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## *ESSAY*

### A PRELUDE TO A CRITICAL RACE THEORETICAL ACCOUNT OF CIVIL PROCEDURE

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*In this Essay, I examine the lack of scholarly attention given to the role of civil procedure in racial subordination. I posit that a dearth of critical thought interrogating the connections between procedure and the subjugation of marginalized peoples might be due to the limited experiences of procedural scholars; a misconception that procedural rules are a technical, objective, neutral area; and avoidance of discussion of race or other aspects of identity unless there is a case, material, or scholarly topic that meets an unreasonably high standard. I emphasize the importance of a critical race analysis of civil procedure.*

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## INTRODUCTION

In response to the uprisings and social movement for racial justice following police officers<sup>1</sup> killing George Floyd, Breonna Taylor, and other Black<sup>2</sup> people,<sup>3</sup> several dozen civil procedure scholars gathered virtually during the summer of 2020 to discuss how to include racial justice and issues of race in our classrooms.<sup>4</sup> While this event was a valiant attempt, it struck me as long overdue.

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<sup>1</sup> The social movement, uprisings, and demonstrations have primarily focused on police killings of Black people, but there also have been notable killings of Black people by people who weren't police officers. The summer of 2020 witnessed significant demonstrations against those other killings as well, including demonstrations against Travis McMichael, Gregory McMichael, and William "Roddie" Bryan Jr. killing Ahmaud Arbery. Brandon Tensley, Ahmaud Arbery and the Resilience of Black Protest, CNN Politics (May 12, 2020, 8:54 PM), <https://www.cnn.com/2020/05/12/politics/ahmaud-arbery-black-protest-pandemic/index.html>. [<https://perma.cc/V87J-F24C>]; Jessica Savage, Looking Back at the Arbery Case and Where Do We Go from Here?, CNN (Feb. 23, 2021, 5:36 PM), <https://www.wtoc.com/2021/02/23/looking-back-arbery-case-where-do-we-go-here/> [<https://perma.cc/Z9J9-RTMZ>]. Others have discussed the relationship between non-police killings of Black people and police killings of Black people. Lyndsey Gough, Protest Held to Demand Arrests for the Death of Ahmaud Arbery, WTOC (May 6, 2020, 10:52 PM), <https://www.wtoc.com/2020/05/06/protest-held-demand-arrests-death-ahmaud-arbery/> [<https://perma.cc/XPN3-KF4Y>]; Shervin Assari, George Floyd and Ahmaud Arbery Deaths: Racism Causes Life-threatening Conditions for Black Men Every Day, *The Conversation* (June 1, 2020, 8:14 AM), <https://theconversation.com/george-floyd-and-ahmaud-arbery-deaths-racism-causes-life-threatening-conditions-for-black-men-every-day-120541> [<https://perma.cc/5JCE-5A34>]. In this Essay, I tend to refer to police killings of Black people because that seemed to be the primary focus of the largest and most sustained mobilizations, but I don't mean to prioritize one group of killings of Black people over another by doing so.

<sup>2</sup> I capitalize "Black" and do not capitalize "white," "people of color," or "women of color." See Portia Pedro, Toward Establishing A Pre-Extinction Definition of "Nationwide Injunctions", 91 U. Colo. L. Rev., 849 n.5 (2020); Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1332 n.2 (1988) [hereinafter Crenshaw, Race] ("Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun."); see also Kimberle Williams Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1244 n.6 (1991) ("... I do not capitalize 'white,' which is not a proper noun, since whites do not constitute a specific cultural group.").

<sup>3</sup> Demonstrations Force America to Reckon with Contentious Past, N.Y. Times (June 16, 2020), <https://www.nytimes.com/2020/06/16/us/george-floyd-rayshard-brooks-protests.html> [<https://perma.cc/M54X-7JKD>]; Damian Cave, Livia Albeck-Ripka & Iliana Magra, Huge Crowds Around the Globe March in Solidarity Against Police Brutality, N.Y. Times (June 6, 2020), <https://www.nytimes.com/2020/06/06/world/george-floyd-global-protests.html> [<https://perma.cc/6AND-3V3K>].

<sup>4</sup> This July 22, 2020 session addressed racial and social justice in civil procedure.

In this Essay, first, I share a personal experience with police as part of suggesting that Black people's interactions with police might be a source of collective identity and might help us (Black proceduralists, litigators, and scholars of color) to see some of the role of racial subordination within policing and procedure.<sup>5</sup> Next, I describe some of the importance of developing a critical race analysis of civil procedure and briefly discuss some of the reasons that this analysis might be underdeveloped.

#### I. INTERACTING WITH THE POLICE AS A COLLECTIVE BLACK EXPERIENCE

My first memory of my father is also my first memory of the police.<sup>6</sup> I was almost five years old when it happened. I was riding as a passenger in my dad's car, a 1977 Dodge Monaco, as my father, who is Black and, at the time, was a bit under 30 years old, was driving. We were on our way to pick up my cousin from preschool. As my dad and I passed his high school alma mater, sheriffs pulled us over. The deputies approached the car with their guns drawn, pointed at us. They made my dad get out with his hands up, made him lay on the ground, and handcuffed him. With the amount of force that they displayed, he was scared about what they might do to me, especially if I surprised them. He told them that his 5-year-old daughter was in the car. Their response to hearing that a child was in the car was to yell out to 5-year-old me, "One move and I'll blow your head off."

The sheriffs didn't physically harm either of us in that encounter, but our safety was far from guaranteed. When I was older, my parents explained to me that the supposed reason that the sheriffs pulled us over that day was that the prior owner of the car had tampered with one letter of the license plate to make it spell out his name backwards. My dad's Irish friend had used nail polish to make a "1" look like an "I" so the license plate spelled his name (Patrick) backwards. My dad had ordered his own vanity license plate and was waiting on its arrival, but my dad hadn't even realized that Patrick had altered the current license plate. My dad had only had the car for a few weeks at most when sheriffs pulled him

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<sup>5</sup> Perhaps there might not be as much in the way of a racial analysis, or analysis integrating other aspects of marginalized identities, within civil procedure because procedural scholars may be primarily white, heterosexual, cisgender men who might not be as aware of the role of race or identity in their experiences in the same way that many people of color, women, members of the Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ) community, people who identify as gender nonbinary, and people with disabilities might be.

<sup>6</sup> To be specific, the Los Angeles County Sheriff's Department.

over, but (white) Patrick had driven the car with the altered license plates for years without any issues from police or sheriffs. A part of me wonders if some of the reason that the sheriffs reacted with such a show of force toward me and my father when they had not pulled Patrick over for the license plate issue was due to sheriffs' reactions to seeing my Black dad driving a car that, even though it was repainted to be tan and brown, clearly used to be a California Highway Patrol cruiser.

After the sheriffs forced my dad to get out of the car and questioned him, he gave consent for them to search him and the car. On that day—as I sat on the curb, with my legs in the street and watched—I had my first real life lesson on encounters with the police as a Black person. My first lesson of how Black people interact with the police to try to remain unharmed was through this experience and stories of it after.

In separate sheriff cars, they took us both down to the station and harassed him for so long that my next meal came from the station vending machine. As a five year old with no understanding of the context, I remember thinking that the deputies were so nice for giving me that tuna fish sandwich. Because I was hungry. And had no parent or guardian with me. Because they took my dad and I to the station for no reason. Instead of giving him a simple fix-it ticket, they brought criminal charges against him. My parents had to hire a lawyer and pay hundreds of dollars just to get the charges dropped.

