

**PROXY DISCRIMINATION: THE MISUSE OF GOVERNMENT ACTORS  
AS PROXIES TO RACIALLY DISCRIMINATE AGAINST PEOPLE OF COLOR**

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## I. Introduction

Founder James Madison declared that “[j]ustice is the end of government” and it is to be pursued until it is obtained.<sup>1</sup> But justice is not yet obtained. The government, instead of pursuing justice, is a partner with majority society members in committing acts of injustice against people of color. Overt racial bias of the past has metamorphized into the oblique bias of the present wherein majority society uses government actors such as law enforcement to carry out discriminatory acts against people of color. This is racial bias by proxy. It is outsourcing racial bias to government actors and weaponizing government against people of color. The majority society commandeers the government to perpetuate the subordination of people of color.

The election of the first Black president of the United States did not end racial discord. Former President Barack Obama understood that his election would neither compel racial reconciliation nor mark the “end of race” in America.<sup>2</sup> Instead, racism persists and has merely taken subtler forms. One subtler form is using government actors as proxies against people of color. This can be viewed as domestic warfare involving a “shadow war,” where majority society members deploy government actors to legitimize their acts against people of color.<sup>3</sup> Their use of government actors, who are accepted as lawful authority, provides them with plausible deniability when they assert racial bias is not involved in their actions against people of color.

Racial bias endures in the *vox populi*. Section II reveals how majority society employs federal and local government actors as proxies in multitudinous settings to discriminate against people of color. Section III explains why government-participant discrimination is damaging to the United States and especially so to people of color. Section IV proposes a means of combating government-mediated discrimination. Racial discrimination continues in the modern era, but government should forebear participating in discrimination and remove the imprimatur of government beneficence from those who discriminate.

## II. Misusing Government Actors as Proxies Against People of Color

Majority society members reaffirm their privileged position by using government actors as proxies to mediate racial discrimination against racial minorities.<sup>4</sup> The majority outsources discrimination to the police and other government actors.<sup>5</sup> Below are non-exhaustive examples of how federal and local government actors continue to be deployed against people of color in myriad societal settings.

### A. Misusing Law Enforcement Against Blacks in Their Everyday Lives

In the entirety of American history, there has never been peace between the Black community and the police.<sup>6</sup> This remains true today as majority society continues to use law enforcement to police Blacks in their everyday activities.<sup>7</sup> The following episodes in 2018 instantiate the weaponization of law enforcement to target Blacks.

In Portland, Oregon, a White hotel security guard, and another hotel employee called the police on a Black guest who was merely sitting in the hotel lobby talking on his cell phone.<sup>8</sup> The

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<sup>1</sup> THE FEDERALIST NO. 51, at 358 (James Madison) (Benjamin Fletcher Wright ed., 2002).

<sup>2</sup> BEN RHODES, THE WORLD AS IT IS: A MEMOIR OF THE OBAMA WHITE HOUSE 258 (2018).

<sup>3</sup> See SEAN MCFATE, THE NEW RULES OF WAR: VICTORY IN THE AGE OF DURABLE DISORDER 199 (2019).

<sup>4</sup> See Thomas A. Saenz, *Mendez and the Legacy of Brown: A Latino Civil Rights Lawyer's Assessment*, 19 BERKELEY WOMEN'S L.J. 395, 400 (2004).

<sup>5</sup> See Lua Kamál Yuille, *Inequity as a Legal Principle*, 66 U. KANSAS L. REV. 859, 859 (2018).

<sup>6</sup> PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 2 (2017).

<sup>7</sup> See *id.* at 1–2.

<sup>8</sup> Joe Douglass, *Black Guest Kicked Out of Portland Hotel Plans to File Racial Discrimination Lawsuit*, KATU NEWS

Black guest sat in the lobby to talk on the phone with his mother when the security guard questioned whether he was staying in the hotel.<sup>9</sup> At one point, the Black guest showed his hotel keycard envelope with the room number and date to the security guard.<sup>10</sup> Nonetheless, police officers were called, and they escorted the Black guest to his room to collect his belongings and then escorted him off hotel property.<sup>11</sup> The hotel later apologized to the Black guest stating that his treatment by hotel employees “was unacceptable and contrary to our values, beliefs and how we seek to treat all people who visit our hotel.”<sup>12</sup> The Black guest described the experience as “hurtful” and “humiliating” and expressed frustration that such racial injustices recurred.<sup>13</sup>

In New Jersey, L.A. Fitness employees called the police to kick out a Black gym member and his friend who were working out.<sup>14</sup> The employees accused the two Black men of not paying, but the Black gym member was an active and current gym member, and his friend was using a four-day guest pass.<sup>15</sup> Two police officers showed up and questioned the two Black men who explained the situation and continued working out.<sup>16</sup> But a short time later, an L.A. Fitness manager told them to leave, and within minutes more police officers arrived asked them to leave.<sup>17</sup> The two Black men felt they were racially profiled and harassed by their treatment.<sup>18</sup> L.A. Fitness later apologized to the two Black customers, stated that the employees “unnecessarily escalated the situation and called the police rather than work through it,” and terminated the employees involved.<sup>19</sup>

In Oakland, California, a White person called the police on two Black men who were barbecuing at Lake Merritt in a designated barbeque zone.<sup>20</sup> The White caller reported that someone was illegally using a charcoal grill and demanded that the situation be “dealt with immediately.”<sup>21</sup> She called two hours later to request police assistance again.<sup>22</sup> After arriving, the police did not cite anyone and permitted the barbeque to continue.<sup>23</sup> But it was a disturbing

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(Dec. 28, 2018), <https://katu.com/news/local/black-man-evicted-police-called-portland-hotel-while-calling-mother-in-lobby-doubletree-responds>.

<sup>9</sup> *Id.*

<sup>10</sup> Keith Allen, *Hotel Employees Who Asked Black Guest to Leave Fired*, CNN (Dec. 29, 2018),

<https://www.cnn.com/2018/12/28/us/portland-hotel-police-black-guest-trnd/index.html>.

<sup>11</sup> Douglass, *supra* note 8.

<sup>12</sup> *Id.*

<sup>13</sup> Rachel Monahan, *Portland DoubleTree Fires Two Employees for Kicking Black Guest Out of Hotel*, WILLAMETTE WEEK (Dec. 30, 2018), <https://www.wweek.com/news/city/2018/12/30/portland-doubletree-fires-two-employees-for-kicking-black-guest-out-of-hotel/>.

<sup>14</sup> Darran Simon, *LA Fitness Apologizes After Racial Profiling Allegations at Club*, CNN (Apr. 20, 2018),

<https://www.cnn.com/2018/04/20/us/la-fitness-apology/index.html>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Charisse Jones, *L.A. Fitness Says Employees Accused of Harassing Two Black Men Are No Longer With Company*, USA TODAY (Apr. 19, 2018), <https://www.usatoday.com/story/money/2018/04/19/l-fitness-fires-three-two-black-men-accuse-local-la-fitness-racial-profiling-three-employees-report/531865002/>.

<sup>19</sup> *Id.*

<sup>20</sup> Christina Zhao, *'BBQ Becky,' White Woman Who Called Cops on Black BBQ, 911 Audio Released: 'I'm Really Scared! Come Quick!'*, NEWSWEEK (Sept. 4, 2018), <https://www.newsweek.com/bbq-becky-white-woman-who-called-cops-black-bbq-911-audio-released-im-really-1103057>.

<sup>21</sup> *Id.*

<sup>22</sup> Dianne de Guzman, *Video Shows Woman Calling Police Over Barbecue at Lake Merritt*, SFGATE (May 10, 2018), <https://www.sfgate.com/bayarea/article/Oakland-barbecue-Lake-Merritt-Sunday-confrontation-12902520.php>.

