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SEPARATE BUT (UN)EQUAL: WHY INSTITUTIONALIZED *ANTI*-RACISM IS THE ANSWER TO THE NEVER-ENDING CYCLE OF *PLESSY V. FERGUSON*

Maureen Johnson *

INTRODUCTION

Do as I say, not as I do. For decades, *Plessy v. Ferguson* has been identified as one of the worst decisions ever handed down by the Supreme Court.[1] In a near unanimous opinion, the Justices found nothing unconstitutional about a law that required African Americans to ride in a separate boxcar from their white counterparts. In fact, the ruling even seemed progressive at the time as it required that the separate boxcars be qualitatively the same.[2] Justice Harlan authored the sole dissent that housed his infamous prophecy that the *Plessy* decision "in time, [would] prove to be quite as pernicious" as the *Dred Scott* decision.[3] Yet despite

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1. Corinna B. Lain, *Three Supreme Court "Failures" and a Story of Supreme Court Success*, 69 VAND. L. REV. 1019, 1020 (2016) (identifying *Plessy v. Ferguson*, *Buck v. Bell*, and *Korematsu v. United States* as three "particularly strong examples of the Supreme Court's failure to protect"); *accord* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 37 (2014) ("*Plessy v. Ferguson* is remembered together with *Dred Scott* as being among the most tragically misguided Supreme Court decisions in American history.").

2. Lain, *supra* note 1, at 1026 (Due to the spike in violence against African Americans, "*de jure* segregation was widely justified as 'enlightened public policy'—a distinctly progressive response to interracial conflict—although it was racist through and through."); *see* Chris Edelson, *Judging in a Vacuum, Or, Once More, Without Feeling: How Justice Scalia's Jurisprudential Approach Repeats Errors Made in* Plessy v. Ferguson, 45 AKRON L. REV. 513, 523 (2012) (quoting Justice H. David Souter, *Harvard University's 359th Commencement Address*, 123 HARV. L. REV. 429, 434–35 (2010) (stating that to the *Plessy* generation, the "formal equality [*sic*] of an identical railroad car meant progress") (alteration in original)).

3. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (comparing

universal condemnation, America still has not learned to truly rid itself of the lingering effects of *Plessy*.

If the sin of *Plessy* was failing to *recognize* the obvious—that *of course* African Americans were stigmatized by the requirement they ride in separate boxcars—the sin going forward has been the failure of the American people to *do* the obvious, namely, refrain from engaging in the same type of "pernicious" reasoning that supported *Plessy*'s core holding. Time and time again, whether through Jim Crow or other overt or covert government-sanctioned acts, dominant America has gone back to the *Plessy* model of othering those who are different.[4] Perhaps the most egregious slip into this amoral morass is the fact that the *Plessy* core rationale—that those deemed by society as inferior can constitutionally be treated as such—has later been embraced by the very same groups that previously cried foul when they were the target of oppression.

More particularly, while American immigrants—from Ireland to Poland to Italy and back again—felt the sting of bigotry and hatred when they first came to America, once they obtained relative equality for their own group, many turned their backs on both future immigrants and on those of color already living in the United States.[5] In other words, instead of adhering to the principles behind human dignity that gave rise to their own demand for equality, they "hated down," continuing the ugly cycle of *Plessy* by treating others as different and inferior.

Post-*Plessy* examples of government-sanctioned othering are abundant. Easily coming to mind is the Japanese internment—validated by the Supreme Court in *Korematsu v. United States*—that is also now universally condemned.[6] Another obvious example is the treatment of the lesbian, gay, bisexual, transgender,

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the future effects of the Court's opinion to the after-effects of *Dred Scott v. Sandford*, 60 U.S. 393 (1857)).

4. *See, e.g.*, William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U.L. REV. 1327, 1398–99 (2000) (referencing *Plessy* and making comparisons to both women's rights and LGBTQ rights); *see also* Daniel R. Gordon, *One Hundred Years After* Plessy*: The Failure of Democracy and the Potentials for Elitist and Neutral Anti-Democracy*, 40 N.Y.L. SCH. L. REV. 641, 641–42 (1996) (noting the continuing cycle of *Plessy* on the "United States' social, political, and legal systems" and the danger posed to future generations).

5. *Cf.* DAVID M. CHALMERS, HOODED AMERICANISM, THE HISTORY OF THE KU KLUX KLAN 110–14 (1987) (discussing the Ku Klux Klan's resentment toward immigrants).

6. 323 U.S. 214, 217–18 (1944); *see* Lain, *supra* note 2, at 1021.

and queer ("LGBTQ") community, including both "Don't Ask, Don't Tell" ("DADT") and the current ban on military recruitment of transgender individuals.[7] In fact, the marriage equality cases present one of the closest parallels to *Plessy*. Prior to *Obergefell v. Hodges*, gay and lesbian couples were relegated to forming civil unions, which was argued to be a separate-but-equal equivalent to legal marriage.[8] When trying to make sense of why it took so long to overturn this policy, will future generations be as befuddled as we are when we try to understand the majority opinion in *Plessy*?

This article tackles the lingering effects of the *Plessy* decision on racism. The final act is now in play. People of color still face institutionalized racism, which only has worsened following the 2016 presidential election. The turning point may have begun with the events in Charlottesville, Virginia, in August 2017.[9] The brash hate spewed by unmasked white supremacists as they marched across the University of Virginia campus carrying Tiki-torches made clear they believed the nation was open to their message.[10] Less than a fortnight later, President Trump pardoned Sherriff Joe Arpaio, who was convicted of failing to obey a court order to stop racial profiling.[11] And a mere ten days after that, the

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7. For a thorough contemporary discussion of DADT and its effect on gays and lesbians, see generally Tobias B. Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 IOWA L. REV. 1633 (2004). Trump ended service by transgendered individuals by a June 25, 2017, tweet followed by an executive order on August 25, 2017. Memorandum on Military Service by Transgender Individuals, 82 Fed. Reg. 41,319, 41,319–20 (Aug. 25, 2017); Jeremy Diamond, *Trump Signs Directive Banning Transgender Military Recruits*, CNN (Aug. 25, 2017), http://www.cnn.com/2017/08/25/politics/trump-transgender-military/index.html. On September 11, 2017, Senators Kirstin Gillibrand (D-N.Y.) and Susan Collins (R-Me.) introduced a bipartisan amendment to block the ban. Katie Reilly, *Democrat and Republican Senators Move to Stop Trump's Transgender Military Ban*, TIME (Sept. 11, 2017), http://time.com/4936786/transgender-military-ban-amendment-susan-collins-kirsten-gillibrand/.

8. 576 U.S. __, 135 S. Ct. 2584 (2015). Notably, the only difference between "civil unions" and "marriage" was nomenclature, which served the sole purpose of stamping gays and lesbians as inferior. *See id.* at __, 135 S. Ct. at 2601–02.

9. *See* Conor Friedersdorf, *Was Charlottesville a Turning Point for the 'Alt-Right'?*, ATLANTIC (Sept. 6, 2017), https://www.theatlantic.com/politics/archive/2017/09/was-charlottesville-a-turning-point-for-the-alt-right/538824/; *see also* Carol Anderson, *By Ending Daca, Donald Trump has Declared War on a Diverse America*, GUARDIAN (Sept. 5, 2017), https://www.theguardian.com/commentisfree/2017/sep/05/donald-trump-dreamers-daca-carol-anderson (noting that "[Trump's] message is clear: in the United States, few are welcome and even fewer are equal").

10. Denis Slattery, *Charlottesville Mayor Michael Singer Says Trump Campaign Gave Hate Groups 'a Reason to Come In the Light,'* N.Y. DAILY NEWS (Aug. 13, 2017, 12:00 PM), http://www.nydailynews.com/news/national/charlottesville-mayor-trump-campaign-emboldened-hate-groups-article-1.3408162.

11. *See* Lisa Mascaro, *Speaker Ryan 'Does not Agree' with Trump's Pardon of Arpaio,*

Trump Administration again threw down the gauntlet by announcing the phasing out of the popular Deferred Action for Childhood Arrivals ("DACA") program.[12] The following day, the White House issued talking points telling 700,000 affected individuals—almost all Latinos—to prepare for deportation.[13]

This trifecta of racially divisive actions each triggered a powerful counter-response that collectively was one of the more powerful ever seen in the long and complicated history of American racism. After the Charlottesville riots, white nationalists were publicly outed, scorned, and forced back into darkened corners.[14] At counter-rallies, anti-racists would out number white supremacists by a thousand-to-one.[15] Ultimately, Congress unanimously passed a resolution rebuking President Trump's failure to unequivocally denounce white nationalists.[16] Still, the continued institutional stoking of racism even *after* Charlottesville made it apparent that modern-day America faced a very important choice. America was either going to stand idly by and let government institutions adopt and further white nationalist beliefs. Or it was not.

L.A. TIMES (Aug. 27, 2017, 11:30 AM), http://www.latimes.com/politics/washington/la-na-essential-washington-updates-speaker-ryan-does-not-agree-with-1503856893-htmlstory.html.

12. *See* Matt Ford, *President Trump Pardons Former Sheriff Joe Arpaio*, ATLANTIC (Aug. 25, 2017), http://www.theatlantic.com/politics/archive/2017/08/trump-pardon-arpaio/537729; *see also* Tal Kopan & Jim Acosta, *Admin Memo: DACA Recipients Should Prepare for 'Departure From the United States*, CNN (Sept. 6, 2017, 6:14 AM), http://www.cnn.com/2017/09/05/politics/white-house-memo-daca-recipients-leave/index.html; Mascaro, *supra* note 11.

13. *See* Kopan & Acosta, *supra* note 12 (discussing a memo stating that the "Department of Homeland security urges DACA recipients to use the time remaining on their work authorizations to prepare for and arrange their departure from the United States"); *see also* Catherine E. Shoichet et al., *US Immigration, DACA and Dreamers Explained*, CNN (Oct. 26, 2017), http://www.cnn.com/2017/09/04/politics/daca-dreamers-immigration-program/index.html.

14. *See, e.g.*, Jessica Guynn, *Top Dog Worker in Berkeley Loses Job After He's Outed as Charlottesville Protester*, USA TODAY (Aug. 15, 2017, 4:02 PM), https://www.usatoday.com/story/tech/2017/08/15/top-dog-worker-loses-job-after-being-outed-charlottesville-protester/569487001/.

15. *See, e.g.*, Kurtis Lee & Vera Haller, *'Thank God Nobody Got Hurt': Boston Protestors Gather Peacefully a Week After Charlottesville Violence*, L.A. TIMES (Aug. 19, 2017, 5:15 PM), http://www.latimes.com/nation/la-na-boston-march-20170819-story.html (reporting that there were "tens of thousands of counter-protestors" to fifty supporting far-right views).

16. Pub. L. No. 115-58, 131 Stat. 1149 (2017); *see* Jessica Chia, *Trump Signs Congressional Resolution Condemning White Supremacist*, N.Y. DAILY NEWS (Sept. 12, 2017, 2:31 AM), http://www.nydailynews.com/news/politics/trump-signs-congressional-resolution-condemning-white-supremacist-article-1.3497052.

Part I of this article examines the social and legal context behind the *Plessy* decision with a particular focus on the parallels to present day. Interestingly, railroads initially were not required to have segregated boxcars and many typically allowed well-to-do African Americans to ride in first-class coaches with whites. Often there was no objection, especially if the African American was "passable."[17] The demand for mandatory segregation instead came from white agrarian farmers who could not afford first-class fare and instead rode unsegregated second-class coaches.[18] Such farmers had grown to blame African Americans for these farmers' own economic strife.[19] Similarly, today white nationalists blame minorities for taking their jobs.[20]

Part I also includes this author's humble rewrite of the briefing of the legal and social rhetoric giving rise to the *Plessy* decision. In doing so, this author does not fault the attorneys who penned the *Plessy* briefs. They are in no position to defend their drafting, and they likely did the best they could under the circumstances. Nor does this author simply blame the Justices who upheld *Plessy*. As many scholars argue, these Justices ruled in accordance with prevailing societal norms and legal precedent.[21] Instead, the blame falls on the collective consciousness of white America, which has stalled true equality even through this very day.

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17. CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 13–14 (1987) (noting that in the "late 1870s and the 1880s, properly dressed and behaved blacks evidently came to be accepted into first-class accommodations"); *see* John M. Wisdom, Plessy v. Ferguson—*100 Years Later*, 53 WASH. & LEE L. REV. 9, 14 (1996) (discussing how "persons of tolerably fair complexion, even if unmistakably colored" could use public places largely free of segregation).

18. *See* LOFGREN, *supra* note 17, at 23–24.

19. *Id.* at 23–24; *see* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 81–83 (2d rev. ed. 1966) (discussing economic strife and scapegoating).

20. For an interesting pop-culture spoof on this, see Todd Van Luling, *'South Park' Skewers White Nationalists and White Americans Who Forgive Them*, HUFFINGTON POST (Sept. 15, 2017), http://huffingtonpost.com/entry/south-park-white-nationalists_us_59ba7cfae4b02da0e13f8676. Among other things, the South Park producers poke fun at the absurdity of blaming others for taking jobs that the white nationalists refuse to perform. *Id.* They do so in the particular context of the Charlottesville riots. Michael Cavna, *"South Park" Spoofs White Nationalists, Digital Assistants—and Kendrick Lamar*, WASH. POST (Sept. 14, 2017), https://washingtonpost.com/news/comic-riffs/wp/2017/09/14/south-park-spoofs-white-nationalists-digital-assistants-and-kendrick-lamar/?utm_term=.b1bc7669bb7f.

21. Lain, *supra* note 1, at 1021–22 (considering historical context and noting that it would have been "wildly hubristic, to the point of being almost unfathomable" for the Supreme Court to have ruled differently); *accord* LOFGREN, *supra* note 17, at 199. *But see* CHEMERINSKY, *supra* note 1, at 38 ("Is it reasonable to have expected the Supreme Court to have ruled differently? Absolutely.").

Obviously, *Plessy* horribly impacted African Americans in both the short term and the long term.[22] But it was not only the children of slaves who would be burdened. Validation of the separate but (un)equal rationale also cast a curse on the sons and daughters of those who supported Jim Crow.[23] The tortured faces and souls of those who marched at Charlottesville said it all. Hate takes work. Imagine how different this world would be had the *Plessy* Court been moved by rhetoric to simply hold that equal protection under the law meant equal protection under the law. Put simply, not only would our present world have been better for people of color, it would have been better for everyone.[24]

Part II of this article chronicles the ebb and flow of white nationalism throughout our nation's history, beginning with the first resurgence of the Ku Klux Klan ("Klan") in the immediate aftermath of *Plessy*. Blanketed by the cloak of legitimacy afforded by the Supreme Court's ruling, and stoked by economic woes and the influx of immigrants, the Klan's membership swelled upwards of 4,000,000 by the mid-1920s.[25] Albeit behind their signature white hoods, Klansmen marched through the streets of our capital with much the same bravado as those who would march in Charlottesville a century later. Jim Crow flourished as did the accordant dose of stigma. Yet the Klan would go too far. As a result of violent extremism, membership would plummet to only 100,000 in 1929.[26]

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22. Terry Smith, *White Backlash in a Brown Country*, 50 VAL. U.L. REV. 89, 97 (2015) (recognizing that *Brown v. Board of Education* "acknowledged that feelings of inferiority were engendered in black children who are taught in a segregated educational environment").

23. *Id.* at 98–99 (noting the dearth of authority addressing "what racism does to its host"); *see* Ta-Nehisi Coates, *The First White President: The Foundation of Donald Trump's Presidency Is the Negation of Barack Obama's Legacy*, ATLANTIC (Oct. 2017), https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/ (recognizing the view that racism harms not just African Americans, but also the "shared country, and even the whole world"). *See generally* TA-NEHISI COATES, WE WERE EIGHT YEARS IN POWER: AN AMERICAN TRAGEDY (2017) (arguing that racism harms more than African Americans only).

24. CAROL ANDERSON, WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE 161–64 (2016) (imagining how different the world might be had America responded differently, for example, during the Reconstruction era).

25. Roland G. Fryer, Jr. & Steven D. Levitt, *Hatred and Profits: Under the Hood of the Ku Klux Klan*, 123 Q.J. OF ECON. 1883, 1883 (2012).

26. MICHAEL NEWTON & JUDY ANN NEWTON, THE KU KLUX KLAN: AN ENCYCLOPEDIA x (1991).

While the Klan was silenced, it would not be long before it would again rear its ugly head. The second resurgence occurred as the stage was being set for the landmark decision in *Brown v. Board of Education* that would implicitly overrule *Plessy*.[27] The backlash against these liberal polices was swift and fierce. Confederate statutes and flags were raised at universities and on government properties—including town squares and city halls—to make clear to African Americans that but for that unfortunate loss in the Civil War, they might still be slaves.[28] Again as a result of violent extremism, support for the Klan lost steam.[29] Still, de facto separate but (un)equal treatment of people of color never really went away. The last resurgence of white nationalism festered when America elected Barack Obama as its first African American President.[30] It grew exponentially when white supremacists found a hero in Donald J. Trump. And it boiled over when they saw that hero take the White House with blistering rhetoric that had the effect of not only stoking, but validating, racist beliefs.[31]

"Whack-A-Mole."[32] If there is a pattern, it is that support for white supremacy rises when whites feel cornered, and it diminishes—but in no way disappears—when extremists are societally seen as going too far, e.g., by publicized acts of extreme violence resulting in the loss of human life. To be clear, history teaches

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27. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

28. *See* Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L.R. 539, 599–605 (2002); *see also* Kevin Drum, *The Real Story Behind All Those Confederate Statues*, MOTHER JONES (Aug. 15, 2017, 8:15 PM), http://www.motherjones.com/kevin-drum/2017/08/the-real-story-of-all-those-confederate-statues/ (setting forth a chart from the Southern Poverty Law Center linking confederate monuments to both the early 1900s, following Reconstruction, and the 1950s, reacting to *Brown* and other civil rights advances).

