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## The New Tipping Point: Disruptive Politics and Habituating Equality

Rachel D. Godsil

Sarah E. Waldeck

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# THE NEW TIPPING POINT: DISRUPTIVE POLITICS AND HABITUATING EQUALITY

*Rachel D. Godsil  
Sarah E. Waldeck\**

## ABSTRACT

*This Essay argues that the events of 2020 opened a window of political opportunity to implement policies aimed at dismantling structural injustice and systemic racism. Building on the work of philosopher Charles Mills and political scientist Clarissa Rile Hayward, we argue that the Black Lives Matter Movement constituted the “disruptive politics” necessary to shift dispositions of many in the United States toward racial equity by interrupting the white “epistemologies of ignorance.” Moreover, because policies that correct structural injustice are beneficial for people across race, even those whose hearts and minds remained closed may embrace legislative policies that function to dismantle systemic racism. As people become habituated to structures that facilitate equality and the policies that underlie them, the United States will finally begin to tip toward equality and a society of belonging.*

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\* Rachel D. Godsil is a Distinguished Professor of Law and Chancellor’s Scholar at Rutgers Law School. Sarah E. Waldeck is a Distinguished Professor of Law at Loyola University Chicago School of Law. Our names appear in alphabetical order. We would like to thank Don Herzog and John A. Powell for constructive feedback, and Naomi Gulama and Samuel A. Torrence for research assistance.

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## INTRODUCTION

On May 25, 2020, we saw yet another Black man die at the hands of police and white “epistemologies of ignorance”<sup>1</sup> began to crumble. The murder of George Floyd by Minneapolis police officers was captured on a video showing a white officer pinning his knee to George Floyd’s neck for more than nine minutes as others helped hold him to the ground.<sup>2</sup> That same day, a white woman in Central Park wielded a potentially deadly power play at a Black man who asked her to leash her dog, calling 911 to report, “[T]here is a man, African American . . . I am being threatened by a man in the Ramble[.] [P]lease send the cops immediately.”<sup>3</sup> This video also went viral. Both events occurred in cities generally associated with liberal politics, and both vividly displayed white people treating Black men with a blatant disregard for their humanity. The videos played against the drumbeat of a global pandemic in which deaths occurred at significantly higher rates in Black communities than in white communities.<sup>4</sup>

With protests beginning in Minneapolis and quickly spreading to other cities and across the globe, demands to end “systemic racism” moved from the streets to statements by leaders of Fortune 500 companies.<sup>5</sup> A wide range of corporations—from Apple to FitBit to Sephora—announced concrete changes to their business practices aimed at reducing systemic racism.<sup>6</sup> After speaking to two dozen CEOs, the head of the Ford Foundation reported that “everyone is riveted . . . [T]he murder of George Floyd has gripped the psyche of white Americans like nothing I’ve seen in my lifetime.”<sup>7</sup> What occurred in the spring and summer of 2020 did not just focus attention on the racist actions of

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<sup>1</sup> See Charles W. Mills, *White Ignorance*, in RACE AND EPISTEMOLOGIES OF IGNORANCE 13 (Shannon Sullivan & Nancy Tuana eds., 2007).

<sup>2</sup> See N.Y. Times, *What to Know About the Death of George Floyd in Minneapolis*, N.Y. TIMES (Mar. 15, 2021), <https://www.nytimes.com/article/george-floyd.html>.

<sup>3</sup> Sarah Maslin Nir, *White Woman Is Fired After Calling Police on Black Man in Central Park*, N.Y. TIMES (Feb. 16, 2021), <https://www.nytimes.com/2020/05/26/nyregion/amy-cooper-dog-central-park.html>.

<sup>4</sup> See *Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> (last visited Mar. 12, 2021).

<sup>5</sup> See *Bosses Say They Want to Tackle Racial Injustice*, ECONOMIST (June 11, 2020), <https://www.economist.com/business/2020/06/11/bosses-say-they-want-to-tackle-racial-injustice>. As one example, General Motors’ chief executive declared: “I am both impatient and disgusted.” *Id.* And, in a letter to suppliers, she stated that “the firm will not tolerate racism and will stand up against injustice.” *Id.* Similarly, IBM’s chief executive sent a letter to Congress, critiquing policing and refusing to “make its facial-recognition software available for racial profiling.” *Id.*

<sup>6</sup> See Gillian Friedman, *Here’s What Companies Are Promising to Do to Fight Racism*, N.Y. TIMES (Aug. 23, 2020), <https://www.nytimes.com/article/companies-racism-george-floyd-protests.html>.

