RACIAL EQUALITY AND INEQUALITY IN AMERICA AND LESSONS FROM OTHER COUNTRIES

William Y. Chin[†]

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America, a mighty global hegemon supreme in military matters, regards itself as second to none, and where it leads, it expects other countries to follow. But on matters of race, America could follow the examples of countries that have taken the lead in experimenting with racial equality efforts and initiatives. From Brazil's "redemption through reading" prison program to the High Court of Australia's return of land to indigenous inhabitants, much could be learned from the lessons of other countries. That there is still much to learn about racial equality is evident

from the police killing of George Floyd, a Black citizen who died after a Minneapolis police officer kneeled on his neck for an extended period of time. George Floyd's death highlights the dichotomous nature of race in America where every advance leads to backlash. On the path to racial equality, America could follow the steps of other countries that have taken the lead. On this path, America's race is not against other countries to achieve supremacy, but against itself to achieve equality.

I. INTRODUCTION

The United States is a global leader in science, technology, medicine, and other fields. It raced to be first in creating the atomic bomb and sending astronauts to the moon. It strives to be first in the Olympic Games and other international competitions. It aspires to be first in creating the first effective quantum computer. Whatever the arena, America seeks to be first. But not so in the arena of racial equality. Other countries at various times in various ways have been ahead of the United States in instituting policies and programs promoting racial equality. An example is slavery in which America was late, not early, in ending slavery. Haiti abolished slavery in 1804,[1] Chile in 1823,[2] and Mexico in 1829.[3] Britain passed the Abolition of Slavery Act in 1833 that began the process of abolishing slavery in all British colonies. The Danish Governor-General emancipated the slaves in Danish West Indies in 1848. France abolished slavery in 1848. Portugal passed a law in 1858 that began the process of ending slavery.[4] But the United States abolished slavery only in 1865 after a brutal civil war,[5] and even then, neoslavery arose through legal means including criminal laws and convict leasing that were used to re-subjugate Blacks.[6]

America's rush to be first in all things versus its lackadaisical efforts in promoting racial equality leads to the question of why. "Why is equality so assiduously avoided?" asked Dr. Martin Luther King, Jr.[7] The answer

† Professor Chin teaches Race and the Law and other courses at Lewis & Clark Law School. Professor Chin thanks Lina Rodriguez-Lancheros and Faith Fox for their diligent research assistance and Paul L. Boley Law Library staff members for their book-procurement assistance.

[1] Jeffrey E. Zinsmeister, *In Rem Actions Under U.S. Admiralty Jurisdiction as an Effective Means of Obtaining Thirteenth Amendment Relief to Combat Modern Slavery*, 93 CAL. L. REV. 1249, 1284 n.254 (2005).

[2] *Id.*

[3] *Id.*

[4] *Chronology-Who banned slavery when?*, REUTERS (Mar. 22, 2007, 2:18 AM), https://www.reuters.com/article/uk-slavery/chronology-who-banned-slavery-when-idUSL1561464920070322.

[5] U.S. CONST. amend. XIII, § 1.

[6] Alexandra Natapoff, *Atwater and the Misdemeanor Carceral State*, 133 HARV. L. REV. 147, 173-74 (2020).

[7] MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 4 (1967).

resides in America's divided selves in which racial progress is followed by "stiffening . . . resistance," and passage of civil rights laws is followed by evasion and nullification of those laws.[8] America engages in "self-deception" if it believes that American society is one of steady growth toward a racial utopia.[9] Rather, to achieve racial progress, America must recognize the "world house" it lives in and learn from others who reside in this common house.[10]

This Introduction has identified the incongruity of America being first in many things with a notable exception of racial equality. Part II provides examples of other countries taking the lead in instituting policies or programs promoting racial equality. Part III examines the reasons for America's enervate endeavors in experimenting with and instituting racial equality efforts. The world contains many different countries engaged in many different racial equality efforts. Being open to lessons learned from other countries could help promote racial equality in this country.

II. RACIAL EQUALITY LESSONS FROM OTHER COUNTRIES

Racial bias is a global phenomenon.[11] Other countries, like the United States, contend with racial inequality in their midst. In doing so, they offer lessons that could help America contend with racial inequality in its midst. America views itself as an experiment in democracy.[12] But America since inception has been torn between proudly professing democracy while practicing the antithesis of democracy.[13] As such, America should be open to experimenting with efforts to reduce racial inequality, especially when other countries have taken the lead in experimenting with racial equality programs and policies.[14] The non-exhaustive examples below of racial equality efforts by other countries accentuate both what America is not doing and what it could do. The examples below do not signify that these countries have resolved the problem of racial inequality; rather, they signify the common challenge of combating racial inequality.

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[8] *Id.* at 5, 10.

[9] *Id.* at 4-5.

[10] *See id.* at 167, 171.

[11] Max Fisher, *A fascinating map of the world's most and least racially tolerant countries*, WASH. POST (May 15, 2013, 3:28 PM), https://www.washingtonpost.com/news/worldviews/wp/2013/05/15/a-fascinating-map-of-the-worlds-most-and-least-racially-tolerant-countries/.

[12] Andrew Guthrie Ferguson, *Jury Instructions As Constitutional Education*, 84 U. COLO. L. REV. 233, 245 (2013).

[13] KING *supra* note 7, at 68.

[14] *See, e.g.*, John Leicester, *'Dangerous': Around World, Police Chokeholds Scrutinized*, AP NEWS (June 3, 2020), https://apnews.com/article/b186c4825ef8fdb67ce62b537ac6073d.

A. Abolish Law Enforcement's use of Neck Restraints

George Floyd, a handcuffed Black suspect, died after a white police officer pressed his knee against Floyd's neck for over eight minutes during Floyd's arrest for allegedly using a counterfeit $20 bill at a local grocery store.[15] On May 25, 2020, at 8:19 p.m., Floyd was placed on the ground by several Minneapolis officers and one of the officers pressed his left knee against Floyd's neck while Floyd was lying prone on the concrete pavement.[16] At 8:25 p.m., the officer continued to kneel on Floyd's neck as Floyd appeared to stop breathing and another officer checked Floyd's pulse but could not find one.[17] At 8:27 p.m., the officer removed his knee from Floyd's neck as medical emergency personnel arrived.[18] At 9:25 p.m., Floyd was pronounced dead at a medical center.[19] During the encounter with the police, Floyd said, "Mom, I love you. I love you."[20] He also said, "Tell my kids I love them. I'm dead."[21] Floyd stated several times that he could not breathe.[22] His final words were, "Come on, man. Oh, oh. I cannot breathe. Cannot breathe. Ah! They'll kill me. They'll kill me. I can't breathe. Can't breathe. Oh!" and "Ah! Ah! Please. Please. Please."[23] Floyd's death sparked protests in the United States and around the world.[24] The officer who kneeled on Floyd's neck was charged with second-degree murder, third-degree murder, and second-degree manslaughter.[25] Three other officers at the scene were charged with aiding and abetting murder and manslaughter.[26]

Police officers are instructed that neck restraints are inherently dangerous.[27] There are two types of neck restraints: the (1) "stranglehold" (also termed carotid restraints, sleeper holds, or blood chokes), which

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[15] Chao Xiong, A *Timeline of Events Leading to George Floyd's Death as Outlined in Charging Documents*, STARTRIBUNE (June 4, 2020, 4:59 AM), https://www.startribune.com/a-timeline-of-events-leading-to-george-floyd-s-death-as-outlined-in-charging-documents/570999132/.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Rochelle Olson, *Body Camera Transcripts: George Floyd Repeatedly Begged Police Not to Kill Him*, STARTRIBUNE (July 9, 2020, 10:12 AM), https://www.startribune.com/george-floyd-repeatedly-begged-police-for-his-life-in-transcripts-of-minneapolis-police-body-cameras/571683252/?refresh=true.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Chao Xiong, *Attorneys for Ex-Minneapolis Officers Object to Judge's Gag Order in George Floyd Death*, STARTRIBUNE (July 13, 2020, 9:01 PM), https://www.startribune.com/attorneys-for-ex-minneapolis-officers-object-to-judge-s-gag-order-in-george-floyd-death/571743272/.