29. NEWTON & NEWTON, *supra* note 26, at x.

30. YVONNE G. WILLIAMS, SLAVES OF A DIFFERENT KIND: UNSHACKLING OUR SOUL TO HEAL AMERICA 197 (2015) (The "nomination and election of our first African American president, Barack Obama, in 2008 brought to light what has obviously been lying dormant for decades . . . . While liberties were granted to African Americans by law, the hearts of those who oppressed giving this freedom to our brothers and sisters passed down the enmity of old and have kept it alive.").

31. *See* Coates, *supra* note 23 (discussing how no prior president had ever ran on and incorporated white supremacy as a presidential ideal).

32. "Whac-A-Mole," which is the official spelling, is a popular arcade game dating back to the 1970s. There are five holes from which moles pop up. The gamer whacks the mole down, only for it to reappear from a different hole. *Whac-a-Mole SE*, BOBS SPACE RACERS, http://www.bobsspaceracers.com/whacamole-se-arcade.html (last visited Nov. 15, 2017).

that the basic premise of *Plessy*—that people of color can be permissibly othered and degraded—lingers even when white supremacy is tamped down by the government. And when there instead is *validation* of white supremacy by government institutions, it becomes downright dangerous.[33] This is because institutional racism—whether done expressly or even just with a wink and a nod—condones violence towards minorities.[34] Once that occurs, we are but a stepping stone away from the kind of ugly white nationalism that fueled the atrocities of Nazi Germany.[35]

Part III speaks to the future. How do we undo the many wrongs perpetuated by the *Plessy* legacy that has kept many individuals of color stigmatized and impoverished? As a practical matter, we need to stop "whacking the mole." Put simply, racists are not going to wither up and die. If America—and the world—is going to end what has become a never-ending cycle of rising and falling white nationalism, racists need to be shown a path to shed their hate and evolve. Granted, many may argue this is a monumental task that society should not have to shoulder, but that reasoning reflects the same complacency that has allowed racism to be a dormant, if not dominant, part of the collective American psyche since before the Civil War.

Scholars already have begun to address racism through the disciplines of neuroscience, neurorhetoric, and the related notion that racism is "addictive."[36] Studies reveal a profile of modern-day white nationalists that is not all that different from the Klansmen of America's past. One commonality is that white nationalists are quick to blame. It is always someone else—i.e., minorities—who are the cause of a racist's perceived shortcomings in his

33. Angela A. Allen-Bell, *The Incongruous Intersection of the Black Panther Party and the Ku Klux Klan*, 39 SEATTLE U.L. REV. 1157, 1179–82 (2016) (discussing the Klan's control of local government and how Klan members routinely were acquitted or never even forced to stand trial).

34. CHEMERINSKY, *supra* note 1, at 52 (discussing "separate but equal" and noting that the Supreme Court's "express approval of laws mandating racial segregation encouraged them and gave them support from on high").

35. Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and the Healing Alternatives*, 76 MD. L. REV. 663, 675–76 (2017) (setting forth striking parallels between President Donald Trump's campaign rhetoric and techniques employed by Adolf Hitler in Nazi Germany).

36. *See* Smith, *supra* note 22, at 94–95 (discussing the addictive nature of white privilege).

own status.[37] Therein lies the wedge. White nationalists need to be prodded to redirect their blame. No child is born a racist. Prejudice is imprinted by both society and more immediate authority figures, like a child's caregivers.[38] Simply forcing white nationalists back into a hole—from whence history foretells they surely will reemerge—does not end racism. Would it not be better to pivot racists to direct blame at those truly at fault, namely, the individual and societal forces that instilled hate in the heart of a once-innocent child?

Part III further posits that the best way to combat institutionalized racism is institutionalized *anti*-racism. This means more than just race-neutral polices. It means expressly *countering* historic and currently existing institutional racism. One area where this immediately is needed is ending the "school-to-prison pipeline" that effectively has not only denied children of color equal educational opportunity but has also instilled in all students the government-sanctioned message that people of color are unworthy of equal treatment under the law.[39] This affects children of today and those of tomorrow. Taking a lesson from the social context under which *Plessy* was decided, judicial and social advocates should reframe racially charged issues to focus on the long-term effect of racism on our children, including those born into the dominant group. Given the present divisive environment, it is imperative that powerful counter-messages displace the stigmatizing social and legal cues currently inundating our children and emboldening racists.

Part III ends with a letter to a reader a hundred years from now who is trying to make sense of our laws and judicial decisions in the same manner that current scholars scratch their heads and try to understand *Plessy*. Like Justice Harlan's dissent, it is a prophecy that today's institutional racism—and other similar discriminatory policies—will be seen by future generations as just as illogical and "pernicious" as *Plessy*. It is also an apology for this

37. *See* NANCY MACLEAN, BEHIND THE MASK OF CHIVALRY: THE MAKING OF THE SECOND KU KLUX KLAN 53–54 (1994); *see also* discussion, *infra* Part I.A.

38. *See* LYNNE M. JACKSON, THE PSYCHOLOGY OF PREJUDICE: FROM ATTITUDES TO SOCIAL ACTION 83–87 (2011).

39. Lia Epperson, Brown's *Dream Deferred: Lessons on Democracy and Identity From* Cooper v. Aaron *to the "School-to-Prison Pipeline,"* 49 WAKE FOREST L. REV. 687, 687–90, 698–702 (2014) (defining "school-to-prison pipeline").

nation's continued and longstanding grappling with finally putting *Plessy* to rest.

The United States of America—if not the world—is at a crossroad. And it is not the first time. While it may have been impossible to change *Plessy*'s result when decided, it is certainly possible now. Judicial advocates are particularly poised to use their words to reframe and permanently eradicate the notion that othering is constitutionally acceptable, and instead create a world where every child is truly respected and has just as equal an opportunity from birth as the next.

I. THE *PLESSY* ERA: A DAY IN THE LIFE OF POST-RECONSTRUCTIONIST AMERICA

New Orleans, 1892. Homer Plessy steps up to a train platform fully knowing he was about to be arrested.[40] Two prominent civil rights attorneys had carefully orchestrated the circumstances. James Walker and Albian W. Tourgée had contacted several railroads proposing the idea of a test case to challenge Louisiana's separate-car law.[41] While some railroads initially resisted, these lawyers arranged two test cases, *State v. Desdunes,* involving *inter*state commerce, and *Plessy*, which involved *intra*state commerce, meaning it solely involved rail passage within Louisiana state lines.[42] Following the script, Homer boarded a train bound for Covington, Louisiana, and took a seat reserved for white passengers.[43] He was instructed by the train conductor to relocate to a seat designated for the "colored race."[44] When Homer refused to move to the "Jim Crow" coach, he was forcibly ejected and arrested by a New Orleans police officer who had apparently been pre-

40. Plessy v. Ferguson, 163 U.S. 537 (1896). The majority opinion was written by Justice Brown. *Id.* at 540. The case was decided by only eight Justices as Justice Brewer neither heard oral argument nor participated in the opinion. *Id.* at 552. Justice Harlan penned the sole dissent. *Id.* (Harlan, J., dissenting). Homer was the second chosen plaintiff in a pair of test cases brought by civil rights attorneys James Walker and Albian W. Tourgée. *See* LOFGREN, *supra* note 17, at 39–41. The first-filed case, *State v. Desdunes*, involved interstate commerce and the plaintiff, Daniel Desdunes, was a friend of Homer. *Id. Desdunes* was dismissed at approximately the same time of Homer's arrest. *Id.*

41. Wisdom, *supra* note 17, at 14.

42. *Id.* at 14–15. Walker and Tourgée initially disagreed as to whether the test case should involve interstate or intrastate commerce. *Id.* at 14. Notably, one railroad refused to work with Tourgée because "it had never enforced the law." *Id.*

43. *Id.* at 15.

44. *Plessy,* 163 U.S. at 541–42; *see* Wisdom, *supra* note 17, at 15.

informed of the plan.[45] Homer was then imprisoned in the New Orleans parish jail.[46]

In a way, Homer was the Rosa Parks of his time. In another way, he was not. Homer was seven-eighths white and passable, a fact that would stand out prominently in both the briefing and the resulting Supreme Court opinion.[47] To be clear, the "mixture . . . was not discernable."[48] This was no accident. Tourgée wanted a "nearly white" person as the plaintiff for the test case.[49] Thus, the push was not to champion the rights of rank-and-file African Americans. Rather, the focus was on those who—like Homer—could pass for white and could afford the passage for a first-class coach. This appeal was grounded in common sense. How could white passengers object to riding in the same boxcar as a passenger they did not even know was technically "colored?" And did this not likely describe numerous other white individuals who knowingly or *un*knowingly carried a small percentage of black blood?[50] The elephant in the room was that passengers like Homer would no longer have to hide their African American heritage.[51] If successful, Homer's challenge presumably would also crush the distinction between African Americans who were passable and those who were not. While striking down Jim Crow rail laws certainly would have benefitted *all* African Americans, there was one problem. The plan failed.

The almost-unanimous *Plessy* decision affirming segregation was the law of the land for fifty-eight long years, literally a

45. *Plessy*, 163 U.S. at 542; Wisdom, *supra* note 17, at 15. Lofgren asserts that like the arrest in the *Desdunes* test case, Homer's arrest similarly was "surely arranged." LOFGREN, *supra* note 17, at 41. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 8 (2004) (also asserting that the arrest was prearranged and noting that it occurred at the train station because "once the train left the city, whites would 'simply beat and throw [Homer] out and there [would] be no arrest'").

46. *Plessy*, 163 U.S. at 542.

47. *Id.* at 541.

48. *Id.*

49. Wisdom, *supra* note 17, at 14 ("Tourgée advised that a 'nearly white' person should be chosen for the test case.").

50. *Plessy*, 163 U.S. at 552 (discussing the "difference of opinion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race").

51. In this sense, it really was DADT a hundred years prior. If a gay serviceman could "pass" for straight, the serviceman could remain in the military. Zachary A. Kramer, *Heterosexuality and Military Service*, 104 NW. U.L. REV. COLLOQUY 341, 361 (2010) (discussing the illogic of forcing gays and lesbians to hide their sexual orientation).

lifetime for many.[52] Application of the separate-but-equal doctrine went far beyond boxcars. From diners, to bathrooms, to water fountains, segregation was deemed constitutional so long as African Americans had a separate but (un)equal option.[53] As set forth below, while it is difficult for present generations to fathom how this could be reconciled with our Constitution, it was not so difficult for those living in the *Plessy* era. The ruling was entirely within the social norms of the time, including a push by poorer farmers, who had to ride in often unsegregated second-class coaches. In fact, it was so non-controversial, it received little press coverage.[54] With this in mind, and the considerable benefit of hindsight, this part ends with a re-write of the frame and rhetoric employed by Homer's attorneys in his Supreme Court brief.

A. *Context: Why* Plessy *Was Seen as Progressive at the Time of the Decision*

Following the end of the Civil War, there is no dispute racial tensions were high. But what might be less known is that the Jim Crow laws put to test in *Plessy* actually had their origin in the northern states. As explained by scholar and historian C. Vann Woodward, "One of the strangest things about the career of Jim Crow was that the system was born in the North and reached an advanced age before moving South in force."[55] Northern states had essentially abolished slavery by 1830, but northern African Americans were "made painfully and constantly aware [they] lived in a society dedicated to the doctrine of white supremacy and Negro inferiority."[56] In other words, while northerners soundly rejected the idea that human beings could be owned, they were not yet ready to treat freed slaves as equals. African Americans were kept in oppressive circumstances by numerous social and legal constraints, specifically including being outright prohibited

52. *Plessy*, decided in 1896, 163 U.S. at 537, 552, was overturned by *Brown v. Board of Education*, 347 U.S. 483, 483, 495 (1954) (holding that "separate but equal" education facilities in public schools are inherently unequal, and that persons subject to segregation on such grounds are deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment).

53. CHEMERINSKY, *supra* note 1, at 37 (listing numerous post-*Plessy* segregation applications).

54. LOFGREN, *supra* note 17, at 5, 196–97 (noting the "press met [*Plessy*] mainly with apathy").

55. WOODWARD, *supra* note 19, at 17.

56. *Id.* at 18.

from entering many hotels, restaurants, and resorts.[57] If African Americans worshipped at white churches, they were confined to "Negro pews" and placed at the end of the line if they wished to partake in communion.[58] Similarly, if they were allowed in movie theaters, they were forced to take seats in "remote corners."[59] Segregation even extended to hospitals and cemeteries.[60] Not surprisingly, this type of rampant segregation also manifested itself in housing, such as African Americans residing in Boston's "N**** Hill."[61]

Notably, even Abraham Lincoln, who signed the Emancipation Proclamation in 1863, made clear that neither he nor his political party supported treating African Americans as equals.[62] He understood "the feelings of 'the great mass of white people' on Negroes," noting that it was a "universal feeling, whether well or ill-founded, [that] can not be safely disregarded."[63] For that reason, Lincoln said, "We can not, then, make them equals."[64] In 1858, five years before signing the Emancipation Proclamation, Lincoln reiterated that freeing slaves was not meant to displace traditional notions of white superiority. As quoted by Woodward:

> I will say then that *I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races* [applause]—*that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people*, and I will say in addition to this that *there is a physical difference between the black and white races which I believe will for ever forbid the two races living together on terms of social and political equality*. And inasmuch as they cannot so live, while they do remain together *there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race*.[65]

Adding to the mix was substantial "scientific" opinion that colored individuals were inferior.[66] Put simply, white Americans—even

57. *Id.* at 18–19.
58. *Id.* at 19.
59. *Id.*
60. *Id.*
61. *Id.*
62. *See id.* at 21.
63. *Id.*
64. *Id.*
65. *Id.* at 21 (emphasis added).
66. PAUL A. OFFIT, PANDORA'S LAB: SEVEN STORIES OF SCIENCE GONE WRONG 111–19 (2017) (chronicling and rebuking early science behind eugenics—using genetics to achieve

those from the North—had convinced themselves that whites were the superior race and that they had the science to prove it.

Against this backdrop, the notion of "separate but equal" was not only viewed as *not* offensive, but it actually was seen as *progressive*. In fact, the requirement that accommodations for colored individuals truly be "equal" in kind to those of whites was viewed by many as an improvement.[67] Prior to *Plessy*, rail carriers could freely engage in segregation but were under no duty to ensure the Jim Crow car was equal in kind to the car designated for white passengers. As a result, the Jim Crow boxcars often were "reeking with filth" as opposed to the "clean and comfortable" cars afforded to white passengers.[68] After *Plessy*, this difference, theoretically, was no longer tenable.

Looking at this era with over a hundred years of hindsight, it becomes clear that while the North and the South had irreconcilable views on slavery, even northern liberals espoused views about white supremacy that would be condemned today. A car does not go from zero to sixty miles per hour in only a second. While some in the *Plessy* era no doubt were forward-thinking, the general societal view—even of northerners—tracked the usual pragmatic two-step approach to bringing an oppressed minority into the fold. Tolerance comes first. Minorities are accepted but only on terms that maintain the prevailing view of the superiority of the dominant group. Inclusion is second.[69]

When Homer bravely stepped up to that train platform in New Orleans in 1892 and self-identified as colored, that second step was nowhere in sight. While there may be numerous reasons for that, there is at least one striking parallel to modern times. It was not wealthy conservatives who pushed for *state-mandated*

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race dominance—and "America's Master Race"); *cf.* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (noting that "[t]he white race deems itself to be the dominant race in this country" and that it likely will continue to be for all time); *id.* at 561 (alluding to the perceived inferiority of the "Chinese race"). For further discussion of Justice Harlan's biased view of Chinese individuals, *see* Josh Blackman et al., *Justice John Marshall Harlan: Professor of Law*, 81 GEO. WASH. L. REV. 1063, 1103–08 (2013).

67. Interestingly, the majority opinion, and the underlying statute, referred to "equal, but separate." *Plessy*, 163 U.S. at 540. Justice Harlan's dissent flipped that to "separate but equal," which is the label that has stuck when referring to *Plessy*'s core holding. *Id.* at 552 (Harlan, J., dissenting).

68. Brief for Plaintiff in Error, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 210), 1893 WL 10660, at *30.

69. Eskridge, *supra* note 4, at 1398–99 (discussing "tolerable variation" as one step in the progression away from ostracism of a marginalized group).

Jim Crow segregation on railcars. Rather, it was poor whites who voiced the loudest call to maintain white supremacy through mandated segregation on all railcars.[70]

B. *The Tipping Point: How Poorer White Farmers Pushed for Mandatory Segregation on Railcars and Thus Set the Stage for Supreme Court Approval of Jim Crow*

A Confederate soldier hobbles home after being soundly defeated in the Battle of Gettysburg.[71] For some, taking a stand against abolitionists had a concrete economic benefit. Slaves tilled the fields at southern plantations, directly lining the pockets of their master. For others, it was framed as simply a matter of pride. Northerners shamed Southerners for defending slavery despite the fact that our founding fathers themselves held slaves.[72]

Forced into submission, many Confederates reacted on a visceral level. And the obvious targets were freed slaves whose mere existence was a bitter reminder of both the southern states' failure to secede from the Union and the devastating effect on the South, not only in terms of extensive Confederate causalities, but on the demolition of many Confederate landmarks.[73] That sentiment was captured in the following words contained in a personal letter penned by a Confederate soldier in 1865, who returned home to find "n***** with arms in hand, doing guard duty."[74] As vehemently vowed by the Confederate soldier, "[T]he day will come when we have the upper hand of those scondrels [*sic*] and

70. LOFGREN, *supra* note 17, at 24.

71. For a lively account of Gettysburg and other Civil War battles, including discussion of how many officers were lawyers, see Peter Drymalski, *Trial by Combat: Lawyers on the Battlefields of the Civil War*, 86 N.Y. ST. B.J. 10, 12 (May 2014) ("Lawyers commanded entire armies—such as Benjamin Butler and Nathaniel Banks for the North and Jubal Early for the South.").