<sup>7</sup> *Bosses Say They Want to Tackle Racial Injustice*, *supra* note 5.

individuals, but instead sparked an awakening to the realities of systemic racism, particularly anti-Black racism.<sup>8</sup>

Finally, actors in public, private, and civil society—such as judges, prosecutors, schools, universities, corporations, media content makers, and foundations—are showing a broader interest in understanding systemic racism. Individuals and institutions are seeking to determine what might be in their sphere of control. Their actions—the actions of those who now care—may have some positive effects. They can evaluate the extent to which their policies and procedures reinforce existing social structures and then seek to enact reforms that will create meaningful change. But this will not be enough. Our societal structures were formed by governmental actions designed to maintain both racial hierarchy and separation. Until the government dismantles the societal structures it created, attempts to create an anti-racist America will be Sisyphean.

These governmental policies are what we have deemed “inceptive structures”<sup>9</sup>—explicitly racialized policies that support “whiteness.”<sup>10</sup> They are at the root of systemic racism. Their harms have been exacerbated over time by “compounding structures” that perpetuate the racialized benefits that the inceptive structures created. These compounding structures may not have been consciously constructed to benefit whiteness,<sup>11</sup> but they too are responsible for systemic racism.

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<sup>8</sup> Leaders of Latinx and Asian-American communities have issued statements of solidarity with the Black community. See, e.g., Catherine E. Shoicet, *These Leaders Say Latinos Need to Acknowledge Their Racism, Too*, CNN (June 9, 2020, 5:22 PM), <https://www.cnn.com/2020/06/09/us/latino-leaders-racism-letter/index.html>; Jeremy C. Fox, *Asian-Americans Declare Solidarity with Black Americans, Double Down on Controversial Message*, Bos. GLOBE (June 16, 2020, 11:27 PM), <https://www.bostonglobe.com/2020/06/16/metro/asian-american-leaders-declare-solidarity-with-black-americans-double-down-controversial-message/>.

<sup>9</sup> By inceptive, we mean those that created the original conditions. Its formal definition is “*Grammar* [of a verb]. Expressing the beginning of [an] action.” *Inceptive, adj. and n.*, OXFORD ENG. DICTIONARY, <https://www-oed-com.proxy.library.emory.edu/view/Entry/93403?redirectedFrom=inceptive&> (last visited Aug. 3, 2021).

<sup>10</sup> As many scholars have argued, “whiteness” is a social construct rather than a simple descriptor of people. See, e.g., JOHN A. POWELL, *RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY* 56 (2012). As Powell explains, whiteness was deemed by the Supreme Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896) to be a *property* right that included a host of private and public benefits. POWELL, *supra*, at 43. Inclusion into the category was contested and determined by a combination of Court decisions and statutes, remaining fluid through the twentieth century. *Id.* at 57. Irish Catholics, Italians, and Eastern Europeans had an ambiguous racial status that accelerated into whiteness in the post-World War II era. *Id.*; see Rachel D. Godsil & Sarah E. Waldeck, *Home Equity: Rethinking Race and Federal Housing Policing*, 98 DENVER L. REV. (forthcoming Apr. 2021) (arguing that the federal government conferred “racial agency” upon those seeking to create and preserve white communities and that this agency was extended to white ethnics in the post-World War II era).

