violence. *See, e.g.*, Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 105–06 (2016).

306. Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

307. McDonald v. City of Chicago, Ill., 561 U.S. 742, 752 (2010).

308. *Id.* at 773. *See also* District of Columbia v. Heller, 554 U.S. 570, 610–16 (2008) (discussing pre- and post-Civil War history of racialized disarmament).

309. Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229, 234 (2020).

310. *Id.* at 253.

311. *See id.* at 250–51.

312. *See, e.g.*, Radley Balko, *Shaneen Allen, Race and Gun Control*, WASH. POST (July 22, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/07/22/shaneen-allen-race-and-gun-control/ [https://perma.cc/CPJ6-PJZC] (noting that in 2010, over 75 percent of people convicted and sentenced for violating 18 U.S.C. § 924(c) were African American or Hispanic).

313. *See, e.g.*, Ashley Southall & Michael Gold, *Why 'Stop-and-Frisk' Inflamed Black and Hispanic Neighborhoods*, N.Y. Times (Nov. 17, 2019),

historical roots, that police cite to justify the use of force against people of color.[314]

This is not to weigh-in on the merits of gun control laws[315]—that's a controversy outside the scope of this Article.[316] It is to say that what's good for the goose is good for the gander: if activists are invoking the country's history of racism to jettison firearm restrictions across the board, then we need to ponder this same history when police justify stopping Black people because they aren't "used" to seeing Black people legally bear arms in states where open carry is the law.[317] And we need to consider this history when law enforcement target communities of color for "safe neighborhood" programs or other initiatives purportedly designed to get guns off the streets in spite of corollary efforts to put guns in everyone's hands.[318] The racialized history of gun control seems equally,

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https://www.nytimes.com/2019/11/17/nyregion/bloomberg-stop-and-frisk-new-york.html [https://perma.cc/4ADQ-QJUY].

314. *See, e.g.*, Jocelyn R. Smith Lee & Michael A. Robinson, *"That's My Number One Fear in Life. It's the Police": Examining Young Black Men's Exposures to Trauma and Loss Resulting from Police Violence and Police Killings*, 45 J. BLACK PSYCH. 143, 145–46 (2019); Timothy Williams, *Study Supports Suspicion that Police Are More Likely To Use Force on Blacks*, N.Y. TIMES (July 7, 2016), https://www.nytimes.com/2016/07/08/us/study-supports-suspicion-that-police-use-of-force-is-more-likely-for-blacks.html [https://perma.cc/EHK2-94JB].

315. *See, e.g.*, Michael B. de Leeuw, Dale E. Ho, Jennifer K. Kim & Daniel S. Kotler, *Ready, Aim, Fire?* District of Columbia v. Heller *and Communities of Color*, 25 HARV. BLACKLETTER L.J. 133, 134 (2009) (arguing that while "it may make sense to view certain firearms restrictions with a degree of skepticism . . . [o]n balance, . . . communities of color will not be served by a loosening of firearms restrictions").

316. It's worth noting that in *New York State Rifle & Pistol Ass'n v. Bruen*, a case challenging New York's handgun licensing scheme as unconstitutional under the Second Amendment, amicus briefs were filed on both sides of the argument from groups purporting to be interested in advocating the interests of citizens of color. 804 F.3d 242 (2d Cir. 2015). *See* Jordan S. Rubin, *New York Case Spotlights Gun Laws, Race History: Explained (1)*, BLOOMBERG L. (Nov. 3, 2021), https://news.bloomberglaw.com/us-law-week/new-york-case-spotlights-gun-laws-and-race-history-explained [https://perma.cc/T5EJ-8PS7].

317. Two cases from the Fourth Circuit illustrate this point. In one case, police were suspicious of a group of Black men in part because one was openly carrying a gun. Even though open carry was legal in North Carolina, the officer justified his suspicion because "in his years in the Eastway Division," which patrols minority "high crime neighborhoods," "he had never seen anyone do it." United States v. Black, 707 F.3d 531, 535, 542 (4th Cir. 2013). The Fourth Circuit held the stop was unconstitutional. *Id.* at 539–40. *See also* Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1131–33 (6th Cir. 2015) (adopting the same reasoning). Then in a subsequent case, the Fourth Circuit considered whether police were justified in *frisking* a Black man, during the course of a traffic stop, who was openly carrying a gun in West Virginia—a state that also permits open carry. United States v. Robinson, 846 F.3d 694, 695 (4th Cir. 2017) (en banc). The Fourth Circuit there adopted "a bright-line rule that any citizen availing him or herself of the legal right to carry arms in public is per se 'dangerous' . . . and therefore subject to frisk and disarmament." *Id.* at 707 (Harris, J., dissenting).

318. *See, e.g.*, Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 315–16 (2007) (arguing that the Department of Justice's nationwide project from the early 2000s, "Project Safe Neighborhoods," targeted African American communities for enforcement); Spencer S. Hsu & Keith L. Alexander, *D.C. Crackdown on Gun Crime Targeted Black Wards, Was Not Enforced Citywide as Announced*, WASH. POST (Sept. 3, 2020), https://www.washingtonpost.com/local/legal-issues/dc-crackdown-on-gun-crime-targeted-black-wards-was-not-enforced-citywide-as-

if not more, relevant to these considerations, which affect thousands of arrests and prosecutions each day.