72. Caroline M. Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U.L. REV. 605, 621 n.79 (2008) (quoting Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 624 & n.12 (4th Cir. 2002) ("[T]he Fourth Circuit acknowledged, for some the Confederate flag represents 'pride in Southern heritage and ideals of independence' and for others it is 'a symbol of racial separation and oppression.'" (citations omitted)).

73. LOFGREN, *supra* note 17, at 23 (noting "white southerners conjoined black freedom with white defeat, and added a version of Reconstruction that emphasized black misdeeds and buffoonery"). Lofgren further notes that "blacks served nicely as 'enemies surrogate for the hated North.'" *Id.* (quoting JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES 77–78 (1980)).

74. *Id.* at 7.

we will have no mercy for them[;] *we will kill them like dogs.* I [was] never down on a n***** as I am now."[75]

While Jim Crow originated in the North, disgruntled Southerners quickly picked up the playbook and piled on. In other words, if Jim Crow was the manner to tolerate freed African Americans, it needed to happen, and fast, in the post-Civil War South. Yet political maneuvering would still take its course. African Americans could vote and that vote was up for grabs.[76] Numerous scholars report an attempted populist alliance between poorer whites and African Americans.[77] As aptly put by civil rights historian C. Vann Woodward, it was an "equalitarianism of want and poverty, the kinship of a common grievance and a common oppressor," namely rich white Southerners.[78] As frankly stated by a Texas populist, "They are in the ditch, just like we are."[79]

During the agricultural depression of the late-nineteenth century, Tom Watson stood at the helm of the Southern Populism movement. Reaching out to African Americans, he declared that the "People's party will settle the race question," by *inter alia* "offering to white and black a rallying point which is free from the odium of former discords and strifes."[80] Watson, a strong believer that "self-interest always controls," also pledged to make "it to the interest of both parties to act together for the success of the platform."[81] To the Southern Populists' credit, they made headway, including gaining inclusion of a plank in the 1896 Georgia Populist party platform decrying lynchings.[82] And in an 1892 election campaign, when a politically active African American Populist was threatened, Watson rallied "[t]wo thousand armed white farmers, some of whom rode all night," to stand guard against the violence.[83]

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75. *Id.* at 7–8 (second, third, and fourth alterations in original) (emphasis added).

76. *See, e.g.*, Cheryl Harris, *In the Shadow of* Plessy, 7 U. PA. J. CONST. L. 867, 887 (2005) (noting the attempts to disenfranchise black voters to keep property-less white voters voting Democratic).

77. *Id.* at 886 (noting Populists "as potential allies" given their similar economic status).

78. WOODWARD, *supra* note 19, at 61.

79. *Id.*

80. *Id.*

81. *Id.* at 61–62.

82. *Id.* at 62.

83. *Id.* at 62–63.

While the alliance made sense, it did not sit well with conservatives. Moreover, Watson and his populists were faced with one major hurdle: racism. While it existed throughout the South, it "ran highest and strongest among the very white elements to which the Populist appeal was especially addressed—the depressed lower economic classes."[84] For that reason, it was a marvel that the alliance made as much headway as it did.[85] Make no mistake, Watson's message was to put African Americans on equal footing as whites. He also saw how racial tensions could be exploited to the detriment of both.[86] Woodward summarizes Watson's eloquent rhetoric, which is at least as forward-thinking as Justice Harlan's prophetic dissent in *Plessy,* as follows:

> Addressing himself directly to the problem of color prejudice, Watson told the two races: "*You are made to hate each other because upon that hatred is rested the keystone of the arch of financial despotism which enslaves you both. You are deceived and blinded that you may not see how this race antagonism perpetuates a monetary system which beggers you both.*" Repeatedly [Watson] stressed the identity of interest that transcended differences in race, telling them that "*the colored tenant . . . is in the same boat with the white tenant, the colored laborer with the white laborer,*" and that the "accident of color can make no difference in the interest of farmers, croppers, and laborers." He promised the Negroes that "if you stand up for your rights and for your manhood, if you stand shoulder to shoulder with us in this fight," *the People's party will "wipe out the color line and put every man on his citizenship irrespective of color.*"[87]

Conservatives learned that to retain power, it was necessary to stoke racism, specifically including pitting poorer whites against their African American counterparts.[88] Divide and conquer. Racist rhetoric forged a new and solid alliance between the once-estranged upper-class conservatives and lower-class whites, with the common goal to disenfranchise African Americans. As described by Woodward, it was a "guarantee that in the future nei-

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84. *Id.* at 62.

85. *Id.* ("The wonder is not that the Populists eventually failed but that they made as much headway as they did against the overwhelming odds they faced.").

86. *See id.* at 63.

87. *Id.* (second alteration in original) (emphasis added).

88. *Id.* at 79–82 ("Alarmed by the success that the Populists were enjoying with their appeal to the Negro voter, the conservatives themselves raised the cry of 'Negro domination' and white supremacy and enlisted the Negrophobe elements."); *see* discussion *infra* at Part II.A regarding voter suppression.

ther of the white factions would violate the white man's peace by rallying the Negro's support against the other."[89]

A second component to the racist rhetoric was that African Americans were somehow responsible for the economic woes of poorer whites. The longer than expected agricultural depression took its toll on this demographic.[90] In Woodward's words, "Economic, political, and social frustrations had pyramided to a climax of social tensions."[91] With no relief in sight, a scapegoat was needed and who better than newly enfranchised African Americans?[92] As mentioned, their mere presence was a constant reminder of the bitter loss of the Confederacy. Frustration leads to aggression and signal after signal—both social and institutional—were notching up to what Woodward termed "permissions-to-hate" from even those who previously scorned aggression against African Americans.[93] In modern parlance, poorer whites wanted their share of white privilege.

It was amidst this turbulence that *Plessy* made its way to the Supreme Court. As noted above, the Jim Crow laws existing in the 1880s and 1890s largely were de facto instead of de jure, meaning rail companies were under no legal duty to segregate railcars.[94] Passable African Americans regularly rode railcars without challenge in first-class segregated coaches.[95] But because there was no legal requirement to have a Jim Crow second-class car, poorer whites rode side-by-side with African Americans.[96] With the possible exception of Watson's Populists, this did not go over well. The *mandatory* segregation required by Louisiana's separate-car law changed that.[97] Poorer whites could assert their perceived superiority over poorer blacks.[98]

89. WOODWARD, *supra* note 19, at 83; *see* Harris, *supra* note 76, at 887 ("Both Populists and the Democratic Party gravitated to black disfranchisement as the solution to their differences and a way to make common cause: the elite wing . . . sought to promote black disfranchisement as a way of currying favor with the Populist movement.").

90. *See* WOODWARD, *supra* note 19, at 81.

91. *Id.*

92. *See id.*

93. *Id.*

94. *See id.* at 70–71; *see generally* LOFGREN, *supra* note 17, at 7–27 (describing the acts of segregation leading up to the *Plessy* decision).

95. LOFGREN, *supra* note 17, at 9.

96. *Id.*

97. *Id.* at 21–22 (listing the mandatory segregation laws passed by states).

98. *Id.*

Lofgren also acknowledged the push for *mandatory* railway segregation came from poorer Southern whites, in particular, Southern farmers, who were suffering the most from the agricultural depression. In addition to recognizing the failed alliance between white Populists and African Americans, Lofgren found that "legislators with small farmer constituencies likely saw the legislation as a means of obtaining segregated cars for poorer whites, who normally rode the second-class cars that railroad company policy often left unsegregated."[99]

The parallel to modern times cannot be ignored. In the 2016 presidential election, working-class voters were courted through the scapegoating of people of color—this time including undocumented Mexican immigrants—in rhetoric that echoed and stoked white supremacy, just as was done in the *Plessy* era. That rhetoric included the notion that undocumented Mexicans somehow were responsible for the economic distress of poorer whites.[100] Naturally this "permission-to-hate" had an impact not only on Latinos, but on all non-white minorities, including African Americans. Following the Trump campaign and election, hate crimes against minorities skyrocketed.[101] And as seen in the indelible images of those marching with Tiki-torches in Charlottesville, this generation of white supremacists is so emboldened that they do not even feel the need to hide their faces behind the traditional white hoods.[102]

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99. *Id.* at 24. Lofgren also concurred with Woodward's assessment that institutionalizing Jim Crow practices by enacting laws *requiring* segregation was a part of an overall mission to politically isolate and disenfranchise African Americans. *Id.* at 24–25.

100. *See* Tessa Berenson, *Poll Shows Limits Of Donald Trump's Anti-Immigrant Rhetoric*, TIME (Aug. 25, 2016), http://time.com/4464831/donald-trump-mexico-wall-election-poll/ (recognizing Trump's rhetoric that characterizes "many undocumented immigrants as criminals or as people who take jobs away from struggling Americans" but noting polls that suggests majority of Americans reject that view).

101. *See* Hatewatch Staff, *Update: 1,094 Bias-Related Incidents in the Month Following the Election*, SOUTHERN POVERTY L. CTR. (Dec. 16, 2016), https://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election.

102. *See* Conor Gaffey, *There Will Be More Charlottesville-Style Riots Under Trump, Civil Rights Chief Says*, NEWSWEEK (Aug. 30, 2017, 7:12 AM), http://www.newsweek.com/charlottesville-president-donald-trump-naacp-656818 (The interim president of the NAACP predicts more violence, stating, "Unfortunately, this administration has created an atmosphere where . . . [hate groups] feel comfortable to walk in public without the hoods anymore." (alteration in original)); *see also* Abigail Jones, *The White Supremacists Who Attacked Charlottesville are Coming Back with a Vengeance*, NEWSWEEK (Sept. 11, 2017), http://www.newsweek.com/white-supremacists-charlottesville-campus-fliers-662659 (discussing Charlottesville and the rise in alt-right campus recruiting).

While it may have been poorer whites that pushed for the type of legislation at issue in *Plessy*, that does not mean they should bear the brunt of the blame for the *Plessy* decision and its century-plus of lingering racism. As noted, like today, racism was purposefully stoked by affluent Southern whites for their own political and economic gain.[103] What is more to blame for a fire: smoldering embers or the hand that stokes such embers into an uncontrollable flame?

Ending the lingering effects of *Plessy* requires more than just understanding the social context of the *Plessy* decision. It also requires recognizing the modern day social and institutional parallels, including an examination of how *Plessy* just *might* have come down differently.

C. *Rewriting* Plessy *by Reframing and Rewriting the Then-Existing Social Rhetoric*

In civil rights litigation, it cannot be doubted that the legal strategy for a test case is critical to success. Just as a football team needs a game plan, so do attorneys seeking to challenge the constitutionality of a statute, especially when the statute has been easily passed by the legislature and appears to reflect well-established societal norms. It may be difficult, but it is not impossible. Tourgée and Walker faced this considerable challenge as they plotted the course to strike Louisiana's mandated segregation of railcars.[104]

As noted above, Tourgée wanted a "nearly white" plaintiff.[105] Homer was an "octoroon," meaning he was seven-eighths white.[106] Interestingly, Louis A. Martinet, a major proponent of challenging the statute and recruiting Tourgée, initially objected.[107] Martinet was a highly educated fair-skinned African American and his objection was based on his own perception that "persons of tolerably fair complexion, even if unmistakably colored, enjoy[ed] a large degree of immunity from the accursed prejudice."[108] Tourgée won the point. The Supreme Court brief he filed on behalf of

103. *See* LOFGREN, *supra* note 17, at 24; WOODWARD, *supra* note 19, at 61–63.
104. *See* Wisdom, *supra* note 17, at 14.
105. *Id.*
106. *Id.* at 14–15.
107. *Id.* at 14.
108. *Id.*

Homer led with one main argument, which entirely focused on Homer's mixed-blood and the fact that the "African admixture [was] not . . . perceptible."[109]

The brunt of Tourgée's main argument rested on the deprivation of property rights, more particularly, the deprivation "of the reputation of being a white man."[110] To be clear, Tourgée's primary argument was the statute was unconstitutional because of the burden it imposed on passable blacks.[111] In doing so, Tourgée spilled significant ink on the desirability of being white, or of at least passing for such. Especially odious was the notion that the railroad conductor had the de facto power to enforce the law. As prominently set forth in Homer's opening brief:

> There is no question that the law which puts it in the power of a railway conductor, at his own discretion, to require a man to ride in a "Jim Crow" car, that is, in the car "set apart exclusively for persons of the colored race," *confers upon such conductor the power to deprive one of the reputation of being a white man, or at least to impair that reputation.* The man who rides in a car set apart for the colored race, will inevitably be regarded as a colored man or at least be suspected of being one. And the officer has undoubtedly the power to entail upon him such suspicion. To do so, is to deprive him of "property" if such reputation *is* "property." Whether it is or not, is for the court to determine from its knowledge of existing conditions. Perhaps it might not be inappropriate to suggest some questions which may aid in deciding this inquiry. *How much would it be* worth *to a young man entering upon the practice of law, to be regarded as a* white *man rather than a colored one? Six-sevenths of the population are white. Nineteen-twentieths of the property of the country is owned by white people. Ninety-nine hundredths of the business opportunities are in the control of white people.* These propositions are rendered even more startling by the intensity of feeling which excludes the colored man from the friendship and companionship of the white man. *Probably most white persons if given a choice, would prefer death to life in the United States* as colored persons. *Under these conditions, is it possible to conclude that the* reputation of being white *is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?*[112]

The problem with Tourgée's argument—and what likely prompted Martinet's initial objection—is that he really was not

109. Brief for Plaintiff in Error, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 210), 1893 WL 10660, at *3.

110. *Id.* at *8–9.

111. *See id.* at *8.

112. *Id.* at *9 (first, third, and fourth emphases added).

going to bat for average African Americans. Rather, his argument only applied to a relatively few African Americans who could pass for white. It also encouraged passable blacks to do just that, thereby deepening the divide between blacks and whites, and supporting the notion of white supremacy.[113] Had the argument been accepted, it also could have led to a disaster for African American rights. Would passable blacks seek declaratory judgments of their white property rights, thereby turning their backs on their black heritage? And how possible was true determination of ancestry manageable in a world that had not yet even heard the term DNA? Of course, maybe that was the genius of Tourgée's argument. If Jim Crow laws could not be managed, would not they have to be struck? Put differently, and as most lawyers can appreciate, a win is a win.

The Supreme Court majority gave short shrift to Tourgée's property-right argument.[114] However, the fact that Homer was seven-eighths white did make its way front-and-center in the Court opinion.[115] While Tourgée must have hoped that fact would invoke relatability and empathy, it resulted in just the opposite. The Supreme Court made clear that the ability to pass was irrelevant and the determination of what percentage of black blood rendered an individual "colored" in the eyes of the law was a matter left to the states.[116] In fact, a state could legally segregate based upon even a single drop of black blood.[117]

It is perhaps impossible to truly say whether Tourgée and Walker erred in playing the "nearly white" card in the hopes of advancing civil rights for African Americans. That being said, it should be recognized that acceptance of this argument could easily have led to a three-tiered race-based caste system: whites, passable blacks, and non-passable blacks. This hardly constitutes equality for all.

Still, it is worth noting that Tourgée had other arguments that squarely focused on the injustice to *all* African Americans, as op-

113. It would appear undisputed that "passing" poses severe physical and psychological harms. *See* Andrew Tae-Hyun Kim, *Immigrant Passing*, 105 KY. L.J. 95, 137 (2016) (discussing illegal immigrants "passing" as United States citizens).

114. *See Plessy*, 163 U.S. at 537, 552 (dismissing the notion that the "proportion of colored blood" was relevant).

115. *See id.* at 538.

116. *Id.* at 552.

117. *See id.*

posed to just those who could pass for white. Yet these were buried deep into Homer's Supreme Court brief and were dwarfed by the overarching point that someone with seven-eighths white blood possessed property rights that a whole-blooded African American did not. For example, it was not until page nineteen that Tourgée would introduce the line that gave rise to the infamous quote from Justice Harlan's dissent that the Constitution should be "color-blind."[118] Tagged at the very last line of section XI, Tourgée finally argued, "Justice is pictured blind and her daughter, the Law, ought at least to be color-blind."[119] This eloquent line cannot be reconciled with the notion that an "octoroon"—with seven-eighths white blood—has a property right in the "reputation of being white" that a full-blooded African American would not. The clear implication is that the greater the amount of white blood that runs through an individual's veins, the higher degree of legal and social status they should be entitled.[120]

This author respectfully posits that the briefing in *Plessy* should have more squarely championed the rights of *all* African Americans, instead of lamenting the plight of passable blacks who—per Martinet—did not suffer anywhere near the same injustices and indignities. Interestingly, in voicing this objection, Martinet—who was a "lawyer, doctor, and newspaper editor"—had at least contemplated serving as the named plaintiff.[121] Judge Wisdom put it this way: "[Martinet said h]e would go himself, 'but I am one of those whom a fair complexion favors. *I go everywhere, in all public places though well-known all over the city, and never is anything said to me.*'"[122]

This author posits that Martinet might have been the better plaintiff. He was an accomplished and well-educated African American, which would have allowed brief-writers to squarely address and dispel the underlying social rhetoric that African Americans were mentally inferior.[123] The fact that Martinet regu-

118. Brief for Plaintiff in Error, *Plessy*, 163 U.S. 537 (No. 210), 1893 WL 10660, at *19.

119. *Id.*

120. As noted above, Homer's brief also made the point that the boxcars afforded to African Americans were unkempt and clearly inferior. *Id.* at *30.