<sup>11</sup> As we describe below, the research on implicit preferences and biases demonstrates that policies that benefit one group may have been implemented as a result of race even without explicit intention. See *infra* note

This Essay argues that the events of 2020 opened a window—albeit a narrow one—to implement the substantive policy changes necessary to dismantle structural injustice and systemic racism. We build on the work of political theorist Clarissa Rile Hayward, who wrote in 2017 that the “politics of disruption” could generate conscious awareness of structural injustice by interrupting what philosopher Charles Mills named white “epistemologies of ignorance,” and that the combination of this awareness and the desire to see oneself as ethical might combine to “produce a shift in [the] disposition[s]” of people who had never before taken action against structural injustice.<sup>12</sup>

Critically, even those whose hearts and minds remain closed to the realities of racism may nonetheless embrace legislative policies that seek to remedy structural injustice. Governmental action that is economically or socially advantageous for Black people also tends to be advantageous for people of other races and ethnicities. This means that most people will benefit from dismantling inceptive structures and redistributing or realigning the compounding ones. Because of this widespread benefit, policies that correct and eliminate systemic racism can garner widespread support. As these policies become law, they often become politically protected as a result of the concrete benefits they provide. At this point, the United States may tip toward genuine equality. Just as the world in which we currently live has become normalized, we can also become habituated to a world that is free from the structural underpinnings of anti-Blackness.

Part I draws on the work of political theorists and philosophers to discuss the necessity of identifying remedial correctives for systemic injustice. Part I emphasizes that the policies sustaining structural injustice and systemic anti-Black racism are also detrimental to many people of all races. Building on Hayward’s work on disruptive politics, Part I then discusses the window of political opportunity that opened in November 2020 and what lasting change may emerge from it. Part II uses examples from housing and transportation to illustrate what kind of remedial correctives are necessary to eliminate structural injustice, as well as how policies that dismantle inceptive structures would be widely beneficial and quickly normalized. The Essay concludes with thoughts on building a cross-racial movement for social justice and a society of belonging.

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93 and accompanying text.

<sup>12</sup> Clarissa Rile Hayward, *Responsibility and Ignorance: On Dismantling Structural Injustice*, 79 J. POL. 396, 406 (2017).

## I. A SYSTEMIC APPROACH TO DISMANTLING SYSTEMIC RACISM

Systemic racism refers to “the set of practices, cultural norms, and institutional arrangements that both reflect and help to create and maintain race-based outcomes in society.”<sup>13</sup> A wide array of facially neutral policies have the effect of sustaining racial inequity in the United States. In education, for example, the decision to fund schools through local property taxes has created massive inequity in the amount of dollars expended per student, with schools with predominantly Black students often having a fraction of the funding of nearby schools with predominantly white students.<sup>14</sup> The Internal Revenue Code is rife with provisions that end up benefiting far greater numbers of white taxpayers than those of other races and ethnicities when they are applied, such as special rates for capital gains, favorable treatment of gifts and inheritances, and the deductibility of home mortgage interest.<sup>15</sup> Bankruptcy laws, which favor homeowners over renters and tangible property over income, have the effect of being favorable to far more white debtors than Black debtors.<sup>16</sup> The electoral college and the common “winner take all electors” rule dilutes the political power of Black voters, particularly in the South.<sup>17</sup> This list could go on. In nearly every aspect of life, governmental actions that do not mention race sustain systemic racism.

Invariably, these same policies often disadvantage even middle-class white people and undermine the well-being of working-class and poor whites. This is in keeping with the “miner’s canary” metaphor<sup>18</sup> about the role of race employed by Lani Guinier and Gerald Torres. The danger to the canary was an alert to the danger to all—and ensuring safety for the canary would ensure safety for all. Translating the metaphor, Guinier and Torres contend:

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<sup>13</sup> POWELL, *supra* note 10, at 4.

<sup>14</sup> See, e.g., James R. Hackney, Jr., *The Philosophical Underpinnings of Public School Funding Jurisprudence*, 22 J.L. & EDUC. 423, 434 (1993) (noting the enormous funding disparities between poor and wealthy localities).

<sup>15</sup> See Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996); see also Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007) (discussing the race and class effects of the Earned Income Tax Credit). See generally DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT (2021).

<sup>16</sup> See, e.g., A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725 (2004).

<sup>17</sup> See, e.g., Michael M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935 (1996).

<sup>18</sup> Guinier and Torres derive the miner’s canary metaphor for addressing issues of race from a Felix Cohen quote from 1953: “Like the miner’s canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere, and our treatment of the Indian . . . marks the rise and fall in our democratic faith.” LANI GUINIER & GERALD TORRES, THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2002).