[26] *Id.*

[27] Leicester, *supra* note 14.

renders a person unconscious by temporarily cutting off blood flow to the brain through pressure on arteries on the sides of the neck, and (2) "chokehold" (also termed airway holds), which restricts breathing by applying pressure on the windpipe.[28]

The dangers of neck restraints are increased for people of color because of racial bias.[29] Of the 428 people subjected to neck restraints by Minneapolis police officers since 2012, 280 (65%; almost two-thirds) were Black although Black residents make up only 19% of Minneapolis.[30] Further, of those subjected to neck restraints, fifty-eight lost consciousness, and of the fifty-eight, thirty-three were Black, accounting for 57% of those who lost consciousness.[31]

Also, in San Diego, community members have expressed racial disparity concerns over law enforcement's use of the carotid restraint against Black and brown individuals.[32] Between 2013 and 2018, the San Diego Police Department used the carotid restraint in approximately 114 cases each year, and the San Diego County Sheriff's Department used the carotid restraint 474 times during the entire 2013-2018 period.[33] During that time, the restraint was used against nine teenagers, with most being teenagers of color: four were Black, four were Latinx, and one was white.[34] Also, officers used the carotid restraint 130 times against Black individuals, which represents 26% of the cases (where race information was provided) whereas Blacks make up only 6.5% of the San Diego population.[35]

Due to the inherent dangerousness of neck restraints, kneeling on a suspect's neck is disallowed in various jurisdictions outside the United States.[36] For example, the United Kingdom's Metropolitan Police

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[28] Harmeet Kaur & Janine Mack, *The Cities, States and Countries Finally Putting an End to Police Neck Restraints*, CNN (June 16, 2020, 6:24 AM), https://www.cnn.com/2020/06/10/world/police-policies-neck-restraints-trnd/index.html.

[29] *See* Casey Tolan, *Two-Thirds of People Put in Neck Restraints by Minneapolis Police Were Black, Department Data Shows*, CNN (June 2, 2020, 4:01 AM), https://www.cnn.com/2020/06/02/us/mn-minneapolis-police-neck-restraints-george-floyd-invs/index.html.

[30] *Id.*

[31] *Id.*

[32] Lyndsay Winkley, *San Diego Police Leaders Defend Use of Controversial Neck Restraint, Despite Continuing Calls for a Ban*, SAN DIEGO UNION TRIB. (May 20, 2019, 6:00 AM), https://www.sandiegouniontribune.com/news/public-safety/story/2019-05-19/san-diego-police-leaders-defend-use-controversial-neck-restraint-despite-calls-for-ban.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] METROPOLITAN POLICE SERVICE, MEDICAL IMPLICATIONS (2017), https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/disclosure_2017/november_2017/information-right-unit—-police-officer-training-to-apply-a-choke-hold-to-a-persons-neck-and-circumstance-when-this-would-be-justified.

instructions state that "[w]ith only rare exceptions, neck restraints are not taught within the officer safety training programme."[37] This restriction applies to even violent-crime situations.[38] The Metropolitan Police cautions officers that methods such as neck restraints are discouraged even when offenders are "attacking" or "violently resisting" because of "significant inherent dangers in the use of any neck restraint."[39] In Israel, a police spokesperson averred, "[T]here is no tactic or protocol that calls to put pressure on the neck or airway."[40] Germany's GdP police union explained that officers may briefly exert pressure on the side of a suspect's head, but not on the suspect's neck.[41]

Only after George Floyd's death are federal lawmakers seeking to ban neck restraints.[42] In the 2021 House bill (George Floyd Justice in Policing Act of 2021) that passed during the Biden administration, the federal government will deny federal grants to state and local governments that fail to prohibit law enforcement from using a chokehold or carotid hold.[43] The House bill defines "chokehold or carotid hold" to mean "pressure to the throat or windpipe," "maneuvers that restrict blood or oxygen flow to the brain," or "carotid artery restraints that prevent or hinder breathing."[44] The House bill adds to existing civil rights law found in 18 U.S.C. § 242, which states a law enforcement official may not subject a suspect to "different *punishments, pains, or penalties*" on account of the suspect's race.[45] The House bill adds to 18 U.S.C. § 242 by defining "punishment, pain, or penalty" to include chokehold methods such as applying pressure to the throat, using maneuvers that restrict blood or oxygen to the brain, or using carotid artery restraints.[46]

A prior 2020 Senate bill (Just and Unifying Solutions To Invigorate Communities Everywhere Act of 2020) that did not pass during the Trump administration also limits federal funds to state and local governments that fail to provide policies prohibiting chokeholds, but unlike the House version, the Senate bill provides an exception for law enforcement to use chokeholds "when deadly force is authorized."[47] Also, the Senate bill defines "chokehold" more narrowly to limit it to a "physical maneuver" that

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Leicester, *supra* note 14.

[41] *Id.*

[42] H.R. 1280 , 117th Cong. § 363(b) (2021).

[43] *Id.*

[44] *Id.* at § 363(a).

[45] 18 U.S.C. § 242 (1996) (emphasis added).

[46] H.R. 7120, 116th Cong. § 363(c)(2) (2020).

[47] S. 3985, 116th Cong. § 105(b)(1)-(2) (2020).

(1) "restricts an individual's ability to breathe" and (2) is used "for the purposes of incapacitation."[48]

B. Add Day Fines to the Range of Sanctions

Day fines can benefit the criminal justice system in myriad ways including help reduce the U.S. prison population.[49] Day fines are monetary sanctions imposed on the offender in lieu of incarceration,[50] an important feature given that Black and brown individuals constitute over 70% of the imprisoned population, a number that exceeds their proportion of the general population.[51] A day fine is a type of intermediate sanction between less-severe unsupervised probation and more-severe incarceration.[52] Finland was the first European country to use day fines in 1921. Decades later, other European countries adopted this practice.[53] Germany began using day fines in the early 1970s as part of sentencing reform to reduce the use of short-term incarceration.[54] Germany's effort succeeded. Between 1968 and 1976, Germany's short-term prison sentences (terms shorter than six months) dropped 90% from more than 110,000 to approximately 10,000.[55]

In America, a few counties experimented with day fines in the 1980s and 1990s, but day fines were not widely adopted throughout the United States.[56] The first U.S. jurisdiction to experiment with day fines was Richmond County,─New York, in 1988, producing positive results.[57] Additional limited experiments followed in Milwaukee (Wisconsin), Maricopa County (Arizona), Polk County (Iowa), Bridgeport (Connecticut), and a few counties in Oregon.[58]

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[48] *Id.*

[49] Elena Kantorowicz-Reznichenko, *Day Fines: Reviving the Idea and Reversing the (Costly) Punitive Trend*, 55 AM. CRIM. L. REV. 333, 335 (2018).

[50] Lisa E. Cowart, *Legislative Prerogative vs. Judicial Discretion: California's Three Strikes Law Takes A Hit*, 47 DePaul L. Rev. 615, 647 (1998).

[51] Cecil J. Hunt, *Feeding the Machine: The Commodification of Black Bodies from Slavery to Mass Incarceration*, 49 U. BALT. L. REV. 313, 336-37 (2020).

[52] U.S. DEPT. OF JUSTICE, HOW TO USE STRUCTURED FINES (DAY FINES) AS AN INTERMEDIATE SANCTION, 2 (Nov. 1996).

[53] Kantorowicz-Reznichenko, *supra* note 49, at 339.

[54] U.S. DEPT. OF JUSTICE, HOW TO USE STRUCTURED FINES (DAY FINES) AS AN INTERMEDIATE SANCTION, 3 (Nov. 1996).

[55] *Id.*

[56] Kantorowicz-Reznichenko, *supra* note 49, at 346.

[57] Ronen Perry & Elena Kantorowicz-Reznichenko, *Income-Dependent Punitive Damages*, 95 WASH. U.L. REV. 835, 863 (2018).

[58] *Id.*

Judge Rose McBrien of the Staten Island Criminal Court (New York) imposed the first day fines in the United States on August 12, 1988.[59] Judge McBrien supported day fines because they expanded the range of sentencing options for judges.[60] Day fines can fill the gap when jail, probation, restitution, or community service is inappropriate or unavailable.[61] First, regarding jail, as Judge McBrien observed, it is doubtful jail will actually rehabilitate a young misdemeanor defendant who becomes "street-wise" after being locked up with hardened inmates convicted of more serious crimes.[62] Second, although probation is a valuable resource, the probation department is overburdened with too many caseloads.[63] Third, although restitution and community service are also useful options, they are limited to a narrow range of cases.[64]

Other day fine benefits include the following: (1) offender accountability (offenders pay their debt to society through structured fines that vary according to, among other factors, the gravity of the offense), (2) deterrence (structured fines create an economic disincentive for offenders to reoffend), (3) fairness (structured fines, unlike a fixed-amount fine, consider the gravity of the offense and the income of the offender), (4) efficient use of limited resources (structured fines free up expensive jail resources and labor-intensive probation supervision resources), (5) revenue (structured fines generate more revenue than supervised probation or incarceration), and (6) court credibility (a well-designed day-fines system creates meaningful sanctions accepted by the community that enhances the credibility of the court).[65]

C. Promote and Reward Reading by Prisoners

America's prisons should promote and reward prisoners for reading rather than censor what incarcerated people, especially incarcerated people of color, read.[66] Brazil is an example of rewarding reading in prison.[67] A

[59] U.S. DEP'T OF JUSTICE, NAT'L INSTITUTE OF JUSTICE, DAY FINES IN AMERICAN COURTS: THE STATEN ISLAND AND MILWAUKEE EXPERIMENT 2-3 (Apr. 1992).

[60] Rose McBrien, *Tailoring Criminal Fines to the Financial Means of the Offender-A Richmond County Judge's View*, 72 JUDICATURE 42, 42 (1988).