<sup>23</sup> *Id.*

experience for the Black picnickers. The two Black men reported that the White caller had used the N-word against them and told them to leave the park.<sup>24</sup> One of the Black men stated that he feared for his life when the police were called.<sup>25</sup>

In Kirkland, Washington, a frozen yogurt shop owner called the police on a Black man, Byron Ragland, because store employees felt “uncomfortable” due to his presence.<sup>26</sup> But Ragland was a court-appointed special advocate and a visitation supervisor who was supervising a mother and son who went to the yogurt shop.<sup>27</sup> Ragland explained to the police officers that it was his job to be present in the yogurt shop, and the mother and son also explained that Ragland was supervising their visit.<sup>28</sup> Nonetheless, the two police officers still asked him to leave.<sup>29</sup> For Ragland, the episode constituted the racial profiling of a Black man.<sup>30</sup>

In Clackamas, Oregon, a resident called the police on a Black Oregon state representative, Janelle Bynum, who was going door-to-door talking to her constituents.<sup>31</sup> A deputy police officer pulled up to Representative Bynum, who explained she was the elected representative for the area and was talking to her constituents.<sup>32</sup> The deputy explained the caller thought Representative Bynum was casing the area and spending excessive time on her cell phone after leaving each house.<sup>33</sup> In actuality, it was Representative Bynum’s habit to stand publicly on the sidewalk after each talk to type notes into her cellphone.<sup>34</sup>

In New York, State Senator Jesse Hamilton was speaking to constituents when a White person called 911 to report the Black senator.<sup>35</sup> The police arrived and determined that no police action was necessary.<sup>36</sup> “The pattern of targeting Black men and women for being Black and alive in the communities we all share has to stop,” declared Senator Hamilton.<sup>37</sup>

### **B. Misusing Law Enforcement Against Arabs and Muslims in the War on Terror**

After the 9/11 terrorist attacks on U.S. soil, a fearful populace used law enforcement to keep tabs on Muslims in America. A poll on the night of the 9/11 attacks revealed that 58% of Americans were “very” worried or “somewhat worried about becoming the victims of terrorism.”<sup>38</sup> American suspicion of Arabs increased after the attacks.<sup>39</sup> A poll conducted a few

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<sup>24</sup> Simone Aponte, *2 Investigates Obtain 'BBQ Becky's' Viral 911 Calls*, KTVU (Aug. 31, 2018),

<http://www.ktvu.com/news/listen-bbq-becky-s-viral-911-call-made-public>.

<sup>25</sup> *Id.*

<sup>26</sup> Tanasia Kenney, *Washington Police Ignore Black Man’s Explanation About His Job After a White Yogurt Shop Employee Says He’s Making Her Uncomfortable*, ATLANTA BLACK STAR (Nov. 19, 2019), <https://atlantablackstar.com/2018/11/19/seattle-police-ignore-black-mans-explanation-about-his-job-after-a-white-female-yogurt-shop-employee-says-hes-making-her-uncomfortable/>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Amelia Templeton, *Oregon’s Rep. Bynum On Race, Grace And Getting Stopped By The Police While Canvassing*, OREGON PUB. BROADCASTING (July 5, 2018), <https://www.opb.org/news/article/oregons-janelle-bynum-police-canvassing/>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Graham Rayman, *Angry 'Trump Supporter' Calls Police, Reports Black Brooklyn State Sen. Jesse Hamilton — Who Was (Gasp) Talking to Voters*, N.Y. DAILY NEWS (Aug. 9, 2018), <https://www.nydailynews.com/new-york/ny-metro-trump-supporter-police-black-state-20180809-story.html>.

<sup>36</sup> *Id.*

<sup>37</sup> Larry Celona & Max Jaeger, *State Senator Says Woman Called 911 on Him for Opposing Trump*, N.Y. POST (Aug. 9, 2018), <https://nypost.com/2018/08/09/state-senator-says-woman-called-911-on-him-for-opposing-trump/>.

<sup>38</sup> Joseph Carroll, *American Public Opinion About Terrorism*, GALLUP (April 19, 2005),

days after the attacks revealed that nearly six out of ten Americans interviewed supported “requiring people of Arab descent to undergo special, more intensive security checks when flying on American airplanes.”<sup>40</sup> Also, 49% of Americans surveyed supported requiring Arabs, even those who were U.S. citizens, to carry a special identification card.<sup>41</sup>

The following example highlights the post-9/11 shift toward increased scrutiny of people of color. In 1999, prior to the 9/11 attacks, the then-Attorney General of New Jersey released a report criticizing his own state police for pervasive racial profiling when stopping motorists of color.<sup>42</sup> In 2001, on the very day of the September 11 terrorist attacks, New Jersey’s new Attorney General, John Farmer, Jr., was at a conference discussing the progress made in addressing the racial profiling problem.<sup>43</sup> But days after the September 11 attacks, Attorney General Farmer published an article titled “Rethinking Racial Profiling” and asserted that pre-9/11 criticism of racial profiling was a luxury that could no longer be countenanced.<sup>44</sup> He also stated that law enforcement should consider ethnicity at airports to deter hijackers.<sup>45</sup>

Public tolerance for increased scrutiny of Muslims led the Intelligence Division of the New York Police Department (NYPD) to systematically spy on American Muslims throughout New York City and farther into New Jersey, Connecticut, and Pennsylvania.<sup>46</sup> This was part of the effort by then-NYPD Police Commissioner Ray Kelly to protect New York City by creating the NYPD’s counterterrorism bureau and elevating the status of the NYPD’s Intelligence Division.<sup>47</sup> A secret unit within the Intelligence Division mapped and spied on the home, work, and social lives of American Muslims.<sup>48</sup> According to former NYPD Police Commissioner Kelly, the goal was to “know who lived where” and to have police officers accurately record everything when they walked around various neighborhoods and interviewed residents.<sup>49</sup> But the NYPD’s intelligence-gathering efforts included noting how often Muslim students prayed during a university rafting trip, which Egyptian businesses closed for daily prayers, which restaurants showed the Al-Jazeera channel, and which Newark businesses sold halal<sup>50</sup> food and alcohol.<sup>51</sup> The mapping and spying did not result in a single lead or investigation and instead curbed

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<https://news.gallup.com/poll/10009/terrorism.aspx>.

<sup>39</sup> Jeffrey M. Jones, *Americans Felt Uneasy Toward Arabs Even Before September 11: Majority Supports Increased Security Measures Even For Arabs Who Are United States Citizens*, GALLUP (Sept. 28, 2001),

<https://news.gallup.com/poll/4939/americans-felt-uneasy-toward-arabs-even-before-september.aspx>.

<sup>40</sup> *Id.*

<sup>41</sup> Jeffrey M. Jones, *The Impact of the Attacks on America: Americans Believe Country Already at War, Accept Increased Security Measures*, GALLUP (Sept. 25, 2001), <https://news.gallup.com/poll/4894/impact-attacks-america.aspx>.

<sup>42</sup> BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 194 (2017).

<sup>43</sup> *Id.* at 198.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Diala Shamas et al., *Mapping Muslims: NYPD Spying and its Impact on American Muslims*, CUNY SCH. OF L. 7, 10 (2013), <https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/clear/Mapping-Muslims.pdf>.

<sup>47</sup> RAY KELLY, VIGILANCE: MY LIFE SERVING AMERICA AND PROTECTING ITS EMPIRE CITY 167 (2015).

<sup>48</sup> See Shamas, *supra* note 45, at 7.

<sup>49</sup> KELLY, *supra* note 46, at 205–06.

<sup>50</sup> “‘Halal’ . . . means ‘permissible’ . . . and signifies ‘pure food.’” Ethridge B. Ricks, *The Gospel According to the Warden: Rluipa, the First Amendment, and Prisoners’ Religious Liberty Requests*, 11 FIRST AMEND. L. REV. 542, 592 n.208 (2013) (quoting JOHN FISHCER, *THE HALAL FRONTIER: MUSLIM CONSUMERS IN A GLOBALIZED MARKET* 1 (1st ed. 2011)).

<sup>51</sup> Shamas, *supra* note 45, at 8.

constitutionally-protected activities and undermined trust between American Muslim communities and the government.<sup>52</sup>

The Federal Bureau of Investigation (FBI) also racially mapped various communities of color, including American Muslim communities, after the 9/11 attacks.<sup>53</sup> The FBI compiled maps of businesses, community centers, and religious institutions within communities of color across the United States.<sup>54</sup> The FBI's racial mapping effort purportedly combines lawfully-collected data to identify connections that might go unnoticed.<sup>55</sup> It is akin to putting pushpins on a map, according to the FBI.<sup>56</sup> But the problem is that instead of tracking criminals, the FBI's racial mapping effort tracks innocent people.<sup>57</sup> Instead of tracking crime, the racial maps track American Muslim communities.<sup>58</sup> The FBI collected intelligence on and mapped American Muslim communities by linking the perception of an "international terrorism" threat with a particular community's race, ethnicity, national origin, or religion.<sup>59</sup> This linkage is seen, for example, in a 2009 FBI memorandum stating, "Because Michigan has large Middle-Eastern and Muslim population, it is prime territory for attempted radicalization and recruitment by these terrorist groups."<sup>60</sup> The ACLU stated that the FBI's methods constituted illegal racial profiling.<sup>61</sup>

### **C. Misusing Law Enforcement Against the Latinx Community in the War on Immigrants**

The government has engaged in a "war on immigrants" that reflects ethnocentric nationalism.<sup>62</sup> Federal and local law enforcement have targeted the Latinx community to enforce exclusionary immigration policies.<sup>63</sup> For example, in 1997, in Chandler, Arizona, the Chandler Police and the Border Patrol partnered in a joint immigration operation dubbed the "Chandler Roundup" that focused on Latinxs.<sup>64</sup> After community activists called the media about racial profiling and civil rights violations,<sup>65</sup> the media uncovered incidences of police intimidation of Mexican Americans and legal residents.<sup>66</sup> In one instance, an officer approached Venecia Zavala and asked her for proof of citizenship as she walked to her car after shopping.<sup>67</sup> In a second

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<sup>52</sup> *Id.* at 9.