I wonder how many other Black children have similar firsts. My father later explained that, as a Black man in a Black, working class neighborhood with his child in the car, he thought that the best and safest way for him to handle the encounter was to give consent to whatever search the police requested. Looking back, I think that he was probably right. Because the deputies stopped us with such a show of force, it is hard to imagine them peacefully accepting a refusal to search. This was my first experience in what would become an oft-repeated role as a Black girl and later woman with Black boys and men (or other boys or men of color).<sup>7</sup> Unfortunately, this type of experience is not unique for Black people in the United States. This interaction (along with many others) is

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<sup>7</sup> I mention some of the role of sex/gender and race/ethnicity in my experiences with police. I do so only to share what patterns there have been in my experiences, not to erase or ignore the experiences of Black girls and women, other girls and women of color, transgender girls and women, other members of the LGBTQ+ community, people with mental health issues or disabilities, or any other group who tends to have a heightened risk of interactions with police and are too often on the receiving end of police violence.

a part of the experiences that I have drawn from as I make life decisions. It informs my scholarship, just as others' life experiences inform their research agendas.

There are so many different directions in which this encounter could have gone. The direction that had worried my father most was that the sheriffs might have hurt or killed one or both of us, as has happened to so many other Black people. There may have been the possibility of criminal charges against the officers in that situation, but, depending on the circumstances and the political reality of the situation, there is a significant possibility that the only legal recourse left would have been civil litigation. But no civil claim against a law enforcement official or department would have been successful unless it survived summary judgment, a civil procedural hurdle.<sup>8</sup>

In a country that is, in part, founded on white supremacy,<sup>9</sup> it can feel like a losing battle to try to identify and counteract the various factors and structures that contribute to Black people being harmed by, or dying at the hands of, police. In looking at one of my own areas of expertise, it is important to understand the ways in which civil procedure encourages and excuses police violence.<sup>10</sup> When someone harmed by police (or the loved ones of someone harmed) brings suit to hold a police officer, a police department, or the city liable civilly (not criminally), the defendant (office, police department, city) may file a motion for summary judgment to ask that the judge decide the case in their own favor. Under Federal Rule of Civil Procedure 56, a judge should grant summary judgment only if there is no genuine dispute of material fact (such that the movant—here, the police officer, department, and city—is entitled to judgment as a

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<sup>8</sup> See, e.g., Shirin Sinnar, *Civil Procedure in the Shadow of Violence*, in *A Guide to Civil Procedure: Integrating Critical Legal Perspectives* [Pt. III: Procedure Immunizing Police Violence] (NYU Press) (Brooke Coleman, Suzette Malveaux, Portia Pedro, & Elizabeth Porter, eds., forthcoming 2022) (on file with author) (describing how the Supreme Court has used civil procedure, especially qualified immunity and summary judgment, to “immuniz[e] police violence”).

<sup>9</sup> Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 *Yale J. L. & Human.* 413, 427–45 (2001) (noting the Constitution's direct and indirect protections of the enslavement of African and Black peoples through various clauses including, among others, the Three-Fifths Clause, the Slave Trade Clause, the Fugitive Slave Clause, the Domestic Insurrections Clause, and the Electoral College).

<sup>10</sup> See Sinnar, *supra* note 8.

matter of law).<sup>11</sup> According to precedent, when deciding a motion for summary judgment, judges must look at the record in the light most favorable to the non-moving party (the plaintiffs who police harmed or whose loved ones have been harmed) and must draw reasonable inferences in that party's favor.<sup>12</sup> Under the doctrine of qualified immunity, police officers, their departments, and the cities for which they work are immune from civil suit—meaning that they aren't liable civilly—in certain circumstances. Qualified immunity protects the defendants from litigation if the officer did not violate a clearly established constitutional right.<sup>13</sup> Through civil procedural decisions against Black plaintiffs harmed by police, the Supreme Court has affirmed lower courts that have granted summary judgment because they found that defendants were protected by qualified immunity even when there was a genuine factual dispute that should have gone to the jury.<sup>14</sup> There might be much more if we dig beneath the surface to critically analyze civil procedure as a tool to reinforce racial subjugation.

#### A. Black Experiences with Police

Black people report a higher number of interactions with police (including police sightings) than the national average.<sup>15</sup> More contacts

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<sup>11</sup> Fed. R. Civ. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).

<sup>12</sup> *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

<sup>13</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>14</sup> See, e.g., *Scott v. Harris*, 550 U.S. 372 (2007) (holding that a police officer did not violate the Fourth Amendment by deliberately ramming his car into the car of a motorist suspected of speeding); *Sinnar*, supra note 8 (noting that *Scott v. Harris* included a factual dispute that would ordinarily have gone to a jury and that the decision “has given lower courts greater latitude to immunize police officers rather than allow juries to decide whether an officer’s use of force was reasonable.”).

It seems that no judge or justice mentioned Victor Harris's race, Black—or the race of the officer (Timothy Scott, white) who rammed Harris's car and rendered him quadriplegic—in any opinion. See Jeffrey W. Stempel, Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice, 43 *Loy. U. Chi. L.J.* 627, 642 (2012). vic2k3, *Why I Ran.*, YouTube (Dec. 9, 2009), <https://www.youtube.com/watch?v=JATVLUOjzVM> (featuring interviews with Victor Harris and Timothy Scott) [<https://perma.cc/3F4F-8CUM>].

<sup>15</sup> Lydia Saad, Black Americans Want Police to Retain Local Presence, Gallup, 2020, [news.gallup.com/poll/316571/black-americans-police-retain-local-presence.aspx21](https://news.gallup.com/poll/316571/black-americans-police-retain-local-presence.aspx21) (last visited Nov 3, 2020) [<https://perma.cc/M5NT-44QR>]. More Black people than white people report seeing police in our neighborhoods “often or very often.” *Id.*

between Black people and police means greater exposure of Black people to the “possibility of violence” at the hands of the police.<sup>16</sup> Of reported experiences with police, over 40% of Black people’s experiences with police are not positive, while only 25% of white people’s reported experiences with police are not positive.<sup>17</sup> Generally, Black people’s level of confidence in police differs from, and is lower than, white people’s level of confidence in the police more than those groups’ confidence levels differ on almost any other social institution.<sup>18</sup> Perhaps in part

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<sup>16</sup> Devon W. Carbado, *Predatory Policing*, 85 *UMKC L. Rev.* 545, 561 (2017); see also Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 *Calif. L. Rev.* 125, 128 (2017) (explaining “the significant ‘circuits of violence’ through which the ordinary (African Americans’ vulnerability to ongoing police surveillance and contact) becomes the extraordinary (serious bodily injury and death). . . . For there is a direct relationship between the scope of ordinary police authority, on the one hand, and African American vulnerability to extraordinary police violence, on the other.”); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 *Geo. L. J.* 1479, 1509–11 (2016) (further describing the Police Violence Model). The Police Violence Model of Professor Devon Carbado and Patrick Rock explains why a higher level of police interactions creates a higher risk of police violence for Black people:

- First, the simple fact of repeated police interactions overexposes African Americans to the possibility of police violence.
- Second, the fact that African Americans’ exposure to the police occurs against the background of stereotypes of African Americans as violent and dangerous increases the likelihood that police officers will interact with African Americans from the perspective that violent force is both necessary and appropriate.
- Third, the more exposed African Americans are to the police, the greater the probability that they will be arrested.
- Fourth, black peoples’ repeated exposure to the police potentially increases their incarceration rates or facilitates some form of system involvement, and the incarceration and system involvement of African Americans likely mediates how police officers interact with black people. . . .
- Fifth, the more numerous African Americans’ contacts with the police are, the more vulnerable African Americans are to a set of violence-producing insecurities or vulnerabilities police officers experience in the context of police encounters.

Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 *Harv. C.R.-C.L. L. Rev.* 160, 164–65 (2016).

<sup>17</sup> Camille Lloyd, *For Black Americans, 41% of Police Encounters Not Positive*, Gallup (July 30, 2020), <https://news.gallup.com/poll/316247/black-americans-police-encounters-not-positive.aspx> (last visited Nov 3, 2020) [<https://perma.cc/M5HX-8CGN>].

<sup>18</sup> See Jeffrey M. Jones, *Black, White Adults’ Confidence Diverges Most on Police*, Gallup (Aug. 12, 2020), <https://news.gallup.com/poll/317114/black-white-adults-confidence-diverges-police.aspx> (last visited Nov 3, 2020) (noting that 56% of white adults say that “they have ‘a great deal’ or ‘quite a lot’ of confidence in the police” while only 19% of Black adults say the same) [<https://perma.cc/5A3A-HB42>]. “This 37-percentage-point racial gap is the largest found for any of 16 major U.S. institutions rated in Gallup’s annual Confidence in Institutions poll.” *Id.* There was only a gap of 5% or less in levels of confidence for half of rated institutions. *Id.* The only other institution for which Black and white respondents’ ratings

because of these higher levels of exposure to police, higher levels of police encounters that aren't positive, and lower levels of confidence in police, the Black Census Project reported that, in 2019, "[t]he vast majority of Black Census respondents see the excessive use of force by police officers (83 percent) and police officers killing Black people (87 percent) as problems."<sup>19</sup> These experiences and perspectives of police are common among many Black people regardless of lines of class, education, and social opportunity. Professor Devon Carbado has shared how his own experiences with the police, even as an elite Black legal scholar, are fraught with "questions [that] are part of black people's collective consciousness."<sup>20</sup> Recent attention called to police murdering Black people has "presented a readily discernible target around which to organize."<sup>21</sup> In the context of police killings and other extrajudicial killings of Black people, there is "enough similarity between [our] life experiences . . . to warrant collective political action."<sup>22</sup>

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are nearly as large is a 33-percentage-point gap in levels of confidence in President Trump's administration. *Id.*

<sup>19</sup> Aaron Ross Coleman, *How Black People Really Feel About the Police, Explained*, Vox (June 17, 2020, 8:30 AM) <https://www.vox.com/2020/6/17/21292046/black-people-abolish-defund-dismantle-police-george-floyd-breonna-taylor-black-lives-matter-protest> [<https://perma.cc/VCT2-4LSJ>] (quoting *More Black than Blue: Politics and Power in the 2019 Black Census*, Black Futures Lab 8 (June 2019), <https://blackfutureslab.org/wp-content/uploads/2019/06/Digital-More-Black-Than-Blue-2.pdf> [<https://perma.cc/NS9F-S68H>]); see also Drew Desilver, Michael Lipka & Dalia Fahmy, *10 Things We Know About Race and Policing in the U.S.*, Pew Research Center, 2020, <https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/> (last visited Nov 3, 2020) [<https://perma.cc/9QL9-LL5U>]. 33% "of Black adults said that police in their community did an 'excellent' or 'good' job in using the right amount of force (compared with 75% of white[] [people]), treating racial and ethnic groups equally (35% vs. 75%), and holding officers accountable for misconduct (31% vs. 70%)." *Id.*

<sup>20</sup> These questions are part of Black people's collective consciousness:

I have not, however, been able to normalize my experiences with the police. They continue to jar me. The very sight of the police in my rear view mirror is unnerving. Far from comforting, this sight of justice (the paradigmatic site for injustice) engenders feelings of vulnerability: How will I be over-policed this time? Do I have my driver's license, insurance, etc.? How am I dressed? Is my UCLA parking sticker visible? Will any of this even matter? Should it?

And what precisely will be my racial exit strategy this time? How will I make the officers comfortable? Should I? Will I have time—the racial opportunity—to demonstrate my respectability? Should I have to? Will they perceive me to be a good or a bad Black?

Devon W. Carbado, (E)rasing the Fourth Amendment, 100 Mich. L. Rev. 946, 952 (2002).

<sup>21</sup> Crenshaw, *Race*, supra note 2, at 1384.

<sup>22</sup> *Id.* at 1384.

*B. Shared Experience with Policing as a Source of Black Collectivity and Mobilization to Support Black Interests and Lives*

Personal experiences with, and data on, the policing of Black bodies in the United States may shed light on a collective experience among many Black people and, perhaps, more broadly, many people of color.<sup>23</sup> Policing is one area in which many of us continue to experience racism in similar debilitating and dangerous ways, often regardless of income, level of education, and access to other opportunities. The national spotlight, education, concern, and momentum galvanized by Summer 2020 mobilizations against police killings of Black people provides what may have become an otherwise increasingly rare opportunity for a Black collective identity<sup>24</sup> and action supporting Black lives. Policing seems to be a great equalizer of what could otherwise be a fragmented Black society in the United States. Many of us (Black people) experience interactions with the police similarly to the extent that the experience remains one of collectivity and has become a central part of the essence of what it means to be Black—the ability to be murdered without cause and without redress. This moment of mobilized Black collectivity comes, however, at a time when prior civil rights victories for Black people and other marginalized communities continue to be threatened. A good understanding of the relationship between these two oppositional mobilizations can help anti-subordination litigants, lawyers, and scholars to maximize litigation victories and to minimize losses.

For Black people, this moment—of mobilized Black collectivity with the potential for interest convergence at the same time that past victories

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<sup>23</sup> I refer to “people of color” throughout this Essay intending to include Black, Latinx, Asian Americans, Native Americans, and other Indigenous peoples, Arab Americans, and other racialized groups (non-whites). I do so understanding that this term groups people who have some shared experiences, but the term might also be problematic in that it does not emphasize differences in how these various communities, and others within them, might experience racism and other sources of oppression. See Meera E. Deo, *Why BIPOC Fails*, 107 *Va. L. Rev. Online* 115, [Pt. II When Unity Leads to Erasure] (2021).