3. Sex Crimes

America's history of sex crime prosecution is enmeshed with all forms of racism. The historical and present-day prosecution of sexual assault reflects a racial hierarchy where Black people are firmly at the bottom. For most of history, Black women were not protected by rape laws,[319] and Black men were most vigorously prosecuted and most severely punished for the alleged rape of White women.[320] In short, sex crimes historically "co-constituted race and gender" by making White men protectors of White women and Black men threats to White women—placing White "women simultaneously on a pedestal and in a cage," and leaving Black women vulnerable to be victimized by White men.[321]

Take for example the federal sex trafficking law.[322] The Mann Act had the explicit purpose of protecting White women from Black men and other men of color.[323] When introduced, the official title of the legislation was the "White Slave Traffic Act."[324] The Act made it a felony to take across state lines "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[325] It was borne from the hysteria surrounding "[W]hite slavery"—"the business of securing [W]hite women and girls and of selling them outright, or of exploiting them for immoral purposes."[326] Professor Barbara Holden-Smith recounted that the Act was at base designed to protect White women's virtue; the "focus of the congressional floor debates on Mann's Bill was the mythical [W]hite farm girl who came to the city looking for adventure and found herself trapped in a life of sexual slavery."[327] Then, when it came to the Act's enforcement, Professor Cheryl Nelson Butler explained that the Mann Act was "used to further police the sexuality of [W]hite women by prosecuting

announced/2020/09/03/f6de0ce2-e933-11ea-970a-64c73a1c2392_story.html [https://perma.cc/FS7N-A8ML] (noting that D.C.'s initiative to crackdown on gun crime was focused exclusively in the majority Black parts of the city).

319. *See* DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 31 (1997); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 117 (1983).

320. *See* Wriggins, *supra* note 319, at 105–06.

321. Stewart Chang, Frank Rudy Cooper & Addie C. Rolnick, *Race and Gender and Policing*, 21 NEV. L.J. 885, 890 (2021).

322. *See* 18 U.S.C. § 2421.

323. Kelli Ann McCoy, *Claiming Victims: The Mann Act, Gender, and Class in the American West, 1910-1930s*, at 39 (2010) (Ph.D. dissertation, U. Cal., San Diego), https://escholarship.org/content/qt8f60q9gt/qt8f60q9gt.pdf?t=ml368h [https://perma.cc/ABG9-YB9B].

324. H.R. 12315, 61st Cong. (1910).

325. *Id. See, e.g.*, Bell v. United States, 349 U.S. 81, 82 (1955). While the law has been amended over the years and new sections have been added, the operative section is still on the books.

326. Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, YALE J. L. & FEMINISM 31, 61 (1996).

327. *Id.* at 67–68.

[B]lack men for engaging in consensual interracial relations."[328] At the same time, the Act, and the way it was enforced, ignored "the pervasiveness of sex trafficking of Black women and girls," and thus "did little to discourage White men who were determined to have their way with Black women."[329] Many state sex crime laws have similarly racist origins and histories of racialized enforcement.[330]

The racial disparities surrounding the prosecution of sex crimes persist today, with the harshest penalties reserved for Black men convicted of sexually assaulting White women, comparatively undervaluing Black women's humanity and the harms they face, and with Black men being vastly overrepresented in sex trafficking prosecutions.[331] When thinking about how this history could be used today, one could imagine that it would be directly relevant at sentencing. When prosecutors recommend or judges sentence defendants of color to disproportionately harsh sentences for sex crimes perpetrated against White women (as statistics show they are wont to do), this is the direct legacy of explicit racism.[332] Taking it a step further, when prosecutors engage in these disparate prosecution practices, and judges hand down these disparate sentences, they are wielding the law in a way that maintains a racial hierarchy. This, we can and should remind them, is something the Supreme Court has said the law should not do.[333]

4. Public Order Offenses

As the Court recounted in *Timbs*, in the postbellum era, Southern states enacted Black Codes making "'vagrancy' and other dubious offenses" crimes and enforced them against Black people as a tool of subjugation.[334] But the use

328. Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1494 (2015).

329. *Id.* at 1490–91 (quoting Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 8–11 (2006)). *See* JESSICA R. PLILEY, POLICING SEXUALITY 82 (2014) ("The very title of the act seemed to preclude it from protecting women of color. As one African American newspaper declared, 'If under the term 'White Slave Traffic' the same protection is given to women of other races, then the law is a blessing, if not, then it is bias.'").

330. *See, e.g.*, I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1355 (2010).

331. *See id.* at 1361–63; Duren Banks & Tracey Kyckelhahn, *Characteristics of Suspected Human Trafficking Incidents, 2008-2010*, U.S. DEP'T JUST., 1, 6 (Apr. 2011), https://bjs.ojp.gov/content/pub/pdf/cshti0810.pdf [https://perma.cc/35CX-CESJ] (noting that 68 percent of confirmed sex trafficking suspects were Black for the 2008–2010 period).

332. This is similar to the arguments the NAACP Legal Defense made when challenging the constitutionality of the imposition of the death penalty for rape, which the Supreme Court ruled unconstitutional. *See* Coker v. Georgia, 433 U.S. 584, 600 (1977); Brief for Petitioner, Coker v. Georgia, 433 U.S. 584 (1977) (No. 75-5444), 1976 WL 181481, at *54–57.

333. *See* Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

334. *Id.*

of such "dubious" offenses to subjugate Black people was not just a post-Reconstruction tactic. Nor was it, or is it now, limited to the South.

The defining feature of vagrancy laws was that they were broad and unspecific, allowing police to essentially choose targets of enforcement.[335] By being so broad, "vagrancy and loitering laws made it possible for police to arrest pretty much anyone, or at least anyone on the street: the laws were so broad as to plausibly cover anything anyone might do in public."[336] Black people often found themselves in the crosshairs.[337]

Despite data showing that vagrancy laws were racially enforced throughout the early twentieth century,[338] it wasn't until the *1970s* that the Supreme Court struck down a vagrancy ordinance out of Jacksonville, Florida on vagueness grounds in *Papachristou v. City of Jacksonville*.[339] The Court found problematic the fact that the Jacksonville ordinance criminalized behavior that "by modern standards [was] normally innocent" and did not provide adequate notice to citizens of what conduct was illegal.[340] But beyond that, the Court noted that the ordinance was troubling given the "unfettered discretion it place[d] in the hands of the Jacksonville police," which police could then use to target "the poor and the unpopular."[341]

But the Court struck down one ordinance, not all vagrancy laws. Like whack-a-mole, states and local municipalities went about revising and narrowing their statutes, criminalizing loitering, disorderly conduct, breaking curfew, and similar offenses, all which would have fallen under the general umbrella of vagrancy.[342] Indeed, twenty-five years after *Papachristou*, the Court in *City of Chicago v. Morales* held that Chicago's anti-gang loitering ordinance was unconstitutionally vague because, much like the Jacksonville vagrancy ordinance, it failed to give adequate notice of the conduct that fell within its ambit and delegated too much discretion to police.[343]

Despite *Morales* and *Papachristou*, vagrancy-like laws are still on the books across the country. According to the available data, Black people are still vastly overrepresented when it comes to arrests for those offenses. They

335. *See* RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKINGS OF THE 1960S 2 (2016).