<sup>53</sup> Spencer Ackerman, *FBI Crime Maps Now 'Pinpoint' Average Muslims*, WIRED (Oct. 24, 2011), <https://www.wired.com/2011/10/fbi-geomaps-muslims/>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Nusrat Choudhury, *Mapping the FBI: Documents Show Widespread Racial and Religious Profiling by Government*, ACLU: NEWS & COMMENT. (Oct. 21, 2011), <https://www.aclu.org/blog/national-security/privacy-and-surveillance/mapping-fbi-documents-show-widespread-racial-and>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Detroit Domain Management, International Terrorism Assessment*, FED. BUREAU OF INVESTIGATION (July 6, 2009), <https://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011609.pdf>.

<sup>61</sup> Choudhury, *supra* note 56.

<sup>62</sup> Erin Corcoran, *The Construction of the Ultimate Other: Nationalism and Manifestations of Misogyny and Patriarchy in U.S. Immigration Law and Policy*, 20 GEO. J. GENDER & L. 541 (2019).

<sup>63</sup> Trevor George Gardner, *Immigrant Sanctuary As the "Old Normal": A Brief History of Police Federalism*, 119 COLUM. L. REV. 1, 69 (2019).

<sup>64</sup> Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police's Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75, 83–84 (2005).

<sup>65</sup> *Id.* at 81.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 82.

instance, an officer pulled over Celso Vazquez and asked for his papers.<sup>68</sup> In a third instance, the police saw Juan Gonzales pumping gas into his car and asked him to show proof of citizenship; however police did not question the White couple next to Gonzales.<sup>69</sup>

Jose Garcia, a retired Mesa Police Department Lieutenant, stated, “[t]hey were looking for dark-skinned workers speaking Spanish.”<sup>70</sup> While watching the Chandler roundup from his video rental business, Garcia stated<sup>71</sup> “[t]he police were way out of bounds. One of our customers was stopped four times within a single block while on her way home on foot.”<sup>72</sup> An Arizona State Attorney General investigation found sixteen cases where police officers who lacked probable causes or search warrants entered homes to obtain proof of citizenship.<sup>73</sup> Lawsuits ensued, and the City of Chandler settled for half a million dollars.<sup>74</sup>

More recently, as of 2017, five states (New York, California, Illinois, Oregon, and Washington) restricted the ability of local police to question immigrants about their legal status or hold them for Immigration and Customs Enforcement (ICE).<sup>75</sup> But fifty-nine local agencies in seventeen states have partnerships with ICE to train their officers to enforce federal immigration laws.<sup>76</sup> A third group consists of states with no ICE partnership or state-imposed restrictions.<sup>77</sup> In this third group that has no ICE partnerships, officers nonetheless help ICE by stopping Latinx drivers to question them about their immigration status.<sup>78</sup> For example, a Pennsylvania state trooper in 2017 turned over at least nineteen undocumented immigrants to immigration officials by converting routine traffic stops into immigration arrests.<sup>79</sup> After stopping the vehicles, he questioned not only the drivers but also the passengers about their immigration status and detained them without warrants.<sup>80</sup> The trooper also converted random encounters into immigration arrests.<sup>81</sup> In one random encounter, the trooper saw two Hispanic men leaning against a vehicle sharing a cigarette and asked if they were “illegal.”<sup>82</sup> They acknowledged they were undocumented whereupon the trooper called ICE and handcuffed the two men.<sup>83</sup> Another random encounter involved a person who was buying a soda in the trooper’s police barracks. The trooper heard him speak Spanish, asked him to empty his pockets, found his Salvadoran identification, and reported him to federal immigration officials.<sup>84</sup> Using these methods, the

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Louis Sahagun, *Immigration Sweep Stirs Cloud of Controversy Residents Sue Arizona Town, Saying Crackdown on Illegal Workers Led to Harassment of U.S. Citizens*, L.A. TIMES (Sept. 1, 1997), <https://www.latimes.com/archives/la-xpm-1997-sep-01-mn-27943-story.html>

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Greg K. Venbrux, *Devolution or Evolution? The Increasing Role of the State in Immigration Law Enforcement*, 11 UCLA J. INT’L L. & FOREIGN AFF. 307, 328 (2006).

<sup>74</sup> *Id.* at 328–29.

<sup>75</sup> Dale Russakoff & Deborah Sontag, *For Cops Who Want to Help ICE Crack Down on Illegal Immigration, Pennsylvania Is a Free-for-All*, PROPUBLICA (April 12, 2018), <https://www.propublica.org/article/pennsylvania-immigration-ice-crackdown-cops-free-for-all>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Russakoff, *supra* note 74.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

trooper turned over numerous undocumented immigrants to immigration officials.<sup>85</sup>

Harsh immigration enforcement practices continue under a Trump Administration that began with the Trump presidential campaign demonizing immigrants.<sup>86</sup> When commenting in 2015 on immigrants from Mexico, Trump stated, “[t]hey’re bringing drugs. They’re bringing crime. They’re rapists.”<sup>87</sup> After the presidential election in a 2018 meeting with U.S. senators discussing immigration, President Trump questioned why the United States received immigrants from Haiti, El Salvador, and African countries.<sup>88</sup> “Why do we need more Haitians?”<sup>89</sup> Trump asked. “Take them out,” he stated.<sup>90</sup> To replace them, he called for more immigrants from European countries such as Norway.<sup>91</sup> Stephen Miller, who was the senior policy advisor to President Trump, stated, “I would be happy if not a single refugee foot ever again touched American soil.”<sup>92</sup> Trump’s slogan *Make America Great Again* was actually code for *Make America White Again*, averred Representative Cedric Richmond, Chair of the Congressional Black Caucus.<sup>93</sup>

Unsurprisingly, a 2018 survey found that a majority (55%) of Latinxs worried that they, a family member, or close friend could be deported.<sup>94</sup> Two-thirds (67%) stated that the Trump administration’s policies had harmed Latinxs.<sup>95</sup> Whites have their fears.<sup>96</sup> Studies show that Americans, especially Whites, significantly overestimate the proportion of crime committed by Latinos.<sup>97</sup> An example of fear of immigrants was shown by the residents of Murrieta, California, who stood in front of the gates to Murrieta’s Border Patrol facility to object to the influx of immigrants into Murrieta’s Border Patrol facility for processing.<sup>98</sup> Residents feared the immigrants would eventually be dropped off at nearby malls and bus stations.<sup>99</sup> One resident stated, “[w]e can be called a racist and we’ll just smile. Because we don’t care.”<sup>100</sup> What they did care about was preventing immigrants from being released into their community.<sup>101</sup>

#### **D. Misusing Law Enforcement Against Communities of Color in the War on Drugs**

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<sup>85</sup> *Id.*

<sup>86</sup> Jill E. Family, *The Executive Power of Political Emergency: The Travel Ban*, 87 UMKC L. REV. 611, 624 (2019).

<sup>87</sup> Darran Simon, *President Trump's Other Insensitive Comments on Race and Ethnicity*, CNN (Jan. 13, 2018), <https://www.cnn.com/2018/01/11/politics/president-trump-racial-comments-tweets/index.html>.

<sup>88</sup> Ibram X. Kendi, *The Day ‘[ ]ithole’ Entered the Presidential Lexicon*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/>.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> CLIFF SIMS, *TEAM OF VIPES: MY 500 EXTRAORDINARY DAYS IN THE TRUMP WHITE HOUSE* 191 (2019).

<sup>93</sup> Chantal Da Silva, *Trump Wants to “Make America White Again,” Says Black Leader in Congress After “[ ]ithole Countries” Comment*, NEWSWEEK (Jan. 12, 2018), <https://www.newsweek.com/trump-wants-make-america-white-again-black-leader-congress-after-shithole-779309>.

<sup>94</sup> Mark Hugo Lopez et al., *More Latinos Have Serious Concerns About Their Place in America Under Trump*, PEW RESEARCH CENTER (Oct. 25, 2018), <https://www.pewhispanic.org/2018/10/25/more-latinos-have-serious-concerns-about-their-place-in-america-under-trump/>.

<sup>95</sup> *Id.*

<sup>96</sup> See Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, THE SENTENCING PROJECT 11–13 (2014), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf>.