<sup>24</sup> See Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 *Socio. Theory* 335 (2016) (discussing the ways in which a routine infliction of harm on a subordinated group can constitute collective trauma and cultural trauma); see also Jalila Jefferson-Bullock & Jelani Jefferson Exum, *That Is Enough Punishment: Situating Defunding the Police Within Antiracist Sentencing Reform*, 48 *Fordham Urb. L.J.* 625, 636–41 (2021) (discussing the ways in which Black people in the United States are experiencing a racial and cultural trauma from recent police killings of Black people).

are threatened—is rare although not without precedent.<sup>25</sup> A time of strong, shared, collective Black identity with the sociopolitical support to undo our structural subordination is singular, in part, because of the prior meaningful gains in opportunities for some Black people.<sup>26</sup> Much of the formal symbolic subordination of Black people has been illegal and disallowed for longer than my lifetime.<sup>27</sup> As Professor Kimberlé Crenshaw has noted, Black people may have lost much of our

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<sup>25</sup> See Richard Gergel, *Unexampled Courage: The Blinding of Sgt. Isaac Woodard and the Awakening of President Harry S. Truman and Judge J. Waties Waring* 4–5 (2019) (describing how the acquittal of a white police chief in the beating and blinding of a Black World War II Army veteran prompted the presiding judge to issue a series of landmark civil rights decisions). See generally Richard Delgado, *Why Obama?: An Interest Convergence Explanation of the Nation's First Black President*, 33 *L. & Ineq.* 345 (2015) (discussing the election of President Barack Obama as a moment of interest convergence between people of different backgrounds); William M. Carter, Jr., *The Thirteenth Amendment and Interest Convergence*, 71 *Md. L. Rev.* 21 (2011) (exploring interest convergence in the passage of the Thirteenth Amendment to the U.S. Constitution); Sheryll Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 *St. John's L. Rev.* 253, 255 (2005) (discussing interest convergence in the Civil Rights Era); Marisa Abrajano & Zoltan L. Hajnal, *White Backlash: Immigration, Race, and American Politics* 2 (2017) (discussing the interrelation between opinions on immigration and relations between racial and ethnic groups within the United States); Kevin M. Kruse, *White Flight: Atlanta and the Making Of Modern Conservatism* 13–15 (2013) (discussing the effect of desegregation and white flight on shifting political coalitions in Atlanta); Gregory S. Jacobs, *Getting Around Brown: Desegregation, Development, and The Columbus Public Schools* xii–xiii (1998) (discussing the interrelation between race, class, and politics in response to desegregation in Columbus, Ohio); see also Ta-Nehisi Coates, *The First White President*, *The Atlantic* (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/> [<https://perma.cc/FE5H-4YTA>] (discussing the coalition of white classes whose alignment culminated in the 2016 election of President Donald Trump).

<sup>26</sup> Crenshaw, *Race*, *supra* note 2, at 1383–84.

<sup>27</sup> See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (finding that segregation in public schools violates the Equal Protection Clause even if physical facilities were relatively equal); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that a state violates the Fifteenth Amendment when it constructs jurisdictional boundary lines with the purpose of denying equal representation to Black voters); *Bailey v. Patterson*, 369 U.S. 31 (1962) (finding that states may not require racial segregation of transportation facilities); Civil Rights Act of 1964, Pub. L. no. 88-353, 78 Stat. 241 (1964) (outlawing literacy tests as a qualification for voting in federal elections unless certain protections were observed); *Loving v. Virginia*, 388 U.S. 1 (1967) (finding that statutes outlawing interracial marriage violated the Fourteenth Amendment and the Equal Protection and Due Process Clauses); Fair Housing Act of 1968, 42 U.S.C. §§ 3601 et seq. (outlawing discrimination in the sale or rental of housing); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that racially restrictive covenants violate the Equal Protection Clause).

collectivity<sup>28</sup> due to the formal reforms of the civil rights victories.<sup>29</sup> The reforms of the civil rights movement made it so fewer Black people experience racism in collective ways that are similar to each other.<sup>30</sup> This is particularly true for Black people with greater access to capital than others. The formal end of the apartheid regime in the United States left Black people more fractured because those reforms let some of us improve our material situations much more than others.<sup>31</sup>

While many of the current efforts to protect Black lives will aim at changing police training, defunding police, or abolishing police, much of this effort inspired by the Movement for Black Lives will also aim at compensating Black people and our families through the legal process.<sup>32</sup> Historically, demands of movements inspired by Black collective identity are not typically limited to ending one singular condition or phenomenon (such as police murders of Black people), but also traditionally insist on the inclusion of Black people in the U.S. “political imagination,” even beyond policing.<sup>33</sup>

## II. THE CURRENT IMPORT OF A CRITICAL RACE THEORETICAL ACCOUNT OF CIVIL PROCEDURE

There is arguably not yet a “Whiteness as Procedure,”<sup>34</sup> an “(E)racing the Fourth Amendment,”<sup>35</sup> or a critical race civil procedure term as ubiquitous as intersectionality<sup>36</sup> is in constitutional law and civil rights. A

<sup>28</sup> Crenshaw, *Race*, supra note 2, at 1383 n. 197: (“By ‘collectivity,’ I refer to the recognition of common interests and the benefits derived by Blacks of all classes in sharing the burdens of social struggle. The potential for collective struggle is maximized where the grievance is shared by all. It was clear that racial segregation, for example, affected all Blacks. The creation of opportunity for some Blacks—however small the number may be—can obscure the degree to which Blacks have common interests that warrant continual collective struggle.”).

<sup>29</sup> *Id.* at 1383–84.

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

<sup>31</sup> *Id.* at 1381–84.

<sup>32</sup> See, e.g., Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 *J. Legal Educ.* 352, 357–58, 370 n.73 (2015); Kwadwo Frimpong, *Black People Are Still Seeking Racial Justice—Why and What to Do About It*, Brookings Inst. (Nov. 12, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/11/12/black-people-are-still-seeking-racial-justice-why-and-what-to-do-about-it/> [<https://perma.cc/3E6E-4ZC3>].

<sup>33</sup> Crenshaw, *Race*, supra note 2, at 1365.

<sup>34</sup> See Cheryl I. Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1707, 1714 (1993).

<sup>35</sup> See Carbado, supra note 20.

<sup>36</sup> See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. Chi. Legal F.* 139, 141–52.

primary purpose of critical race theory is to “reveal[] the ways in which racial subordination is embedded in social structures and bureaucracies.”<sup>37</sup> Within law and litigation, civil procedure provides the structure for deciding who can bring a claim to court to request a remedy for the harms that they have suffered. To prevent civil procedure from reinforcing, or continuing to reinforce, racial subjugation, we need to understand how these seemingly technocratic or neutral rules and doctrine are already deployed in ways that reinforce existing hierarchies including white supremacy. Part of this project is to develop an understanding of what I call “procedural identity”—how aspects of identity, including race, sex, gender identity, sexual orientation, disability, and religion have affected (and been affected by) procedural standards. Mapping out procedural identity within civil procedure could be an impetus for changing procedural standards in a way that prevents further subjugation of marginalized groups.

In this Essay, I do not attempt to resolve the longstanding debate over the legitimacy or efficacy of rights discourse.<sup>38</sup> But civil rights reform may play a role in the continued subordination of Black people by “creat[ing] the illusion that racism is no longer the primary factor responsible for the condition of the Black underclass.”<sup>39</sup> Civil rights reform may have increased “access to the dominant framework”<sup>40</sup> without challenging, questioning, or changing the underlying subordination.

A critical race analysis of civil procedure within the context of police violence reveals areas of procedure that generally will not provide justice for Black people harmed by police. Some of those doctrinal areas, such as summary judgment in police brutality cases, do not need reform. They

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<sup>37</sup> Portia Pedro, *Forging Fortuity Against Procedural Retrenchment: Developing a Critical Race Theoretical Account of Civil Procedure*, in *A Guide to Civil Procedure: Integrating Critical Legal Perspectives* (NYU Press) (Brooke Coleman, Suzette Malveaux, Portia Pedro, & Elizabeth Porter, eds., forthcoming 2022) (on file with author).