336. William J. Stuntz, *Crime Talk and Law Talk*, 23 REVS. OF AM. HIST. 153, 157 (1995) (reviewing LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AM. HIST. (1993)).

337. *See* Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2258 (1998).

338. *See, e.g.*, Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 270 (2021).

339. Papachristou v. City of Jacksonville, 405 U.S. 156, 163 (1972). The year before, the Court sustained an as applied challenge to a vagrancy statute. *See* Palmer v. City of Euclid, 402 U.S. 544, 545 (1971).

340. *Papachristou*, 405 U.S. at 163.

341. *Id.* at 168, 170.

342. *See* Peter W. Poulos, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 CALIF. L. REV. 379, 388 (1995).

343. City of Chicago v. Morales, 527 U.S. 41, 64 (1999).

comprise over 40 percent of those arrested for curfew or loitering violations, over 30 percent of disorderly conduct arrests, and in places where vagrancy laws still exist, comprise close to 30 percent of those arrests.[344] Remember, Black people make up just 13 percent of the population.[345]

The available legal challenges to these vagrancy laws are well-developed. They have been successfully challenged on Due Process, First Amendment, and Fourth Amendment grounds.[346] It's important to note, however, that when mounting legal challenges to vagrancy-type laws, often the racism undergirding them goes unexplored.[347] This story must be told. If Black people continue to bear the brunt of retooled vagrancy-like laws, linking the history of vagrancy laws to modern day realities is critical to understanding what is really going on here. Despite any claims of progress, governments continue to use public order offenses in racially subordinating ways.[348]

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So how would these strategies play out more concretely? Briefly,[349] as these examples demonstrate, there are at least three ways advocates can surface a law's or practice's racist history in a criminal prosecution. The first strategy is to wield that history as part of a full-frontal attack on the law, which we've seen in the immigration context. Under this strategy, the argument would be that because the law was passed with discriminatory intent, it is unconstitutional under the Fourteenth Amendment.

We also saw a history of racial discrimination deployed in the immigration context in a subtler way, with it being paired with other defendant-friendly arguments as part of what can viewed as something like a race-based rule of lenity.[350] In essence, under this strategy, when a legal question is close—and the

344. FED. BUREAU INVESTIGATION, CRIME IN THE UNITED STATES TABLE 43 (2017), https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-43 [https://perma.cc/L57C-YHK5]. Close to one hundred thousand Black people were arrested for these offenses that year. *Id.*

345. *Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045219 [https://perma.cc/XJ2K-KK88].

346. *See* Joel D. Berg, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 CHI.-KENT L. REV. 461, 467–84 (1993) (laying out various legal challenges to vagrancy-like laws). *See also* Goluboff, *supra* note 335, at 6 (noting that civil rights groups successfully challenged vagrancy laws throughout the 1960s).

347. *See* Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 778 ("The *Morales* case was decided without much attention to race.").

348. *See, e.g.*, Stewart, *supra* note 337, at 2251 (noting that anti-gang civil injunctions, although "justified in less overtly racist terms . . . share with postbellum vagrancy ordinances a repressive effect that stamps minority communities with badges of inferiority"); KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 44–48 (2021) (explaining how public order offenses are disproportionately enforced against Black youth).

349. I plan to develop these strategies in more depth in a future project.

350. The rule of lenity is the "judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." *Rule of Lenity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

underlying law has explicit racist origins or a clear history of racialized enforcement, given the persistent disparities in prosecutions—the tie must break in the defendant's favor to help remedy some of that racism.

Finally, advocates can use a history of racism to call out practices that are vestiges of express racial discrimination. From who gets stopped, to what gets prosecuted, to how one is sentenced, the current racial disparities are often vestiges of past explicit discrimination. Advocates can call these practices out when they see them happening to alert both the judges and the prosecutors to how their actions are in many ways perpetuating a system of racialized injustice.

As this Section shows, history is not just important for history's sake (though it's important for that). Rather, as *Ramos* conveys, it should color the way we construe the law going forward.[351] And even if legal challenges fail or courts and prosecutors refuse to recognize race or the racialized implications of their actions, there's value in raising the arguments. We should not allow courts and prosecutors to shy away from the truth behind the laws they purport to wield with impartiality. If nothing else, foregrounding the unshakable fact that the stain of racism still very much tarnishes the law, despite the fiction of neutrality, will hopefully cause those with power in the criminal legal system to make material, antiracist changes to how they practice law on a day-to-day basis, especially when those laws are enforced against the very people they were designed to oppress.

Legal opinions too often whitewash race. They get away with it because race is often relegated to the shadows. At least after being forced to face the facts, if a court ignores race it will be clear that it was a conscious choice and erode the notion that the law works equally for everyone. We cannot reckon with race if we don't talk about race.[352] The federal reporter should not be exempt from this discussion. As Justice Brennan once said, "[W]e remain imprisoned by the past as long as we deny its influence in the present."[353]

This Section is not intended to be exhaustive in highlighting the types of crimes still regularly enforced despite their racist origins. Nor is it supposed to provide a complete retelling of history. The goal is to provide a guide to the types

351. It is unclear what weight the majority in *Ramos* gave to the fact that Louisiana's and Oregon's nonunanimous jury provisions had racist and anti-Semitic histories when holding that the Sixth Amendment requires unanimity. And while *Timbs* highlighted the disparate treatment of African Americans after the Civil War in holding that Eighth Amendment's Excessive Fines Clause should be incorporated against the states, that certainly was not necessary to the analysis there, as the Court more often than not conducts an incorporation inquiry without contemplating how recently emancipated Black people were treated in the South.

352. Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263, 310 (2003) (arguing in favor of local truth and reconciliation commissions to address lynching in order "to identify and adopt reparation measures," which could range from monetary reparation, to "erection of monuments," to "[e]ducating police officers, prosecutors, and judges").

353. McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting). The death penalty is another area riddled with a history of racism that could be revisited. *See id.* And policing has a long history of racialization. *See, e.g.*, Miles v. United States, 181 A.3d 633, 641–44, 641 n.14 (D.C. 2018).

of litigation arguments racial justice advocates can make faithfully following Supreme Court precedent using legal scholarship and to urge legal scholars to continue excavating the history of racism in our criminal laws so that the history can be reckoned with in the courts. In sum, the Section provides just one example of how the Roberts Court's jurisprudence can be used to advance a racial justice agenda.

B. A Call to Action

Racial justice advocates can also harness these cases as part of a call for action in the push for change. Professors Lani Guinier and Gerald Torres explained when coining the term "demosprudence" that social movements have the power to influence legal elites and shift the direction of the law.[354] Therefore, in thinking about what to make of the Supreme Court's most recent race-aware decisions and what they portend for the fight for racial justice, it's important to think beyond the Supreme Court[355] and contemplate what influence these cases could have on policymakers and other powerful actors within the criminal legal system. We must ask: How can these cases be leveraged by the racial justice movement?

In response to a massive social movement, actors across the criminal legal system, *perhaps even the Supreme Court*,[356] have asserted a willingness to take steps to affirmatively address racial inequalities within the system. With the rise

354. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2752 (2014); Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 50 (2008); Gerald Torres, *Legal Change*, 55 CLEV. ST. L. REV. 135, 143 (2007).

355. *See* Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 459 (2012) (explaining that legal scholarship too often focuses on the Supreme Court where the bulk of constitution litigation takes place in the lower courts).

356. Professor Michael Klarman has noted that many of the Court's most celebrated individual rights decisions "seiz[e] upon a dominant national consensus . . . ." Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 16 (1996). Thus, Klarman argues that in *Brown v. Board of Education*, the Justices "did not think that they were creating a movement for racial reform; they understood that they were working with, not against, historical forces." Michael J. Klarman, Brown *at 50*, 90 VA. L. REV. 1613, 1621 (2004). Put another way, the Court often follows social movements rather than leads them. *See also* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 6–7 (2004) (discussing factors that may indicate whether a Court decision was leading or following a social movement).

Recently, in a pair of § 1983 cases involving police misconduct where the Court ruled against the officers, Justice Alito and Justice Gorsuch, have, in essence, accused their colleagues of bowing to the pressure of the racial justice movement. *See* Torres v. Madrid, 141 S. Ct. 989, 1015 (2021) (Gorsuch, J., dissenting); Lombardo v. City of St. Louis, Mo., 141 S. Ct. 2239, 2242 (2021) (Alito, J., dissenting).

of the "progressive prosecutor"[357] and courts openly committing to racial justice,[358] those with power in the system have claimed interest in introspection.

As prosecutors, judges, and lawmakers announce priorities and platforms in response to the racial justice movement, advocates can continue to push these actors to adopt progressive policies aimed at ameliorating the racial inequities in the criminal legal system using the Supreme Court's case law.

For instance, advocates can point to *Peña-Rodriguez* as a clear example of how racial bias still infects the jury system. Therefore, as courts draft rules and jury instructions, lawmakers propose legislation, and judges and prosecutors make campaign or confirmation promises, advocates can ask what these actors plan on doing to ensure racially biased jurors do not taint the trial process. There are a number of reforms which these actors could commit to. For instance, judges could commit to being far more permissive in allowing lawyers to voir dire on issues of race.[359] Jurisdictions could adopt implicit bias testing for jurors or enact a model instruction on implicit bias.[360] Judges could give instructions informing jurors to come forward if another juror makes racially biased statements.[361] Prosecutors could promise to use their peremptory strikes against jurors who appear to harbor racial bias regardless of whether they seem favorable to the government.[362] Courts could commit to freely allowing defense counsel to contact jurors after trial to investigate potential claims of bias.[363] Jurisdictions

357. *See* I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795 (outlining the policy platforms of various progressive prosecutors). There are debates over the efficacy of progressive prosecutors and their power to make change. *See, e.g.*, Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y. L. SCH. L. REV. 70, 72 (2019); I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1563 (2020); Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 771 (2020); Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. 8, 8 (2018); Note, *The Paradox of "Progressive Prosecution,"* 132 HARV. L. REV. 748, 750 (2018). I do not wade into this debate.

358. *See* Harawa, *The False Promise of* Peña-Rodriguez, *supra* note 30, at 2159–60, 2159 n.252 (detailing the courts that committed to addressing racial inequities in the wake of George Floyd's murder).

359. *See, e.g.*, Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 UC IRVINE L. REV. 843, 866–72 (2015) (describing how the jury selection process can be improved by accounting for implicit bias in voir dire); Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165, 188 (2011) (presenting voir dire as an opportunity to directly address racism in the jury).

360. *See generally* Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 827 (2012) (proposing using the Implicit Association Test "as an experiential learning tool during orientation"); Colin Miller, *The Constitutional Right to an Implicit Bias Jury Instruction* (Feb. 14, 2021) https://ssrn.com/abstract=3785645 [https://perma.cc/YT73-6974] (arguing that there is a Constitutional right to an implicit bias jury instruction).

361. *See, e.g.*, Samantha Saddler, Note, *A Defendant's Race as a Determinant of the Outcome of His Lawsuit*, 2019 U. ILL. L. REV. 1771, 1773 (2019).