<sup>97</sup> *Id.*

<sup>98</sup> *‘We’re Watching’: Locals Concerned After Migrants Arrive At Murrieta Border Control Facility*, CBS LOS ANGELES (May 20, 2019), <https://losangeles.cbslocal.com/2019/05/20/murrieta-boarder-control/>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

At its inception, America's War on Drugs was infected by racial bias. Dr. Hamilton Wright, the first opium commissioner appointed by President Theodore Roosevelt in 1908, stated that an unfortunate result of opium use in the United States was "the large number of women who have become involved and were living as common-law wives or cohabitating with Chinese in the Chinatowns of our various cities."<sup>102</sup> He also asserted that "cocaine is often the direct incentive to the crime of rape by the Negroes of the South."<sup>103</sup> An authority that Opium Commissioner Wright relied on was Dr. Christopher Koch who testified before Congress in 1914 in favor of criminalizing drug use.<sup>104</sup> Dr. Koch stated that "[m]ost of the attacks upon the white women of the South are the direct result of a cocaine-crazed Negro brain."<sup>105</sup>

Under the Nixon Administration the War on Drugs was a racially-biased policy tool directed against Blacks, among others.<sup>106</sup> President Nixon's former domestic policy adviser, John Ehrlichman, explained that the Nixon Administration,

had two enemies: the antiwar left and black people . . . . We knew we couldn't make it illegal to be either against the [Vietnam] war or black, but by getting the public to associate the hippies [i.e., antiwar left] with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities.<sup>107</sup>

The War on Drugs targeting the antiwar-left and Blacks allowed law enforcement to arrest their leaders, raid their homes, disrupt their meetings, and demonize them in media reports.<sup>108</sup> Ehrlichman rhetorically asked, "[d]id we know we were lying about the drugs?" His answer: "Of course we did."<sup>109</sup>

Unsurprisingly, the War on Drugs became a failed policy.<sup>110</sup> In a 2012 meeting with then-U.S. Attorney General Eric Holder, an FBI supervisor stated that the war on drugs was a "complete bust, a complete waste of money," and that resources should be diverted elsewhere.<sup>111</sup> Nonetheless, the War on Drugs continued, and it continued to target communities of color.<sup>112</sup> Matthew Fogg, a retired chief deputy U.S. marshal, who at one point ran a joint Drug Enforcement Administration task force, stated that drug raids targeted Black neighborhoods.<sup>113</sup> But Whites also used illegal drugs, so Fogg once suggested to his supervisor that they should also raid White neighborhoods.<sup>114</sup> His supervisor, however, explained the difficulties of prosecuting Whites who had access to the powerful: "Fogg, you know you're right they are using drugs there [but] you know what? If we go out and we start targeting those individuals, they

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<sup>102</sup> JAMES KILGORE, UNDERSTANDING MASS INCARCERATION: A PEOPLE'S GUIDE TO THE KEY CIVIL RIGHTS STRUGGLE OF OUR TIME 60 (2015).

<sup>103</sup> ALEXANDER COCKBURN & JEFFREY ST. CLAIR, WHITEOUT: THE CIA, DRUGS AND THE PRESS 71 (1998).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAGAZINE (April 2016),

<https://harpers.org/archive/2016/04/legalize-it-all/>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> A Drug Enforcement Administration (DEA) supervisor also present at the meeting disagreed with the FBI supervisor. The DEA supervisor believed the war on drugs was needed to "stop the violence, to stop drugs from flowing in and destroying lives." See JACK RILEY & MITCH WEISS, DRUG WARRIOR: INSIDE THE HUNT FOR EL CHAPO AND THE RISE OF AMERICA'S OPIOID CRISIS 156 (2019).

<sup>111</sup> *Id.*

<sup>112</sup> JOHANN HARI, CHASING THE SCREAM: THE FIRST AND LAST DAYS OF THE WAR ON DRUGS 94 (2015).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

know judges, they know lawyers, they know politicians, they know all of the big folks in government.”<sup>115</sup> Fogg’s supervisor explained the consequences of going after privileged Whites: “[i]f we start targeting them, and their children, you know what’s going to happen? We’re going to get a phone call and they’re going to shut us down. You know that, Fogg? You know what’s going to happen? There goes your overtime. There’s the money that *you’re* making.”<sup>116</sup> Accordingly, the government should go after people of color who were easier to lock up because they were not privileged with access to the powerful, explained the supervisor: “[s]o let’s just go after the weakest link. Let’s go after those who can’t afford the attorneys, those who we can lock up.”<sup>117</sup>

Fogg’s supervisor’s statement reveals the racial injustice permeating the War on Drugs and the criminal justice system. Former FBI Director James Comey recognized this injustice. He stated that the criminal justice system operated on a double standard. For example, former CIA Director David Petraeus was charged with a mere misdemeanor after improperly disclosing classified information, but he should have also been charged with a felony for lying to the FBI about his disclosure of classified information, asserted Comey. By contrast, “[a] poor person, an unknown person—say a young Black Baptist minister from Richmond—would be charged with a felony,” Comey averred.<sup>118</sup>

#### **E. Misusing the Prison System to Incarcerate People of Color**

America’s prison system holds approximately 2.3 million people in a multitude of facilities, including state prisons, federal prisons, juvenile correctional facilities, local jails, Indian Country jails, and immigration detention facilities.<sup>119</sup> Another 3.7 million are on probation, and 840,000 are on parole.<sup>120</sup> Those carrying the heaviest burden of punishment include African American, Latinx, and Native American communities.<sup>121</sup> According to 2017 data, Blacks make up only 12% of the U.S. population, but make up 33% of the U.S. prison population; Hispanics make up only 16% of the U.S. population, but make up 23% of the U.S. prison population.<sup>122</sup> In various parts of the United States, Native American communities also suffer disproportionate levels of incarceration.<sup>123</sup>

Racial bias is a factor accounting for the mass incarceration of people of color.<sup>124</sup> Justice Sotomayor states that people of color are disproportionate victims of illegal police stops and searches, that courts excuse these violations of citizens’ rights, and that we are now subjects of a “carceral state, just waiting to be cataloged.”<sup>125</sup> In this carceral state, prison authorities seek to imprison not only bodies but also minds by controlling what prisoners read.<sup>126</sup> For example,

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> JAMES COMEY, *HIGHER LOYALTY: TRUTH, LIES, AND LEADERSHIP* 163–64 (2018).

<sup>119</sup> Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (March 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

<sup>120</sup> TONY PLATT, *BEYOND THESE WALLS: RETHINKING CRIME AND PUNISHMENT IN THE UNITED STATES* 6 (2018).

<sup>121</sup> *Id.*

<sup>122</sup> Whites make up 64% of the U.S. population, but make up only 30% of the U.S. prison population. *Blacks, Hispanics Make up Larger Shares of Prisoners Than of the U.S. Population*, PEW RESEARCH CENTER (April 30, 2019), [https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/ft\\_19-04-29\\_prisonracegapsupdate\\_2\\_updated/](https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/ft_19-04-29_prisonracegapsupdate_2_updated/).

<sup>123</sup> See KILGORE, *supra* note 101, at 16.

<sup>124</sup> *Id.* at 13.

<sup>125</sup> *Utah v. Strieff*, 136 S. Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting).

<sup>126</sup> SHANE BAUER, *AMERICAN PRISON: A REPORTER’S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT*

Louisiana prisons ban *Huey: Spirit of the Panther, Faces of Africa, and Message to the Blackman in America*.<sup>127</sup> Texas allows Adolf Hitler’s *Mein Kampf* and David Duke’s *My Awakening* but disallows books by Sojourner Truth, Harriet Beecher Stowe, Langston Hughes, and Richard Wright.<sup>128</sup> Arizona bans *Chokehold: Policing Black Men* authored by a former federal prosecutor<sup>129</sup> who wrote that mass incarceration is used to control Black men in America.<sup>130</sup> In the current era, mass incarceration in the United States constitutes a “comprehensive and well-disguised system of racialized social control.”<sup>131</sup>

#### **F. Misusing the Internal Revenue Service (IRS) Against Taxpayers of Color**

A national map created from a study of IRS audits reveals that the five most audited counties in the United States are predominantly Black counties in the rural Deep South.<sup>132</sup> The high-audit counties are Humphreys, Mississippi; Tunica, Mississippi; East Carroll, Louisiana; Coahoma, Mississippi; and Noxubee, Mississippi. In Humphreys, Mississippi, for example, three out of four residents are Black.<sup>133</sup>

Other high-audit areas include counties in South Texas with large Latinx populations and counties with Native American reservations such as in South Dakota.<sup>134</sup> Paul Kiel, co-author of the ProPublica report that analyzed IRS tax audits from 2012 to 2015, stated “[t]he below-average . . . [audit area] is basically the northern part of the United States, and the above-average [audit area] is more or less the south.” He explained, “[y]ou could also see things [on the audit map] like counties with a high Latino population, like in the south of Texas, or where the Native American reservations are” that had higher audit rates.<sup>135</sup>

Representative Charlie Crist saw the map’s unequal audits and queried IRS Commissioner Charles Rettig: “[t]he map looks like the IRS is targeting Black, Hispanic and Native American populations for audit. Is that the case?” Rettig denied the targeting.<sup>136</sup> But Senator Ron Wyden called the map “shameful.”<sup>137</sup>

#### **G. Misusing the U.S. Department of Agriculture (USDA) Against Farmers of Color**

For most of its history since its inception in 1862, White men controlled the USDA and

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103 (2018).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Associated Press, *Arizona Prisons Ban Book on Black Men in the Justice System*, ABC 15 (May 21, 2019), <https://www.abc15.com/news/state/arizona-prisons-ban-book-on-black-men-in-the-justice-system>.