121. Wisdom, *supra* note 17, at 14.

122. *Id.* (emphasis added).

123. While this proposition would seem self-evident, it should be noted that at least some *Plessy*-era racists would not agree. One 1890 Jackson, Mississippi, newspaper argued just the opposite: "If every Negro in Mississippi was a graduate of Harvard . . . he

larly rode white coaches provided concrete evidence that the world was not going to end if the Louisiana statute was struck. And even assuming he carried a percentage of white blood, this did not need to be mentioned, let alone, emphasized. The better frame was that his education and social status made him a perfect role model for African American children. That model would be denigrated if he was made to ride in a segregated boxcar solely because of his African American heritage.

Still, there was bad law on the books that African Americans had to overcome. While the Supreme Court had upheld statutes that *prohibited* segregation, and had ruled that segregation could not be imposed upon *inter*state commerce, the Supreme Court also noted that states *theoretically* could mandate segregated railcars for routes that only involved *intra*state travel. For example, in *Louisville, New Orleans & Texas Railway Co. v. Mississippi*, the Supreme Court affirmed a Mississippi statute mandating segregation but did so arguably in dicta as the particular challenge was that the segregated boxcars were not equal in kind.[124] By contrast, segregation of routes involving *inter*state travel was prohibited in *Hall v. De Cuir*.[125]

By contrast, the constitutionality of local ordinances *prohibiting* segregation on railcars had been upheld in *Railroad Co. v. Brown*.[126] And there was at least *some* very clear law favoring African Americans, namely, the plain language of the Fourteenth Amendment, which flatly prohibited states from enacting law that denied the "equal protection" of the laws to African Americans, or from otherwise "making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States."[127] The majority expressly acknowledged that the "object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law."[128]

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would not be as well fitted to exercise the right of suffrage as the Anglo-Saxon farm laborer . . . [w]hose cross "X" mark . . . means force and intellect, and manhood . . . ." Mary Ellen Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 HOW. L.J. 1, 12 (alterations in original).

124. Plessy v. Ferguson, 163 U.S. 537, 547 (1896) (quoting Louisville, New Orleans & Tex. Ry. Co. v. Mississippi, 133 U.S. 547, 591 (1890)).

125. *Id.* at 546 (citing Hall v. De Cuir, 95 U.S. 485, 488 (1877)).

126. *Id.* at 545–46 (citing R.R. Co. v. Brown, 840 U.S. (17 Wall.) 445, 452–53 (1873)).

127. *Id.* at 543.

128. *Id.* at 544.

Therein lied the wedge. With this backdrop in mind, switching plaintiffs, and using the modern-day convention of a three-to-four paragraph persuasive introduction, this author humbly sets forth the following rewrite in the hypothetical case of *Martinet v. Ferguson.*

STATEMENT OF THE CASE

Louis A. Martinet is an accomplished lawyer, doctor, and newspaper editor. He also is of African American heritage. Prior to the passage of the Louisiana separate-car law, Mr. Martinet regularly rode first-class passage, enjoying the company and conversation of his fellow passengers without a single objection. It made no difference that he was black or that they were white. That changed on November 22, 1892, when a railroad conductor demanded that he forego his usual seat and instead ride in a separate railcar, solely based upon the color of his skin. When Mr. Martinet refused, he was forcefully removed from the coach, shackled, and imprisoned in a parish jail.

As this Court must recognize, the intent of the Fourteenth Amendment was to enforce the absolute equality of African Americans under the law. In *Hall v. De Cuir*, 95 U.S. 485 (1877), the Court ruled that segregation could not occur on railcars traveling between states. In *Louisville, New Orleans & Texas Railway Co. v. Mississippi*, 133 U.S. 547 (1890), this Court easily saw that a Mississippi separate-car law was an open invitation for railroads to provide African Americans with inferior accommodations while at the same time charging the same passage as better-equipped cars reserved for white passengers. If equal protection means anything, it means that an American dollar is an American dollar, regardless of the color of the hand by which it is offered. Absent this Court's intervention, the practice of providing inferior accommodations will continue not only on railcars, but in all places of business.

Mr. Martinet's challenge raises an additional issue not yet squarely addressed by this Court. Even assuming boxcars could be—and *would* be—maintained in truly the same physical condition, segregation of the races in and

> of itself renders such boxcars separate but inherently and undeniably *un*equal. Citizens are prohibited from riding alongside and engaging in common discourse with those of another race, which is a necessary step in achieving equality of citizenship for African Americans. It also disserves whites who wish to ride in tandem and discuss matters of public importance with all fellow citizens who are entitled to vote. To that end, it cannot be ignored that the thousands of white passengers who previously rode with Mr. Martinet on that route to Covington never once asked for his removal.
>
> Justice is pictured blind and her daughter, the Law, ought at least to be color-blind.[129] While it is argued that the law is powerless to eradicate personal prejudices, neither Louisiana nor this Court should place its considerable thumb on the scale in the opposite direction. Mr. Martinet is a role model and a pillar in his community. His educational achievements alone dispel the odious myth that African Americans are mentally inferior. He also has proven first-hand that African Americans can commune with whites on equal footing. That legacy will be severely tarnished if he is not allowed to retake his seat amongst his fellow white passengers on that route to Covington, none of which ever asked for his removal. The pernicious effects of such a rule will impact not only children born today, but those born tomorrow and for generations to come. This Court cannot uphold a law that makes it *more* difficult for African Americans to stand equally with their white brethren, either metaphorically or on a boxcar en route to Covington.

Hindsight analysis comes easy, but could *Plessy* have possibly turned out differently had the narrative been framed more squarely on equality for *all* African Americans, instead of leading with the particular unfairness imposed on those who could pass for white? And might there have been additional possible plaintiffs whose narratives provided different perspectives demonstrating the stigma imposed by Jim Crow?

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129. The reference to "pictured blind" and "pernicious" are in homage respectively to the language used by Tourgée in his brief, Brief for Plaintiff in Error, *Plessy*, 163 U.S. 537 (1896), 1893 WL 10660, at *19, and Justice Harlan in his dissent, *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

Of course, any chance of prevailing likely would have entailed not simply setting forth these narratives in briefs filed at the Supreme Court, but in telling these stories nationwide and changing the perspective by which the American public viewed racism. Obviously, given social media, that is a lot easier done today than in 1890. Still, how different would our world be today if the *Plessy* Court had struck down Jim Crow in his infancy? The true "pernicious" effect of *Plessy* can be more fully appreciated by a review of the rise in white nationalism following *Plessy* and the absolute license *Plessy* gave to states to institutionalize racism.

II. THE RECURRING RISE AND FALL OF THE KU KLUX KLAN IN THE POST-*PLESSY* ERA

The Klan was formed in May or early June of 1866 in Pulaski, Mississippi, by a handful of young men bored by the tedium of "small-town life" after returning home from the Civil War.[130] One of these men, Calvin Jones, offered up the law offices of his father, a local judge, for their first meeting.[131] Their tasks were to settle upon a "mysterious" name and to create rules and "ritual[s]."[132] "Ku Klux" was based on the Greek word "kuklos" which means "circle."[133] The use of a Greek word dovetailed with the fraternity-styled "hazing" rituals that became signature Klan devices.[134] "Klan" was not Greek but it added to the catchy alliteration. The group's purpose became clear within a year of its founding: to defend white supremacy through intimidating and even killing African Americans for sport.[135] Ultimately, because of the need for secrecy, the Klan moved their meetings from the law offices of Judge Thomas M. Jones to the ruins of an abandoned

130. ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION 3 (paperback ed. 1995).

131. *Id.* Trelease identifies the men as "Captain John C. Lester, Major James R. Crowe, John B. Kennedy, Calvin Jones (son of [Judge Thomas M. Jones]), Richard R. Reed, and Frank O. McCord." *Id.*

132. *Id.* at 4.

133. *Id.*

134. *Id.* at 4–5. Other Greek fraternity-styled influences including unusual names for the Klan's officers, such as "Grand Cyclops" (president), "Grand Magi" (vice-president), and "Grand Exchequer" (treasurer). *Id.* at 4. Trelease asserts that the name and basic rituals were closely patterned after Kuklos Adelphon or "old Kappa Alpha," which began at the University of North Carolina in 1812. *Id.*

135. *Id.* at 5–6, 10–11, 17.

house on the outskirts of town that had been destroyed by a cyclone.[136]

That the first meeting of the Klan was at the law office of a judge is intriguingly fitting, as it represented institutionalized racism. Throughout the history of the Klan, there has been a connection between the Klan with not only law enforcement, but also with the judiciary, legislature, and the executive branch of both state and federal government.[137] Sometimes this has been open and notorious, such as when police officers, judges, and politicians themselves donned the signature white hoods.[138] Other times, the association was at least a little less blatant, such as when President Woodrow Wilson screened the film *The Birth of a Nation*, an homage to the Klan, at the White House.[139] Wilson may not have openly espoused the values of the Klan through his words, but he did so through his conduct and the message sent had a resounding effect.[140] Notably, Wilson arranged previews for "other elected officials, members of his cabinets, and justices of the Supreme Court."[141] As set forth in more detail below, Klan membership skyrocketed, ultimately reaching five million nationwide.

While the first iteration of the Klan was largely shut down by 1930 because of its extremist terrorist activities, it did not die. In the post-*Plessy* era, America has seen three major resurgences of white nationalism, each carrying the metaphorical torch of those handful of men who first met at the law offices of Judge Jones. It did not really matter whether a person was rich or poor, educated or not. Membership was open to anyone who believed in white supremacy and who was willing to look at the world through the cut-out eyes of a white hood.

136. *Id.* at 5. Trelease paints the picture by further noting, "Next to the ruins was a grove of barren, storm-lashed trees, adding to the desolate and haunted atmosphere of the place." *Id.*

137. *See, e.g.*, *id.* at 3 (noting that John Lester, Calvin Jones, and Richard Reed would all go on to be lawyers and Lester would serve in the Tennessee legislature).

138. *See, e.g.*, Allen-Bell, *supra* note 33, at 1182.

139. *See id.* at 1190.

140. *Id.* (noting that President Wilson's "enthusiastic[]" screening of *Birth of a Nation* "must have shaped policy and more").

141. *Id.*

A. *The Rise of the Ku Klux Klan Following the* Plessy *Decision*

"Blacks not welcome here." These were the type of signs that greeted African Americans across the nation in the wake of the *Plessy* ruling upholding a state's right to enact Jim Crow laws.[142] In political terms, Professor Mary Ellen Maatman describes the basic white supremacist strategy as resting upon "twin pillars"—namely segregation and rampant disenfranchisement of African American voters.[143] Segregation did its part by emphasizing "presumed differences by relegating Blacks to unmistakably inferior facilities."[144] Lawmakers simultaneously endeavored to disenfranchise African Americans in any way they could, even including attempts to limit the vote to only those citizens who were eligible to vote *prior* to the date that African Americans were enfranchised.[145] Other measures included conditioning the right to vote on property ownership or literacy and then carving "loopholes in the barriers through which only white men could squeeze."[146] Other common schemes were poll taxes, seen by some as the "most reliable means of curtailing the franchise—not only among the Negroes, but among objectionable whites as well."[147] The startling effectiveness of such tactics could be seen in Louisiana, where the amount of registered African American voters dropped from 130,334 in 1896 to a mere 1342 in 1904, reflecting a ninety percent differential.[148]

It was during this post-*Plessy* period that Jim Crow flourished. Woodward describes this as a "mushroom growth" during the first two decades of the twentieth century.[149] It permeated every facet of life, effectively precluding common contact between the races. For example, an elaborate South Carolina code prohibited textile workers of different races from "working together in the same room, or using the same entrances, pay windows, exits, doorways, stairways, 'or windows [*sic*]' at the same time, or the same 'lavatories, toilets, drinking water buckets, pails, cups, dippers or

142. *See, e.g.*, WOODWARD, *supra* note 19, at 98 (referencing "Whites Only" signs).
143. Maatman, *supra* note 123, at 4; *see* WOODWARD, *supra* note 19, at 83–86.
144. Maatman, *supra* note 123, at 14.
145. *Id.* at 10–11 (speaking of Louisiana's efforts to disenfranchise blacks).
146. WOODWARD, *supra* note 19, at 83–84.
147. *Id.* at 84.
148. *See id.* at 85. Woodward also notes that while African Americans had the majority in twenty-six Louisiana parishes in 1896, this dropped to zero by 1900. *Id.*
149. *Id.* at 97–98.

glasses.'"[150] And no one truly disputes that the promise of *Plessy*—that separate accommodations truly be equal at least in kind—fell by the wayside.[151] The substandard nature "spelled inferiority and humiliation on a daily basis."[152]

Disenfranchisement coupled with segregation provided the perfect seed ground for a resurgence of the Klan. African Americans were politically powerless and easy targets for violence as law enforcement and elected officials either looked the other away or actively participated.[153] And liberal Northerners had simply grown accustomed to treating African Americans as inferior.[154]

Popular culture made a place for freed African Americans and it was far from flattering. Klansmen were glorified in a 1905 novel by Thomas Dixon that would become a nationally toured stage play, ultimately resulting in the film *The Birth of a Nation*, discussed above.[155] In contrast to the heroic portrayal of the Klansmen, African Americans were portrayed as "lecherous emancipated slaves hungry to assault white women."[156] Dixon acknowledged that the fictional story was the "true story of the Klan."[157] And he would even get Supreme Court Chief Justice Edward White to admit that he had been a member of the Klan, which Justice White described as the "uprising of outraged man-

150. *Id.* at 98 (alteration in original). In a prior section, Woodward ironically looks at an editorial posted by the Charleston *News and Courier* in 1898. *See id.* at 67–69. In *decrying* Jim Crow, the writer called attention to what he believed to be "absurd consequences" such as separating the races at "saloons . . . and Jim Crow eating houses" and even having a "Jim Crow Bible" in courtrooms. Sadly, that is exactly what happened, even "down to and including the Jim Crow Bible." *Id.*

151. CHEMERINSKY, *supra* note 1, at 37 ("By every measure and standard, separate was never equal, as the facilities for blacks were never nearly the same as those for whites.").

152. Maatman, *supra* note 123, at 14 (quoting DAVID R. GOLDFIELD, BLACK, WHITE, AND SOUTHERN 11 (1990)). Maatman also cites a 1939 commentator who frankly noted, "No city in the South provides equal facilities under its policy of segregation . . . . The physical inequality has become a symbol of the essential racial status and has been defended with great determination." *Id.* (alterations in original).

153. *See* Allen-Bell, *supra* note 33, at 1182 ("The KKK often shared a symbiotic relationship with local law enforcement entities."). Allen-Bell also notes that in the 1920s, the Klan "controlled hundreds of elected officials and several state legislatures" and the "1960s Klan had a share of businessmen, homeowners, minor professionals, politicians, policemen, and individuals with roots in the community." *Id.* at 1161–62.

154. *See generally* Darren L. Hutchinson, *Racial Exhaustion*, 86 WASH. U.L. REV. 917, 928–41 (2009) (reviewing history of the Reconstruction era and concluding "After only ten years, concentrated legal efforts to disestablish slavery and to respond to white supremacist violence had become too taxing for the nation to sustain").

155. Allen-Bell, *supra* note 33, at 1189–90.

156. *Id.* (quoting DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 267 (2008)).

157. CHALMERS, *supra* note 5, at 27.

hood."[158] Given the widespread initial approval, specifically including that of President Wilson, the film went on to enjoy tremendous public appeal.[159]

The impact of *The Birth of a Nation* arguably provided the main impetus for the revival of the Klan. It was led by William J. Simmons, who had vowed, even as a child, to bring back what he later would dub "comprehensive Americanism."[160] Iconic images of the original Klansmen seduced and mesmerized Simmons. In words spoken of his childhood, Simmons said, "*On horseback in their white robes they rode across the wall in front of me. As the picture faded out I got down on my knees and swore that I would found a fraternal organization that would be a memorial to the Ku Klux Klan.*"[161]

In 1915, one week prior to the debut of *The Birth of a Nation* in Simmons's Atlanta hometown, Simmons fulfilled his childhood dream. In ritualistic fashion, he gathered "nearly two-score men from various fraternal orders, including two members of the original Klan and the speaker of the Georgia legislature" and marched them up to the top of Stone Mountain.[162] Shivering in the cold, they built a makeshift altar with stones and a cross made of pine boards drenched in kerosene. [163] Simmons "touched a match to the cross" thereby calling the "Invisible Empire . . . from its slumber."[164] When *The Birth of a Nation* opened, an Atlanta newspaper ran an announcement from Simmons calling for recruits side by side with an advertisement for the film.[165] Within a short time, Simmons had ninety followers.[166]

Simmons's Klan differed from the original Klan in one key respect. It was a business, even selling life insurance to its mem-

158. *Id.*
159. *See id.* at 26–27; *see also* Allen-Bell, *supra* note 33, at 1189–90.
160. CHALMERS, *supra* note 5, at 28.
161. *Id.* (emphasis added).
162. *Id.* at 29–30.
163. *Id.* at 30.
164. *Id.*
165. *Id.*
166. *Id.* African American leaders rightfully feared that the mere reference to the Klan would trigger a resurgence of violence. For example, one Georgia Republican leader, Henry Lincoln Johnson, "begged the governor to make the order change its name, on the grounds that the Klan's re-establishment would encourage 'mob outlawry,'" which, of course, it did. MACLEAN, *supra* note 37, at 13.

bers.[167] It grew, not only in size, but also in scope. With the influx of immigrants, the Klan had a new target. While still primarily focused on maintaining superiority over African Americans, most immigrants, including Jews and Catholics, were also demonized.[168] This led to the notion that "the only good Catholic was a dead Catholic."[169]

Economic frustration also played a part in fueling the revival, but in a different manner than before. Both rich and poor signed up, but it was not their actual wealth and place in society that caused frustration. Instead it was their belief that whatever their social status was, it should be better. They were more than willing to scapegoat both African Americans and immigrants for their own perceived economic shortcomings.[170] As explained by historian Nancy MacLean,

> [W]hat attracted men to the Klan was not simply their relative standing. It was the changes they experienced in that standing over the years leading up to and following 1920, as *their expectations were first raised, then abruptly dashed.* By and large, these were men who had climbed the economic ladder, if only by a rung or two. The Protestant work ethic had paid off for them, most dramatically during the wartime bonanza. Then, suddenly, just when their prospects had appeared most promising, they confronted unforeseen obstacles—if not disaster. Being on edge to begin with, *they reeled under the wave of the hard times that washed across the land.* Already feeling vulnerable, Klansmen-to-be then looked on as labor and capital locked heads. Whether unskilled workers pushed up wages or capital beat them back and expanded on the proceeds, *middling men feared being crowded out. Large numbers joined the Klan in hopes of warding off that fate and reclaiming their cherished independence.*[171]

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167. *See* CHALMERS, *supra* note 5, at 30–31. In 1920, Simmons essentially farmed out recruitment to two publicists, Edward Young Clarke and Elizabeth Tyler. *Id.* at 31. In 1920, a contract was struck by which Clarke's department would receive "eight dollars of the ten dollars paid by each recruit it brought in." *Id.* at 32; *see id.* at 109 (referencing the "TEN-DOLLAR SPECIAL"). In 1921, Simmons himself would earn $170,000, among other financial incentives, which could only be described as a fortune for that time. *See id.* at 35.