[P]atterns which converge around race are often markers of systematic injustice that affect whites as well, and thus disclose how institutions need to be transformed more generally. Our premise is that current institutional arrangements do not work for people of color, and that it is not possible to address the present racial hierarchy without addressing these institutional arrangements. By attending to this larger critique, one gains the critical insight and motivation necessary to change institutions to benefit others.<sup>19</sup>

In other words, focusing on what is beneficial for communities of color will improve conditions across race and ethnicity.

A twenty-first century incarnation of Guinier and Torres's argument is being employed in both academic argument and political organizing by Ian Haney López, who wrote in 2014 that the age-old tool of racialized "dog whistle politics" to win votes from white people was being pursued with renewed vigor and success.<sup>20</sup> The consequences of policies that were wrought as a result were, as he bluntly argues, to wreck the middle class of all races and to continue to hurt poor and working-class people across race and ethnicity.<sup>21</sup>

Myriad government policies—developed originally with explicitly racist goals and perpetuated by racialized appeals—are only one facet of systemic racism. Yet their pervasiveness and the degree to which they sustain systemic racism in other contexts make abundantly clear that the goal of dismantling systemic racism requires a systematic approach with a significant focus on government policy.

Political philosopher Tommie Shelby has argued that "[p]rinciples of rectification . . . should guide the steps a society takes to remedy or make amends for the injuries and losses the oppressed have suffered as a result of past injustice."<sup>22</sup> Rectification—the act of making something right—necessarily requires understanding how things went wrong. Political theorist and philosopher Iris Marion Young has similarly argued that "[a]n understanding of how structural processes produce and reproduce injustice requires understanding

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<sup>19</sup> *Id.* at 20.

<sup>20</sup> See IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS (2014).

<sup>21</sup> To address the harm he identified in his work on dog whistle politics, Ian Haney López has created the Race-Class Academy to make accessible the argument he details in his book, MERGE LEFT: FUSING RACE AND CLASS, WINNING ELECTIONS, AND SAVING AMERICA (2019).

<sup>22</sup> Tommie Shelby, *Racial Realities and Corrective Justice: A Reply to Charles Mills*, 1 CRITICAL PHIL. RACE 145, 154 (2013).

the history of those processes, often looking far into the past.<sup>23</sup> In prior work, we closely examined how—beginning with the refusal to honor the promise of forty acres in land grants to formerly enslaved people and continuing through the New Deal and post-World War II period—federal government housing policy facilitated the creation of exclusionary white spaces by creating “racial agency” for white people intent on building homogenous communities.<sup>24</sup>

This close study suggested several interventions—massive in size and scope—that would begin to correct for past injustices in housing policy and end the racialization of agency linked to finding a home. These include a \$100 billion federal fund to provide down payment assistance to those whose neighborhoods make it difficult to secure loans with favorable terms; fully funding Section 8 and evaluating Section 8’s policies and procedures to ensure maximum mobility; partnerships between the U.S. Department of Housing and Urban Development (HUD) and local governments to provide adequate Section 8 housing supply; programs to protect long-time residents from the risks of gentrification; reallocation of transportation spending so that mass transit receives more support than highways; and various amendments to the Fair Housing Act.<sup>25</sup>

Analyses of other systemic injustices—education,<sup>26</sup> the wealth gap,<sup>27</sup> and transportation<sup>28</sup>—produce similarly long and expensive recommendations for new programs. To move these proposals from the pages of academic journals into the halls of government requires answering the conceptual question of how to harness the current inchoate desire many have expressed to be “antiracist”<sup>29</sup> and to “do the work”<sup>30</sup> to create systemic change.

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<sup>23</sup> Iris Marion Young, Political Responsibility and Structural Injustice, *The Lindley Lecture*, University of Kansas 3 (May 5, 2003) (available at <https://kuscholarworks.ku.edu/bitstream/handle/1808/12416/politicalresponsibilityandstructuralinjustice-2003.pdf?sequence=1>).

<sup>24</sup> Godsil & Waldeck, *supra* note 10.

<sup>25</sup> *Id.* at 26–40, 45–47.