<sup>130</sup> BUTLER, *supra* note 6, at 9.

<sup>131</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 4 (The New Press rev. ed. 2012); “Jim Crow” refers to the period after de jure slavery was abolished when state and local laws and customs re-segregated and re-subjugated Blacks. Adjoa Artis Aiyetoro, *Truth Matters: A Call for the American Bar Association to Acknowledge its Past and Make Reparations to African Descendants*, 18 GEO. MASON U. CIV. RTS. L. J. 51, 105 n.7 (2007).

<sup>132</sup> Paul Kiel, *Lawmakers Just Confronted the IRS Over Tax Audits That Target the Poor*, PROPUBLICA (April 10, 2019), <https://www.propublica.org/article/lawmakers-to-irs-commissioner-charles-rettig-system-stacked-for-the-rich>.

<sup>133</sup> Aimee Picchi, *Here Are the Counties Where Taxpayers Are Most Likely to Be Audited*, CBS NEWS (April 2, 2019), <https://www.cbsnews.com/news/where-does-the-irs-audit-the-most-poor-rural-counties-that-are-mostly-black/>.

<sup>134</sup> Paul Kiel & Hannah Fresques, *Where in The U.S. Are You Most Likely to Be Audited by the IRS?*, PROPUBLICA (April 1, 2019), <https://projects.propublica.org/graphics/eitc-audit>.

<sup>135</sup> Jeanie Ahn, *Tax audits: Where You Live Could Increase Chances of an Audit*, YAHOO! FINANCE (April 3, 2019), <https://finance.yahoo.com/news/tax-audits-where-you-live-could-increase-chances-of-an-audit-165739430.html>.

<sup>136</sup> Kiel, *supra* note 131.

<sup>137</sup> *Id.*

excluded people of color from decision-making positions.<sup>138</sup> Local White farmers used the USDA to discriminate against Black, Native American, and Hispanic farmers.<sup>139</sup> A 1998 USDA report by the Commission on Small Farms acknowledged that minority farmers experienced “blatant discrimination” when dealing with USDA programs and staff.<sup>140</sup> The report stated that the history of racial discrimination by the USDA “is well documented” and contributed to the dramatic decline of Black farmers over the past decades.<sup>141</sup> In 1920, Black farmers operated 14.3% percent of all farms in the United States.<sup>142</sup> But this number diminished decade after decade and Black farmers operated only 1% of the farms in 1992.<sup>143</sup> The number remained low twenty years later, in 2012, when only 1.58% of U.S. farmers were Black.<sup>144</sup>

Timothy Pigford and other Black farmers who received unequal treatment filed lawsuits against the USDA.<sup>145</sup> Their cases were consolidated into a class-action lawsuit that prevailed, resulting in government payments to Black farmers.<sup>146</sup> The suit resulted in a 1999 settlement favoring Black farmers.<sup>147</sup> The Black plaintiffs estimated the settlement to be worth at least \$2.25 billion, the largest civil rights settlement in U.S. history.<sup>148</sup> Judge Friedman noted that the frustration of Black farmers “arise from a deep and overwhelming sense that the USDA and all of the structures it has put in place have been and continue to be fundamentally hostile to the African American farmer.”<sup>149</sup>

Although the case did not proceed to trial because both sides reach a negotiated settlement through the Consent Decree, the *Pigford* Court stated that there was “strong evidence” that the USDA and county committees discriminated against Black farmers.<sup>150</sup> The county committee approves or denies local farmers’ applications for federal credit or benefits.<sup>151</sup> Local farmers and ranchers elect the members of a county committee.<sup>152</sup> The USDA pays the salaries of county committee members, although they are not federal employees.<sup>153</sup> The county committee appoints a “county executive” who is supposed to help farmers with their applications and who recommends which applications should be approved.<sup>154</sup> These county committee members are predominantly White, and Black farmers in the lawsuit explained how the county

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<sup>138</sup> PETE DANIEL, DISPOSSESSION: DISCRIMINATION AGAINST AFRICAN AMERICAN FARMERS IN THE AGE OF CIVIL RIGHTS xii (2013).

<sup>139</sup> *See id.* at 34, 262.

<sup>140</sup> *A Time to Act: A Report of the USDA National Commission on Small Farms*, 1545 U.S. DEP’T OF AGRICULTURE 40 (1998), <https://archive.org/details/timetoact1545usda/page/40>.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 43.

<sup>143</sup> *Id.*

<sup>144</sup> Abril Castro & Zoe Willingham, *Progressive Governance Can Turn the Tide for Black Farmers*, CTR FOR AM. PROGRESS (Apr. 3, 2019), <https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>.

<sup>145</sup> Mark A. Bunbury, Jr., “Forty Acres and A Mule” . . . Not Quite Yet: Section 14012 of the Food, Conservation, and Energy Act of 2008 Fails Black Farmers, 87 N.C. L. REV. 1230, 1236 (2009).

<sup>146</sup> *Id.*

<sup>147</sup> *Pigford v. Glickman*, 185 F.R.D. 82, 112–13 (D.D.C. 1999), *aff’d*, 206 F.3d 1212 (D.C. Cir. 2000), and *enforcement denied sub nom. Pigford v. Schafer*, 536 F. Supp. 2d 1 (D.D.C. 2008).

<sup>148</sup> *Id.* at 95.

<sup>149</sup> *Id.* at 111.

<sup>150</sup> *Id.* at 103–04.

<sup>151</sup> *Id.* at 86.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

committees discriminated against them for decades by “denying their applications, delaying the processing of their applications or approving them for insufficient amounts or with restrictive conditions.”<sup>155</sup> The *Pigford* Court noted that the USDA’s own Inspector General and Civil Rights Action Team reports revealed “pervasive discrimination” against Black farmers, including decades-long bias when reviewing Black farmers’ applications for farm credits and benefits.<sup>156</sup>

More recently, studies from 1997 through 2008 show that racial discrimination remains a serious and continuing problem in the USDA.<sup>157</sup> Black farmers relate how USDA officials who served as local loan authorities in all-White county committees in the South discriminated by spitting on them, discarding their loan applications, and denying them loans.<sup>158</sup> This occurred for decades. Black farmers say racial discrimination by local loan officials persists.<sup>159</sup> The new secretary of agriculture who took over in 2009 inherited 11,000 unprocessed civil rights complaints, lawsuits, and discrimination complaints among the 113,000 USDA employees.<sup>160</sup> A 2011 study by a consulting firm documented discrimination against women and people of color.<sup>161</sup>

#### **H. Misusing Child Service Agencies Against Native American Families**

South Dakota removed disproportionate numbers of Native American children from their families and tribes into state foster care. Native Americans constitute less than 9 percent of South Dakota’s population, but 52 percent of the children in the state’s foster care system are Native American.<sup>162</sup> A 2011 investigation by National Public Radio found that South Dakota removed an average of 700 Native American children from their homes to state-run foster care instead of to their relatives or tribes.<sup>163</sup> The investigation found South Dakota had financial incentives to remove Native American children from their homes to foster care.<sup>164</sup> One incentive was the federal government reimbursing South Dakota approximately three-quarters of the money it spent on foster care.<sup>165</sup> Another incentive was the “adoption incentive bonus,” whereby the federal government provided approximately \$4,000 per child to states if the child was moved from foster care into adoption, and the \$4,000 per child increased to \$12,000 per child if the child had “special needs.”<sup>166</sup> Ten years prior to NPR’s 2011 investigation, South Dakota had designated all Native American children as “special needs” children.<sup>167</sup> By 2011, this bonus program had produced nearly a million dollars for South Dakota.<sup>168</sup>

In a recent lawsuit, the Oglala Sioux Tribe and Rosebud Sioux Tribe sued various South

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<sup>155</sup> *Id.* at 87.

<sup>156</sup> *Id.* at 103–04.

<sup>157</sup> Susan A. Schneider, *Discrimination at USDA: Response to New York Times*, AGRIC. LAW (May 1, 2013), <http://aglaw.blogspot.com/2013/05/discrimination-at-usda-response-to-new.html>.

<sup>158</sup> Jessica Hoffmann, *The Last Plantation: Black Farmers Are Organizing to Counter the Racist Practices of the USDA*, COLORLINES (Jan. 6, 2009), <https://www.colorlines.com/articles/last-plantation>.

<sup>159</sup> *Id.*

<sup>160</sup> DANIEL, *supra* note 137, at 261.

<sup>161</sup> *Id.*

<sup>162</sup> Stephen Pevar, *In South Dakota, Officials Defied a Federal Judge and Took Indian Kids Away From Their Parents in Rigged Proceedings*, ACLU (Feb. 22, 2017), <https://www.aclu.org/blog/racial-justice/american-indian-rights/south-dakota-officials-defied-federal-judge-and-took>.