[61] *Id.* at 43.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] U.S. DEPT. OF JUSTICE, HOW TO USE STRUCTURED FINES (DAY FINES) AS AN INTERMEDIATE SANCTION, 2-3 (Nov. 1996).

[66] *See* James Tager, *Literature Locked Up: How Prison Book Restriction Policies Constitute the Nation's Largest Book Ban*, PEN AMERICA (Sept. 2019), https://pen.org/wp-content/uploads/2019/09/literature-locked-up-report-9.24.19.pdf.

2012 Brazilian law codified a "redemption through reading" program reducing a federal incarcerated person's sentence by four days for each book read, up to 48 days shaved off their sentence each year.[68] Prisoners may read up to twelve books.[69] They have up to four weeks to read one book.[70] The incarcerated person not only reads a book, but must also write a book report that is neatly written and focused on the topic of the book.[71] Essay guidelines require incarcerated people to "make correct use of paragraphs, be free of corrections, [and] use margins and legible joined-up writing."[72] After writing the book report, a judge reviews the book report and decides whether to shorten the incarcerated person's sentence (up to four days for each book read).[73] The books available cover a range of subjects including science, philosophy, and literature.[74] One Brazilian incarcerated person sentenced to ten years for drug trafficking shared how he loved reading *Gone With The Wind* and also *Les Miserables*, especially because he interpreted *Les Miserables* to be about a former incarcerated person trying to create a new life outside of prison.[75] Brazil's prisons are not perfect penal institutions.[76] They suffer from overcrowding, disease, and gang-related killings.[77] The reading program will not solve all prison problems, but it does allow some people in prison to change for the better.[78] The reading program gives incarcerated people something constructive to accomplish and helps prepare them to reintegrate within society, explained a Brazilian professor and expert on criminal law.[79] As one teacher

[67] Mariano Castillo, *Brazilian inmates reduce sentences by hitting the bike, books*, CNN (July 15, 2012, 8:33 PM), https://www.cnn.com/2012/07/14/world/americas/brazil-alternative-sentence-reduction/index.html.

[68] *Id.*

[69] *Reading offers Brazilian prisoners quicker escape*, REUTERS (June 25, 2012, 12:30 PM), https://www.reuters.com/article/us-brazil-prison-reading/reading-offers-brazilian-prisoners-quicker-escape-idUSBRE85O0WR20120625#.

[70] *Id.*

[71] Castillo, *supra* note 67.

[72] *Reading offers Brazilian prisoners quicker escape*, REUTERS (June 25, 2012, 12:30 PM), https://www.reuters.com/article/us-brazil-prison-reading/reading-offers-brazilian-prisoners-quicker-escape-idUSBRE85O0WR20120625#.

[73] Melanie Reid, *The Culture of Mass Incarceration: Why "Locking Them. Up and Throwing Away the Key" Isn't a Humane or Workable Solution for Society, and How Prison Conditions and Diet Can be Improved*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 251, 270 (2015).

[74] Castillo, *supra* note 67.

[75] Philip Reeves, *In Brazil, Some Inmates Are Using A Novel Way To Get Out of Prison Earlier*, NPR (July 4, 2017, 4:33 PM), https://www.npr.org/2017/07/04/535530400/in-brazil-some-inmates-are-using-a-novel-way-to-get-out-of-prison-earlier.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] Castillo, *supra* note 67.

elucidated, it is more than just helping incarcerated people pass the time; rather, it is about fundamentally changing lives.[80]

In the United States, a limited effort to reward reading was attempted by Judge Yvonne Gonzalez Rogers in the U.S. District Court for the Northern District of California. In a 2012 ruling, Judge Rogers agreed with the lower court that a defendant be released to his grandmother pending trial, but with the stipulation that he read "at least one hour every day, and . . . write reports on those books for at least 30 minutes every day."[81]

But Judge Rogers' ruling is an isolated event. In the criminal justice system, American prisons restrict rather than reward reading.[82] State and federal prisons engage in systematic and comprehensive censoring of reading materials with minimal oversight.[83] This constitutes the "largest book ban policy in the United States."[84] For example, Holman Correctional Facility in Alabama prohibited a prisoner from receiving the *San Francisco Bay View National Black Newspaper*, a newspaper founded in 1976 covering political and cultural issues around the Bay Area.[85] The prison's reason for the ban was because the prison deemed the newspaper "racially motivated."[86] In other examples, federal prison officials in Colorado blocked a prisoner from receiving former President Barack Obama's memoirs—*Dreams of my Father* and *The Audacity of Hope*—because they were deemed "potentially detrimental to national security."[87] Texas has a list of over 10,000 banned books that reportedly includes Alice Walker's *The Color Purple* and books on the civil rights movement.[88] Illinois correction officials pulled race-themed books from prison bookshelves including *Race Matters* by Cornel West, *Colored People: A Memoir* by Henry Louis Gates, Jr., and *My Daddy Is in Jail*, a children's book.[89] In Georgia, an investigation of twelve state prisons found that although approximately two-thirds of Georgia incarcerated people are Black, over

[80] Reeves, *supra* note 75.

[81] Alexander Nazaryan, *Write a book report, avoid jail: Judge orders man freed if he commits to literature,* DAILY NEWS (May 16, 2012, 4:25 PM), https://www.nydailynews.com/blogs/pageviews/write-book-report-avoid-jail-judge-orders-man-freed-commits-literature-blog-entry-1.1638322.

[82] *See* Tager, *supra* note 66, at 1.

[83] *Id.*

[84] *Id.*

[85] Evan Bianchi & David Shapiro, *Locked Up, Shut Up: Why Speech In Prison Matters*, 92 ST JOHN'S L. REV. 1 (2018).

[86] *Id.* at 2.

[87] The prison officials later reversed their decision. Tager, *supra* note 66, at 4.

[88] *Id.*

[89] *Id.* at 6.

half of their libraries do not have books on Martin Luther King, Jr., and two-thirds do not have books on Malcolm X.[90]

Prison officials' grounds for banning books include ostensibly legitimate reasons such as minimizing racial animus, nudity, or depictions of violence, criminal activity, and prison escapes.[91] But the wide latitude given to prison officials to censor inevitably leads to overt or implicit racially-biased censoring of what prisoners of color read.[92]

D. Offer a National Apology for Subjugating African Americans

America has yet to fully apologize for slavery whereas other countries have apologized.[93] In the past, kings in what is now modern-day Benin sold slaves to European merchants to be transported to Brazil, Haiti, and the United States.[94] Part of the slave trade involved warring African tribes taking captives and trading them to white slave merchants.[95] In 1999, Benin President Mathieu Kérékou embarked on a global apology tour and during a visit to a Baltimore church, fell to his knees while apologizing to African Americans for Africa's role in the international slave trade.[96] In 2000 in Virginia, Benin's Minister of Environment and Housing stated, "The slave trade is a shame, and we do repent of it."[97] In 2013, Ngako Ngalatchui, head chieftain for the Cameroonian town of Bakou, signed a statement officially apologizing for his ancestors' role in the slave trade.[98] "We are sorry and issue an official apology for our involvement and the involvement of our ancestors in the horrible institution of transatlantic slavery," the statement declared.[99] The statement also urged the United States, France, and the United Kingdom to "issue similar formal apologies for this evil institution that broke up families and caused generational

[90] *See id.* at 13.

[91] *Id.* at 1.

[92] *See id.* at 5.

[93] Theodore R. Johnson III, *Africans Have Apologized for Slavery, So Why Won't the US?*, ROOT (June 17, 2014, 6:30 AM), https://www.theroot.com/africans-have-apologized-for-slavery-so-why-won-t-the-1790876029.

[94] Kevin Sieff, *An African Country Reckons with its History of Selling Slaves*, WASH. POST (Jan. 29, 2018), https://www.washingtonpost.com/world/africa/an-african-country-reckons-with-its-history-of-selling-slaves/2018/01/29/5234f5aa-ff9a-11e7-86b9-8908743c79dd_story.html.

[95] Alan Boyle, *Genetic Quest Leads to African Apology for Role in Slave Trad*e, NBC NEWS (Oct. 27, 2013, 7:49 AM), https://www.nbcnews.com/sciencemain/genetic-quest-leads-african-apology-role-slave-trade-8C11467842.

[96] Sieff, *supra* note 94.

[97] Theodore R. Johnson, *How to Apologize for Slavery: What the U.S. can learn from West Africa*, ATLANTIC (Aug. 6, 2014), https://www.theatlantic.com/international/archive/2014/08/how-to-apologize-for-slavery/375650/.

[98] Boyle, *supra* note 95.