168. NEWTON & NEWTON, *supra* note 26, at iv.

169. *Id.* at x.

170. *Cf.* MACLEAN, *supra* note 37, at 53–54.

171. *Id.* (emphasis added). *See generally* CHALMERS, *supra* note 5, at 107–15 (discussing how Klansmen blamed Jews and other immigrants for their economic woes). Chalmers also discusses how urban Klansmen were "internal migrant[s]" who moved to urban areas and were prime recruits when they were "[p]oorly educated and unsure." *Id.* at 114–15. Through "the stress and strain of social competition [the urban immigrant] is made to realize his essential mediocrity" when outdistanced by others. *Id.* at 115. Such individuals found "solace" and a "sense of belonging" upon joining the Klan. *Id.*

Ultimately, membership in the Klan swelled to an estimated 4,000,000 in the mid-1920s, which constituted "roughly 5%—14% of the eligible population."[172] And that included *both* Southerners *and* Northerners.[173] With Jim Crow hitting its full stride, the influence of the Klan was most powerful in the South, where "[a]t least two state governments, those of Texas and Oklahoma, were for a time almost completely under the domination of the Klan."[174]

Despite this power, and a 40,000-strong march in Washington, D.C., in full Klan regalia in August of 1925, interest in the Klan waned.[175] Just as the first wave of Klansmen fell because of out-of-control violence, "[e]xtremists in the Klan became their own worst enemies, frightening the rank and file."[176] By 1929, membership had dwindled to a mere 100,000 nationwide, more than a ninety percent drop from the previous estimate of 4,000,000.[177] Still, like a wart that refuses to go away, the Klan would have a second post-*Plessy* resurgence, this time as a backlash to the Supreme Court's decision in *Brown v. Board of Education*.[178]

B. Brown v. Board of Education *and Jim Crow II: Backlash and the Second Resurgence of White Nationalism*

Nathan Margold, Charles Hamilton Houston, and Thurgood Marshall are a few of the many lawyers along the way who were responsible for the decision in *Brown v. Board of Education*. Yes, the *lawyers*.[179] While the Supreme Court handed down the deci-

172. Fryer & Levitt, *supra* note 25, at 1888; *see* Allen-Bell, *supra* note 33, at 1161 ("At its peak, the new Ku Klux Klan of the 1920s—a reincarnation of the original white supremacist group in the Reconstruction South—had an estimated 5 million members nationwide." (quoting RICHARD K. TUCKER, THE DRAGON AND THE CROSS: THE RISE AND FALL OF THE KU KLUX KLAN IN MIDDLE AMERICA 5–6 (1981))).

173. *See* WOODWARD, *supra* note 19, at 115.

174. *Id.* at 115–16.

175. NEWTON & NEWTON, *supra* note 26, at x.

176. *Id.*

177. *See id.*

178. 347 U.S. 483 (1954).

179. ROBERT J. COTTROL ET AL., *BROWN V. BOARD OF EDUCATION*, CASTE, CULTURE AND THE CONSTITUTION 53 (2003). Margold, Houston and Marshall were all hired by the National Association for the Advancement of Colored People ("NAACP"), which was founded in 1909. *Id.* at 50. A major goal was to overturn *Plessy*. *Id.* at 54. The NAACP and its lawyers saw the need and took care to pave the way through successful resolution of other cases and then pick the perfect plaintiff to squarely challenge *Plessy*. *See id.* at 57–58. Credit also is given to W.E.B. Du Bois, heralded as a visionary and "undoubtedly the most important of the organization's founders." *Id.* at 50; *see* Robert L. Tsai, *Sacred Visions of*

sion—and there are fascinating stories as to the remarkable circumstances—it was *lawyers* who recognized how difficult it was to overturn precedent and came up with both a legal *and* societal strategy to plant a red flag next to *Plessy* in the history books.[180] Sure, these lawyers saw how *Plessy* failed to recognize that separate was inherently unequal. But they did not stop there. Over time, courageous advocates collectively chipped away at *Plessy* until it was time to take it down. To be clear, it was not just eloquent language in the final briefing or the excellent oration of Thurgood Marshall that won the day, it was a careful and methodical journey that took decades and changed the minds not only of the Supreme Court Justices, but of the American people.[181]

Overturning *Plessy* entailed surgically dismissing the rationales supporting the *Plessy* decision, including debunking the "scientific racism" by which African Americans were deemed inferior.[182] Ultimately, when Thurgood Marshall took the podium at the Supreme Court, the social, legal, and scientific rhetoric were aligned. The myths supporting the separate-but-equal model were exposed as the false rhetoric they always were. Truth to power. In a unanimous decision, the *Brown* Court soundly rejected the separate-but-equal doctrine and drove a legal stake through the *Plessy* opinion.[183]

The backlash was fierce.

Many Americans were ready for the *Brown* decision, which mandated integration throughout the nation in public schools.

Law, 90 IOWA L. REV. 1095, 1133–34 n.170 (referencing the "brilliant and dogged team of lawyers who developed and worked so hard and long on *Brown*" (quoting Bob Herbert, *Regressing on Integration*, N.Y. TIMES, Apr. 26, 2004, at A19)).

180. *See generally* COTTROL ET AL., *supra* note 179, at 49–76 (discussing legal strategies of the *Plessy* lawyers).

181. *See id.* at 61–63, 139–41, 144, 146–50; *see also* Nathaniel R. Jones, *The Sisyphean Impact on Houstonian Jurisprudence*, 69 U. CIN. L. REV. 435, 440 (2001) (discussing the reversal of *Brown* and noting that "[t]he effort, led by Charles Hamilton Houston, to dismantle the legal foundation of *Plessy* is one of the remarkable sagas of American history").

182. *See* Edelson, *supra* note 2, at 524–25 (discussing "scientific racism" and noting that while the *Plessy* opinion did not specifically cite scientific findings, such findings were implicit in the opinion); *see also* OFFIT, *supra* note 66, at 115.

183. *See Brown*, 347 U.S. at 486. It is well recognized that the unanimity of the *Brown* decision was no accident. *See* James L. Hunt, Brown v. Board of Education *After Fifty Years: Context and Synopsis*, 52 MERCER L. REV. 549, 567–68 (2001). *Brown* was heard in the spring of 1953 and then *reheard* in the fall at the urging of Associate Justice Felix Frankfurter. *Id.* at 565. This was a stalling tactic to give the Justices more time to come to a unanimous decision after the appointment of Chief Justice Earl Warren. *See id.* at 568; *see also* COTTROL, *supra* note 179, at 162–63, 165–66.

Jackie Robinson had already stepped up to the batter's box as a Brooklyn Dodger, thus shattering the race barrier in professional sports.[184] But many white Americans were not ready to move beyond Jim Crow. While they may have cheered black athletes on their favorite sports teams, they still could not stomach the idea of their children sitting side by side with African Americans in public schools. History repeats itself. Again, while future generations would easily see the irrationality that fueled the cry for continued segregation, many Americans vehemently revolted.[185] And the Klan was right there to answer the call.

Various Klans simultaneously sprouted up, with the question being not *whether* the Klan would reemerge, but instead, which Klan would lead the way. As explained by David Chalmers, "In a South marked by growing hysteria, the Klans burst into activity, and a resurgent proliferation of would-be leaders galloped about the landscape seeking support from old Klans and new Klansmen."[186]

Violence against African Americans would again surge in the wake of the *Brown* decision. Indeed, the Supreme Court would later even recognize how *Brown* resulted in "another outbreak of Klan violence" that included "bombings, beatings, shootings, stabbings, and mutilations."[187] Public opinion supported the decision, but only by a fifty-two percent majority.[188] Notably, a full forty percent of those polled believed the matter was best left to the states.[189] On the Senate floor, a bill was introduced setting forth "the Southern Manifesto," vowing "to maintain Jim Crow by all legal means."[190] The effect was polarizing, and there was no

184. For an interesting correlation between Jackie Robinson and Martin Luther King, Jr., *see generally* James R. Devine, *The Past as a Moral Guide to the Present: The Parallel Between Martin Luther King, Jr.'s Elements of a Nonviolent Civil Rights Campaign and Jackie Robinson's Entry onto the Brooklyn Dodgers*, 3 VILL. SPORTS & ENT. L.J. 489 (1996).

185. DAVID CHALMERS, BACKFIRE: HOW THE KU KLUX KLAN HELPED THE CIVIL RIGHTS MOVEMENT 5 (2003) (The *Brown* decision on May 17, 1954, "gave the 'Invisible Empire' a new impetus and environment for action.").

186. *Id.*

187. Virginia v. Black, 538 U.S. 343, 355 (2003). For a more detailed discussion, *see* Tsai, *supra* note 179, at 1143–44.

188. Tsai, *supra* note 179, at 1135.

189. *Id.* at 1135–36 (setting forth results of a 1954 Gallup poll and noting that forty percent "believed that the best route to long-term peace was to permit racial segregation in those areas where it then existed").

190. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 37 (rev. ed. 2012).

escaping the national conversation. Put simply, "*Brown* forced people to take a position."[191]

With separate but equal off limits, Jim Crow had to reinvent himself. And so he did. Examples of institutionalized racism included state resolutions declaring *Brown* "null" and imposing penalties for compliance with desegregation.[192] Southern states also engaged in other legal shenanigans purposefully intended to thwart or at least delay the Supreme Court's mandate.[193] When this failed, Jim Crow morphed into erecting Confederate monuments and flying Confederate flags at public locations. In 1956, Georgia even modified its state flag to include the "St. Andrew's Cross" to protest *Brown* and other cases that advanced civil rights.[194] As each new statute was unveiled, the governmental message was clear: we stand with the Klan. As aptly put by Alexander Tsesis:

> *Confederate symbols are more than merely fashionable insignia. . . .* The Confederate battle flag called Southerners to arms. It swelled the breasts of those who believed plantation life, with its concomitant racist features, was worth dying for. The Old South not only kept blacks in a state of bondage, it denied them the right to gain an education, speak their minds, and marry whom they would . . . . Contemporary governments, which use the Confederate battle flag in their official logos, stamp blacks with a badge of inferiority. *Any state that extols its Confederate heritage communicates its high regard for a government that abridged freedoms by prohibiting blacks from voting, traveling outside areas their masters permitted them to frequent, denied blacks the right to enter into contracts, including marriage. Modern day statues of leading traitors like Jefferson Davis, erected on publicly owned lands, signal solidarity with Confederate goals.*[195]

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191. Tsai, *supra* note 179, at 1152 & n.253 (quoting Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 150 (1994)). Tsai also entertains Klarman's argument that the South was so entrenched in racism that *Brown* "actually set back racial progress by polarizing the forces of progress and retrenchment." *Id.* at 1152. Tsai views *Brown* as such a "seismic event" that the "history of our secular religion would henceforth be understood in two epochs: B.B. ('Before *Brown*') and A.B. ('After *Brown*')." *Id.* at 1153.

192. *See* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1014 & n.92 (discussing the "massive resistance" of the Southern states).

193. *See, e.g., id.* at 1014 & n.95 (discussing thinly veiled administrative hurdles, such as evaluating a student's "psychological qualifications" before approving a transfer).

194. Tsesis, *supra* note 28, at 601.

195. *Id.* at 599 (emphasis added) (footnotes omitted). *See generally* L. Darnell Weeden, *How to Establish Flying the Confederate Flag with the State as Sponsor Violates the Equal Protection Clause*, 34 AKRON L. REV. 521, 526 (2001) (discussing election campaign controversy relating to the flying of Confederate flags, or Confederate symbols, on state proper-

Put simply, African Americans began to receive their legal due but only under the most begrudging conditions. Jim Crow II. *Plessy* was still alive and well in the spirit if not the letter of the law.[196] African Americans rightfully fought back by demanding increased legislation to secure equal treatment and curb hate crimes. During this battle, Martin Luther King, Jr., and Malcolm X, among many others, would sacrifice their lives to advance civil rights for people of color.[197]

Ultimately, violent extremism would again mark and doom the post-*Brown* resurgence of the Klan.[198] As put by scholar Robert Tsai, "It took the shocking news of intensive and often violent Southern resistance to coax most citizens off the proverbial fence and onto the side of racial equality."[199] A 1961 poll found support for *Brown* had risen to sixty-six percent.[200] And in 1994—a half-century after *Brown* was handed down—eighty-eight percent of those polled "embrac[ed] non-discrimination as a central tenet of the American Creed."[201] By that time, the Klan had long since retreated to the metaphorical backwoods of Pulaski.[202] So that should be the end of the story, right? Wrong. There would be one more event that would awaken the dormant cancer of deep-seated racism. America would elect its first African American President—Barack Obama—which was a stunning rebuke to America's dance with white supremacy. Arguably, modern-day liberals had become as complacent as the Northerners in the Reconstruction era. Racism may have seemed squelched. But, like an apocalypse zombie, racists would again rise and take up arms—literally—in what may be their final stand to preserve white supremacy.

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196. *See* James W. Fox, Jr., *Doctrinal Myths and the Management of Cognitive Dissonance: Race, Law, and the Supreme Court's Doctrinal Support of Jim Crow*, 34 STETSON L. REV. 293, 341 (2005) (summarizing argument by Professor Cedric Merlin Powell that "even though *Brown* arguably changed the old doctrines of Jim Crow segregation, its replacement doctrines and the mythology of colorblindness supporting those doctrines perpetuate structural subordination almost as strongly as Jim Crow").

197. *See* WILLIAMS, *supra* note 30, at 275.

198. *Id.*; *see* Kennedy, *supra* note 192, at 1013–16 (describing the "segregationist defensiveness" in the aftermath of *Brown*).

199. Tsai, *supra* note 179, at 1136.

200. *Id.*

201. *Id.*

202. *See* TRELEASE, *supra* note 130, at 3 (discussing the origins of the Ku Klux Klan in Pulaski, Tennessee).

C. *The Election of Barack Obama and the Third Major Resurgence of White Nationalism*

"Blood and Soil." Sounding myriad Nazi chants, a mob of angry white nationalists and supremacists descended upon the University of Virginia campus. Setting the night sky ablaze, they boldly carried kerosene-filled Tiki-torches signaling their alliance with the Klan.[203] When faced with a relatively small group of counter-protestors, they hurled fists and stones coupled with classic racist and anti-Semitic epithets.[204] America watched in horror as the video rolled. The imagery was iconic and intended to replicate the cross-burning Klan raids that have so pock-marked and stained America's past.[205] But there was one glaring difference. Unlike their predecessors, these angry young men did not even have the shame to hide their faces behind the traditional white hoods.[206]

The rioting continued the next day at a "Unite the Right" rally in downtown Charlottesville. The purpose cited for issuance of a city permit was to protest the planned removal of a Confederate General Robert E. Lee statue.[207] But the call had gone out well beyond the borders of Charlottesville. Amongst the foot-soldiers that came ready to kill—literally—was James Alex Fields, Jr., a twenty-year-old Ohioan.[208] After a day of violent clashes, Fields crept his Dodge Challenger to an area where counter-protestors were peacefully dispersing.[209] Turning his vehicle into a weapon, Fields revved the engine and plowed into the crowd, injuring

203. *See* Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/. For a link to a VICE documentary containing chilling footage of the event, *see Charlottesville: Race and Terror*, VICE NEWS (Aug. 21, 2017), https://news.vice.com/story/vice-news-tonight-full-episode-charlottesville-race-and-terror.

204. Heim, *supra* note 203.

205. *See id.*

206. *See* Matt Thompson, *The Hoods Are Off*, ATLANTIC (Aug. 12, 2017), https://www.theatlantic.com/national/archive/2017/08/the-hoods-are-off/536694/ ("*We used to whisper these thoughts*, the new white supremacists suggest. *But now we can say them out loud.*").

207. *See* Sheryl G. Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html?_r=0.