<sup>163</sup> Laura Sullivan & Amy Walters, *Incentives And Cultural Bias Fuel Foster System*, NPR (Oct. 25, 2011), <https://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

Dakota officials. The Federal District Court ruled in favor of the tribes, finding that South Dakota officials removed Native American children from their parents' custody in violation of the Indian Child Welfare Act and Due Process Clause of the Fourteenth Amendment.<sup>169</sup> The Court stated, “Indian children, parents and tribes deserve better.”<sup>170</sup>

### **I. Misusing Child Service Agencies Against Black Families**

The overrepresentation of Black children in the child welfare system has been a problem for decades.<sup>171</sup> For example, Black children in Minnesota are disproportionately represented in child maltreatment allegations.<sup>172</sup> A 2016 report found that Black children in Minnesota were approximately three times more likely to be involved in “screen in” maltreatment reports than White children.<sup>173</sup> “Screen in” refers to child protection staff determining that a child maltreatment report should be further investigated.<sup>174</sup> Although Black people constitute only six percent of Minnesota’s population, they accounted for twenty percent of Minnesota’s child maltreatment cases.<sup>175</sup> Thus, a coalition of Black parents, civil rights advocates, and state legislators seek enhanced parental rights and increased oversight of state social service agencies.<sup>176</sup>

Additionally, a 2011 study using data from the Texas Department of Family and Protective Services found that “African Americans were 14.8% more likely . . . to have reports [of child maltreatment] substantiated when contrasted with Whites.”<sup>177</sup> Once an allegation of maltreatment was reported and a caseworker investigated, the caseworker would then decide whether the allegation of maltreatment was substantiated or unsubstantiated.<sup>178</sup> “Substantiated” means a caseworker decides there is “reason to believe” the allegation of maltreatment.<sup>179</sup>

Other studies provide similar results showing racial disproportionality.<sup>180</sup> A 1999 study found that “African American children are substantiated at a rate that is disproportionate to their percentage in the population.”<sup>181</sup> A 2003 study found that “African American children were more likely to be substantiated for allegations of maltreatment than White children.”<sup>182</sup>

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<sup>169</sup> *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 754 (D.S.D. 2015), *on reconsideration in part sub nom.* *Oglala Sioux Tribe v. Hunnik*, No. CV 13-5020-JLV, 2016 WL 697117 (D.S.D. Feb. 19, 2016), and *vacated sub nom.* *Oglala Sioux Tribe v. Fleming*, 904 F.3d at 603.

<sup>170</sup> *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d. at 768. The Eighth Circuit vacated the district court’s order on procedural grounds, ruling that the district court should have abstained from exercising jurisdiction under federal-state comity principles. *Oglala Sioux Tribe v. Fleming*, 904 F.3d at 607.

<sup>171</sup> Alan J. Dettlaff et al., *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare*, 33 CHILD & YOUTH SERVICES REV. 1630, 1630 (2011), <http://www.ucdenver.edu/academics/colleges/medicalschoo/departments/pediatrics/subs/can/research/pubs/Documents/2011%20Disentangling%20substantiation%20%20the%20influence%20of%20race.pdf>.

<sup>172</sup> MINNESOTA DEP’T OF HUMAN SERVICES, MINNESOTA’S CHILD MALTREATMENT REPORT, 2016: CHILDREN AND FAMILY SERVICES 1, 11 (2017), <https://edocs.dhs.state.mn.us/lfserver/Public/DHS-5408I-ENG>.

<sup>173</sup> *Id.* at 3.

<sup>174</sup> *Id.* at 7.

<sup>175</sup> Chris Serres, *State Accused of Racial Bias in Crackdown Against Child Abuse*, STAR TRIBUNE (Apr. 29, 2018), <http://www.startribune.com/state-accused-of-racial-bias-in-crackdown-against-child-abuse/481153801/?refresh=true>.

<sup>176</sup> *Id.*

<sup>177</sup> The study also found that “Hispanic Americans were 20.9% more likely . . . to have reports [of child maltreatment] substantiated when contrasted with Whites.” Dettlaff, *supra* note 170, at 1634.

<sup>178</sup> *Id.* at 1632.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*, at 1631.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

### III. Particular Problems of Government Racial Discrimination

Government discrimination is distinctly problematic for the following reasons. First, discrimination by the government pits the power of the state against people of color who are already disadvantaged.<sup>183</sup> The government is generally more powerful than a private actor,<sup>184</sup> and especially so against people of color who are already struggling against inequities resulting from generations of injustice.<sup>185</sup> The government's power is vast, as seen in the realm of immigration, where the government has the power of special registration, detention, and deportation.<sup>186</sup> In the realm of criminal justice, the government has the power of stopping, searching, arresting, prosecuting, imprisoning, and imposing the death penalty.<sup>187</sup> Racial discrimination by the government reflects and reinforces the power imbalance between the government and the individual of color.<sup>188</sup>

Second, when the government abuses its power to discriminate racially, government discrimination harms the individual victim who experiences two categories of harm.<sup>189</sup> One category consists of harms created by the particular substantive deprivation, such as the discriminatory questioning, arrest, detention, or prosecution of the victim.<sup>190</sup> The other category consists of harms associated with the discrimination itself, including experiencing unequal treatment, humiliation, a loss of dignity, and more.<sup>191</sup>

Third, when the power of government is used to discriminate against people of color, the discrimination reinforces their sense of non-belonging and weakens their faith in government institutions.<sup>192</sup>

Fourth, government racial discrimination furthers the biases of private actors by legitimatizing and reinforcing their biases against people of color.<sup>193</sup>

Fifth, government racial discrimination perpetuates White supremacy by preserving White advantage and minority disadvantage in areas such as education and wealth.<sup>194</sup>

Sixth, government racial discrimination cleaves society by creating division between majority and minority, advantaged and disadvantaged, and government-favored and government-disfavored.<sup>195</sup>

Seventh, government racial discrimination undermines the legitimacy of government.<sup>196</sup> It also undermines the legitimacy of law and weakens the obligation of citizens to obey the laws

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<sup>183</sup> See RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 230 (2000).

<sup>184</sup> David Pittman, Comment, *Heller: A Bulwark Against Tyranny*, 8 APPALACHIAN J. L. 201, 214 (2009).

<sup>185</sup> See ROBINSON, *supra* note 182.

<sup>186</sup> Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L. J. 161, 186 (2005).

<sup>187</sup> See Laney Ellisor, *Faith-Based Rehabilitation Programs and the Establishment Clause: What Lower Courts Are Getting Wrong in the Absence of Supreme Court Precedent and How to Fix It*, 22 LEWIS & CLARK L. REV. 271, 291 (2018).

<sup>188</sup> See Blanche Bong Cook, *A Paradigm for Equality: The Honorable Damon J. Keith*, 47 WAYNE L. REV. 1161, 1174 (2002).

<sup>189</sup> Legomsky, *supra* note 185, at 183

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Reginald C. Wisenbaker, Jr., *Muslim Community Reparations*, 2 SAVANNAH L. REV. 391, 436 (2015).

<sup>193</sup> *Id.*

<sup>194</sup> Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 642 (2014).

<sup>195</sup> See Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. 1471, 1503 (2018).

<sup>196</sup> *Id.*

of the state.<sup>197</sup>

Eighth, government racial discrimination undermines U.S. foreign policy. For example, U.S. government discrimination against Muslims in America negatively affects U.S. foreign policy in the Middle East because Muslim leaders abroad may believe America's treatment of Muslims in America reflects America's view of Muslims globally.<sup>198</sup>

Finally, government racial discrimination enervates America's global voice by rendering America unable to effectively discuss anti-discrimination, human rights, and the rule of law in international forums.<sup>199</sup>

#### **IV. Addressing Government Racial Discrimination**

Two broad-based proposals are presented below to address the range of racially-discriminatory actions by the government. Other narrower solutions are possible that are specific to a particular type of government racial discrimination.<sup>200</sup> For example, a specific solution to the particular problem of callers misusing the 911 system to deploy the police against people of color is the proposed "911 Abuse Act."<sup>201</sup> This Act would deter the racially-biased misuse of 911 calls by allowing dispatchers discretion to decline to send an officer, creating a 911 abuse database, and providing penalties for those abusing the 911 system.<sup>202</sup> The 911 Abuse Act and other specific solutions are important, but this Article will focus on more comprehensive solutions to provide a broader-based perspective on remedying government racial discrimination.

##### **A. Creating Government Equality Commissions**

If the government is part of the problem in perpetuating racial discrimination, then the government should be part of the solution.<sup>203</sup> Congress and state legislatures should pass legislation creating Equality Commissions that investigate government actors engaging in racial discrimination to protect the rights of people of color, similar to the United Kingdom's former Commission for Racial Equality that also focused on addressing racial discrimination.<sup>204</sup>

##### **1. Purpose and Authority**

The Equality Commission's purpose would be to work toward eliminating racial discrimination by government actors against people of color.<sup>205</sup> The Equality Commission would have the authority to carry out its purpose. First, it would have the authority to hear complaints and investigate racial discrimination allegations.<sup>206</sup> "Discrimination" would include direct and

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<sup>197</sup> See Susanne Sreedhar & Candice Delmas, *State Legitimacy and Political Obligation in Justice for Hedgehogs: The Radical Potential of Dworkinian Dignity*, 90 B.U. L. REV. 737, 755 (2010).