[99] *Id.*

hardships that continue to the present day."[100] Ghana issued an apology for slavery to African Americans in 2006.[101] Ghana's Ministry of Tourism and Diasporean Relations shared that the history of slavery was "something that we have to look straight in the face because it exists.[102] So, we will want to say something went wrong, people made mistakes, but we are sorry for whatever happened."[103] Ghana's apology is part of an effort to regather the African diaspora so that African Americans will perceive Ghana as their homeland to visit, live, and retire.[104]

In America, a combined national apology from the House, Senate, and White House has yet to occur.[105] In fact, the office of the President of the United States has never issued an apology.[106] During his presidency, President Bill Clinton had considered and rejected officially apologizing to African Americans for slavery.[107] At most, he expressed contrition to a crowd in a Ugandan village that America had benefitted from the slave trade.[108] "Going back to the time before we were even a nation, European Americans received the fruits of the slave trade,"[109] Clinton stated. "And we were wrong in that," he added.[110] Clinton's unplanned expression of contrition deviated from the statements of aides who earlier said Clinton would not issue an apology during his six-nation Africa tour.[111] In effect, Clinton's unexpected expression of contrition fell short of an official apology to African Americans for slavery.[112]

The House passed a resolution in 2008 apologizing for slavery and Jim Crow.[113] The resolution noted that millions of Africans and their descendants were enslaved in the thirteen American colonies and the United States from 1619 through 1865, and that the end of the Civil War in 1865 saw slavery replaced by Jim Crow—a system of *de jure* racial segregation

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[100] *Id.*

[101] Johnson, *supra* note 97.

[102] *Id.*

[103] *Id.*

[104] Lydia Polgreen, *Ghana's Uneasy Embrace of Slavery's Diaspora*, N.Y. TIMES (Dec. 27, 2005), https://www.nytimes.com/2005/12/27/world/africa/ghanas-uneasy-embrace-of-slaverys-diaspora.html.

[105] Johnson, *supra* note 93.

[106] *Id.*

[107] John F. Harris, *Clinton Says U.S. Wronged Africa*, WASH. POST (March 25, 1998), https://www.washingtonpost.com/archive/politics/1998/03/25/clinton-says-us-wronged-africa/ca090cd0-bdb8-4e33-9dfc-e66fdc2e59b6/.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *See* Johnson, *supra* note 93.

[113] H.R. RES. 194, 110th Cong. (2008).

involving separate and unequal conditions for African Americans.[114] The resolution "apologizes to African Americans on behalf of the people of the United States, for the wrongs committed against them and their ancestors who suffered under slavery and Jim Crow . . . ."[115] The House resolution asserted the need for a "genuine apology" to begin the process of racial reconciliation.[116]

The Senate passed a resolution in 2009 apologizing for slavery and Jim Crow.[117] Similar to the House resolution, the Senate resolution acknowledged America's history of racial inequality and recognized that African Americans continue to "suffer from the consequences of slavery and Jim Crow laws . . . through enormous damage and loss, both tangible and intangible, including the loss of human dignity and liberty . . . ."[118] But unlike the House resolution, the Senate resolution added disclaimer language at the end asserting that nothing in the Senate resolution "authorizes or supports any claim against the United States" or "serves as a settlement of any claim against the United States."[119] The Senate's inclusion of this disclaimer caused the House to reject the Senate resolution, stymieing the effort to produce a joint resolution.[120] Thus, the United States has yet to offer a unified, unconditional national apology.[121]

A recent legislative effort to apologize is a 2019 bill sponsored by Representative Sheila Jackson Lee, a Democrat from Texas.[122] The bill would establish the Commission to Study and Develop Reparation Proposals for African-Americans to, among other things, address the question of how the U.S. government will offer a "formal apology on behalf of the people of the United States for the perpetration of gross human rights violations and crimes against humanity on African slaves and their descendants."[123] Arguably, an apology consists of merely empty words.[124] But although mere words after the crime cannot change the past, a national

[114] *Id.* at 1-2.

[115] *Id.* at 4.

[116] *Id.* at 3.

[117] S. CON. RES. 26, 111th Cong. (2009).

[118] *Id.* at 2.

[119] *Id.* at 4-5.

[120] Johnson, *supra* note 93.

[121] *Id.*

[122] H.R. 40, 116th Cong. § 3(b)(7)(B) (2019).

[123] *Id.*

[124] *See* Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903, 913-14 (2003).

apology is an important first step in moving into the future based on a unified affirmation of American values that includes equality for all.[125]

E. Assist Workers of Color by Providing National Paid Sick Leave

The United States and South Korea are the only two OECD (Organisation for Economic Co-operation and Development) countries that fail to provide guaranteed paid leave to workers for personal illnesses.[126] The OECD recognizes the benefits of paid sick leave including (1) protecting the sick worker's income through sick pay or sickness benefits, (2) protecting the sick worker's job by preserving the employment relationship throughout the worker's period of illness, and (3) protecting the sick worker's health by allowing the sick worker to rest and recover instead of continuing to work.[127] The United States, as an OECD member, presumably also recognizes these paid sick leave benefits. But the United States remains one of two (of the thirty-four) OECD countries to not provide guaranteed paid leave to sick workers.[128]

The lack of guaranteed paid sick leave disproportionately affects Latinx workers because they are least likely to have access to paid sick days even though they "have the highest labor force participation rate of any racial or ethnic group in the United States and are the fastest-growing segment of the workforce."[129] Latinx workers composed 7.4% (9.0 million) of the U.S. labor force in 1988 and increased to 16.8% (26.8 million) in 2016.[130] From 2018 to 2028, the U.S. Bureau of Labor Statistics expects

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[125] Mark Medish & Daniel Lucich, *Congress Must Officially Apologize for Slavery Before America can Think About Reparations*, NBC NEWS (Aug. 30, 2019, 4:30 AM), https://www.nbcnews.com/think/opinion/congress-must-officially-apologize-slavery-america-can-think-about-reparations-ncna1047561.

[126] AMY RAUB ET AL., PAID LEAVE FOR PERSONAL ILLNESS: A DETAILED LOOK AT APPROACHES ACROSS OECD COUNTRIES, WORLD POLICY ANALYSIS CENTER (2018), https://www.worldpolicycenter.org/sites/default/files/WORLD Report - Personal Medical Leave OECD Country Approaches_0.pdf.

[127] MAËLLE STRICOT & DUNCAN MACDONALD, PAID SICK LEAVE TO PROTECT INCOME, HEALTH AND JOBS THROUGH THE COVID-19 CRISIS, OECD 3 (July 2, 2020), https://read.oecd-ilibrary.org/view/?ref=134_134797-9iq8w1fnju&title=Paid-sick-leave-to-protect-income-health-and-jobs-through-the-COVID-19-crisis.

[128] AMY RAUB ET AL., PAID LEAVE FOR PERSONAL ILLNESS: A DETAILED LOOK AT APPROACHES ACROSS OECD COUNTRIES, WORLD POLICY ANALYSIS CENTER (2018), https://www.worldpolicycenter.org/sites/default/files/WORLD Report - Personal Medical Leave OECD Country Approaches_0.pdf.

[129] *Latinos and Their Families Need Paid Sick Days*, UNIDOSUS AND THE NAT'L P'SHIP FOR WOMEN & FAMILIES (Mar. 2020), https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-sick-days/latino-workers-need-paid-sick-days.pdf.

[130] *26.8 million Hispanics or Latinos in the U.S. labor force in 2016*, U.S. BUREAU OF LABOR STATISTICS (Sept. 25, 2017), https://www.bls.gov/opub/ted/2017/26-point-8-million-hispanics-or-latinos-in-the-u-s-labor-force-in-2016.htm?view_full.

the number of Latinx workers to increase by about 7.4 million, a number greater than any other racial or ethnic group.[131] Of this large group of Latinx workers, more than half (approximately 15 million) are unable to earn a single paid sick day through their employer.[132] A disproportionate amount of Latinx workers are employed in fields that do not provide paid sick days such as food preparation and serving, construction, building cleaning and maintenance, and production.[133]

The lack of paid sick days can lead to various negative consequences.[134] One is the impairment of health where the lack of paid sick days compels many Latinx workers to continue working rather than take days off to help themselves when sick or to help family members who are sick.[135] A second negative consequence is significant loss of pay for workers who take unpaid sick day leave because Latinx workers are paid less, on average, than workers overall, thus making even a few days of lost pay a major setback.[136] A third negative consequence is job termination for being sick, a problem for all workers, but one which affects Latinx workers more severely because they are, on average, paid less, have less savings to draw from, and have less access to wealth than white workers.[137]

F. Return Land to Native Americans

Federal courts have consistently ruled against Native American tribes seeking to regain and reconnect with their ancestral lands.[138] An example is *Onondaga Nation v. New York* where the Second Circuit ruled against the Onondaga Nation.[139] The Onondaga Nation argued that New York State purchased tribal land in six transactions between 1788 and 1882 that violated the Trade and Intercourse Act and two federal treaties.[140] Thus, the Onondaga Nation "retained interests in the land taken by the State" and the land "remain[s] the property of the Nation."[141] The Onondaga Nation asked

[131] Elka Torpey, *Projected employment growth in industries with many Hispanics*, U.S BUREAU OF LABOR STATISTICS (Oct. 2019), https://www.bls.gov/careeroutlook/2019/data-on-display/hispanics.htm?view_full - :~:text=Employment in this industry is,average rate for all industries.&text=Elka Torpey is an economist,.elka%40bls.gov.