<sup>38</sup> For descriptions of, and views on, the legitimacy and efficacy of rights discourse, see Crenshaw, *Race*, *supra* note 2, at 1381.

<sup>39</sup> *Id.* at 1381. (“[T]he very transformation afforded by legal reform itself has contributed to the ideological and political legitimation of continuing Black subordination.”); see also Bernard E. Harcourt, Foreword: “You Are Entering a Gay and Lesbian Free Zone”: On the Radical Dissents of Justice Scalia and Other (Post-) Queers. [Raising Questions About Lawrence, Sex Wars, and the Criminal Law], 94 *J. Crim. Law & Crimin.* 503, 510 (2004). (arguing that “to properly understand Lawrence—and other sex and cultural wars—we need a much finer grained understanding of sexual projects and of the fragmentation of those projects.”).

<sup>40</sup> Harcourt, *supra* note 39, at 534.

need radical transformation. Although civil rights litigation may provide relief to some Black people (and others) harmed by police, there is still a need for something akin to a “politics of spleen”<sup>41</sup> that others have described for the LGBTQ community.<sup>42</sup> A “politics of spleen” incorporates “the need to transgress limits that do not make room for all of us.”<sup>43</sup>

Perhaps more post-slavery Black people living in the segregated, apartheid, Jim Crow era had a similar sort of politics of spleen. The existence and life of a free Black person explicitly threatened the fundamental sociopolitical and cultural structure of the United States and was, in and of itself, a transgression. This politics of spleen might help to explain why numerous Black people and organizations thought that the only way that Black people would be fed,<sup>44</sup> that Black children would learn,<sup>45</sup> that Black people would be gainfully employed,<sup>46</sup> and that Black

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<sup>41</sup> Although I attempt to give something of a definition of “politics of spleen” in the text, I worry that there is still something lost in the summary that might be better described in a quotation:

Perhaps the best or only way to express this politics, then, is through a pastiche of post-queer venom. It has something to do with “*the intense charge that comes with transgression and the pleasure of that transgression.*” It involves “*an alternate culture in and around it, to be taken seriously, and left alone.*” It is a “*boundary-free zone in which fences are crossed for the fun of it, or simply because some of us can’t be fenced in. It challenges either/or categorizations in favor of largely unmapped possibility.*” It is nostalgic, transgressive, full of hope and hopeless at the same time.

Id. at 534. (internal citations omitted). Something in this reminds me of what I’ve read about the Black Panther Party and other Black people armed in self-defense and fighting for liberation, but much of that was before my time, so I am not sure where these experiences differ and converge.

<sup>42</sup> Harcourt, *supra* note 39, at 534.

<sup>43</sup> Harcourt, *supra* note 39, at 532 (quoting Carol Queen & Lawrence Schimel, Introduction to *PomoSexuals: Challenging Assumptions about Gender and Sexuality* 19, 21–23 (Carol Queen & Lawrence Schimel eds., 1997)).

<sup>44</sup> See, e.g., Husain Lateef & David Androff, “Children Can’t Learn on an Empty Stomach”: The Black Panther Party’s Free Breakfast Program, 44 *J. Soc. & Soc. Welfare* 3 (2017); Erin Blakemore, How the Black Panthers’ Breakfast Program Both Inspired and Threatened the Government, *History* (last updated Jan. 29, 2021), [history.com/news/free-school-breakfast-black-panther-party](https://www.history.com/news/free-school-breakfast-black-panther-party) [https://perma.cc/8Q98-LE2Z]; History.com Editors, Black Panthers, *History* (last updated Jan. 26, 2021), [history.com/topics/civil-rights-movement/black-panthers](https://www.history.com/topics/civil-rights-movement/black-panthers) [https://perma.cc/KU4P-9YK2].

<sup>45</sup> See, e.g., Hakim M. Rashid & Zakiyyah Muhammad, The Sister Clara Muhammad Schools: Pioneers in the Development of Islamic Education in America, 61 *J. Negro Ed.* 178 (1992).

<sup>46</sup> See, e.g., Nafeesa Muhammad, The Nation of Islam’s Economic Program, 1934-1975, *Blackpast* (Apr. 1, 2020), <https://www.blackpast.org/african-american-history/the-nation-of-islams-economic-program-1934-1975/> [https://perma.cc/XT27-W9CZ].

people would be safe<sup>47</sup> was if we took those responsibilities upon ourselves and did not expect the liberal state to embrace us.

That we may have lost this politics of spleen in the context of police violence through assimilationist civil rights reform might have been unavoidable in some ways. As Professor Bernard Harcourt has described, “the politics of *spleen* may be fundamentally unstable in the criminal law context.”<sup>48</sup> It may be that the politics of spleen only existed in its true form in the U.S. LGBTQ community before *Lawrence v. Texas*,<sup>49</sup> which held that a state criminal prohibition on sodomy was unconstitutional,<sup>50</sup> because “who in their right mind would want to live in fear of criminal prosecution” and “how would they justify imposing that fear on others? . . . Perhaps the politics of spleen, in reality, is nothing more than a coping mechanism—a way of making the best of a terrible situation.”<sup>51</sup> If the politics of spleen is also fundamentally unstable in the context of police killings of, and violence inflicted upon, Black people, then much of the discussions about protecting Black lives through law will center on a civil rights framework.

Because liberal reform has given us some of the rights toward inclusion in the U.S. political experience and imagination, demands and goals of the activity galvanized by the Movement for Black Lives will not all be extra-institutional.<sup>52</sup> While some organizers are calling for police abolition, prison abolition, or both, there is not a widespread call for abolishing courts. Or at least there is not such a call yet. Several reforms and goals will be within institutions and especially within the courts.<sup>53</sup>

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<sup>47</sup> See, e.g., Lateef & Androff, *supra* note 44, at 11.

<sup>48</sup> Harcourt, *supra* note 39, at 548–49.

<sup>49</sup> 539 U.S. 558 (2003).

<sup>50</sup> *Id.* at 578–79, 585.

<sup>51</sup> Harcourt, *supra* note 39, at 548–49.

<sup>52</sup> Akbar, *supra* note 32, at 358. (noting that the Movement for Black Lives has protested inequality in the law while also calling for special prosecutors, civilian review boards, and police indictments in response to police killings of Black people).

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Challenges and demands made from outside the institutional logic would have accomplished little because Blacks, as the subordinate “other,” were already perceived as being outside the mainstream. The struggle of Blacks, like that of all subordinated groups, is a struggle for inclusion, an attempt to manipulate elements of the dominant ideology to transform the experience of domination. It is a struggle to create a new status quo through the ideological and political tools that are available.

Crenshaw, *Race*, *supra* note 2, at 1386; see also Michael D. White, Henry F. Fradella, Weston J. Morrow & Doug Mellom, *Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the *Floyd* Ruling on Stop-and-Frisk Activities in*

I admit the possible futility in ever attempting to use “the master’s tools” to “dismantle the master’s house.”<sup>54</sup> But generations of lawyers and legal scholars have engaged in litigation and legal scholarship in attempts to prevent the continued or further subjugation of Black people and others, so it hardly seems outside of expectation to attempt to prevent civil procedural rules and doctrine from being deployed to maintain or further subjugate marginalized people.