<sup>26</sup> See, e.g., TINA TRUJILLO, JABARI MAHIRI, ZEUS LEONARDO, KRIS D. GUTIERREZ, JANELLE SCOTT & NA’ILAH NASIR, RESPONDING TO EDUCATIONAL INEQUALITY: ADDRESSING RACE AND SOCIAL CLASS DISPARITIES TO INCREASE OPPORTUNITY (2017), [https://belonging.berkeley.edu/sites/default/files/haas\\_institute\\_race\\_education\\_brief\\_june\\_2017\\_1.pdf](https://belonging.berkeley.edu/sites/default/files/haas_institute_race_education_brief_june_2017_1.pdf).

<sup>27</sup> See, e.g., Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap*, BROOKINGS (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/>.

<sup>28</sup> See, e.g., Deborah N. Archer, “*White Men’s Roads Through Black Men’s Homes*”: Advancing Racial Equity Through Highway Reconstruction, 73 VAND. L. REV. 1259 (2020).

<sup>29</sup> See IBRAM X. KENDI, HOW TO BE AN ANTIRACIST (2019).

<sup>30</sup> See Layla F. Saad, *Do the Work: An Anti-Racist Reading List*, GUARDIAN (June 3, 2020, 3:45 PM), <https://www.theguardian.com/books/booksblog/2020/jun/03/do-the-work-an-anti-racist-reading-list-layla-f-saad>.

#### A. Collective Responsibility for Change

A significant hurdle to gaining support for systemic change is the acknowledgement of collective responsibility. Young's social connection model of political responsibility offers one often-acclaimed route to this end.<sup>31</sup> In classic formulations of responsibility, the obligation to act stems from moral blameworthiness: people are responsible for remedying the harm that they caused.<sup>32</sup> But with structural injustices like systemic racism, one cannot assign discrete moral responsibility for the resulting harms.<sup>33</sup> Black people who live in a community that is policed differently than exclusionary white suburbs or who are at increased risk of dying from COVID-19 cannot point to a single individual or group of individuals who caused the harm they are experiencing. Rather, their harm is caused by large-scale structural processes built and sustained decade after decade—beginning with slavery, continuing through Reconstruction, Jim Crow, and the New Deal, and cemented with each exclusionary zoning decision or constriction in the supply of affordable housing.

Young, however, argued that some people who lack moral blameworthiness for structural injustice nonetheless have responsibility to help eliminate it.<sup>34</sup> This obligation—or political responsibility—“derives from belonging together with others in a system of interdependent processes of cooperation and competition through which we seek benefits and aim to realize projects. Within these processes, each of us expects justice toward ourselves, and others can legitimately make claims of justice on us.”<sup>35</sup> In Young’s political responsibility framework, the responsibility to eliminate structural injustice arises out of participating in and receiving benefits from the societal structures that produce systemic inequities.<sup>36</sup> According to this theory, because white people collectively benefit from the current structures constructed under racially inequitable conditions, white people as a collective bear a responsibility to support corrective policies.

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<sup>31</sup> See Young, *supra* note 23.

<sup>32</sup> See *id.* at 11.

<sup>33</sup> Young illustrates this point with the story of a single mother searching for a new apartment. The story begins with a condominium conversion; follows the mother through multiple attempts to find an affordable apartment within reasonable commuting distance of her job, as well as her effort to secure a housing subsidy; and ends with her facing homelessness as she cannot pay the deposit necessary for the suboptimal apartment for which she has decided to settle. *Id.* at 1–2. No single actor is morally responsible for the mother’s struggles; rather, she falls prey to a series of larger social and economic processes.

<sup>34</sup> *Id.* at 5. Philosopher Martha Nussbaum has critiqued Young’s view of blameworthiness, arguing that we should often blame people for actions or inactions that contribute to unjust structures. See Martha Nussbaum, *Foreword* to IRIS MARION YOUNG, *RESPONSIBILITY FOR JUSTICE*, at xxi (2011).

<sup>35</sup> YOUNG, *supra* note 34, at 105.