362. *See* Tania Tetlow, *Granting Prosecutors Rights to Combat Discrimination*, 14 U. PA. J. CONST. L. 1117, 1125–26 (2012) (arguing for a prosecutorial duty to defend against jury discrimination that would target the defendant).

363. *See* Harawa, *The False Promise of* Peña-Rodriguez, *supra* note 30, at 2155.

could adopt a standard that would automatically require a new trial if it is determined that a juror made a comment suggesting racial bias and state courts could relax the standard for overcoming the no-impeachment rule.[364] Or even further, jurisdictions could even consider memorializing jury deliberations in some way to ensure that racial bias did not infiltrate the jury's decisional process.[365]

Or take *Flowers*. There, a racist prosecutor used his peremptory strikes in a clearly discriminatory way, leading to the wrongful imprisonment of a Black man for over twenty years. In light of *Flowers*'s startling facts and the national attention the case gained, advocates can ask relevant actors what their plan is to guarantee such a tragedy doesn't repeat in their jurisdiction. There are a number of promises they could extract in return. As an initial matter, it was only when the juries were not diverse that Curtis Flowers was condemned to death. So jurisdictions could promise to take multiple steps to ensure diversity in the jury pool, including broadening the sources from which jury pools are selected,[366] and eliminating jury qualification statutes that disproportionately exclude jurors of color (e.g., felony disenfranchisement provisions).[367] Judges could vow to be more discerning about prosecutors' purportedly race-neutral questions that target jurors of color.[368] Prosecutors who claim interest in racial justice could forgo the use of peremptory strikes altogether given that historically they have been used to exclude Black jurors.[369] Additionally, prosecutors could promise to revisit other aspects of the system that can lead to a wrongful conviction in the first place, including using junk science, relying on officers and informants who are not credible, and failing to turn over exculpatory evidence to the defense during discovery.[370]

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364. *Compare* Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987) (requiring a showing that racial bias "pervaded the jury room" before granting a new trial), *with* United States v. Henley, 238 F.3d 1111, 1120 (9th Cir. 2001) (rejecting this standard, stating "[o]ne racist juror would be enough").

365. *See* Harawa, *supra* note 241, at 640–44 (proposing one approach to memorializing jury deliberations).

366. *See, e.g.*, Mary R. Rose, Raul S. Casarez & Carmen M. Gutierrez, *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts*, 15 J. EMPIRICAL LEGAL STUD. 378, 400–01 (2018).

367. *See, e.g.*, Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 595–599 (2013).

368. *See, e.g.*, People v. Miles, 464 P.3d 611, 642–43 (Cal. 2020) (where the prosecutor struck Black jurors because they agreed with the O.J. Simpson verdict and the answer to that question had a sharp racial divide).

369. *See, e.g.*, Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369 (2010). Thomas Frampton also compiled data showing that prosecutors also disproportionately use for-cause challenges against Black people. *See* Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 793–97 (2020). Prosecutors should also think hard about what actually should disqualify someone from jury service.

370. *See, e.g.*, Maneka Sinha, *Junk Science at Sentencing*, 89 GEO. WASH. L. REV. 52 (2021); ALEXANDRA NATAPOFF, SNITCHING CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (2009); Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through*

Finally, advocates can channel the message underlying this line of cases to push actors throughout the criminal legal system to eliminate the influence of race in the system more broadly. On their face, these cases stand for the important proposition that courts must address the noxious and deleterious influence of race in the criminal process (regardless of whether one thinks the Court actually meant what it said). Therefore, racial justice advocates can point to these cases as they push legal actors to take a closer look at the system and mine for ways to make the system less racially biased. If the conservative and often colorblind Roberts Court can call out racists,[371] reject harmful racial stereotypes,[372] understand the racially subordinating aspects of criminal law doctrine,[373] and revisit a centuries-old evidentiary rule to combat racism,[374] advocates can push other actors within the system—especially those who claim to be "progressive"—to do the same. In short, the Supreme Court's recent decisions provide "a powerful pedagogical opportunity to open up space for public deliberation and engagement."[375]

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In the fight for racial equity, advocates (conceived broadly), including those in the academy,[376] can help by construing the Supreme Court's cases as tools to support racial justice. In addition to criticizing the cases and the Court—which is undoubtedly an important function of legal scholarship and any critical analysis of our carceral state—we can also be thinking about how to use the cases in calls for reform. Of course, advocates can, and often do, take an outsider perspective and critique the system. But advocates can also take an insider perspective and explain that even within the system there are serious problems that need to be addressed, which the Court itself has noted in this line of cases. Then, consistent with this insider perspective and in the spirit of these cases, advocates can push for reforms that further racial equity while also pursuing more radical solutions. As Professor Mari Matsuda explained in her conception of "multiple consciousness," "outsiders, including feminists and people of color," on one hand "respond as legal realists, aware of the historical abuse of law to sustain existing conditions of domination," but on the other, "have

the Defendant Due Diligence Rule, 60 UCLA L. REV. 138 (2012); Vida B. Johnson, *Federal Criminal Defendants out of the Frying Pan and into the Fire?* Brady *and the United States Attorney's Office*, 67 CATH. U. L. REV. 321 (2018).

371. *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2245 (2019).

372. *See* Buck v. Davis, 137 S. Ct. 759, 776 (2017).

373. *See* Timbs v. Indiana, 139 S. Ct. 682, 689 (2019); Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020).

374. *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 863–65 (2017).