208. *Id.*

209. *Id.*; *see also* Heim, *supra* note 203.

nineteen pedestrians and killing Heather Heyer, a paralegal described by friends as a "passionate advocate for the disenfranchised who was often moved to tears by the world's injustices."[210]

The Charlottesville events—and the tens of thousands of anti-racism protestors that turned out in subsequent rallies both that weekend and the next to drown out the voices of white supremacists[211]—began the trifecta of rapid-fire events in the summer of 2017 that made clear America was in the midst of yet another national and much-needed conversation about racism. But it hardly was the beginning of the resurgence of white nationalism. True, David Duke, a former Imperial Wizard of the Klan would comment on the Charlottesville events by saying his "'protestors were going to fulfill the promises of Donald Trump' to 'take our country back,'"[212] but the resurgence began long before Charlottesville. In fact, it came long before President Trump rode down that golden escalator at Trump Tower and announced his candidacy for President, while in almost the same breath characterizing Mexicans as "rapists."[213] President Trump's message did not *start* the resurgence, it *reflected* the resurgence, which began in earnest no later than the day America dared to elect its first African American President. As recognized by Carol Anderson in her book, *White Rage*, that was "the ultimate advancement, and thus the ultimate affront."[214]

Just as 1950s racists could not stomach the idea of a white child sitting next to a black child, today's generation of racists could not stomach the idea of a black man hosting heads-of-state

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210. Christina Caron, *Heather Heyer, Charlottesville Victim, Is Recalled as 'a Strong Woman,'* N.Y. TIMES (Aug. 13, 2017), https://www.nytimes.com/2017/08/13/us/heather-heyer-charlottesville-victim.html. A friend who was with Heather when she was killed further shared that Heather "often posted messages on Facebook about equality and love." *Id.* The friend added the following: "I've never had a close friend like this be murdered .... We thought, 'What would Heather do?' Heather would go harder. So that's what we're going to do. We're going to preach love. We're going to preach equality, and Heather's death won't be in vain." *Id.*

211. Lee & Haller, *supra* note 15.

212. Stolberg & Rosenthal, *supra* note 207.

213. David A. Graham, *What the Press Got Right About Trump's Candidacy*, ATLANTIC (June 16, 2016), https://www.theatlantic.com/politics/archive/2016/06/what-the-press-got-right-about-trumps-announcement/487247/.

214. ANDERSON, *supra* note 24, at 5; *see* WILLIAMS, *supra* note 30, at 197 ("The nomination and election of our first African American president, Barack Obama, in 2008 brought to light what has obviously been lying dormant for decades .... While liberties were granted to African Americans by law, the hearts of those who opposed giving this freedom to our brothers and sisters passed down the enmity of old and have kept it alive.").

at the White House. And President Trump easily was seen as harboring that same contempt. Insulted by Obama at the 2011 White House Correspondents' Dinner, President Trump continued to push his false "birther" claim—that Obama was constitutionally disqualified from serving as President because he was not born in the United States.[215] Especially given President Trump's prior brushes with racism,[216] he was instantly aligned with the "alt-right," the newly coined name for white nationalists and supremacists.[217] The alt-right includes both the Klan and neo-Nazis and a gaggle of other hate groups bent on the common goal of maintaining white privilege at all costs.[218]

Let the violence .

Even as a candidate, there were shocking examples of overt racism directed toward Obama, specifically including a sharp increase in death threats.[219] The hatred continued when Obama took office. From cross-burnings to school children chanting "Assassinate Obama,"[220] to a Facebook survey that asked "Should Obama be Killed?," racist rants served as a battle cry.[221] Both news media and the Southern Poverty Law Center documented the steady and sharp rise in hate crimes against minorities.[222]

Not surprisingly, business was booming for the Klan. By 2012, the estimated number of hate groups increased almost tenfold,

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215. *See* Patrice Taddonio, *WATCH: Inside the Night President Obama Took On Donald Trump,* PBS (Sept. 22, 2016), http://www.pbs.org/wgbh/frontline/article/watch-inside-the-night-president-obama-took-on-donald-trump/. Ultimately, Trump would admit that the birther claim was untrue. *See* Maggie Haberman & Alan Rappeport, *Trump Drops False 'Birther' Theory, but Floats a New One: Clinton Started It,* N.Y. TIMES (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/us/politics/donald-trump-birther-obama.html.

216. *See* Coates, *supra* note 23 (discussing public history of Trump's racist housing policies as well as Trump "call[ing] for the death penalty for the eventually exonerated Central Park Five").

217. *See Alternative Right,* SOUTHERN POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/ideology/alternative-right (last visited Nov. 15, 2017).

218. For a definition and explanation of the Alt-Right by the Southern Poverty Law Center, *see generally id.*; *see also* Matt Thompson, *The Hoods Are Off,* ATLANTIC (Aug. 12, 2017), https://www.theatlantic.com/national/archive/2017/08/the-hoods-are-off/536694/.

219. ANDERSON, *supra* note 24, at 156; *see* Camille A. Nelson, *Racial Paradox and Eclipse: Obama as a Balm for What Ails Us,* 86 DENV. U.L. REV. 743, 778–79 (2009) (explaining an unusually high spike of death threats, post-election, against Obama "from Maine to Idaho").

220. Nelson, *supra* note 219, at 779 nn.159 & 161 (chronicling events of racism directed toward Obama).

221. ANDERSON, *supra* note 24, at 156 (discussing a Facebook survey and noting that although it was taken down, "hundreds" had answered affirmatively).

222. Nelson, *supra* note 219, at 779 n.159; *see* Hatewatch Staff, *supra* note 101.

from 149 in 2008, when Obama was first elected, to 1360 in 2012.[223] Residents in Virginia began to receive driveway flyers from the Klan seeking new recruits.[224] One Klansman directly tied the resurgence to Obama's presidency, proudly stating, "Since Obama's first term our numbers have doubled and now that we're headed to a second term it's going to triple, *this is going to be the biggest resurgence of the Klan since 1915.*"[225]

Open recruitment continued throughout the nation, with leaflets left on "front lawns or car windscreens" that bore a "crudely drawn hooded Klansman" with the words "The KKK Wants You," an apparent reference to World War I recruiting posters.[226] Other leaflets highlighted the Klan's vigilante past: "Neighborhood watch! The law abiding citizens of your community can sleep in peace knowing the Klan is awake!"[227]

Nor can it be doubted that President Trump contributed to the rise in white-supremacist beliefs. During the campaign, he literally became the front-page poster boy for the Klan's newspaper.[228] A full twenty percent of President Trump's supporters who were polled disagreed with the Emancipation Proclamation and believed slaves should never have been freed.[229] Following the election, hate crimes against minorities again soared.[230]

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223. Annette Witheridge, *The Ku Klux Klan Back on Recruitment Drive Fueled by Hatred of Barack Obama and Decades of Racist Bile,* MIRROR (Apr. 12, 2014, 18:00), http://www.mirror.co.uk/news/world-news/ku-klux-klan-back-recruitment-3405202.

224. Annie-Rose Strasser, *Virginia KKK Uses Obama's Presidency as a Recruiting Tool,* THINKPROGRESS (Jan. 9, 2013, 5:50 PM), https://thinkprogress.org/virginia-kkk-uses-obam as-presidency-as-a-recruiting-tool-fe9af0e98fe3/.

225. *Id.* (emphasis added).

226. Witheridge, *supra* note 223 (reporting flyer recruitment in "small towns across the US," specifically including in Texas, Louisiana, Illinois, Maryland, and Pennsylvania).

227. *Id.*

228. Peter Holley, *KKK's Official Newspaper Supports Donald Trump for President,* WASH. POST (Nov. 2, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/11/01/the-kkks-official-newspaper-has-endorsed-donald-trump-for-president/ ("Under the banner 'Make America Great Again,' the entire front page" of the Klan's newspaper embraced Trump's message.).

229. Lynn Vavreck, *Measuring Donald Trump's Supporters for Intolerance,* N.Y. TIMES (Feb. 23, 2016), https://www.nytimes.com/2016/02/25/upshot/measuring-donald-trumps-supporters-for-intolerance.html.

230. There were 1094 documented hate crimes in the first month following Trump's election, many of which occurred within days. *See* Hatewatch Staff, *supra* note 101; *see also* Hatewatch Staff, *Update: Incidents of Harassment Since Election Day Now Number 701,* SOUTHERN POVERTY L. CTR. (Nov. 18, 2016), https://www.splcenter.org/hatewatch/2016/11/18/update-incidents-hateful-harassment-election-day-now-number-701; Hatewatch Staff, *Update: Over 400 Incidents of Hateful Harassment and Intimidation Since the Elec-*

Another familiar pattern emerged. Many of those who supported President Trump fit the same profile that always has underlied increases in racial tensions: disgruntled whites eager to scapegoat minorities for their own perceived economic shortcomings.[231] Jim Crow III. As argued by Anderson, "Make America Great Again" was code for bringing back and maintaining white supremacy in the face of a growing population of minorities.[232] In Anderson's words:

> Trump . . . *dangled a vision before his constituency where the vast resources of the nation would flow to whites, who in a few years would be a numerical minority*, but whose comfortable lifestyle would be supported by a large but virtually rightless body of workers, cowed by threats of deportation and virtually unchecked police power in black and brown neighborhoods.[233]

The fact that the Klan was not going anywhere was made blatantly obvious by a VICE documentary tracking the Charlottesville violence, wherein white supremacists were filmed openly stating, for example, that they were "talking about the ethnic cleansing of America."[234] Chillingly, in commenting on Heather Heyer's death, a white nationalist leader predicted "a lot more people are going to die before we're done here."[235] Another said, "we'll f***** kill these people if we have to."[236]

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tion, SOUTHERN POVERTY L. CTR. (Nov. 15, 2016), https://www.splcenter.org/hatewatch/2016/11/15/update-more-400-incidents-hateful-harassment-and-intimidation-election.

231. Jeff Guo, *A New Theory for Why Trump Voters Are So Angry—That Actually Makes Sense*, WASH. POST (Nov. 8, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/11/08/a-new-theory-for-why-trump-voters-are-so-angry-that-actually-makes-sense/?utm_term=.7eec5ff2aa97 ("[W]hite voters feel the American Dream is drifting out of reach for them, and they are angry because they believe minorities and immigrants have butted in line."); *see* KATHERINE CRAMER, THE POLITICS OF RESENTMENT: RURAL CONSCIOUSNESS IN WISCONSIN AND THE RISE OF SCOTT WALKER 8–9 (2016) (discussing reliance on group social identity and the intersection with resentment when met with economic insecurity, and identifying rural voting groups not feeling they are getting their "fair share"). *But see* Coates, *supra* note 23. Coates questions the common thought that "cultural resentment and economic reversal" accounted for Trump's win. However, he does agree that "Trump assembled a broad white coalition" that included both rich and poor. *Id.* This is akin to the coalition in the post-Reconstruction era that shut down Watson's Populists and joined poorer southern farmers with rich whites to ensure continued dominance. WOODWARD, *supra* note 19, at 82–83; *see* discussion *supra* Part I.B regarding white dominance.

232. *See* CAROL ANDERSON, WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE 170–71 (paperback ed. 2017).

233. *Id.* at 171 (emphasis added).

234. Jenna Amatulli, *This Charlottesville Documentary Is Required Watching for Americans in 2017*, HUFFINGTON POST (Aug. 15, 2017, 11:39 AM), http://www.huffingtonpost.com/entry/charlottesville-vice-documentary_us_59930983e4b09071f69cc8f6.

235. *Id.*

236. *Id.*

If there is a silver lining to the Trump presidency, it is that America has another opportunity to finally end the lingering effects of racism. Every problem is an opportunity. Might there be a way to finally put *Plessy* to rest?

III. THE NEXT STEP: ENDING THE *PLESSY* CYCLE BY REFRAMING DISCUSSIONS ON EQUALITY AND FOCUSING ON THE INSIDIOUS AND DEBILITATING LONG-TERM IMPACT ON OUR CHILDREN

The summer of 2017 may go down in American history as one of the most tumultuous ever. In little more than a week's time, Hurricane Harvey, and then Irma, pounded Texas, Florida, and the Virgin Islands, claiming numerous lives and causing hundreds of billions of dollars in damage.[237] A hurricane of a different sort pounded Charlottesville, and by extension, the entire country.

In hurricane parlance, it was a "category 5."[238] But it was not *just* the nightmarish images of the torch-lit march, or even the next-day rioting, that would cause such a stir. Institutionalized racism was impactful as well. What so outraged the vast majority of Americans, was despite the brutal display of hatred at Charlottesville against minorities—and the loss of the life of a peaceful protestor—an American President would blame "both sides," and not only fail to condemn white supremacists, but actually seem to defend them when he finally spoke his heart.[239]

While President Trump later made the case that he was misunderstood,[240] America was not willing to give him a pass. Not only was the mob of white supremacists at Charlottesville heavily dotted with Trump paraphernalia, but throughout his campaign and throughout his presidency, President Trump was all too slow

237. Tim Pearce, *Here's the Breakdown of Hurricanes Harvey and Irma by the Numbers*, DAILY CALLER (Sept. 12, 2017, 5:16 PM), http://dailycaller.com/2017/09/12/heres-the-breakdown-of-hurricane-harvey-and-irma-by-the-numbers.

238. *Saffir-Simpson Hurricane Wind Scale*, NAT'L HURRICANE CTR., http://www.nhc.noaa.gov/aboutsshws.php (last visited Nov. 15, 2017).

239. Dan Merica, *Trump Says Both Sides to Blame Amid Charlottesville Backlash*, CNN (Aug. 16, 2017, 1:14 AM), http://www.cnn.com/2017/08/15/politics/trump-charlottesville-delay/index.html; *see Trump Bestows Moral Equivalency*, USA TODAY (Aug. 13, 2017, 7:01 PM), https://www.usatoday.com/story/opinion/2017/08/13/trump-bestows-moral-equivalency-editorials-debates/104573520/ (quoting a Republican consultant stating, "Donald Trump carefully, purposefully and strategically established moral equivalency between the Nazis and white supremacists in Charlottesville, and those protesting them").

240. *See* Merica, *supra* note 239.

to denounce support from the alt-right, specifically including former Imperial Wizard David Duke.[241] And time and time again, President Trump also was slow to condemn violence against people of color, such as when there was an attack on a Minnesota mosque,[242] or when two Indian men were shot, one killed, by a Kansas man shouting "get out of my country."[243] By contrast, when the *perpetrator* of a crime was a person of color, President Trump's condemnation was swift and unequivocal.[244]

Actions speak louder than words.

Despite the universal condemnation of his conduct, and the clear perception that he was siding with avowed racists, less than a fortnight after Charlottesville, President Trump threatened to and did pardon Sheriff Joe Arpaio, the recently ousted sheriff of Arizona's Maricopa County, who had been convicted of failing to obey a court order directing him to end racial profiling.[245] Notably, even Republican lawmakers urged President Trump not to pardon Arpaio.[246] Despite having to know the fury it would cause, President Trump pardoned "Sheriff Joe" before he had been sentenced. And just like the aftermath of Charlottesville, the alt-

241. *See* Glenn Kessler, *Donald Trump and David Duke: For the Record*, WASH. POST (Mar. 1, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/03/01/donald-trump-and-david-duke-for-the-record/; *see also* Coates, *supra* note 23 (noting Trump "grudgingly" denounced David Duke's support of alt-right in Charlottesville).

242. Jake Lahut, *Trump's Silence on Minnesota Mosque Attack Prompts Criticism*, POLITICO (Aug. 8, 2017, 4:10 PM), http://www.politico.com/story/2017/08/08/minnesota-mosque-attack-trump-241408.

243. Mark Berman & Samantha Schmidt, *He Yelled 'Get Out of My Country,' Witnesses Say, and Then Shot 2 Men from India, Killing One*, WASH. POST: MORNING MIX (Feb. 24, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/24/get-out-of-my-country-kansan-reportedly-yelled-before-shooting-2-men-from-india-killing-one/.

244. *See generally* Phillip Bump, *Trump Once Again Rushes to Use an Overseas Terrorist Attack as Leverage on Twitter*, WASH. POST (Sept. 15, 2017), https://www.washingtonpost.com/news/politics/wp/2017/09/15/trump-once-again-rushes-to-use-an-overseas-terrorist-attack-as-leverage-on-twitter/ (compiling and contrasting a list of Trump's quick responses to terrorist attacks by Muslims, but slow responses when an attack is against people of color or their allies, such as both Heather Heyer and two Portland men who were stabbed to death when they confronted a white supremacist harassing a Muslim woman).

245. Julie H. Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html.

246. Lisa Mascaro, *Speaker Ryan 'Does not Agree' with Trump's Pardon of Arpaio*, L.A. TIMES (Aug. 27, 2017, 11:30 AM), http://www.latimes.com/politics/washington/la-na-essential-washington-updates-speaker-ryan-does-not-agree-with-1503856893-htmlstory.html.

right would herald President Trump's actions and counter-protestors would take to the streets in throngs in opposition.[247]

But President Trump was not done.