[132] *Latinos and Their Families*, *supra* note 129, at 1.

[133] *Id.* at 2.

[134] *Id.* at 1.

[135] *Id.*

[136] *Id.* at 2.

[137] *Id.*

[138] Samuel Pokross, *"Dramatically Altered the Legal Landscape"? City of Sherrill v. Oneida Indian Nation in the Lower Courts*, 43 AM. INDIAN L. REV. 243, 243-44 (2018).

[139] Onondaga Nation v. New York, 500 F. App'x 87, 90 (2d Cir. 2012).

[140] Brief of Appellant at 3, Onondaga Nation v. New York, 500 F. App'x 87, 90 (2012) (No. 10-4273), 2012 WL 764693.

[141] *Id.* at 2, 58-59.

for a declaratory judgment that New York violated the Trade and Intercourse Act and the treaties, asserting that this would be a first step in "healing an historic wrong" that caused "generations of hardship and disruption of the Onondaga culture and community" and holding responsible those who polluted Onondaga Nation lands.[142] To increase the likelihood of a favorable court ruling, the Onondaga Nation eschewed seeking money damages, compensation, restitution, rent, or any remedy that "dispossesses, or evicts . . . neighbors from their lands."[143]

Despite the Onondaga Nation's narrow remedy request, the Second Circuit affirmed the lower court's ruling against the Onondaga Nation based on three factors.[144] First, the Second Circuit considered "the length of time at issue between an historical injustice and the present day" and regarded the 183 years separating the past land taking from the present lawsuit as too long a time period.[145] This despite the conclusion of experts that the Onondaga Nation did not delay filing.[146] For example, in support of the Onondaga Nation's opposition to a motion to dismiss in 2006, a professor of law, history, and Native American studies submitted a declaration stating that limitations on access to courts prevented the Onondaga Nation from suing in New York courts even up to the present time.[147] Second, the Second Circuit considered "the disruptive nature of claims long delayed" and declared as "indisputable" the disruptive nature of the Onondaga Nation's claims to present-day landowners and land purchasers.[148] Third, the Second Circuit considered "the degree to which these claims upset the justifiable expectations of [present-day] individuals and entities" and stated that the government and current land occupiers had "justifiable expectations" of ownership because the contested land was "extensively populated by non-Indians" and extensively developed by private and public entities.[149]

In essence, U.S. courts and other institutions continue to adhere to the Discovery Doctrine, a legal fiction formulated by Justice Marshall[150] declaring that European colonists "discovering" the New World divested already-present indigenous peoples of certain rights to the lands they

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142 *Id.* at 4, 51.

143 *Id.* at 3-4.

144 Onondaga Nation v. New York, 500 F. App'x 87, 90 (2d Cir. 2012).

145 *Id.*

146 *See* Declaration of Lindsay G. Robertson at 2, Onondaga Nation v. New York, 500 Fed. Appx. 87, 90 (2012) (No. 05-314), 2006 WL 6897840.

147 *Id.*

148 Onondaga Nation v. New York, 500 F. App'x 87, 90 (2d Cir. 2012).

149 *Id.*

150 Johnson v. McIntosh, 21 U.S. 543 (1823).

inhabited.[151] The purported "discovery" of new lands provided legal justification for the European "discoverers" to transfer political, commercial, and property rights to themselves without the knowledge or consent of the tribes even though they were antecedent inhabitants occupying and using the land.[152] The Discovery Doctrine has not been overruled and remains part of U.S. legal jurisprudence.[153] This relic from a colonial past remains part of modern day Indian law and continues to limit tribal sovereign and property rights.[154]

By contrast, Australian courts recognize the rights of indigenous peoples to their lands.[155] In *Mabo v Queensland*, the High Court of Australia ruled that the Meriam people, who live on the Murray Islands, possess traditional land rights despite England's colony of Queensland using Imperial Authority to annex the Murray Islands in 1879.[156] The High Court rejected the Discovery Doctrine and a related concept, *terra nullius*, as "unjust and discriminatory."[157] *Terra nullius* means empty land, and European colonists applied the concept liberally to assert they "discovered" land that was "vacant" despite the preexistence of indigenous people.[158] The High Court stated that the concept of *terra nullius* could no longer be retained in the modern world because it was imperative "that the common law should neither be nor be seen to be frozen in an age of racial discrimination."[159] The High Court ruled that the common law of Australia recognized a form of native title that reflected the "entitlement of the indigenous inhabitants . . . to their traditional lands."[160] It was a fiction, the High Court explained, to deem the land rights of the indigenous inhabitants as non-existent.[161] Whatever legal fiction was used to justify non-recognition of the indigenous inhabitants' land rights, "an unjust and

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[151] Symposium, *United States Called to Task on Indigenous Rights: The Western Shoshone Struggle and Success at the International Level*, 31 AM. INDIAN L. REV. 619, 628 (2007).

[152] Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 5 (2005).

[153] Nathan Goetting, *The Marshall Trilogy and the Constitutional Dehumanization of American Indians*, 65 GUILD PRAC. 207, 216 (2008).

[154] Miller, *supra* note 152, at 104.

[155] *See* Gary D. Meyers & John Mugambwa, *The Mabo Decision: Australian Aboriginal Land Rights in Transition*, 23 ENVTL. L. 1203, 1204 (1993).

[156] Mabo v Queensland [No. 2] (1992) 175 CLR 1 (Austl.); Gary D. Meyers & John Mugambwa, *The Mabo Decision: Australian Aboriginal Land Rights in Transition*, 23 ENVTL. L. 1203, 1204 (1993).

[157] *Id.*; John Borrows, *Ground-Rules: Indigenous Treaties in Canada and New Zealand*, 22 N.Z. U. L. REV. 188, 212 n.120 (2006).

[158] Robert J. Miller & Jacinta Ruru, *An Indigineous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand*, 111 W. VIR. L. REV. 849, 857 (2008).

[159] Mabo v Queensland [No. 2] (1992) 175 CLR 1 (Austl.).

[160] *Id.*

[161] *Id.*

discriminatory doctrine of that kind can no longer be accepted," declared the High Court.[162]

G. Create a Cabinet-Level Body Addressing Racial Inequality

In 2003, Brazil established a Ministry for Racial Equality—the Secretaria de Políticas de Promoção da Igualdade Racial (SEPPIR) (Special Secretariat for Policies to Promote Racial Equality).[163] This was Brazil's first ministry-level body created to exclusively promote racial equality.[164] A ministry-level body is equivalent to a cabinet-level body in the United States,[165] and the creation of a high-level body such as SEPPIR was an indicator of Brazil's serious effort at the national level to directly address racial inequality.[166] SEPPIR's mandate included crafting affirmative action and health policies for underrepresented groups, and coordinating and working with other government bodies to promote racial equality.[167]

A challenge for SEPPIR was securing adequate funding.[168] In Brazil's 2015 budget, the Special Secretariat of Fishing and Agriculture received 254 million reais, the Special Secretariat of Policies for Women received 182 million reais, but SEPPIR received only 39.5 million reais (equivalent to just under 9 million U.S. dollars).[169] Another challenge was overcoming resistance from other government agencies. For example, SEPPIR encountered resistance from Ministry of Education bureaucrats who vigorously opposed affirmative action efforts in the field of education.[170] The greatest challenge was surviving as an independent body. Ultimately, the Ministry of Racial Equality was merged with the Ministry of Human Rights and Ministry of Women, and in 2016, after Brazil's president was

[162] *Id.*

[163] FELIPE AROCENA & KIRK BOWMAN, LESSONS FROM LATIN AMERICA: INNOVATIONS IN POLITICS, CULTURE, AND DEVELOPMENT, 98 (2014).

[164] Marcus Vinicius Peinado Gomes & Mario Aquino Alves, *How to Create a Ministry: The Co-optation Process as A Distention Mechanism in The Relationship Between Social Movements and The State*, BRAZ. J PUB. ADMIN. 389 (May-June 2017).

[165] *See* Kia Lilly Caldwell, *Transitional Black Feminism in the Twenty First Century: Perspectives from Brazil* in NEW SOCIAL MOVEMENTS IN THE AFRICAN DIASPORA 105, 117 (Leith Mullings ed., 2009).

[166] G. REGINALD DANIEL, RACE AND MULTIRACIALITY IN BRAZIL AND THE UNITED STATES: CONVERGING PATHS? 258 (2006).

[167] Tianna S. Paschel, *Disaggregating the Racial State: Activists, Diplomats, and the Partial Shift toward Racial Equality in Brazil* in THE MANY HANDS OF THE STATE 203, 217 (Kimberly J. Morgan & Ann S. Orloff, eds. 2017).