<sup>36</sup> See *id.*

Young emphasizes that her use of the term “political” is in the spirit of Hannah Arendt,<sup>37</sup> and it incorporates not only utilizing state institutions “to enact collective goals,” but also working together “to form public works and institutions.”<sup>38</sup> Young envisions us coming together, normatively evaluating structural injustices, and then devising interventions to eliminate them. Just as no individual is personally responsible for systemic injustice, no one person can remedy it. The collective, however, can tackle the task that is beyond the ken of any single individual.

### B. Disruptive Politics and Shifts in Disposition

Not surprisingly, Young has been criticized for underestimating the “significant obstacles” that stand in the way of her framework for dismantling systemic injustice.<sup>39</sup> In this particular political moment, a not-insignificant portion of the population is actively seeking to re-instantiate white supremacy, so Young’s idealized vision of the “collective” dismantling structural injustice may seem utopian and exceedingly unlikely to be realized. Yet this is also a moment in which calls to action to address racism are widespread.

These calls for action appear to be consistent with political theorist Clarissa Rile Hayward’s argument that individuals may “do the right thing,” if they become consciously aware of the need for action.<sup>40</sup> Here Hayward is influenced by philosopher Charles Mills, who has written about white “epistemologies of ignorance.”<sup>41</sup>

*White ignorance*, for Mills, is a result of social-structural causation that began with racist motivation, but now includes both those with racist motivations and those who may not personally hold prejudice.<sup>42</sup> Despite its name, white ignorance is not confined to white people.<sup>43</sup> It may also be shared by nonwhites in light of cross-race power relations and patterns of ideological hegemony.<sup>44</sup> Mills’ epistemology of white ignorance is particularly focused on moral ignorance, as he says, “not merely ignorance of facts with moral implications but also moral non-knowings, incorrect judgments about the rights

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<sup>37</sup> Young, *supra* note 23, at 11.

<sup>38</sup> *Id.*

<sup>39</sup> Hayward, *supra* note 12, at 401.

<sup>40</sup> *Id.* at 401–03.

<sup>41</sup> *Id.* at 396.

<sup>42</sup> See Mills, *supra* note 1, at 21.

<sup>43</sup> *Id.* at 22.

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

and wrongs of moral situations themselves.”<sup>45</sup> Interruption of this ignorance then—given the psychological investment people have in maintaining a sense of themselves as moral beings—has the capacity to have a practical payoff as people become aware of and concerned about social oppression and inspired to “reduce and ultimately eliminate that oppression.”<sup>46</sup>

Of course, awareness alone is insufficient to motivate people to act. As Jade Schiff has argued, Young appears not to have “sufficiently appreciated the depth of the [practical] problem” that she identifies<sup>47</sup>—“the problem of motivating people to act to challenge and change structural injustice.”<sup>48</sup> This challenge is particularly acute when a broad spectrum of people are likely to believe that they are not being harmed by the structural injustice and instead that they are benefiting from it.

Hayward suggests a way through the challenges of both epistemological ignorance and motivation: disruptive politics. This term does not encompass the sort of violent insurrection that this country witnessed on January 6, 2021; instead, it describes lawful forms of unruly politics, such as mass protests and sit-ins.<sup>49</sup> Hayward argues that disruptive politics help dismantle systemic inequity by creating conscious awareness of the need for action.<sup>50</sup>

Unlike Young’s political responsibility model, Hayward’s disruptive politics do not function to persuade people of their ethical obligation to dismantle structural inequity. Instead, disruptive politics “make it all but impossible for the privileged to not hear the voice of, to not know the claims, of the oppressed.”<sup>51</sup> For some, this sudden conscious awareness and the desire to see oneself as ethical—even while benefiting from privilege—produces “a shift in disposition” that compels the individual to take action against systemic injustice.<sup>52</sup>

2020 was *the* year of disruptive politics, in ways not seen since the Civil Rights Movement. After George Floyd’s murder, protests began in Minneapolis and quickly spread to other cities, with demonstrations referencing other killings of Black people in 2020, such as Breonna Taylor—killed by police in her home

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<sup>45</sup> *Id.* (emphasis added).

<sup>46</sup> *Id.*

<sup>47</sup> JADE LARISSA SCHIFF, BURDENS OF POLITICAL RESPONSIBILITY: NARRATIVE AND THE CULTIVATION OF RESPONSIVENESS 28 (2014).