375. Guinier, *supra* note 247, at 51.

376. *See, e.g.*, Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020) (arguing that the law school curriculum and its race-neutral approach to criminal law bear responsibility for the crisis of mass incarceration). Law professors should also be training law students to raise and litigate issues of race. *See, e.g.*, Shaun Ossei-Owusu, *Making Penal Bureaucrats*, INQUEST (Aug. 23, 2021), https://inquest.org/making-penal-bureaucrats/ [https://perma.cc/D7C2-K8L6].

embraced legalism as a tool of necessity, making legal consciousness their own in order to attack injustice."[377]

Framing advocacy in part by using Supreme Court case law may prove important to actors who might otherwise be inclined to maintain the status quo. For those who need it, the Court's cases can serve as a prompt to revisit a system riddled with racism. Whether the Supreme Court conveniently started discussing race as a racial justice movement swept the country or in earnest response to the movement itself, racial justice advocates can claim the cases as their own and wield them as proof that racial bias still infects the criminal legal system. Advocates can point to these cases as evidence of the need for change. Leveraging these recent cases to demand reflection and change is yet another way the cases can be used in the fight for racial justice.

C. Broadening Conversations About Race

Criminal law scholars employing a critical race lens have thoughtfully explored how the Court's criminal law decisions too often fail to contemplate race, and how that failure leads to doctrines that are harmful to minorities.[378] But there's a subsidiary problem that is underexplored by this literature: race is often not litigated in the average criminal case.

Take *Arizona v. Gant*, a case from the Roberts Court that cabined police officers' ability to search cars incident to arrest.[379] Even though *Gant* might be considered a win for civil liberties and a defendant-friendly outcome, Professor Frank Rudy Cooper rightly criticized *Gant* for its "failure to fully address racial profiling" and indeed, the Court's "refusal to mention race."[380] But the briefing in *Gant* doesn't discuss racial profiling. In fact, the briefing does not mention race or reference the fact that Gant is Black. As a result, we are left to expect courts to recognize the racial implications of their decisions despite race not being litigated or even discussed. While perhaps that should not be too much to ask of judges, it's much easier for courts to overlook race when the parties ignore it too.

This is not to cast blame on defense lawyers. On a good day, outside the charged atmosphere of the courtroom, race is a third rail discussion topic. It may be for good reason that defenders do not raise race given someone's life is on the

377. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as a Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297, 298 (1992).

378. *See supra* notes 12–16.

379. Arizona v. Gant, 556 U.S. 332, 351 (2009).

380. Cooper, *supra* note 13, at 117, 147. For a pre-Roberts Court example, consider *Florida v. Bostick*, a case about drug interdiction bus raids. 501 U.S. 429 (1991). Professor Tracey Maclin took the Court to task for not "commenting on the racial impact" of the decision, but the parties did not discuss the racial impact; instead, the racial impact was confined to an amicus brief. Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 331, 339 (1998).

line.[381] But if lawyers want to begin having these necessary conversations, the Court's recent line of cases can open the door to the discussion.

On their face, the cases speak to the imperative of eradicating race-based discrimination in the criminal legal system. So, to the extent one feels shy about raising issues of race, they can look to the Court's statements in *Buck*. To begin the discussion of race, advocates can leverage phrases like "[r]elying on race to impose a criminal sanction 'poisons public confidence' in the judicial process" or "[o]ur law punishes people for what they do, not who they are."[382] Because, while the Court has maybe taken contradictory action in other cases, the statements reflect a broad mandate to address racial discrimination in the criminal legal system in all its forms. Thus, advocates can point to the statements and say full-throatedly that race is not an extraneous subject. On the contrary, when racism plays any role in the punishment process, the Court has said that it must be addressed. Taking these cases at face value, racism is always relevant.

Then, when an advocate feels unsure about *how* to discuss race, they can use the Supreme Court's own words to couch the conversation. If a defender wants to make an argument about race-based selective policing or why communities of color often have fraught relationships with law enforcement, the discussion of *Timbs* about Black Codes or the nonunanimous jury provision in *Ramos* can be a helpful framing device.[383] The cases demonstrate how the law has been explicitly used to target and subordinate Black people. Given this history, it is no wonder that Black people may be skeptical of or have an antagonistic relationship with government officials.

If counsel is worried about making an argument that racial bias motivated a police officer's or a prosecutor's conduct, then *Flowers* can be an example of how racism persists. Courts recently took a prosecutor to task for his racism, yet despite repeated reversals by higher courts, the prosecutor persisted in his racist practices. If this prosecutor was undeterred in his flagrant racism, then it is not a stretch to think that other actors within the criminal legal system engage in less egregious racially biased conduct, especially given the existence of subconscious racial bias.

If an advocate wants to point out the racial impacts of a purportedly neutral law or policy, the examination of the nonunanimous jury rule in *Ramos* is a helpful comparator. We know that laws with racist histories can evolve in such a way that they are race-neutral on their face but have a discriminatory effect.

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381. It could also be that the lawyers miss the influence of race in the case. *See, e.g.*, Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1539 (2021). That is less defensible.

382. Buck v. Davis, 137 S. Ct. 759, 776, 778 (2017).

383. *See generally* Tracey Maclin, *"Black and Blue Encounters"– Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243 (1991) (explaining that Black communities often have fraught relationships with police).

If one wants to call out the use of racial stereotypes, *Buck* and *Peña-Rodriguez* are natural go-tos. There are all kinds of coded language used in the courtroom that we should be calling out as racist or founded in racist stereotypes.

And there is also language in the opinions to support broader arguments about systemic racism in the criminal legal system, with references to racial hierarchies (the first time the Supreme Court has used this term in a majority opinion) and white supremacy.[384]

Wittingly or not, the cases provide the vocabulary for broader discussions of race beyond their precise factual scenarios.

Judges are willing to entertain these conversations. Look around and you already see the racial justice movement influencing judicial decision-making. As the streets demand justice for Black people killed by police, their names are starting to appear in legal opinions.[385] Judges are responding to the movement and engaging in real discussions about race. To ensure these conversations broaden beyond these particularly conscientious judges, lawyers must be willing to have these discussions too.