[168] *Id.*

[169] *Id.*

[170] *Id.*

impeached and replaced with interim President Michel Temer, he incorporated the merged ministries into the Ministry of Justice.[171]

Despite SEPPIR's difficulties, it can serve as a template to achieve high-level promotion of racial equality policies. The United States recently attempted to create a similar cabinet-level body.[172] In 2020, Representative Al Green (D-TX) called for the creation of a cabinet-level Department of Reconciliation.[173] In justifying the need for this new department, Representative Green declared, "We survived slavery, but we didn't reconcile. We survived segregation, but we didn't reconcile."[174] Accordingly, leadership at the highest level must "seek reconciliation for black people in the United States of America," declared Representative Green.[175] His resolution calls for the Department of Reconciliation to "eliminate racism and invidious discrimination."[176] This mirrors the exhortation by Aimee Allison, founder and president of She the People, to create a cabinet-level body—a Department of Racial Justice—to address racial inequality in the United States.[177] Any cabinet-level body established would need to learn from the SEPPIR experiment and address the obstacles such as inadequate funding, resistance from other departments, and loss of independence.[178] The effort would be worthwhile because a cabinet-level body would help promote long-overdue racial equality and reconciliation in America, Representative Green explicated.[179]

III. REASONS FOR AMERICA'S DILATORY RACIAL EQUALITY EFFORTS

It is "comfortable vanity" to view America as a place of steady growth toward a racially-harmonious utopia.[180] Rather, every forward step generates a backward step; every action a counter-action; every advance a backlash.[181] Other obstacles exist including frontlash, avoidance,

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[171] Marina Koren, *Who's Missing From Brazil's Cabinet?*, ATLANTIC (May 25, 2016), https://www.theatlantic.com/international/archive/2016/05/brazil-cabinet-rousseff-temer/483372/.

[172] Aaron Morrison, *Floyd's Death Spurs Question: What Is A Black Life Worth?*, AP NEWS (June 12, 2020), https://apnews.com/11e03dfdbd030bead41ba609f3089d78.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] H.R. RES. 992, 116th Cong. (2020).

[177] Nicole Goodkind, *5 Important Ways That A Joe Biden White House Could Address Systemic Racism*, FORTUNE (July 7, 2020), https://fortune.com/2020/07/07/joe-biden-race-racism-racial-unrest-george-floyd-protests/.

[178] *See* Paschel, *supra* note 167, at 217.

[179] Morrison, *supra* note 172.

[180] KING, *supra* note 7, at 4-5.

[181] *Id.* at 72.

whitewashing, and colorblindness that will be discussed below. These racial phenomena impede America's professed goal of equality for all.

A. Backlash

"Backlash" is the "politically and electorally expressed public resentment that arises from perceived racial advance, intervention, or excess."[182] "Backlash" is the reflex of the masses including voters who recoil at policies, candidates, or civil rights efforts that sufficiently elevate their fears.[183] Every racial equality advance will be met with resistance and backlash.[184] The following examples highlight the enduring *advancement-leading-to-backlash* pattern in U.S. society.

First, passage of the Thirteenth Amendment led to backlash.[185] After the Civil War, the Thirteenth Amendment was ratified in 1865 forbidding "slavery" and "involuntary servitude."[186] Backlash ensued with Southern states enacting laws termed "Black Codes" limiting the citizenship rights of African Americans.[187] The Black Codes reimposed bondage on African Americans and restored free labor for white neo-slave owners through forced labor schemes.[188] The Black Codes included curfews and vagrancy laws that restricted the ability of African Americans to travel and steered them back to plantations.[189] The Codes also subjected African Americans to voting restrictions, education limitations, biased courts, harsher sentences, and lynchings.[190]

Second, President Harry Truman's attempts to promote racial equality led to backlash.[191] President Truman sent to Congress in February 1948 his "Special Message to the Congress on Civil Rights." The Special Message called for (1) establishing a permanent Commission on Civil Rights, a Joint Congressional Committee on Civil Rights, and a Civil Rights Division in the Department of Justice; (2) strengthening existing civil rights statutes;

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[182] Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. IN AM. POL. DEV. 230, 237 (Fall 2007).

[183] *Id.* at 238.

[184] Phyllis Goldfarb, *Race, Exceptionalism, and the American Death Penalty: A Tragedy in Many Acts*, 48 NEW ENG. L. REV. 691, 709 n.100 (2014).

[185] George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1401 (2008).

[186] U.S. CONST. amend. XIII, § 1.

[187] Rutherglen, *supra* note 185, at 1401.

[188] Floyd D. Weatherspoon, *The Mass Incarceration of African-American Males: A Return to Institutionalized Slavery, Oppression, and Disenfranchisement of Constitutional Rights*, 13 TEX. WESLEYAN L. REV. 599, 603 (2007).

[189] *Id.*

[190] *Id.*

[191] MICHAEL R. GARDNER, HARRY TRUMAN AND CIVIL RIGHTS 79 (2002).

(3) providing federal protection against lynching; (4) protecting more effectively the right to vote; (5) establishing a Fair Employment Practice Commission to prevent unfair discrimination in employment; (6) prohibiting discrimination in interstate transportation facilities; (7) providing home-rule and suffrage in presidential elections for District of Columbia residents; (8) providing statehood for Hawaii and Alaska and enhancing self-government for America's island possessions; (9) equalizing the opportunities for U.S. residents to become naturalized citizens; and (10) settling the World War II internment claims of Japanese-Americans.[192] Senator James Eastland, a Democrat from Mississippi, called these objectives "outrageous."[193] Mississippi House Speaker Walter Sillers excoriated the ten proposals as "damnable, communistic, unconstitutional, anti-American, anti-Southern legislation."[194] Like-minded voters wrote letters alleging Truman was breaking up the Democratic Party by antagonizing Southern Democrats.[195] Most of the letters contained obscene racial slurs directed at Truman, his family, and his staff.[196]

Truman also signed Executive Order 9981 in July 1948 that desegregated the armed forces. The executive order begins by recognizing a democracy's necessity to provide "equality of treatment and opportunity for all those who served in our country's defenses."[197] It further declares that "there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin."[198] The backlash took the form of spurring the third-party candidacy of segregationist Governor Strom Thurmond.[199] He lost the general election after receiving only 3% of the popular vote, but won four southern states and their thirty-nine electoral votes, thus becoming only one of two third-party candidates in the post-war period to win electoral votes.[200]

Third, the Supreme Court's 1954 ruling that "[racially] [s]eparate educational facilities are inherently unequal" in *Brown v. Board of Education*[201] led to a backlash.[202] The *Brown* decision resulted in Southern

[192] Special Message to the Congress on Civil Rights, 1 PUB. PAPERS 121 (Feb. 2, 1948).

[193] GARDNER, *supra* note 191, at 79.

[194] *Id.* at 80.

[195] *Id.*

[196] *Id.*

[197] Exec. Order No. 9981, 3 C.F.R. § 722 (1943-1948).

[198] *Id.*

[199] Terry Smith, *White Backlash in a Brown Country*, 50 VAL. U. L. REV. 89, 95 (2015).

[200] George Wallace in 1968 was the other third-party candidate to win electoral votes. Steve Crabtree, *Gallup Brain: Storm Thurmond and the 1948 Election*, GALLUP (Dec. 17, 2002), https://news.gallup.com/poll/7444/gallup-brain-strom-thurmond-1948-election.aspx.

[201] Brown v. Board of Educ., 347 U.S. 483 (1954), *supplemented sub. nom.*, Brown v. Board of Educ., 349 U.S. 294 (1955).

politicians and officials using all means to resist racial equality efforts including blatantly defying federal authority and brutally suppressing civil rights demonstrations.[203] Southern politics fixated on race as voters elected men who strenuously fought racial change.[204] Southern politicians condoned or encouraged violence against peaceful civil rights activists.[205] White southerners engaged in massive resistance to the Court's order to desegregate schools.[206]

Fourth, passage of the 1964 Civil Rights Act led to backlash. President Lyndon B. Johnson, a Democrat from Texas, pushed a civil rights agenda that included passage of the Civil Rights Act of 1964.[207] Title VII of the 1964 Civil Rights Act forbids employment discrimination on the basis of race, color, religion, sex, or national origin.[208] The Civil Rights Act backlash included southern states switching from the Democratic Party to the Republican Party, thus weakening the electoral power of the Democratic Party and hindering its ability to advance civil rights policies.[209]Further, after passage of the 1964 Civil Rights Act, President Lyndon B. Johnson used the term "affirmative action" in Executive Order 11,246, which provided equal opportunity to those seeking federal employment and required contractors in federal contracts to "take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color or national origin."[210] But President Ronald Reagan opposed affirmative action and derided it as "reverse discrimination."[211] Also, federal agencies such as the Equal Employment Opportunity Commission (EEOC) enforce Title VII, but the Reagan Administration in the 1980s slashed funding for the EEOC and the Civil Rights Division of the Justice Department.[212]

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[202] Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

[203] *Id.*

[204] *Id.*

[205] *Id.* at 96.

[206] Smith, *supra* note 199, at 95.