Moreover, the law itself is not “the master’s tools.” Civil procedure only becomes “the master’s tools” if we allow procedural doctrine, rules, and mechanisms to be deployed in a way that reinforces white supremacy, misogyny, homophobia, ableism, bigotry, etc. Activist, poet, and social and feminist theorist Audre Lorde questioned and answered, “What does it mean when the tools of a racist patriarchy are used to examine the fruits of that same patriarchy? It means that only the most narrow perimeters of change are possible and allowable.”<sup>55</sup> In this statement, Lorde was not disavowing every use of any existing social structure or institution. Instead, Lorde was saying that a conference on feminist theory that did not include “significant input from poor women, Black and Third World women, and lesbians” was “sad, in a country where racism, sexism, and homophobia are inseparable.”<sup>56</sup> That the conference planners deployed “the tools of a racist patriarchy”—racism, classism, and homophobia—when they put together discussions on feminist theory guaranteed that they would not be moving toward genuine change.<sup>57</sup> Attempting to use the law and civil procedure to bring about equity and social transformation for Black people and other marginalized communities is not using “the master’s tools”; it’s struggling against them.<sup>58</sup> To wage

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New York City, 14 Ohio St. J. Crim. L. 9, 35–46 (2016) (discussing how “federal courts are often called upon” to address discriminatory stop-and-frisk police practices against Black people); Paul Burstein, Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity, 96 Am. J. Soc. 1201, 1204 (1991) (“It is, in fact, impossible to understand the American struggle for equal opportunity without focusing on the courts and on activities intended to influence judicial decisions.”).

<sup>54</sup> See Audre Lorde, *The Master’s Tools Will Never Dismantle the Master’s House*, in *Sister Outsider* 110 (1984).

<sup>55</sup> See *id.* at 110–11.

<sup>56</sup> See *id.* at 110.

<sup>57</sup> See *id.* at 110–12.

<sup>58</sup> See *id.* at 112 (discussing learning “how to make common cause with those others identified as outside the structures in order to define and seek a world in which we can all flourish” as part of a way to “bring about genuine change”).

these fights (particularly litigation to hold police accountable),<sup>59</sup> we need to develop an understanding of the relationship between racial subordination and civil procedure. If that understanding shows that civil procedure, portions of it, or the entirety of the U.S. federal court system is intractably reinforcing white supremacy (or any other type of group subordination), then perhaps there should be calls to abolish those portions of procedure (or the entire court system) along with ideas of what rules, doctrines, or types of structures we should have instead.

*A. Potential Reasons for the Underdevelopment of the Discussion*

There is less of a comprehensive theoretical description of the mutually constitutive and reinforcing relationship between civil procedure and racial subjugation or white supremacy than exists in some other areas.<sup>60</sup>

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<sup>59</sup> See Sinnar, *supra* note 8.

<sup>60</sup> For civil procedure, see Roy Brooks, *Critical Procedure* (1998) (applying a criticalist theory approach to investigate the subordination of “outsider” groups like people of color and women in civil procedure). For corporations, see Richard R.W. Brooks, *Incorporating Race*, 106 *Colum. L. Rev.* 2023 (2006) (discussing the implications of recent court decisions ruling that corporations possess racial identities “as a matter of law”). For criminal procedure, see Devon W. Carbado, (E)racing the Fourth Amendment, 100 *Mich. L. Rev.* 946, 967–68 (2002); Tracey Maclin, “Black and Blue Encounters”—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 *Val. U. L. Rev.* 243, 250 (1991); Tracey Maclin, *Race and the Fourth Amendment*, 51 *Vand. L. Rev.* 333, 392 (1998). For antidiscrimination and constitutional law, see T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 *U. Colo. L. Rev.* 325, 326 (1992); Kimberlé Williams Crenshaw, *Race*, *supra* note 2, at 1335 (1988); Eric Schnapper, *Perpetuation of Past Discrimination*, 96 *Harv. L. Rev.* 828, 831 (1983); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *Minn. L. Rev.* 1049, 1050 (1978). For evidence law, see Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 *Minn. L. Rev.* 2243 (2017) (explaining how evidence law and practice disadvantage people of color). For tax, see Andre L. Smith, *Tax Law and Racial Economic Justice: Black Tax 1* (2015) (discussing the role of tax law in redistributing wealth from Black to white persons); *Critical Tax Theory: An Introduction* (Anthony C. Infanti & Bridget J. Crawford, eds., 2009) (revealing how facially “neutral” tax laws contribute to racial subordination); David Brennen, *Race and Equality Across the Law School Curriculum: The Law of Tax Exemption*, 54 *J. Legal Educ.* 336–37 (2004); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 *Wis. L. Rev.* 751 (1996) (arguing that the tax code systematically favors white over Black persons); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 *Wash. & Lee L. Rev.* 1469, 1471 (1997). For property, see Cheryl I. Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1707, 1714 (1993). For election law and voting rights, see Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor’s Clothes*, 71 *Tex. L. Rev.* 1589, 1641–42 (1993); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 *Harv. L. Rev.* 1663, 1670 (2001).

Critical Race Theory (CRT) might be underdeveloped in civil procedure because it could seem to be the most technical, objective legal discourse, an area of “perspectivelessness.”<sup>61</sup> One could easily assume that “no specific cultural, political, or class characteristics” have any relevance for procedure and that procedural arguments and decisions come from no “particular perspective in legal analysis.”<sup>62</sup> It might seem that discussions of racial justice would fall largely or exclusively within the domain of constitutional law, criminal law, or criminal procedure. Additionally, proceduralists might be less likely to realize the importance of racial subordination in procedure.

Perhaps in part due to the absence of a comprehensive scholarly theoretical account of racial implications of procedure, most civil procedure classes might not discuss the relationship between racial subordination and civil procedure. Scholars might be less likely to recognize and build upon the roles of race and identity in procedure if those topics haven’t been a part of their procedural discussions beginning at least in law school.

CRT in civil procedure might be underdeveloped because many (white) scholars and professors may only realize, or think that they should discuss, the importance of racial subordination in procedure if they’ve found what I refer to as a “Magical Negro”<sup>63</sup> case, casebook, or scholarly topic. The Magical Negro is a term popularized by film director Spike Lee<sup>64</sup> that describes a stereotypical, supporting Black movie character “who, through their special insight or mystical powers, aids the white

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For examples specific to teaching, see Dorothy A. Brown, *Critical Race Theory: Cases, Materials, and Problems* (3rd ed. 2013); Kevin R. Johnson, Integrating Racial Justice into the Civil Procedure Survey Course, 54 *J. Legal Educ.* 242 (2004); Taunya Lovell Banks, Teaching Laws with Flaws: Adopting a Pluralistic Approach to Torts, 57 *Mo. L. Rev.* 443 (1992).

<sup>61</sup> It would seem that someone could easily assume that procedural rules embody the most technical, objective legal discourse and that no “particular perspective in legal analysis” and “no specific cultural, political, or class characteristics” have any relevance. Kimberlé Williams Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 *Nat’l Black Law J.* 1, 2–3 (1989), (defining “perspectivelessness” as the dominant mode of white, middle class beliefs).

<sup>62</sup> *Id.* at 2.

<sup>63</sup> See Matthew W. Hughey, Cinethetic Racism: White Redemption and Black Stereotypes in “Magical Negro” Films, 56 *Soc. Probs.* 543, 544 (2009).