This is not to say that incorporating race in the everyday courtroom will be easy. It very well could be that a number of judges are resistant to more open discussions of race, no matter how an advocate couches the conversation. Ultimately, lawyers must act in their client's best interest, but they cannot use client interest as an excuse to avoid difficult conversations and to stifle imagination and innovation. Better still, lawyers can consult their clients on the decision of whether to raise race. Perhaps defendants of color want a truer story to be told. If given the opportunity, they may want to hold the court and the government to account, even if doing so risks alienating a judge. Either way, whether to raise race needs to become a conscious choice centered in the representation of the client as opposed to a subject we as a profession bend over backwards to avoid.

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The recent line of cases from the Court has rhetorical value that should not be squandered. While talking about race is difficult, framing the conversation around Supreme Court case law can make it less so. Then, once lawyers start talking about race, hopefully judges will too, especially given recent

384. *See* Timbs v. Indiana, 139 S. Ct. 682, 688 (2019); Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020).

385. *See, e.g.*, Stewart v. City of Euclid, 970 F.3d 667, 683 (6th Cir. 2020) (Donald, J., concurring in part and dissenting in part), *cert. denied*, 141 S. Ct. 2690 (2021); Estate of Jones by Jones v. City of Martinsburg, 961 F.3d 661, 673 (4th Cir. 2020); United States v. Curry, 965 F.3d 313, 332 (4th Cir. 2020) (Gregory, C.J., concurring); Jamison v. McClendon, 476 F. Supp. 3d 386, 391 (S.D. Miss. 2020). *See also* Daniel Harawa & Brandon Hasbrouck, *Antiracism in Action*, 78 WASH. & LEE L. REV. 1027 (2021) (discussing the antiracist jurisprudence of Fourth Circuit Judge Roger L. Gregory); Jessica A. Roth, *Jack Weinstein: Reimagining the Role of the District Court Judge*, 33 FED. SENT'G REP. 163 (2021) (discussing how district court judges can become advocates while on the bench).

commitments to address racism in the criminal legal system.[386] Professors Angela Onwuachi-Willig and Anthony Alfieri called for the next generation of lawyers to "refocus on the reintegration of race inside and outside the courtroom."[387] Heeding that call, racial justice advocates can capitalize on this moment and use this line of cases to integrate discussions of race into criminal cases and expose the racial fault lines underlying much of criminal doctrine and practice.

IV.
WHY BOTHER MAKING LEMONADE?

This leaves one lingering question: Why bother making lemonade in the first place? Abolitionists and critical race scholars have urged a shift in the understanding of the criminal legal system and of how, and more fundamentally *whether*, we should be talking about reform. The common refrain that the system is broken is wrong, they explain. Rather, it's working as intended: to subordinate Black people and maintain a racial hierarchy.[388] With that shift in understanding has come a change to how some scholars think about reform. It's no longer sufficient to tinker at the edges. As Professor Amna Akbar asked: "What if law reform was not targeted towards seeing what kind of improvements we can make to the current system, but was instead geared toward building a state governed by different logics . . . ?"[389]

Given this trend, it may seem inadequate to be reading about putting a racial justice spin on the Roberts Court's criminal jurisprudence, especially given the Court's record of racial *in*justice. To be sure, there are legitimate criticisms one could raise in response to the Article's approach. One criticism could be that putting a positive spin on the Roberts Court's decisions obscures the hostility the Court holds towards racial justice and papers over the harms the Court has perpetrated against people of color.[390] One could say that the central thesis of the Article buys into the illusion the Roberts Court is trying to create: claiming to address racial injustice but in reality perpetuating a system that only reproduces

386. *See* Harawa, *The False Promise of* Peña-Rodriguez, *supra* note 30, at 2159–60, 2159 n.252.

387. Anthony V. Alfieri & Angela Onwuachi-Willig, *Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1553 (2013).

388. *See* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. Rev. 1781, 1824–25 (2020); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1621 (2019); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016).

389. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 479 (2018). *See also* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 786 (2021) (noting that "there is a tentative agreement from many corners that large-scale transformation is necessary and possible").

390. *See, e.g.*, Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1604 (2017).

inequality.[391] Put another way, others could believe that the Article falls victim to the "pacification effect" of reform, lulling people to think that by releasing these cases, there has been some form of progress.[392] Maybe some would cast the ideas in the Article as too small, when dismantling the carceral state will require radical thinking. Or some may say that by using the Court's case law, the Article legitimates an inherently illegitimate system.[393]

Instead, this Article disrupts the narrative surrounding the Roberts Court's criminal case law by urging a reimagination of a different sort: reimagining what good can be done with the case law from a Court that is hostile to racial justice. While this proposal may seem trivial on the surface, it is mighty in its importance.

First, the Black Lives Matter movement has transformed (at least for the moment) the way the country is talking about race.[394] There is no reason why these conversations should not also be happening in the courtroom in the routine prosecutions that embody the system the movement is seeking to dismantle. Indeed, this may be one of the most important venues for these conversations.[395] But as critical race scholars have noted, racial realities often do not feature in criminal jurisprudence. So, the question is, how do we change that? And how do we equip lawyers to have these conversations given the general difficulties around discussing race, when a defendant is litigating in a potentially hostile forum? How do we bring race out of the shadows and into general courtroom dialogue? This Article begins to puzzle through this problem.[396]

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391. *See, e.g.*, Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons Is to End Prisons: A Response to Russell Robinson's "Masculinity as a Prison*," 3 CALIF. L. REV. CIRCUIT 182 (2012).

392. Butler, *supra* note 388, at 1467.

393. *See, e.g.*, Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 104 (2020) ("Whereas reformist reforms aim to improve, ameliorate, legitimate, and even advance the underlying system, non-reformist reforms aim for political, economic, social transformation: for example, socialism or abolition democracy. They seek to delegitimate the underlying system in service of building new forms of social organization. Rather than relegitimate, they seek to sustain ideological crisis as a way to provoke action and develop public consciousness about the possibilities of alternatives and our collective capacity to build them together.").