[207] Jeremy D. Mayer, *LBJ Fights the White Backlash: The Racial Politics of the 1964 Presidential Campaign*, 33 PROLOGUE MAG. (2001), https://www.archives.gov/publications/prologue/2001/spring/lbj-and-white-backlash-1.html.

[208] 42 U.S.C. § 2000e-2.

[209] Ron Elving, *Dixie's Long Journey from Democratic Stronghold to Republican Redoubt*, NPR (June 25, 2015, 7:03 AM), https://www.npr.org/sections/itsallpolitics/2015/06/25/417154906/dixies-long-journey-from-democratic-stronghold-to-republican-redoubt.

[210] Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 12,320 (Sept. 18, 1965) (emphasis added).

[211] Hina B. Shah, *Radical Reconstruction: (Re) Embracing Affirmative Action in Private Employment*, 48 U. BALT. L. REV. 203, 256 (2019).

[212] Anthony E. Cook, *The Moynihan Report and the Neo-Conservative Backlash to the Civil Rights Movement*, GEO. J.L. & MOD. CRITICAL RACE PERSP. 1, 19 (2016).

Fifth, passage of the 1965 Voting Rights Act led to backlash.[213] The Voting Rights Act prohibits discrimination in voting based on "race, color, or previous condition of servitude."[214] During the presidential campaign of 1980, Ronald Reagan told his biographer Laurence Barrett that the 1965 Voting Rights Act had been "humiliating to the South."[215] A year into office, President Reagan stated, "I was opposed to the Voting Rights Act from the beginning."[216]

Sixth, efforts to improve the living conditions of Blacks led to backlash.[217] White residents' fear of Blacks moving out of segregated spaces into white neighborhoods engendered white resistance.[218] Dr. King recounts how Blacks seeking better housing faced numerous obstacles including banks charging Blacks higher interest rates for home loans because they were considered a credit risk, local authorities evicting Black homeowners to acquire their land to build shopping centers and parking lots, and white residents creating all-white communities.[219] Such prejudice and irrationality was nothing new, but something familiar since the founding of the nation, explained Dr. King.[220] Ultimately, the backlash against Dr. King and his civil rights efforts led to his assassination in 1968.[221]

B. Frontlash

In addition to "backlash," "frontlash" can also be an impediment to racial equality.[222] Unlike "backlash," "frontlash" is more proactive, strategic, and focused on elites as actors.[223] Whereas "backlash" is akin to a bungee cord (i.e., anti-equality forces) recoiling reactively when stretched too far, "frontlash" is akin to water (i.e., anti-equality forces) moving strategically by using an alternative route when encountering an obstacle.[224] An example of "frontlash" is "law and order" policies that developed as part of a tough-on-crime agenda in the midst of the civil rights victories of

[213] Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 94 n.367 (2013).

[214] 52 U.S.C. § 10101(a)(1).

[215] Siegel, *supra* note 213, at 94 n.367.

[216] *Id.*

[217] KING, *supra* note 7, at 116-17.

[218] *Id.* at 117.

[219] *Id.* at 116, 118.

[220] *Id.* at 117-18.

[221] Michael Millemann, Rebecca Bowman-Rivas & Elizabeth Smith, *Digging Them Out Alive*, 25 CLINICAL L. REV. 365, 423 (2019).

[222] Weaver, *supra* note 182, at 238.

[223] *Id.*

[224] *Id.*

the 1960s (e.g., 1964 Civil Rights Act).[225] Elites opposing civil rights strategically shifted the focus from opposing civil rights to opposing crime by redefining society's core problem as criminal anarchy rather than racial inequality.[226]

As part of their agenda, political, legal, and law enforcement elites first criminalized civil rights struggles by linking civil disobedience with crime increase.[227] Senator Richard B. Russell, a Democrat from Georgia, asserted, "If our highest officials continue to applaud sit-ins, lie-ins, stand-ins, and all other violations of property rights, it can lead us into a state of anarchy."[228] Senator Russell Long, a Democrat from Louisiana, alleged that riots started when Dr. King, while in the Birmingham jail, "wrote a letter . . . to the preachers which said civil disobedience is OK if done in the name of civil rights."[229] After retiring from the U.S. Supreme Court in 1962, and mere days after passage of the 1964 Civil Rights Act, former Justice Charles E. Whittaker criticized sit-ins as illegal invasions of private property and questioned the constitutionality of the 1964 Civil Rights Act.[230] He argued that "certain self-appointed racial leaders, doubtless recalling the appeasements and, hence, successes of that earlier conduct, have simply adopted and used those techniques in fomenting and waging their lawless campaigns which they have called 'demonstrations.'"[231] FBI Director J. Edgar Hoover assailed civil disobedience as a "seditious slogan of gross irresponsibility" creating an attitude of "disrespect for the law and even civil disorder and rioting."[232]

Second, elites racialized crime by linking crime with people of color.[233] The McCone Commission, tasked with identifying the causes of the 1965 Watts uprising in Los Angeles, blamed Blacks for the rioting, absolved police of any responsibility, and called the uprising a "formless, quite senseless" explosion.[234] Senator Robert Byrd, a Democrat from Virginia, averred, "[i]f they [Blacks] conduct themselves in an orderly way, they will not have to worry about police brutality."[235] Republican minority

[225] *Id.* at 231.

[226] *Id.* at 230-31.

[227] *Id.* at 247.

[228] *Id.*

[229] *Id.* at 248.

[230] Brad Ervin, *Result or Reason: The Supreme Court and the Sit-in Cases*, 93 VA. L. REV. 181, 228 n.190 (2007).

[231] Melissa Mortazavi, *The Cost of Avoidance: Pluralism, Neutrality, and the Foundations of Modern Legal Ethics*, 42 FLA. ST. U. L. REV. 151, 166 (2014).

[232] Weaver, *supra* note 182, at 248.

[233] *Id.* at 247.

[234] *Id.* at 249.

[235] *Id.*

leader of the House and future president, Gerald Ford, declared, "The War at home—the war against crime—is being lost . . . . When a Rap Brown[236] and a Stokely Carmichael[237] are allowed to run loose, to threaten law-abiding Americans with injury and death, it's time to slam the door on them and any like them—and slam it hard!"[238] In 1968, then-presidential candidate Richard Nixon published his policy paper on crime, *Toward Freedom From Fear*, calling for fighting the "enemy within" by discarding the "socially suicidal tendency . . . to excuse crime and sympathize with criminals because of past grievances the criminal may have against society."[239] Nixon's policy paper did not address "riots" and "urban disorders," but noted they were a "special" problem that offered "their own challenge to the future existence of our society."[240]

Third, elites adopted language that shifted the focus from *civil rights* to *crime-free rights*—the right to live free from crime and the fear of crime.[241] In 1965, Representative Craig Hosmer, a Republican from California, introduced a proposed constitutional amendment elevating crime-free rights over all other rights including civil rights: "The right of society in general and individual persons in particular to be protected from crimes against person and property *shall be paramount to other rights*."[242] Fearing the spectre of crime, Hosmer railed against "[c]ourt rulings which hamper police work."[243] He also criticized the "[m]ollycoddling of vicious young criminals by juvenile court judges."[244] Violent crime was so rampant and the breakdown of law and order so extensive that American society

[236] Kate Brumback, 1*960s black militant H. Rap Brown challenging imprisonment*, ASSOCIATED PRESS (May 3, 2019), https://apnews.com/4b7c47601f12469aa02c716f01a80f3f.

[237] Stokely Carmichael was a Black activist and Student Nonviolent Coordinating Committee chair. Wil Haygood, *This Powerful Stokely Carmichael Portrait Never Made It to the Cover of Time Magazine,* SMITHSONIAN MAG. (June 2016), https://www.smithsonianmag.com/smithsonian-institution/powerful-stokely-carmichael-potrait-never-made-cover-time-magazine-180959073/.

[238] Weaver, *supra* note 182, at 249.

[239] 114 CONG. REC. S12,944 (daily ed. May 13, 1968), 114 Cong. Rec S 12908, at *12,944 (Senator Byrd inserting in the Congressional Record Richard Nixon's "Toward Freedom From Fear" article outlining his policy on crime).

[240] Richard Nixon, *"Toward Freedom From Fear"*, NIXON FOR PRESIDENT COMM. (1968), https://media.historyit.com/544a309f1cbf26.17895817.pdf?Expires=1612226736&Signature=eN8DTceZ0YmZIITkZICbqHmYxWacTjXqnlqy4MerAtd0EL-OCICS-bCNx67Yg7srluO~07lSE75c-lhxxObjXipBGDvvNWmmDU-Y607ASNcX6acPSjLJmUVzc8UlDpf~U-CNV9WX2Z8nZyyZ59QbJW~9cHC1KWqeNIBAvWBse.

[241] Weaver, *supra* note 182, at 249.

[242] 111 CONG. REC. H21,646 (daily ed. Aug. 24, 1965), 111 Cong. Rec H 21430, at *21,646 (extension of remarks of Representative Craig Hosmer) (emphasis added).