Barely ten days after the ink on Sherriff Joe's pardon had dried, President Trump took on DACA, which affected nearly 700,000 so-called "Dreamers"—largely Latinos—who had been brought to America as children.[248] Dreamers were registered, and per the program's requirements, were crime-free and either working or in school.[249] Again, when it was announced President Trump was likely going to end the program, there was vociferous objections even from Republicans.[250] Civic and religious leaders begged for mercy.[251] Others recognized the unjust impact not only on the Dreamers who faced deportation, but the added indignation to the larger Latino community, which was stigmatized by President Trump's fiery rhetoric and incendiary call to build a wall between Mexico and America to keep out the "bad hombres."[252] Seventy-six percent of Americans—including sixty-nine percent of Republicans—wanted DACA Dreamers to be allowed to stay.[253] Despite this substantial bipartisan national consensus, it

247. Henry Graber, *Trump's Pardon of Joe Arpaio Is a Clear and Ugly Message to Hispanic Americans*, SLATE: SLATEST (Aug. 25, 2017), http://www.slate.com/blogs/the_slatest/2017/08/25/trump_pardons_joe_arpaio_sends_a_message_to_his_anti_immigrant_base.html; *see The Latest: Police Say 4 Arrested in Connection with Rally*, US NEWS (Aug. 23, 2017, 2:48 AM), https://www.usnews.com/news/best-states/arizona/articles/2017-08-22/the_slatest-groups-say-theyre-against-politics-of-hate.

248. Schoichet et al., *supra* note 13.

249. *Id.*

250. Andrew Rafferty, *Congressional Republicans Signal Break With Trump Over DACA*, NBC NEWS (Sept. 4, 2017, 7:22 PM), https://www.nbcnews.com/storyline/immigration-reform/congressional-gop-signal-break-trump-over-daca-n798596.

251. *See id.* Notably, Pope Francis would also object, prompting a swipe by former White House strategist Steve Bannon, who said that Catholic bishops "need illegal aliens to fill the churches." Delia Gallagher, *Pope Francis Says Rescinding DACA Is Not 'Pro-Life,'* CNN (Sept. 12, 2017, 2:31 AM), http://www.cnn.com/2017/09/11/politics/pope-daca-trump/index.html.

252. Associated Press, *Trump Threatens Mexico Over 'Bad* Hombres,' POLITICO (Feb. 1, 2017, 7:12 PM), https://www.politico.com/story/2017/02/trump-threatens-mexico-over-bad-hombres-234524; *see* Carol Anderson, *By Ending Daca, Donald Trump Has Declared War on a Diverse America*, GUARDIAN (Sept. 5, 2017, 12:31 PM), https://amp.theguardian.com/commentisfree/2017/sep/05/donald-trump-dreamers-daca-carol-anderson. As eloquently put by Anderson, "[Trump's] message is clear: in the United States, few are welcome and even fewer are equal." *Id.*

253. Steven Shepard, *Poll: Majority Opposes Deporting Dreamers*, POLITICO (Sept. 5, 2017, 5:00 PM), http://www.politico.com/story/2017/09/05/poll-trump-deporting-daca-dreamers-242343.

was the alt-right who would have their way. On the morning after Labor Day—and while Texas was tending to Hurricane Harvey—Attorney General Jeff Sessions announced that President Trump had decided to phase out DACA.[254]

Reeling from this trifecta of controversial actions, the public outcry was off the charts.[255] Within hours, top Republicans condemned the action and vowed to join with Democrats to pass a bipartisan "DREAM Act" to protect the Dreamers.[256] Business leaders also chimed in, calling the rescission "cruel."[257] In fact, public outrage was so vehement that President Trump would try to shift the blame to Congress, imploring that it pass legislation to undo what he had just done.[258] Again, actions speak louder than words. Had President Trump truly wanted to undo what he had done, he could have simply rescinded his order phasing out the program.[259]

The alignment of these actions brought the discussion of racism to a fever pitch. Just as had been the case when the Supreme Court handed down *Brown*, complacent Americans were being pushed into taking a position.[260] But the more precise frame is that Americans were being put to a test. Exactly what does equal-

254. Andrea Nicole & Stephen Dinan, *Trump Phaseout of DACA Gives Congress Six Months to Devise Solution for Dreamers*, WASH. TIMES (Sept. 5, 2017), https://www.washingtontimes.com/news/2017/sep/5/trump-phase-out-dreamers-program/; Cassandra Pollock, *The Brief: Harvey Recovery Continues; Announcement Likely on DACA's Fate*, TEX. TR. (Sept. 5, 2017, 6:00 AM), https://www.texastribune.org/2017/09/05/brief-sept-5/.

255. *See, e.g.*, Meghan Keneally, *DACA Announcement Sparks Protests Nationwide, Dozens Arrested at Trump Tower*, ABC NEWS (Sept. 6, 2017, 1:54 AM), http://abcnews.go.com/Politics/arrests-made-daca-protest-york/story?id=49625957.

256. Michelle Mark, *'The Clock Is Ticking': Graham and Durbin Urge Action on Bipartisan DREAM Act by End of September*, BUS. INSIDER (Sept. 5, 2017, 4:54 PM), http://www.businessinsider.com/daca-lindsey-graham-dick-durbin-urge-action-on-dream-act-trump-immigration-news-2017-9 (noting Senators Lindsey Graham (R-S.C.) and Dick Durbin (D-Ill.) announced the bipartisan plan "just hours" after the announcement that DACA was being phased out).

257. Dina Bass, *Trump's Move to End DACA Condemned by Executives*, BLOOMBERG NEWS (Sept. 5, 2017, 6:05 PM), https://www.bloomberg.com/news/articles/2017-09-05/trump-move-to-end-daca-met-with-swift-tech-industry-condemnation.

258. *See* Aaron Blake, *Trump's Eerily Familiar DACA Strategy: Blame Congress*, WASH. POST (Sept. 5, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/09/05/trumps-daca-strategy-is-eerily-familiar-delay-the-pain-and-blame-someone-else/.

259. Notably, Trump stepped back from his order the very next day, suggesting in a tweet that if Congress did not act within six months, he would intervene. Sophie Tatum, *Trump: I'll 'Revisit' DACA if Congress Can't Fix in 6 Months*, CNN (Sept. 6, 2017, 9:13 AM), http://www.cnn.com/2017/09/05/politics/donald-trump-revisit-daca/index.html. That belies the argument that Trump believed DACA was an unconstitutional exercise of the presidential power. *See id.*

260. *See* ALEXANDER, *supra* note 190, at 36–37.

ity for all mean? And how willing were Americans to fight for that, not just for themselves, but for each other?

As set forth below, dealing with prejudice means understanding how prejudice is fueled. It also entails both finding a way to undo the "pernicious" effects of *Plessy* and finding a way to move racists to see the dignity in all human beings, including finding their own. Finally, this part ends with a letter of apology written to a reader a hundred years from now. Hopefully, that reader will know that someway and somehow America finally put *Plessy* to rest.

A. *Psychology of Prejudice 101: Neuroscience, Neurorhetoric and the Addictive Nature of Prejudice*

Peter Tefft was a good son. He was raised in Fargo, North Dakota by a solid family in a home that was open to "friends and acquaintances of every race, gender and creed."[261] But somewhere along the line, something went terribly wrong. A nephew explained Peter was a "maniac" that rejected his family and went "down some insane internet rabbit-hole, and turned into a crazy nazi."[262] When Peter was outed by "Yes, You're Racist"[263] as a white supremacist captured on video amidst the torch-carrying marchers at the Charlottesville's "Unite the Right" rally, his father went further. Pearce Tefft wrote an open letter to his community denouncing his son and disavowing his white supremacist views.[264] In no uncertain terms, the elder Tefft wrote, "I, along with all of his siblings and his entire family, wish to loudly repudiate my son's vile, hateful and racist rhetoric and actions. . . . *We do not know specifically where he learned these beliefs. He did not learn them at home*."[265]

Peter's father made clear that Peter was no longer welcome at family gatherings.[266] Comparing Peter to a "prodigal son," he

261. Bill Chappel, *After Son Is ID'd at Supremacist Rally, His Father Responds Publicly*, NPR (Aug. 15, 2017, 9:30 AM), http://www.npr.org/sections/thetwo-way/2017/08/15/543619397/after-son-is-idd-at-supremacist-rally-his-father-responds-publicly.

262. *Id.*

263. *Id.*

264. *See id.*

265. *Id.* (emphasis added).

266. *Id.*

made one final appeal: "Please son, renounce the hate, accept and love all."[267]

Peter is a perfect example of how prejudice is not *always* passed from parent to child. Sometimes it takes a village of dark influences, specifically including fraternal originations such as the Klan and other neo-Nazi groups. Of course, when parents *do* instill prejudice in a child's heart, the result can be even worse. In this circumstance, societal cues supporting racism easily are reconciled with a child's world view.[268] Put simply, hate is both validated and accepted.

Psychology provides some basic principles to understand how prejudice is formed, how it is stoked, and how it might ultimately be rejected. A fundamental principle is that no child is born a racist. Infants at play place no relevance on the color of another child's skin, let alone, ethnicity or religious beliefs.[269] While a white infant might recognize that a child of color looks different—and vice versa—the child does not naturally jump to a conclusion that this somehow renders one superior to the other.[270] In fact, an infant does not even understand that concept.[271] Still, as explained by Dr. Lynne Jackson, research demonstrates that prejudiced views—picked up from cues from either caregivers or society at large—can begin as early as two-and-one-half years.[272]

Dr. Jackson further explains that the psychology of prejudice includes multiple components.[273] One line is that people naturally try to *rationalize* prejudice to avoid guilt, which includes the "need to explain and rationalize why some groups have lower sta-

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267. *Id.*

268. *See* JACKSON, *supra* note 38, at 87–88, 93–95. Regarding the development of prejudice in children, Dr. Jackson notes that there is a "sharp increase around age 5 [that] declines around age 7." *Id.* at 93.

269. *See id.* at 83–85.

270. *See id.* at 84.

271. *See id.* at 85. Dr. Jackson explains there are three manners in which children learn prejudice: children learn prejudice through direct instruction (e.g., when racist parents share their beliefs with their children), by observing role models (when children hear stereotypes expressed on television), and by experiencing the rewards or punishments of their own early expressions of prejudice (e.g., when parents or peers laugh or frown at a prejudiced joke told by a child). *Id.* at 87.

272. *Id.* at 83. "It seems self-evident that children learn prejudice from the people in their environment," which includes "parents and other influential people" as well as "television." *Id.* at 87.

273. *See generally id.* at 9–15 (providing examples of these components, like stereotypes, emotions, and values).

tus than others in terms of income, social power, and the like."[274] That explains how early Americans justified slavery through negatively stereotyping African Americans as inferior. As Dr. Jackson explains:

> In a social system that would otherwise have been seen as absurd and cruel, this [negative] stereotype seems to have provided psychological justification. The belief that slaves were emotionally but not intellectually inclined rationalized their being denied education, the stereotype that they were in tune with nature provide justification for their exclusion to barnlike housing, and so on. From this point of view, the stereotype was part of the ethos surrounding slavery because it served to explain and justify an otherwise nonsensical and painful system.[275]

In other words, slave owners needed to find a way to justify treating another human being as a slave. And once that was done, emotional dissidence dissolved. This reasoning also operates to blind an individual from recognizing their own prejudices given that term is understood as encompassing only irrational prejudice.[276]

Dr. Jackson's research also instructs that prejudice is often intertwined with the need to "scapegoat" others,[277] which, as discussed above, played a part in each resurgence of white nationalism. It also has been directly tied to economic frustration.[278] And while the natural tendency is to target aggression against the oppressor, when that is not feasible, aggression is targeted toward an easier target, for example, minorities. In fact, a 1940 Hovland and Sears study, covering the time period of 1882 to 1930, specifically focused on whether "poor White Americans . . . aggressively scapegoated Black Americans as a result of economic frustration."[279] The study found "there was a strong correlation between the number of Black Americans who were murdered by lynching and the price of cotton."[280] To be clear, "[w]hen prices were low, suggesting economic downturns, the number of lynchings was high."[281]

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274. *Id.* at 17–18.
275. *Id.* at 18.
276. *Id.* at 9.
277. *See id.* at 60.
278. *See id.* at 59–60.
279. *Id.* at 60.
280. *Id.*
281. *Id.* A German study found a similar correlation between economic deprivation and

Neuroscience emphasizes that once prejudice becomes deeply ingrained, it is difficult to budge. This is because prejudicial thoughts—and emotions—arise too quickly. Put succinctly, they just "pop into mind without any warning."[282] These "system one" reactions can pertain to stereotypes and/or deeply ingrained core values, such as patriotism or social justice.[283] Such visceral reactions can purposefully be tapped in both social and legal rhetoric.[284]

The emerging field of neurorhetoric discusses the dark use of words and images to create insidious "neural shortcuts" that trigger hate and lead to demonization and dehumanization of others, which in turn makes violence and/or other unfair treatment not only palatable, but justified.[285] When that rhetoric is institutional, the consequences are beyond dire. The classic example is Nazi Germany.[286] Scholar Jeffrey Murray theorized Hitler's Final Solution earned acceptance through three key steps: "(1) anti-Semitic narratives in speeches, newspapers, and other media, (2) anti-Semitic laws, and, eventually, (3) enacted violence, the public performance of violent acts of physical aggression against Jewish Germans."[287] As further explained by neurorhetoric scholar Lucy Jewel:

> *The anti-Semitic narratives linked the concept of a Jewish person with fear and disgust.* Jewish people were consistently and repeatedly "described as the *murderers of everything the German masses identified as good, true, and beautiful.*" A severe dichotomy devel-

"right-wing extremist attitudes." Felix Knappertsbusch et al., *Guest Editorial: Qualitive Research on Prejudice*, 7 INT'L J. CONFLICT & VIOLENCE 50, 54–55 (2013). When Germany encounters an economic recession, the "economically deprived return to their traditional means of restoring feelings of national strength and unity by ostracizing and blaming migrants and other supposedly harmful groups." *Id.* at 55.

282. JACKSON, *supra* note 38, at 122.

283. *See id.*; *see also* LINDA L. BERGER & KATHYRN M. STANCHI, LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE 15–19 (2018) (discussing "System 1 (thinking 'fast' or intuitively) and System 2 (thinking 'slow' or reflectively)").

284. *See* BERGER & STANCHI, *supra* note 283, at 15–19 (discussing use of rhetorical tools in legal narratives); *see generally* Maureen Johnson, *You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recently Hotly Contested U.S. Supreme Court Decisions*, 49 IND. L. REV. 397, 404–13 (2016) (deconstructing and discussing impact of deeply ingrained emotional beliefs on decision-making and analyzing introductory "hellos" in Supreme Court briefs and cases, including, e.g., *Obergefell v. Hodges*, 576 U.S. __, 125 S. Ct. 2584 (2015)).

285. Jewel, *supra* note 35, at 675; JACKSON, *supra* note 38, at 144–46 (discussing dehumanization and rationalization of "exploitation or violence").

286. *See* Jewel, *supra* note 35, at 675–76.

287. *Id.* at 675 (citing Jeffrey W. Murray, *Constructing the Ordinary: The Dialectical Development of Nazi Ideology*, 46 COMM. Q. 41, 42 (1998)).

> oped in Nazi rhetoric, with *Jewish persons construed as the enemy, inhuman, and incapable of being rehabilitated.* The Jewish villain was then contraposed with the good and heroic people of Teutonic/ Nordic descent. *The Final Solution was so successful because its victims were so effectively dehumanized; killing was not murder but rather a public policy decision*. . . .
>
> Viewed from a neuroscience perspective, Nazi rhetoric successfully carved out deep neural pathways that became collectively entrenched. *In the collective mind, alternative narratives portraying Jewish people as fellow humans withered away from lack of use.* Emotional circuitry became activated, in a rapid and unconscious way, in the brains of German citizens attending rallies or viewing mass media, as they felt a sense of commonality in the face of threat. *The rhetoric also engendered collective mindlessness, entirely anesthetizing the German citizenry to the reality of human death and suffering happening in their midst.* Contemporary neuroscience research tells us that this rhetorically induced mindlessness not only dampened critical thought, but also, in all likelihood, triggered feelings of pleasure.[288]

Jewel and others characterize Hitler as a "potent medicine man" with a talent for riling and rallying his base.[289] Put simply, Hitler's supremacist rhetoric served as a drug and the masses could not get enough.[290]

Hitler's Germany was soundly defeated in World War II and Hitler's white supremacist views have been universally condemned. But while it might be tempting to view Hitler as a monster of his own making, that is not exactly true. Notably, in settling upon that Final Solution to purify the blood of Germany, Hitler looked to a particular book—*The Passing of the Great Race*—which he would dub his "Bible."[291] That book was penned by an American, Madison Grant, in 1916, and was quickly incorporated by the Klan as a recruitment tool.[292] Accordingly, while Hitler may have spawned his Nazis, it was the American Klan that spawned Hitler.

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288. *Id.* (emphasis added) (footnotes omitted) (quoting Michael Blain, *Fighting Words: What We Can Learn from Hitler's Hyperbole*, 11 SYMBOLIC INTERACTION 257, 258 (1988)).

289. *Id.*

290. *See generally id.* at 671–76 (stating that rhetoric can change the brain's structure, providing a high akin to a drug).

291. OFFIT, *supra* note 66, at 121.

292. *Id.* at 111, 114–15. Offit notes that Hitler specifically wrote a "fan letter" to Grant with the words: "This book is my Bible." *Id.* at 121.

Scholar Terry Smith has explored how racism and white privilege can be an "addiction."[293] Quoting psychologists James E. Dobbins and Judith H. Skillings, Smith explains that "individuals in the dominant culture become addicted to the perquisites of power."[294] For that reason, "while it would be simpler to think of racism as an ingroup/outgroup phenomenon that will fade with cross-group contact, the proper framing of this problem requires that we probe more deeply into the addictive properties of racism."[295]

And therein lies the wedge.

No one is born a racist. And if there is one other thing we know about racists, it is that they enjoy scapegoating and blaming others. Instead of racists blaming minorities, why not prod racists to begin turning the finger at the forces that filled their souls with hate? For some, this may include direct caregivers. For others, like Peter Tefft, the blame might solely fall on outside sources, including society at large for failing to address and end racism in America. While this does not excuse racists from being held accountable for their conduct, recognizing that they were once innocent children may be one step toward eventual rehabilitation.