<sup>48</sup> Hayward, *supra* note 12, at 401.

<sup>49</sup> *Id.* at 405.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 406.

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

in Louisville, Kentucky—and Ahmaud Arbery—killed by two civilians while running down a street in Brunswick, Georgia.<sup>53</sup> Between May 26, 2020, and August 22, 2020, there were at least 7,750 demonstrations associated with the Black Lives Matter Movement in more than 2,440 locations, including in all 50 states and Washington, D.C.<sup>54</sup> And even as the demonstrations continued, there were new high profile police shootings of Black men, such as Rayshard Brooks—killed by police in Atlanta, Georgia—and Jacob Blake—paralyzed after being hit by seven police bullets in Kenosha, Wisconsin.<sup>55</sup> Often, cell phone recordings of Black people suffering or dying at the hands of police went viral, making the reality of racism inescapable for many Americans.

The protests of 2020 occurred in the run-up to an election in which both the presidency and Senate control hung in the balance. Surely if disruptive politics cause people to shift toward dismantling systemic racism, one obvious action is responsible ballot-casting—that is, voting for the candidates whose platforms are most geared toward remedying structural inequities.

Results from the November 2020 election suggest that the year’s disruptive politics and the spotlight on systemic racism may have caused shifts in disposition that affected how white people cast their ballots. Although a majority of white voters cast their ballots for Donald Trump, exit poll data shows the margins by which they favored the Republican candidate were reduced nationally, from 20% in 2016 to 17% in 2020.<sup>56</sup> The change was most stark for white male college graduates, who reduced the margin by which they favored Trump from 14% to 3%.<sup>57</sup> White men without a college education reduced the margin from 48% to 42%.<sup>58</sup> White women voters without a college education held their support for Trump steady in both election years, favoring him by a

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<sup>53</sup> See *Policing in America*, N.Y. TIMES, <https://www.nytimes.com/spotlight/visual-investigations-police-misconduct> (last visited Mar. 18, 2021) (collecting articles and visual investigations that focus on prominent police killings from 2020).

<sup>54</sup> ROUBADEH KISHI & SAM JONES, ARMED CONFLICT LOCATION & EVENT DATA PROJECT, DEMONSTRATIONS & POLITICAL VIOLENCE IN AMERICA: NEW DATA FOR SUMMER 2020 (2020), <https://acleddata.com/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020/>.

<sup>55</sup> See Aimee Ortiz, *What We Know About the Death of Rayshard Brooks*, N.Y. TIMES (Jan. 29, 2021), <https://www.nytimes.com/article/rayshard-brooks-what-we-know.html>; Christina Morales, *What We Know About the Shooting of Jacob Blake*, N.Y. TIMES (Jan. 5, 2021), <https://www.nytimes.com/article/jacob-blake-shooting-kenosha.html>; *Policing in America*, *supra* note 53.

<sup>56</sup> William H. Frey, *Exit Polls Show Both Familiar and New Voting Blocs Sealed Biden’s Win*, BROOKINGS (Nov. 12, 2020), <https://www.brookings.edu/research/2020-exit-polls-show-a-scrambling-of-democrats-and-republicans-traditional-bases/>.

<sup>57</sup> *Id.*

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

margin of 27%.<sup>59</sup> But white women voters with a college education, who favored the Democratic candidate by a 7% margin in 2016, increased that margin to 9% in 2020.<sup>60</sup> These gains among white voters contributed to Joe Biden's win, particularly as they played out in the "relatively 'white' states of Pennsylvania, Michigan, and Wisconsin."<sup>61</sup>

The preceding paragraph requires a few qualifications. First, while the changing margins described above contributed to Biden's win, Black voters delivered him the presidency.<sup>62</sup> In a year with historic Black turnout, 87% of Black voters cast their ballots for Biden.<sup>63</sup> Second, it assumes that Biden—whose platform included a plan to advance racial equity—was the candidate whom voters perceived as willing to tackle systemic racism.<sup>64</sup> Third, it is not clear whether concern about systemic racism is what motivated some white voters to flip from Trump in 2016 to Biden in 2020. Other factors could have fueled their switch: the pandemic, the greenlight that allowed Turkey to invade Syria and attack Kurdish allies, offensive tweets, and so on. There are countless reasons why voters may favor one candidate over the other. But let us optimistically suppose that the white voters who flipped Democratic in 2020 did so at least in part because a combination of conscious awareness and the desire to be ethical prompted them to take action against systemic racism.