<sup>64</sup> Andrea Freeman, Unmothering Black Women: Formula Feeding as an Incident of Slavery, 69 *Hastings L.J.* 1545, 1589 (2018); Susan Gonzalez, Director Spike Lee Slams ‘Same Old’ Black Stereotypes in Today’s Films, 29 *Yale Bulletin*, Mar. 2, 2001, <http://archives.news.yale.edu/v29.n21/story3.html> [<https://perma.cc/Y2GD-8WMH>].

main character in his or her character development.”<sup>65</sup> The Magical Negro’s powers “are used to transform disheveled, uncultured, lost, or broken white characters into competent, successful, and content people within the context of the American myth of redemption and salvation.”<sup>66</sup> In much the same way of the Hollywood stereotype, the race-relevant case, casebook, or topic might only be good enough to play, at best, a supporting role, to all of the white-perspective or seemingly neutral cases if the race-relevant case is perfect or “saintly” and the material would serve the “sole purpose” of enriching the white cases around it.<sup>67</sup>

Even if this comparison may be somewhat extreme, civil procedure scholars don’t seem to set anywhere nearly as high of a standard for non-race relevant (or non-marginalized group relevant) cases, casebooks, or topics. We are always supposed to look for and to discuss fairness, efficiency, and other ostensibly identity-neutral concepts seen as central to procedure, but some procedural scholars might only consider the role of race and racial subordination within procedure if someone presents them with the “Magical Negro” case, casebook, or topic. Such absurdly high expectations for cases or scholarly projects that prompt thought about racial subordination could guarantee that some professors who think of themselves as supportive of racial equality, and as against racial subordination, might never engage race-relevant materials in their scholarship, classes, or litigation.

Some scholars may hesitate to explore race (or other aspects of identity) and subordination within procedure unless a perfect opportunity presents itself—either the perfect “race” scholarship project, the perfect case, or the perfect casebook. For teaching, there are numerous civil

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<sup>65</sup> I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 *N.Y.U. L. Rev.* 1, 12–13 n.56 (2019) (citing Cerise L. Glenn & Landra J. Cunningham, *The Power of Black Magic: The Magical Negro and White Salvation in Film*, 40 *J. Black Stud.* 135, 135 (2009)).

<sup>66</sup> DeShayla M. Strachan, *The Triple Threat: The Black, Female Attorney*, 11 *S.J. Pol’y & Just.* 112, 119 (2017); see also Osamudia R. James, *Valuing Identity*, 102 *Minn. L. Rev.* 127, 148 n.98 (2017).

<sup>67</sup> Freeman, *supra* note 64, at 1589.

procedure cases,<sup>68</sup> doctrines,<sup>69</sup> casebooks,<sup>70</sup> and other materials<sup>71</sup> discussing race.<sup>72</sup> When presented with materials to use that are relevant to race and racial justice, some professors require that any race-relevant material meet standards far beyond that which they require for any other class material. As examples, some professors would be happy to teach materials that involve race in civil procedure if there were a single race-relevant case that they could use to teach every section of the syllabus. Others would only want to engage with racial subordination in the classroom if there were an accompanying novel specifically about the case to assign the class. And others still would only teach or think about race in civil procedure if the relevant material were integrated in their preferred casebook (which doesn't include the material). Civil procedure professors who want to engage with cases and doctrine that relate to racial injustice should stop this pretense of a search for the mythical "Magical Negro" case, casebook, or scholarly project. Our jobs as scholars and

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<sup>68</sup> See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (establishing a plausibility standard for pleadings in a case involving a Muslim, Pakistani litigant alleging top government officials were liable for discriminatory treatment and abuse in prison); *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18 (1981) (finding that the due process clause did not require the state to appoint an attorney for indigent parents in danger of losing their parental rights in a case involving an indigent, Black mother); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) (holding that the party asserting summary judgment has the burden of showing a lack of factual controversy where a lunch counter had won on summary judgment after turning a teacher and Black students away and having them arrested); *Scott v. Harris*, 550 U.S. 372 (2007) (holding that a police officer did not violate the Fourth Amendment by deliberately ramming his car into the car of a motorist suspected of speeding); *Hansberry v. Lee*, 311 U.S. 32 (1940) (holding that res judicata may not bind plaintiffs who had no opportunity to be represented in earlier actions in a case involving racially restrictive covenants that barred Black persons from owning or leasing land); *Martin v. Wilks*, 490 U.S. 755 (1989) (allowing white firefighters to challenge consent decrees meant to ensure that Black people would be hired as firefighters in Birmingham, Alabama); *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010) (holding that a Black homeowner's complaint alleging Fair Housing Act violation met the plausibility pleading standards articulated by *Iqbal*).

<sup>69</sup> For example, due process, the right to counsel, pleading standards and motions to dismiss, peremptory challenges, and class actions.

<sup>70</sup> For example, Stephen N. Subrin, Martha L. Minow, Mark S. Brodin, Thomas O. Main & Alexandra Lahav, *Civil Procedure: Doctrine, Practice, and Context* 1188 (5th ed. 2016), which includes a significant case file (that is integrated in problems and discussions throughout the book) for *Warner v. City of New York*, a class action challenging an allegedly racially discriminatory policing stop-and-frisk policy that is based on *Floyd v. City of New York* (Floyd III), 861 F. Supp. 2d 274 (S.D.N.Y. 2012).

<sup>71</sup> See, e.g., Kevin M. Clermont, ed., *Civil Procedure Stories* (2d ed. 2008) (providing a deeper understanding of significant civil procedure cases, including the social and factual backgrounds).

<sup>72</sup> See Johnson, *supra* note 60 at 242 (2004).

teachers include learning, teaching, and building scholarly projects around different complicated ideas and concepts. If we have put in the time, or sought out resources, to learn about law and economics or any other type of framework and we incorporate that into our classrooms or scholarship, then we could and should do the same with race, racism, and racial subordination. If we aren't thinking, teaching, or writing about how civil procedure affects Black people and other marginalized groups, we are likely cultivating generations of lawyers, scholars, legal instructors, and judges who accept and promote the dominant white hegemonic view of procedure as neutral and we are marginalizing students who know better.

### *B. Why Now?*

Some may wonder if there is less of a need to fight against the subjugation of marginalized groups now that Donald Trump is no longer in office. But the threat of racial subordination does not end solely based on a Democrat (in the current time, President Joe Biden) or someone other than Donald Trump having won the 2020 presidential election. While Donald Trump serves as a lightning rod or focal point in the current public resurgence of white supremacy and movements to strip marginalized groups of rights, privileges, and benefits,<sup>73</sup> the potential attempt to retrench civil rights and maintain marginalization of various communities does not necessarily depend on Trump being President, there being a Republican president, or Republicans having control of Congress. As