And even for those racists who were indoctrinated into prejudice by racist parents, that does not erase the co-equal blame that society must bear. Racism is not taught or learned in a vacuum. Just as in 1896, when the collective consciousness of America truly was to blame for the *Plessy* decision, the blame for those holding racist views today is also borne by the collective consciousness of all who either espouse racist views or are complacent.

Understanding racism—and society's role—can lead to a solution. Jewel offers hope by asserting that toxic neural pathways can be replaced by healing pathways forged by *positive* narratives.[296] What is good for the goose is good for the gander. As set forth below, there is one very powerful tool to combat institutionalized racism, namely, institutionalized *anti*-racism.

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293. Smith, *supra* note 22, at 94.

294. *Id.* at 98 (quoting James E. Dobbins & Judith H. Skillings, *Racism as a Clinical Syndrome*, 70 AM. J. ORTHOPSYCHIATRY 14, 21 (2000)).

295. *Id.* Smith goes on to artfully discuss "selective comparison," a common defense to addiction. *Id.* at 103–04. Smith writes, "Like the alcoholic who applauds himself for drinking only after work while other addicts drink continuously, white Americans compare themselves favorably to a benchmark of overt racism." *Id.*

296. *See* Jewel, *supra* note 35, at 691.

B. *Institutionalized Anti-Racism: Tackling Racial and Caste Inequities by Raising the Boats of Impoverished Communities and Ending the School-to-Prison Pipeline*

As Homer stared out from behind the steel rungs of a prison cell in the New Orleans parish jail, he felt first-hand exactly what constitutes institutionalized racism. He was not arrested by the railway company; he was cuffed by a police officer acting under authority of law.[297] Louisiana's message was clear: you ride in your boxcar and we'll ride in ours.

In substance if not form, this message rings true today. Racists have fought tooth and nail to maintain segregation. And in many ways, they have succeeded, for example, through the school-to-prison pipeline. By keeping people of color impoverished and imprisoned, minorities have been marginalized and "othered," maintaining the caste-based segregation and stereotypes of the early South.[298] As aptly put in *The New Jim Crow*, the best-selling book written by scholar Michelle Alexander:

> *Today, a criminal freed from prison has scarcely more rights, and arguably less respect, than a freed slave or a black person living "free" in Mississippi at the height of Jim Crow* . . . . Police supervision, monitoring, and harassment are facts of life not only for all those labeled criminals, but for all those who "look like" criminals. Lynch mobs may be long gone, but the threat of police violence is ever present . . . . The "whites only" signs may be gone, but new signs have gone up—notices placed in job applications, rental agreements, loan applications, forms for welfare benefits, school applications, and petitions for licenses, informing the general public that "felons" are not wanted here. A criminal record today authorizes precisely the forms of discrimination we supposedly left behind—discrimination in employment, housing, education, public benefits, and jury service. Those labeled criminals can even be denied the right to vote.[299]

The numbers are staggering. As Alexander also points out, "More African American adults are under correctional control today—in prison or jail, on probation or parole—than were enslaved in 1850, a decade before the Civil War began."[300] In 2006, one in nine black men between the ages of twenty and twenty-five were

297. *See* Plessy v. Ferguson, 163 U.S. 537, 538 (1896).

298. *See* ALEXANDER, *supra* note 190, at 141; *see also* Edelson, *supra* note 2, at 540 (recognizing that even in 1954—when *Brown* was handed down—"[d]enying African American equality in education meant denying them the possibility of success as an adult").

299. ALEXANDER, *supra* note 190, at 141 (emphasis added).

300. *Id.* at 180.

actually behind bars, with many more subject to some form of penal control.[301] The reason for this is not because black men commit more crimes than white men, but because black men are prosecuted for such crimes in far greater numbers.[302] For example, "[a]lthough the majority of illegal drug users and dealers nationwide are white, three-fourths of all people imprisoned for drug offenses have been black or Latino."[303]

The school-to-prison pipeline exemplifies how people of color are disproportionately funneled from sub-standard schools into jails, thereby destroying the supposed equal opportunity in education mandated by *Brown*.[304] In impoverished neighborhoods, which disproportionately house people of color, "many school systems now serve a disciplinary function over education."[305] Schools have become police zones. And not surprisingly, like the disproportionate treatment of adult people of color, black and Latino students receive more discipline and harsher penalties than white students.[306] Epperson rightfully argues that the detrimental effect goes well beyond the classroom. "'[P]oliced' schools teach students to see law as punishment rather than as protection. Instead of serving as creative institutions that build active and engaged citizens, schools become structures where students learn to be voiceless, powerless, and objectified by the law."[307] Even if students manage to escape discipline or criminal sanctions, "students are denied the knowledge they need to be productive members of society."[308] And this denial of education is exactly what was *supposed* to be remedied by *Brown* and its progeny.[309]

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301. *Id.* at 100.

302. *See id.* at 98.

303. *Id.*

304. Epperson, *supra* note 39, at 687–90, 698–702. Epperson defines the school-to-prison pipeline as a "series of state and local policies adopted with rapid frequency over the last two decades that increases the presence of law enforcement in schools, apportions harsh in-school and criminal penalties for minor student infractions, and ultimately precipitates increased student involvement in the criminal justice system." *Id.* at 698.

305. *Id.* at 697–98; *see, e.g.*, David Leonhardt, *Middle-Class Black Families, in Low-Income Neighborhoods*, N.Y. TIMES (June 24, 2015), https://www.nytimes.com/2015/06/25/upshot/middle-class-black-families-in-low-income-neighborhoods.html (showing that black middle-income families tend to live in lower-income neighborhoods while white middle-income families tend to live in middle-income neighborhoods).

306. *See id.* at 699–700.

307. *Id.* at 701.

308. *Id.* at 700.

309. *See id.* at 701–02.

The antidote to institutionalized racism is institutionalized *anti*-racism. We have already seen this happen in the taking down of Confederate flags and statues that were raised for the exact purpose of sending a government-sanctioned message protesting the advancement of civil rights for people of color.[310] We saw in Charlottesville when Virginia Governor McAuliffe passionately and sternly told white supremacists to get out of his state.[311] We saw this after the DACA announcement when attorneys general from multiple states immediately filed suit, and California passed legislation making it a "sanctuary state."[312] And we saw it when a unanimous congressional resolution was passed rebuking President Trump's handling of Charlottesville and expressly declaring that white supremacists are terrorists.[313]

To truly undo the pernicious effects of *Plessy*, we need to do more than simply stand down the most obvious examples of racism. We need to do what we can to end the caste system that serves as a substitute for Jim Crow.[314] And we need to be clear that countering institutionalized racism means more than just

310. *See, e.g.*, Jon Schuppe, *South Carolina Gov. Nikki Haley Signs Bill Removing Confederate Flag*, NBC NEWS (July 9, 2015, 10:49 PM), https://www.nbcnews.com/storyline/confederate-flag-furor/gov-haley-sign-bill-removing-confederate-flag-n389231 (describing how Governor Nikki Haley signed a bill to remove the Confederate flag from the state capital in response to outrage after a white supremacist gunned down nine members of a historically black church—the Emanuel African Methodist Church—in Charleston).

311. Jennifer Calfas, *Virginia Governor Delivers Defiant Speech Against White Supremacists: 'We Are Stronger Than Them,'* TIME (Aug. 13, 2017), http://time.com/4898560/virginia-governor-terry-mcauliffe-church-speech-transcript/. Governor McAuliffe was quoted as saying, "You go home, you stay out of here, because we are a commonwealth that stays together." *Id.* He also said, "go home and never come back" in addition to vowing to prosecute white supremacists. Reuters Video, *Virginia Governor to White Supremacists: "Go Home"*, REUTERS (Aug. 12, 2017), https://www.reuters.com/video/2017/08/12/virginia-governor-to-white-supremacists?videoId=372308934.

312. Matt Zapotosky, *Attorneys General from 15 States, D.C. Sue to Save DACA*, WASH. POST (Sept. 6, 2017), https://www.washingtonpost.com/world/national-security/attorneys-general-from-15-states-dc-sue-to-save-daca/2017/09/06/98bca3b2-930f-11e7-aace-04b862b2b3f3_story.html?utm_term=.ed76962d5bbf; *see* Jazmine Ulloa, *California Lawmakers Approve Landmark 'Sanctuary State' Bill to Expand Protections for Immigrants*, L.A. TIMES (Sept. 16, 2017), http://www.latimes.com/politics/la-pol-ca-california-sanctuary-state-bill-20170916-story.html.

313. *See Congress Sends Anti-White Supremacist Measure to Trump*, YAHOO! NEWS (Sept. 13, 2017), https://www.yahoo.com/news/congress-sends-anti-white-supremacist-measure-trump-013040254.html; *see also* Chia, *supra* note 16. Another example includes a Marine being ousted after being arrested for flying a white nationalist banner. *Marine Kicked Out of Corps for Flying White Supremacist Banner*, FOX NEWS (Sept. 14, 2017), http://www.foxnews.com/us/2017/09/14/marine-kicked-out-corps-for-flying-white-supremacist-banner.html.

314. *See* ALEXANDER, *supra* note 190, at 20–21.

"raceless antiracism" that fails to rectify the ongoing problems.[315] This can be accomplished by raising the boats of those in impoverished neighborhoods that have been denied needed resources and making clear that such assistance is intended to primarily, if not exclusively, help people of color.[316] It means stopping efforts to suppress or dilute minority votes.[317] And it means that every child—regardless of the wealth or lack thereof of their parents—receives a truly equal opportunity for a quality education.[318]

Equality for all begins at birth.

That is the social and legal rhetoric that should be employed by legal advocates to end de facto Jim Crow. If there is one common value that comes closest to transcending race and wealth, it is that an innocent child should not be stigmatized based upon the identity of their parents. This frame worked beautifully in *Obergefell v. Hodges*.[319] In terms of racism, the focus should also be on our children and their children down the line. Again, no child is born a racist. And no child should be turned into an instrument of hate by prejudicial beliefs of either their caregivers or a society that has taken far too long to move past the original sin of slavery.

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315. *See* Coates, *supra* note 23 (addressing the ineffectiveness of "raceless antiracism"). As Judge Wisdom made clear in his 100-year review of *Plessy*, "Justice must be color-conscious as well as color-blind." Wisdom, *supra* note 17, at 20.

316. Other efforts need to be made to ensure that the stamp of institutionalized racism is removed, such as the removal of Confederate iconography. *See* Christine Coughlin & Adam Messenlehner, *Removing the Barriers of Institutionalized Racism*, HUFFINGTON POST (Aug. 26, 2017, 12:58 PM), http://www.huffingtonpost.com/entry/removing-the-barriers-of-institutional-racism_us_59a0955ce4b0a62d0987af02. Coughlin and Messenlehner also point out that while institutional racism can be overt, it also can be more difficult to spot. *Id.* As stated,

> Institutional racism exists in policies promulgated by government entities like schools, our police force, and courts. Unlike the racism publicly seen in the dark hearts of individuals involved with the neo-Nazis and white supremacists, institutional racism may be less visible to the eye but its immense power perpetuates disadvantage, prejudice, and hate.

Id. For that reason, Coughlin and Messenlehner argue that "[i]n order to break the cycle of racism, we must educate ourselves with the *actual* history of our country—not the white-washed version." *Id.*

317. *See id.* (advocating for "remov[ing] the complex web of barriers integrated in our society . . . [including] voter ID laws that obstruct access to the polls"). Coughlin and Messenlehner also note that "[t]he list goes on, and on, because the racial barriers society has constructed are endless." *Id.*

318. *Cf.* Epperson, *supra* note 39, at 697, 701–02.

319. *See* 576 U.S. __, 135 S. Ct. 2584 (2015); *see also* Johnson, *supra* note 284, at 419, 422, 428–29, 433.

C. *Thoughts on* Plessy: *A Letter to a Reader a Hundred Years from Now*

Con Law 101. Students cram into a classroom to discuss a case heralded as one of the worst Supreme Court decisions of all time: *Plessy v. Ferguson.* Reactions range from disgust to outright astonishment. How could seven Justices of the United States Supreme Court ever think the separate-but-equal doctrine could be reconciled with our great Constitution?[320] Could they really not see the obvious and grave constitutional error?

If there is one thing that stands out to a modern-day reader of *Plessy*, it is that the majority opinion just does not make sense.[321] The critical language in the Fourteenth Amendment plainly said that *every* American was entitled to equal protection under the law.[322] And the majority even acknowledged that the purpose of the amendment was to ensure "absolute equality of the two races."[323] Would not these Justices get a failing grade on a Con Law exam if they then concluded that separate but equal could withstand a constitutional challenge?

As discussed above, the answer is not so simple. While the error of *Plessy* can easily be seen in hindsight, the frank reality is that it made sense to the American population at the time. And the sad reality is that it still makes sense to many Americans today.

Tolerance versus inclusion.

Tolerance is not equality and it never has been. That term implies judgment and keeps alive the notion of "othering" those who are different not for the purpose of appreciating their differences, but to rank them inferior.[324] By contrast, inclusion is equality. This term recognizes our differences while at the same time recognizing we are the same. Embracing this narrative can help negate the chance of future *Plessy* errors and pave the way for true

320. *See* Plessy v. Ferguson, 163 U.S. 537, 537, 548 (1896).

321. In arguing that the Justices decided *Plessy* in an "intellectual vacuum," Chris Edelson nicely sums up the *Plessy* holding: "[I]t is almost as if the Justices were visitors from another planet who, confronting legally required racial segregation on railway cars in Louisiana in 1896, blithely concluded such segregation did not necessarily signify that one race was officially deemed superior to another." Edelson, *supra* note 2, at 522.

322. *Plessy*, 163 U.S. at 543.

323. *Id.* at 544.

324. *See* Eskridge, *supra* note 4, at 1398–99 (discussing "tolerable variation").

equality for all, both in terms of the rule of law and society in general.

The following letter is drafted for a reader, such as a law student, a hundred years from now.

Letter to a Future Reader

Dear Reader:

We are sorry. Despite more than a century to move past the sins of *Plessy v. Ferguson*, we have not done so. Although the separate-but-equal doctrine was ruled unconstitutional in *Brown*, our nation pathetically keeps Jim Crow alive and well through other means. Just like an abusive partner who swears he will never do it again, we do. And it is not just the fault of those who shout the loudest to claim dominance over others; it is the collective fault of those that stand by and either say nothing or not enough.

You have probably figured out that the problem really is not about the color of one's skin or the nation a person's ancestors originally hailed. Rather, the problem is the need to "other"—the practice by which a dominant group demeans, dehumanizes, and even legally treats another group differently under the law. The most egregious example was enslaving another human being. But "othering" does not always require shackles. And each group that successfully navigates through that storm has a choice. They can continue the cycle—and "hate down"—or they can end the cycle, by treating others with the same dignity that they once demanded for themselves.

America has too often chosen the former path.

Beginning in the early 1900s, scores of immigrants came to America in chase of a dream. They thirsted for freedom from religious persecution, political oppression, or simply economic strife. The same was true for those who first touched foot on American soil from the gangplank of the Mayflower. But when the immigrants of the 1900s arrived at Ellis Island, they were not greeted with open arms. Instead, those who once made that same journey greeted these new immigrants with hate. But despite feeling that taste of oppression, once these newer immigrants became accepted, they also began to hate. Their target was not only African

Americans—who were here way before they were—but of anyone who came after.

Institutionalized *anti*-racism. Was that the answer? Taking institutionalized actions that made it abundantly clear that racism—or any insidious "ism" for that matter—was exactly the opposite of what this great country stands for? And did we keep taking those institutionalized actions until there was no doubt that equality—and equity—was finally achieved?

One lesson that even we gleaned from *Plessy* is that future generations can often easily see what a present generation cannot. You will likely find that the idea that same-sex couples could "civil union" but not marry was just silly. And that it was foolish to tell a transgendered man that he could not serve in the military simply because he was not born with male genitalia. We also hope you laugh outright at the idea that even in twenty-first century America, there were still those who believed white blood was somehow superior to the blood of people of color.

Our advice to you is to keep digging and identify other instances of improper othering that we clumsily may have missed in our time. Keep your eye on the guiding star of treating every human being with dignity and respect.

While it may be easy to remember those of our generation by what we got wrong, please remember us for the things we got right. We may have been slow to evolve, but it was not for want of trying. We hope your generation will do better, and the generation after, better still.

CONCLUSION

Justice Harlan's eloquent and prophetic dissent in *Plessy* teaches us that we can see the error in at least some of our ways by viewing legal reasoning from a bird's-eye view.[325] That means looking at the context behind judicial advocacy and decision-making, specifically including and recognizing societal views that may blind us to inequalities that might seem obvious to a generation hence. *Plessy* further instructs that an alarm should go off whenever we come across separate-but-equal rationales. Judicial opinions validating such prejudice play a powerful role by endors-

325. *See Plessy*, 163 U.S. at 554, 556, 580 (Harlan, J., dissenting).

ing the message of government-sanctioned animus. Such actions have ramifications for decades to follow.

Entitlement. One ugly truism of human nature is the desire to seek validation by claiming superiority over someone else. But we can do better.

The dark rhetoric of overt prejudice—and the less odious but still dirty rhetoric of tolerance—can give way to the rhetoric of inclusion. That requires striving to understand how prejudice is forged and consciously replacing biased narratives with narratives that humanize rather than demonize members of marginalized groups. That duty—and *opportunity*—is symbiotic and falls not just on society at large, but on legal advocates and the judiciary as well. We might not get it completely right but we can try. Doing so paves the way toward this nation's continuing journey to honor our constitutional mandate of equality for all.