[243] 111 CONG. REC. H21,646 (daily ed. Aug. 24, 1965), 111 Cong. Rec H 21430, at *21,646 (press release of Representative Craig Hosmer).

[244] *Id.*

itself would be destroyed, declared Representative Hosmer.[245] Continuing in this vein, in 1968, then-presidential candidate Richard Nixon focused not on the Constitution's Fourteenth Amendment's provision of "equality" for all, but on the preamble to the Constitution with its goal to "establish justice." "Justice" involves two parts: (1) the innocent being freed and (2) *the guilty paying the penalty*, and the nation must earnestly address the second part, Nixon declared.[246] He lamented the rise of "street crime" and criticized Supreme Court decisions such as *Miranda*[247] for "ham stringing the peace [i.e., police] forces in our society and strengthening the criminal forces."[248] The result was setting free patently guilty criminals on the basis of "legal technicalities," stated Nixon.[249] Like Representative Hosmer who exalted crime-free rights, Nixon proclaimed that the "first civil right" was the "right to be free from violence."[250] The war on crime would safeguard the "affluent suburbs" from the "brutal society" in core cities, explained Nixon.[251] The pro-active "frontlash" approach used by Nixon and other elites strategically shifted the focus from civil rights to crime fighting.[252] The "frontlash" strategy of using fear of crime to gain voters succeeded in propelling presidential candidate Nixon to the White House.[253]

C. Avoidance

America's avoidance of race issues hinders racial equality efforts.[254] Whites are less willing to descant on topics of race.[255] A 2019 Pew survey of Asian, Hispanic, Black, and White adults asked: "How often, if ever, does race or race relations come up in your conversations with family and friends?" A larger percentage of White respondents (38%) replied "Rarely"

[245] *Id.* at H21646-47.

[246] Nixon, *supra* note 240, at 3.

[247] Miranda v. Arizona, 384 U.S. 436, 479 (1966) (ruling that the Fifth Amendment privilege against self-incrimination requires a person subject to custodial interrogation "be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires").

[248] Nixon, *supra* note 240, at 11-12 (1968).

[249] *Id.* at 12.

[250] LINDA K. MANCILLAS, PRESIDENTS AND MASS INCARCERATION 31 (Praeger ed., 2018).

[251] Robert Weisberg, *Preventing Crime: Private Duties, Public Immunity*, 2 J.L. Econ. & Pol'y 365, 367 (2006); Nixon, *supra* note 240, at 1-2.

[252] *See* Nixon, *supra* note 240, at 1-2.

[253] Weisberg, *supra* note 251, at 367.

[254] *See* KING, *supra* note 7, at 3-5.

[255] Sandee LaMotte, *Robin DiAngelo: How 'White Fragility' Supports Racism and how Whites can Stop it*, CNN (Jun. 7, 2020), https://www.cnn.com/2020/06/07/health/white-fragility-robin-diangelo-wellness/index.html.

versus 24% of Black, 32% of Hispanic, and 29% of Asian respondents.[256] Also, a smaller percentage of White respondents (11%) replied "Often" versus 27% of Black, 15% of Hispanic, and 13% of Asian respondents.[257] Further, the overall low "Often" responses (with the highest being 27% from Black respondents, which is still only about a quarter of Black respondents) reveal generally that race conversations in America do *not* "often" occur.[258] These numbers underscore the avoidance of race discussions in the United States.

D. Whitewashing

America's whitewashing of the significance of race and racial bias impairs racial equality efforts.[259] Pew's 2019 research shows that among those Black and white respondents who say "being black hurts a person's ability to get ahead," 84% of Blacks specifically point to "racial discrimination" as a major reason why Blacks may have a harder time getting ahead versus only 54% of Whites specifically pointing to racial discrimination as a major reason.[260] Second, 84% of Blacks say they are treated less fairly when dealing with the police while only 63% of Whites express this feeling.[261] Third, 87% of Blacks say they are treated less fairly by the criminal justice system while only 61% of whites.[262] Fourth, 50% of whites said "Too much" attention is paid to race and racial issues versus only 12% of Blacks, 27% of Hispanics, and 36% of Asians saying this.[263] Fifth, 52% of whites said the bigger problem in America is people seeing racial discrimination where it does *not* exist, versus only 14% of Blacks, 30% of Hispanics, and 28% of Asians saying this.[264] Sixth, 48% of whites said the bigger problem in America is people not seeing racial discrimination where it *does* exist versus 84% of Blacks, 67% of Hispanics, and 72% of Asians saying this.[265] Seventh, when asked if the legacy of slavery currently affects the position of Black people in American society,

[256] PEW RESEARCH CENTER, AMERICAN TRENDS PANEL 1 (Jan. 22-Feb. 5, 2019), https://www.pewresearch.org/wp-content/uploads/2019/07/FT_19.07.02_TalkingAboutRace_Topline-revised.pdf.

[257] *Id.*

[258] *Id.*

[259] *See* Rob Trousdale, *White Privilege and the Case-Dialogue Method*, 1 WM. MITCHELL L. RAZA 28, 43 (2010).

[260] Juliana M. Horowitz, Anna Brown & Kiana Cox, *Race in America 2019*, PEW RESEARCH CTR. 10 (Apr. 9, 2019), https://www.pewsocialtrends.org/2019/04/09/race-in-america-2019/.

[261] *Id.* at 11.

[262] *Id.*

[263] *Id.* at 23.

[264] *Id.* at 24.

[265] *Id.*

more Blacks (59%), Hispanics (29%), and Asians (33%) said "A great deal" than whites (26%).[266] Eighth, on the same question of slavery's effects on Blacks today, fewer Blacks (9%), Hispanics (11%), and Asians (15%) answered "Not at all" than whites (19%).[267]

E. Colorblindness

America's notion of colorblindness impairs racial equality efforts.[268] America advances a "colorblind" narrative that in theory means a person will not racially discriminate against another because of the other person's race.[269] But in practice, colorblindness can lead people to be blind to the reality of racial discrimination and render invisible people of color.[270] Margaret Moss, a member of the Hidatsa tribe who teaches nursing at the University of Buffalo, experienced the reality of racial discrimination and being rendered invisible when she sought medical care for her son's broken arm at a non-Indian Health Services (IHS) health facility in Washington, D.C., where she was on a health policy fellowship with a U.S. Senate committee.[271] The doctor failed to properly set her son's arm and when Moss requested the doctor reexamine her son's arm, the doctor dismissed her concerns.[272] Moss reluctantly pulled out her business card with the Senate logo to show the doctor.[273] This transformed Moss in the doctor's eyes from an invisible "American Indian woman with [her] obviously minority son" to a visible person with status whom the doctor could no longer dismiss.[274] Native Americans and other racial minorities are rendered invisible because they are not seen for who they actually are—people entitled to equal treatment under the law.[275] Colorblindness that is

[266] *Id.* at 38.

[267] *Id.*

[268] Girardeau A. Spann, *Race Ipsa Loquitur*, 2018 MICH. ST. L. REV. 1025, 1085 (2018).

[269] *See* John Tehranian, *Playing Cowboys and Iranians: Selective Colorblindness and the Legal Construction of White Geographies*, 86 U. COLO. L. REV. 1, 23-25 (2015).

[270] *See* Trina Jones, *Anti-Discrimination Law in Peril?*, 75 Mo. L. REV 423, 433 (2010); Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 40 (1994); Josephine Ross, *Cops on Trial: Did Fourth Amendment Case Law Help George Zimmerman's Claim of Self-Defense?*, 40 SEATTLE U. L. REV. 1, 19 (2016).

[271] Erica Whitney, *Native Americans Feel Invisible in U.S. Health Care System*, NPR (Dec. 12, 2017 5:00 AM), https://www.npr.org/sections/health-shots/2017/12/12/569910574/native-americans-feel-invisible-in-u-s-health-care-system.

[272] Lucy Truschel and Christina Novoa, *American Indian and Alaska Native Maternal and Infant Mortality: Challenges and Opportunities*, CTR. FOR AM. PROGRESS (July 9, 2018), https://www.americanprogress.org/issues/early-childhood/news/2018/07/09/451344/american-indian-alaska-native-maternal-infant-mortality-challenges-opportunities/.

[273] Whitney, *supra* note 271.

[274] *Id.*

[275] *Id.*

blind to the reality of racial inequality subjects people of color to continued racial inequality.[276]

IV. CONCLUSION

Colorblindness and other racial equality obstacles reveal that America, the experiment in democracy, must continue to experiment to achieve racial equality. Justice Brandeis viewed America's federal system as one where a single state could serve as a laboratory to risk trying novel social and economic experiments for the benefit of the whole.[277] Analogously, within the global system, a single country could serve as a laboratory to try novel experiments for the benefit of the global whole. In the matter of racial equality, other countries have experimented, tried different policies, and charted different paths. Just as America learns from the experiments of individual states within its federal system, America can learn from the experiments of individual countries within the global system. An international marketplace of ideas on achieving racial equality would benefit all, including America.

[276] Spann, *supra* note 268, at 1085.

[277] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).