<sup>198</sup> Wisenbaker, *supra* note 191, at 423.

<sup>199</sup> Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429, 462 (2012).

<sup>200</sup> See Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 999 (2019).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 1001.

<sup>203</sup> J. Kevin Jenkins, *An Update on Race-Based Student Assignments in Public K-12 Schools*, 210 ED. L. REP. 1, 18 (2006).

<sup>204</sup> Julie Ringelheim, *Collecting Racial or Ethnic Data for Antidiscrimination Policies: A U.S.-Europe Comparison*, 10 RUTGERS RACE & L. REV. 39, 51 (2008); CODE OF PRACTICE ON THE DUTY TO PROMOTE RACE EQUALITY, COMMISSION FOR RACIAL EQUALITY 9 (May 2002), [https://web.archive.nationalarchives.gov.uk/20040216053420/http://www.doh.gov.uk:80/race\\_equality/](https://web.archive.nationalarchives.gov.uk/20040216053420/http://www.doh.gov.uk:80/race_equality/) (the Commission for Racial Equality has merged with the Disability Rights Commission and Equal Opportunities Commission to form the Equality and Human Rights Commission).

<sup>205</sup> See Steven Kalar, *Two Steps Back: British Lessons for American Fair Lending Reform*, 19 HASTINGS INT'L & COMP. L. REV. 139, 165 (1995).

<sup>206</sup> *Id.*

indirect (i.e., disparate impact) discrimination.<sup>207</sup> Second, it would have the authority to issue subpoenas.<sup>208</sup> Third, it would have the authority to issue nondiscrimination notices to give the offender details of the discriminatory action and urge the offender to desist.<sup>209</sup> Fourth, it would have the authority to seek injunctions.<sup>210</sup> Fifth, it would have the authority to seek conciliation between the parties.<sup>211</sup> Sixth, if conciliation fails, it would have the authority to litigate.<sup>212</sup>

## 2. Focus on Racial Discrimination

A prime benefit of the Equality Commission would be its focus on *racial* equality. By contrast, the federal Civil Rights Commission and the states' civil rights commissions and human rights commissions address the gamut of civil rights issues, including gender, age, disability, and other types of discrimination. These issues are important, but having one organization attempt to address multiple issues could lead to a diffusion of focus.<sup>213</sup> Thus, the Equality Commission should focus on *racial* discrimination, and this focus is justified because of (1) the history of racial discrimination leading to current disadvantages for people of color, (2) the reality of racial discrimination that continues to be disregarded, and (3) benefits flowing from a focused approach.

### a. A History of Facial Discrimination Creating Current Disadvantages

Centuries of overt and covert racial discrimination have created enduring disadvantages for people of color in America.<sup>214</sup> Long-term discrimination creates long-term disadvantages.<sup>215</sup> The continuing effects of generations-long subjugation of Blacks include impoverishment, limited opportunity, and sub-standard education, medical care, and housing.<sup>216</sup> Furthermore, centuries of military conquest, forced relocation, and forced assimilation against Native Americans have created intractable legacies, including cultural loss, poverty, unemployment, low school graduation rates, and more.<sup>217</sup> And centuries of racial violence and unequal treatment against Latinxs have produced segregated neighborhoods, economic disadvantage, employment underrepresentation in a variety of fields, and more.<sup>218</sup> As Justice Sotomayor stated, “race matters” because of the “long history” of racial discrimination in the United States.<sup>219</sup>

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<sup>207</sup> *Id.* at 164.

<sup>208</sup> See Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1270 (2010).

<sup>209</sup> See Stanley S. Herr, *Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 U. MICH. J. L. REFORM 305, 348 (2002).

<sup>210</sup> See Kalar, *supra* note 204, at 165.

<sup>211</sup> Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 444 (2006).

<sup>212</sup> See *id.*

<sup>213</sup> See Herbert V. Morais, *Testing the Frontiers of Their Mandates: The Experience of the Multilateral Development Banks*, 98 AM. SOC'Y INT'L L. PROC. 64, 68 (2004).

<sup>214</sup> Julius Chambers, *Adequate Education for All: A Right, an Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 58 (1987).

<sup>215</sup> Richard Davis, *The Effects of Past Racial Discrimination Still Influence Americans Today*, DESERET NEWS (July 13, 2016), <https://www.deseretnews.com/article/865657927/The-effects-of-past-racial-discrimination-still-influence-Americans-today.html>.

<sup>216</sup> Julius Chambers, *Protection of Civil Rights: A Constitutional Mandate for the Federal Government* *Federal Law*, 87 MICH. L. REV. 1599, 1612 (1989); see generally CLAUD ANDERSON, *POWERNOMICS: THE NATIONAL PLAN TO EMPOWER BLACK AMERICA* 1–3 (2001).

<sup>217</sup> Alexia Fernández Campbell, *How America's Past Shapes Native Americans' Present*, THE ATLANTIC (Oct. 12, 2016), <https://www.theatlantic.com/business/archive/2016/10/native-americans-minneapolis/503441/>.

<sup>218</sup> Suzanne Gamboa, *Racism, Not a Lack of Assimilation, Is the Real Problem Facing Latinos in America*, NBC NEWS (Feb. 26, 2019), <https://www.nbcnews.com/news/latino/racism-not-lack-assimilation-real-problem-facing-latinos-america-n974021>.

<sup>219</sup> *Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 572 U.S. 291, 380 (2014) (Sotomayor, J., dissenting).

Eradicating current racial discrimination requires clearly seeing the “unfortunate effects of centuries of racial discrimination.”<sup>220</sup>

### **b. Racial Discrimination Continues to be Disregarded**

Racial discrimination continues today, but America ignores its race problem.<sup>221</sup> It does not see “racial disease vectors” plaguing the nation, states Randall Robinson, founder of TransAfrica.<sup>222</sup> America ignores the prevalence of racial-subjugation symbols such as the statues still residing in the U.S. Capitol of Robert E. Lee and Stonewall Jackson, generals who fought for the slave-holding South during the Civil War.<sup>223</sup> America also ignores ongoing racial disparity.<sup>224</sup> For example, although the government helps military veterans suffering from post-traumatic stress disorder (PTSD), such help is not provided to thousands of Blacks living in violent cities who also suffer from post-traumatic stress disorder (PTSD).<sup>225</sup> Shootings are common in certain neighborhoods in Oakland, Detroit, New Orleans, and Newark. Approximately 3,500 U.S. troops were killed in the eight-year war in Iraq.<sup>226</sup> Within the same time period, 3,113 were killed on the streets of Philadelphia. Also, between 2002 and 2012, 5,000 homicide deaths occurred in Chicago.<sup>227</sup>

Likewise, the plight of Native Americans has also been ignored. “This section of our population has been invisible—[seen as] too small or insignificant,” stated Patrice Kunesh, Director of the Center for Indian Country Development of the Federal Reserve Bank of Minneapolis.<sup>228</sup> From 2011-2015, 49% of Native American men ages 16-64 were unemployed compared with 19% for non-Hispanic White men, and 47% of Native American women were unemployed compared with 23% for non-Hispanic White women.<sup>229</sup> The infant mortality rate for Native Americans (9.1 per 1,000 births in 2008-2012) was more than twice the rate for Whites (4.3 per 1,000 births).<sup>230</sup> In 2015, 7.2% of Native American births were considered low birth weight compared to 4.1% of non-Hispanic White births.<sup>231</sup>

### **c. Benefits of Focusing on Racial Discrimination**

An organization with a plethora of objectives runs the risk of some objectives becoming lost in the mix.<sup>232</sup> But an organization, such as the proposed Equality Commission, focusing on a single objective (e.g., racial equality) avoids the problem of having one objective being obscured by the multitude of other objectives. Second, a multi-objective organization also runs the risk of failing to prioritize the multiple objectives.<sup>233</sup> But in an organization that focuses on one objective, the priority remains on that single objective without other objectives competing for

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<sup>220</sup> *Id.* at 381.

<sup>221</sup> See ROBINSON, *supra* note 182, at 163.

<sup>222</sup> *Id.* at 164.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 163–64.

<sup>225</sup> Lois Beckett, *Black America's Invisible Crisis*, ESSENCE (Aug. 30, 2014), <https://www.essence.com/news/publica-post-traumatic-stress-disorder/>.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> Pedro Nicolaci da Costa, ‘America First’ Should Start With the Plight of the Country's Abandoned Native Population, BUSINESS INSIDER, May 19, 2018, <https://www.businessinsider.com/economic-plight-of-native-americans-is-largely-invisible-fed-vp-2018-5>.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> ANTONIO NIETO-RODRIGUEZ, THE FOCUSED ORGANIZATION 83 (2012).