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<sup>73</sup> See, e.g., Kevin Roose, *What Is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. Times (Oct. 19, 2020), <https://www.nytimes.com/article/what-is-qanon.html> [<https://perma.cc/4V69-GYXM>]; Russell Berman, *Trump Fails the QAnon Test*, The Atlantic (Oct. 15, 2020), <https://www.theatlantic.com/politics/archive/2020/10/trump-qanon-denounce/616751/> [<https://perma.cc/56J7-Q9PG>]; Alex Kaplan, *Trump has Repeatedly Amplified QAnon Twitter Accounts. The FBI Has Linked the Conspiracy Theory to Domestic Terror*, Media Matters (Jan. 11, 2021, 4:30 PM), <https://www.mediamatters.org/twitter/fbi-calls-qanon-domestic-terror-threat-trump-has-amplified-qanon-supporters-twitter-more-20> [<https://perma.cc/8CY6-VV2N>]; Sarah McCammon, *From Debate Stage, Trump Declines to Denounce White Supremacy*, NPR (Sept. 30, 2020, 12:37 AM), <https://www.npr.org/2020/09/30/918483794/from-debate-stage-trump-declines-to-denounce-white-supremacy> [<https://perma.cc/7DDU-GGJ5>]; Matt Pearce, *Q&A: What Is President Trump's relationship with far-right and white supremacist groups?*, L.A. Times (Sept. 30, 2020, 7:42 PM), <https://www.latimes.com/politics/story/2020-09-30/la-na-pol-2020-trump-white-supremacy> [<https://perma.cc/9E88-AW92>]; Sarah Mizes-Tan, *Experts Warn The Threat of Violence From Far-Right Groups Can Impact Racial Progress*, CapRadio (Oct. 27, 2020), <https://www.capradio.org/articles/2020/10/27/experts-warn-the-threat-of-violence-from-far-right-groups-can-impact-racial-progress/> [<https://perma.cc/G3KC-VL57>].

President, Trump issued several executive orders,<sup>74</sup> rules/regulations,<sup>75</sup> and other policies<sup>76</sup> that likely would never have been issued by a president who was a Democrat or a different or more moderate Republican, but the power to be gained or solidified through a renewed

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<sup>74</sup> See, e.g., Exec. Order No. 13769, 82 Fed. Reg. 8977 (January 27, 2017) (“Protecting the Nation From Foreign Terrorist Entry Into the United States.”) (enacting what was dubbed a “Muslim Ban”); Exec. Order No. 13780, 82 Fed. Reg. 13209 (March 6, 2017) (“Protecting the Nation From Foreign Terrorist Entry Into the United States.”) (functioning practically as another “Muslim Ban”); Exec. Order No. 13798, 82 Fed. Reg. 21675 (May 4, 2017) (“Promoting Free Speech and Religious Liberty.”) (potentially giving religious organizations a greater ability to discriminate against women and members of the LGBT community); Exec. Order No. 13950, 85 Fed. Reg. 60683 (September 22, 2020) (“Combating Race and Sex Stereotyping.”) (preventing discussions of critical race theory, white privilege, and systemic racism and sexism in some diversity trainings).

<sup>75</sup> See, e.g., Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44811 (proposed July 24, 2020) (allowing shelters to declare the gender of people staying at sex-segregated shelters and allowing or encouraging discrimination against and endangerment of trans women and men); Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority 85 Fed. Reg. 37160 (June 19, 2020) (changing definitions within the Affordable Care Act’s nondiscrimination provision to remove the definition of “on the basis of sex” in order to no longer include, and protect against discrimination on the basis of, gender identity or sexual orientation); Adoption and Foster Care Analysis and Reporting System, 85 Fed. Reg. 28410 (proposed May 12, 2020) (to be codified at 45 C.F.R. Pt. 1355) (eliminating collection of sexual orientation date on foster youth/adoptive parents); Student Assistance General Provisions, The Secretary’s Recognition of Accrediting Agencies, The Secretary’s Recognition Procedures for State Agencies 84 Fed. Reg. 58834 (November 1, 2019) (preventing HHS from enforcing, and planning to repeal, regulations prohibiting discrimination based on gender identity and sexual orientation in all HHS grant programs).

<sup>76</sup> See, e.g., Memorandum for the Secretary of Commerce, Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44679 (July 21, 2020) (instructing Commerce Secretary to remove immigrants without legal status from the count for congressional apportionment); Notice, Designating Aliens for Expedited Removal 84 Fed. Reg. 35409 (July 23, 2019) (expanding the scope of expedited removal of undocumented immigrants); Memorandum for the Secretary of Defense and the Secretary of Homeland Security, 82 Fed. Reg. 41319 (Aug. 25, 2017) (banning transgender individuals from serving in the military); Office of Management and Budget Memorandum M-20-37, Ending Employee Trainings that Use Divisive Propaganda to Undermine the Principle of Fair and Equal Treatment for All (Sept. 28, 2020); Memorandum M-20-34, Training in the Federal Government (Sept. 4, 2020) (instructing agencies “to begin to identify all contracts or other agency spending related to any training on ‘critical race theory,’ ‘white privilege,’ or any other training or propaganda effort that teaches or suggests either (1) that the United States is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil” and “begin to identify all available avenues within the law to cancel any such contracts and/or to divert Federal dollars away from these un-American propaganda training sessions.”).

white supremacist silent covenant likely would and will remain.<sup>77</sup> Additionally, the perceived threat to whiteness of a soon to be majority people of color country and society and the ideal privileges that do, or in some minds should, accompany whiteness may drive intensified action now.<sup>78</sup>

#### CONCLUSION

Some may believe that civil procedural standards operate in a neutral, identity-free zone and that judges don't care about litigants' identities, or their positions within the sociopolitical hierarchy, when deciding procedural issues. But judges are not oblivious to racial identity or its proxies in procedural decisions any more than they are in substantive contexts. Even the perception of, or the attempt to be, oblivious to identity could be another way to allow harmful assumptions to thrive.

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For as much as it seems that Donald Trump has changed something about the character of this country, the truth is he hasn't. What is terrible about Trump is also terrible about the United States. Everything we've seen in the last four years — the nativism, the racism, the corruption, the wanton exploitation of the weak and unconcealed contempt for the vulnerable — is as much a part of the American story as our highest ideals and aspirations.

Jamelle Bouie, Don't Fool Yourself. Trump Is Not an Aberration, N.Y. Times (Oct. 30, 2020), <https://www.nytimes.com/2020/10/30/opinion/trump-presidents-history.html>: [https://perma.cc/4ZD8-Z9EL].

According to Professor Derrick Bell's concept of involuntary sacrifice:

To settle potentially costly differences between two opposing groups of whites, a compromise is effected that depends on the involuntary sacrifice of black rights or interests. Even less recognized, these compromises (actually silent covenants) not only harm blacks but also disadvantage large groups of whites, including those who support the arrangements. Examples of this involuntary racial-sacrifice phenomenon abound and continue. A few of the more important are: the slavery understandings, the Constitution, universal white male suffrage, the *Dred Scott v. Sandford* case, the Hayes-Tilden compromise, and the southern disenfranchisement compromise.

Derrick Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* 29 (2005). See also Pedro, *supra* note 37 (“The involuntary sacrifice comes at a time when white people are divided and need to be reunited across class or other lines, so they reunite by taking something away from Black people or other marginalized groups. Given current high levels of polarization, it seems that we are currently in such a time.” (internal citations omitted)).

<sup>78</sup> Angela Onwuachi-Willig, Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin, 102 *Iowa L. Rev.* 1113, 1154–56, 1168–70 (2017).

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Interaction with police cuts across socioeconomic differences within the Black community. We are still at risk of being murdered in extralegal ways. An important step in actualizing some of the goals to protect Black lives is to understand, and work to undo, the ways in which civil procedural doctrine and mechanisms have been deployed to reinforce racial subordination (and the subjugation of other marginalized groups).