394. Although, there is evidence that support for the movement is waning among White Americans. Jennifer Chudy & Hakeem Jefferson, *Support for Black Lives Matter Surged Last Year. Did it Last?*, N.Y. TIMES (May 22, 2021), https://www.nytimes.com/2021/05/22/opinion/blm-movement-protests-support.html [https://perma.cc/X4QR-TSUN].

395. *See, e.g.*, Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 6 (2022) (arguing that "the court system largely legitimizes and perpetuates the racialized violence and control of police and prisons").

396. I understand that some judges may still be willing to look past racism even when confronted with it. I also understand that the Roberts Court's composition is not static and that Justice Barrett replacing Justice Ginsburg could have serious ramifications for racial justice issues. That said, the opinions are still on the books and, until they are overruled, can be used in the manner this Article prescribes. Just because every judge does not buy the arguments does not mean that advocates should not make them.

Second, radical change requires a reckoning.[397] Legal opinions rarely engage in racial introspection. Instead, they gloss over if not outright ignore the racism inherent in our criminal law.[398] Given criminal law's contribution to the subjugation of Black people, there needs to be a reckoning in the law too. Yet there can't be a reckoning if race isn't even acknowledged in routine prosecution, where Black people disproportionately bear the brunt of the system designed to subordinate them. The law too often shies away from these discussions under the guise of civility.[399] This faux civility only masks, and therefore sustains, a racial hierarchy. Thus, any broader reimagination of criminal law needs to start with honest discussions about race. This Article proposes a way to discuss race in the courtroom in a language safest to lawyers and perhaps even their clients: the Supreme Court's own words. It also demonstrates how the Court's cases can serve as a catalyst for action outside of the courtroom and how actors can use these cases to unearth the racism that undergirds criminal laws disproportionately enforced against people of color every day.

More to the point, the interventions proposed in this Article could be a step towards a more radical rethinking of our criminal legal system. For example, as we undergo the excavation process of laws and practices with racist histories, we may unearth that much of our criminal law is rotten at its core. And as the surfacing and litigating of this history continues, maybe that will prompt further reflection on whether it is worth keeping our system in its current form. The same with revisiting institutions. Maybe as we tinker with institutions in an attempt to make them less biased, such tinkering will reveal that incremental change is often ineffectual—the racial bias exception to the no-impeachment rule created by *Peña-Rodriguez* serves as an apt example. Maybe this will help marshal the evidence skeptics need to begin a more wholesale shift away from our current carceral system.

Third, millions of Black and Brown people are shuffled through the penal system each year.[400] Their lives matter too. The question becomes what interventions can we invest in for these prosecutions while we undergo more transformational change?[401] As Professor Carol Steiker put it: "an insistence on transformation or nothing seems to me unrealistic and even cruel in its willingness to decline to support real reductions in human misery. After all, first steps are often the only way to get to a second step."[402] Make no mistake, this

397. *See, e.g.*, Akbar, *supra* note 387, at 1782.

398. *See generally* Ristroph, *supra* note 376, at 1632–38.

399. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1427 (2020) (Alito, J., dissenting) (asserting that the Court's discussion of the racist history of Louisiana's nonunanimous jury provision was uncivil).

400. *See* Utah v. Strieff, 136 S. Ct. 2056, 2069–71 (2016) (Sotomayor, J., dissenting).

401. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1239 (2015).

402. Carol S. Steiker, *Keeping Hope Alive: Criminal Justice Reform During Cycles of Political Retrenchment*, 71 FLA. L. REV. 1363, 1394 (2019) (parenthetical omitted). *See also* Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. J. L. REV. 1, 27 (2019)

Article does not operate under the premise that the criminal legal system is fair or even fixable. Nor does it believe that the Roberts Court is invested in an antiracist project—the opposite is likely true. But that doesn't mean we should give up on the people navigating the system now. We are likely stuck with a defendant-unfriendly Court for the foreseeable future. While true racial equity may ultimately require dismantling and rebuilding the system, including the courts, that goal may seem too fleeting for the people floundering today.[403] To that end, it is worth proposing interventions with the understanding that defense lawyers and defendants are laboring in forums governed by laws and logics that are fundamentally unfair.[404] The Article is situated in this reality.[405]

CONCLUSION

By deploying the Supreme Court's case law to advance racial justice, the Article seeks to find gaps in the Roberts Court's post-racial precedent. Using the Court's words, the Article proposes using the cases to peel back the veneer of impartiality and expose the racist underpinnings of the system in everyday criminal proceedings when it matters most. It suggests wielding the cases to motivate powerful actors within the system to mitigate the racial harms the system perpetuates. And it presents ideas on how the cases can move the law in a positive direction to help the Black and Brown people forced to navigate the system each day.

Beyoncé's magnum opus *Lemonade* reminded the world that generations of Black people, especially Black women, have been handed lemons but have managed to make lemonade. This Article lives in that tradition.

("Any attempt to reduce the incarceration rate and unwarranted racial disparities in the criminal justice system should be supported. An 'all or nothing' approach will achieve nothing.").

403. Akbar et al., *supra* note 286, at 838 (arguing that Derrick Bell, when critiquing the NAACP Legal Defense Fund's school desegregation strategy, "showed that elite conceptions of justice are often contested by those who live the injustice most intensely every day").

404. *See, e.g.*, Alexandra D. Lahav, *Portraits of Resistance: Lawyer Responses to Unjust Proceedings*, 57 UCLA L. REV. 725, 782–85 (2010); Farbman, *supra* note 34, at 1944–49.

405. As Professor Nicole Smith Futrell argues, "defenders can contribute to advancing the long-term, practical work of abolition by standing on the front lines and working with their clients to resist the infliction of institutional harm." Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 178–79 (2021). To be sure, there are systemic issues with policing and the streamlining of prosecutions that the interventions in this Article will not fix. Other scholars are helpfully crafting interventions for that. *See, e.g.*, Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 UCLA L. REV. DISCOURSE 200, 213–21 (2020); Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. CRIM. L. & CRIMINOLOGY 93, 130–40 (2021).