<sup>233</sup> *Id.*

priority status.<sup>234</sup> Third, a multi-objective organization runs the risk of creating competing interests between employees who favor some objectives over others.<sup>235</sup> But an organization that focuses on one objective avoids this problem because a single objective means all employees are united behind this single objective instead of competing against others to favor their preferred objectives.<sup>236</sup> Fourth, a multi-objective organization runs the risk of failing to provide sufficient resources to address all objectives because resources are diluted among competing objectives.<sup>237</sup> Thus, the organization's resource diffusion leads to performance diffusion.<sup>238</sup> But a single-objective organization diverts all resources into accomplishing that single objective leading to a channeling of resources that accomplishes the single objective.<sup>239</sup>

### **3. Simple Complaint Process**

The Equality Commission should have a simple process that makes the Commission accessible to those seeking help.<sup>240</sup> First, to provide sufficient time for the complainant to file a complaint, the time limit should be two years from when the discrimination occurred, similar to the two-year time limit in tort cases.<sup>241</sup> Second, instructions on filing a complaint should be expressed using clear, plain English.<sup>242</sup> Third, clear instructions should also be provided in other languages.<sup>243</sup> Fourth, the complaint may be filed online.<sup>244</sup> Fifth, a representative may file a complaint for the victim.<sup>245</sup> The representative may be a lawyer, family member, social worker, or anyone else chosen by the victim.<sup>246</sup> Sixth, the complaint could ask for the following basic information: (1) name, address, and contact information, (2) the name and address of the government actor that racially discriminated, (3) when the discrimination occurred, (4) where the discrimination occurred, (5) how the discrimination occurred, (6) why the discrimination occurred, (7) the names of those who engaged in the discrimination, (8) the names of witnesses, (9) the names of others who are relevant to the complaint, (10) any other information that helps the reader understand the complaint, and (11) the signature and date of the complaint.<sup>247</sup>

### **4. Strategic and Proactive**

To ensure that the Equality Commission can also engage in strategic, proactive efforts to combat systemic racial discrimination, the Commission is not required to investigate and litigate

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<sup>234</sup> *Id.* at 85.

<sup>235</sup> *Id.* at 84.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> ANTONIO NIETO-RODRIGUEZ, *THE FOCUSED ORGANIZATION* 83 (2012).

<sup>239</sup> *Id.*

<sup>240</sup> See Ariel E. Dulitzky, *When Afro-Descendants Became "Tribal Peoples": The Inter-American Human Rights System and Rural Black Communities*, 15 *UCLA J. INT'L L. & FOREIGN AFF.* 29, 41 (2010).

<sup>241</sup> See Robert T. Carter & Thomas D. Scheuermann, *Legal and Policy Standards for Addressing Workplace Racism: Employer Liability and Shared Responsibility for Race-Based Traumatic Stress*, 12 *U. MD. L.J. RACE, RELIGION, GENDER & CLASS* 1, 57–58 (2012).

<sup>242</sup> See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 *HOFSTRA L. REV.* 801, 1189 n.1546 (1993).

<sup>243</sup> See Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 *COLUM. HUM. RTS. L. REV.* 143, 203 (2011).

<sup>244</sup> See Richard Potomac, *Are You Sure You Want to Eat That?: U.S. Government and Private Regulation of Domestically Produced and Marketed Dietary Supplements*, 23 *LOY. CONSUMER L. REV.* 54, 82 (2010).

<sup>245</sup> See *How to File a Discrimination Claim*, N.Y. STATE DEP'T OF LABOR, <https://www.labor.ny.gov/equal-opportunity/how-to-file-a-discrimination-claim.shtm> (last visited July 17, 2019).

<sup>246</sup> See *id.*

<sup>247</sup> See *id.*

every single complaint.<sup>248</sup> Attempting to fully address all complaints could create an unwieldy enforcement body, produce backlogs, produce random results dictated by individual complaints, and favor reactive, individual victories over pro-active, strategic remedies.<sup>249</sup> Thus, instead of having the Commission attempt to litigate every complaint, aggrieved individuals themselves are allowed to sue the offending government actor.<sup>250</sup>

### **B. Leverage Private Actors Such as the American Civil Liberties Union (ACLU)**

Just as a *government* actor such as the proposed Equality Commission could help combat government discrimination against people of color, a *private* actor such as the ACLU could also help combat governmental discrimination by focusing more effort on battling racial injustice through extending its Racial Justice Program. This would align with the ACLU's *raison d'être* because its mission is to ensure the Bill of Rights extends to "people historically denied its protections."<sup>251</sup> The ACLU addresses myriad issues, including censorship, sexism, homophobia, religious intolerance, reproductive rights, and other civil liberties issues.<sup>252</sup> It also advocates for racial equality and "fight[s] discrimination at all levels of government."<sup>253</sup> It has done so through its national Racial Justice Program.<sup>254</sup> The Program promotes racial equality and combats racism through litigation, legislative initiatives, and other means.<sup>255</sup> Its purview encompasses criminal justice, economic justice, education inequality, affirmative action, and Native American rights.<sup>256</sup> The national Program has a director, executive director, senior staff attorneys, fellows, paralegals, and legal assistants.<sup>257</sup>

To further racial equality, the ACLU's national Racial Justice Program could be extended to each individual state. This has begun with the ACLU of Massachusetts providing for a Racial Justice Program director.<sup>258</sup> ACLU affiliates in all other states could also add a Racial Justice Program director and supporting staff. Decentralization would produce many benefits. First, supplementing the ACLU's national Racial Justice Program with additional Racial Justice Programs in each state would create a more comprehensive approach to combatting racism in the United States.<sup>259</sup> Second, it would increase the number of resources and personnel dedicated specifically to combating racial discrimination.<sup>260</sup> Third, more people working on solutions produces more information on what works and what does not.<sup>261</sup> Fourth, each state could tailor its racial justice effort based on each state's particular circumstances.<sup>262</sup> An example of this

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<sup>248</sup> Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 278 (1995).

<sup>249</sup> *Id.*

<sup>250</sup> *See id.* at 279 n.353.

<sup>251</sup> *About the ACLU*, ACLU, <https://www.aclu.org/about-aclu> (last visited July 19, 2019).

<sup>252</sup> *Guardians of Freedom*, ACLU, <https://www.aclu.org/guardians-freedom> (last visited July 19, 2019).

<sup>253</sup> *Human Rights and Racial Justice*, ACLU, <https://www.aclu.org/issues/human-rights/human-rights-and-racial-justice> (last visited July 19, 2019).

<sup>254</sup> *About the ACLU's Racial Justice Program*, ACLU, <https://www.aclu.org/other/about-aclus-racial-justice-program> (last visited July 19, 2019).

<sup>255</sup> *Id.*

<sup>256</sup> *Racial Justice*, ACLU, <https://www.aclu.org/issues/racial-justice#latest> (last visited July 19, 2019).

<sup>257</sup> *About the ACLU's Racial Justice Program*, *supra* note 253.

<sup>258</sup> *Rahsaan D. Hall*, ACLU, <https://www.aclum.org/en/rahsaan-d-hall-director-racial-justice-program> (last visited July 19, 2019).

<sup>259</sup> *See* Craig S. Lerner, *The Tower of Babel Revisited: Global Governance As A Problematic Solution to Existential Threats*, 19 N.C. J. L. & TECH. 69, 110 (2017).

<sup>260</sup> *See id.*

<sup>261</sup> *See id.*

<sup>262</sup> *See* *ACLU Launches State-By-State Blueprints With Roadmaps for Cutting Incarceration by 50 Percent*, ACLU, <https://www.aclu.org/press-releases/aclu-launches-state-state-blueprints-roadmaps-cutting-incarceration-50->

decentralized state-by-state approach is the ACLU’s Smart Justice 50-State Blueprints initiative consisting of 51 reports (covering all 50 states and the District of Columbia) identifying specific proposals for each state on how to reduce its incarcerated population.<sup>263</sup> Eschewing a one-size-fits-all approach, the Smart Justice 50-State Blueprints initiative provides policy options that “capture the nuance of local laws and sentencing practices.”<sup>264</sup> An expanded ACLU Racial Justice Program extending to every state, along with government Equality Commissions in every state, would help abate majority society’s misuse of government actors against people of color.

## V. Conclusion

Philosopher Reinhold Niebuhr affirmed that society must strive for justice and make it its highest moral ideal.<sup>265</sup> But racial injustice endures through majority society’s use of government to effectuate discriminatory objectives. Government-infused discrimination is especially injurious to people of color who have been historically disadvantaged. Government should promote justice rather than injustice. Government should mediate equality rather than inequality. Government should be a proxy for non-discrimination rather than discrimination. This ensures a government that is for all the people.

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[percent?redirect=news/aclu-launches-state-state-blueprints-roadmaps-cutting-incarceration-50-percent](#) (last visited July 19, 2019).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY 257-58 (1960).