On the one hand, then—oh, the power of disruptive politics! Biden defeated Trump by more than seven million votes.<sup>65</sup> On the other hand, however, what a slender reed, from so many different directions! Trump garnered 58% of the white votes, with nearly three out of every five white voters casting a ballot for him.<sup>66</sup> Only 20,682 votes separated Biden from Trump in the battleground state

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

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See John Eligon & Audra D.S. Burch, *Black Voters Helped Deliver Biden a Presidential Victory. Now What?*, N.Y. TIMES (Dec. 24, 2020), <https://www.nytimes.com/2020/11/11/us/joe-biden-black-voters.html>; Suzette Hackney, *Black Voters Steer America Toward Moral Clarity in the Presidential Race*, USA TODAY (Nov. 12, 2020, 3:15 AM), <https://www.usatoday.com/story/opinion/voices/2020/11/12/americans-didnt-repudiate-donald-trump-but-black-voters-did-column/6222692002/>.

<sup>63</sup> Eligon & Burch, *supra* note 62.

<sup>64</sup> See *The Biden Plan to Build Back Better by Advocating Racial Equity Across the American Economy*, BIDEN HARRIS, <https://joebiden.com/racial-economic-equity/> (last visited Mar. 18, 2021).

<sup>65</sup> *Presidential Election Results, Biden Wins*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html> (last visited Mar. 18, 2021) [hereinafter *Presidential Election Results*].

<sup>66</sup> *National Exit Polls: How Different Groups Voted*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/exit-polls-president.html> (last visited Mar. 18, 2021); see Charles M. Blow, *Exit Polls Point to the Power of White Patriarchy*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/opinion/election-2020-exit-polls.html>.

of Wisconsin; 81,660 in Pennsylvania; 11,779 in Georgia; 10,457 in Arizona.<sup>67</sup> As *New York Times* columnist Charles Blow wrote the day after the election, “It is obscene that the presidential election is too close to call.”<sup>68</sup> In addition, Democrats only narrowly gained control of the Senate after runoffs in Georgia and lost seats in the House.<sup>69</sup> Already, pundits are speculating whether Republicans will take control of Congress in 2022.<sup>70</sup>

### C. Tipping Points

Hayward calls the shift in disposition that arises from sudden conscious awareness of structural inequity and the desire to be seen as ethical the “tipping point.”<sup>71</sup> “Tipping point” is a term with origins in physics, where it describes the point at which an object becomes so unbalanced that even a slight force causes it to topple over.<sup>72</sup> The phrase became well-known in social literature because of economist Thomas Schelling’s models of residential segregation, which suggested that even a slight preference for same-race neighbors can lead to extreme residential segregation.<sup>73</sup> More recently, a great deal of scholarly work has been devoted to figuring out how to nudge people en masse toward desirable social behaviors.<sup>74</sup> In this literature, “tipping” is the point when enough people have moved toward a particular behavior that it becomes a self-reinforcing, sticky social norm.

Hayward acknowledges that political disruptions and shifts in disposition are far from sticky. Rather, they are “partial” and “impermanent.”<sup>75</sup> She argues,

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<sup>67</sup> *Presidential Elections Results*, *supra* note 65.

<sup>68</sup> Blow, *supra* note 66.

<sup>69</sup> See *U.S. House Election Results*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-house.html> (last visited Mar. 17, 2021); *U.S. Senate Election Results: Democrats Win*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-senate.html> (last visited Mar. 17, 2021).

<sup>70</sup> See Nathaniel Rakich & Geoffrey Skelley, *What All Those GOP Retirements Mean for the 2022 Senate Map*, FIVETHIRTYEIGHT (Jan. 25, 2021, 2:21 PM), [https://fivethirtyeight.com/features/what-all-those-gop-retirements-mean-for-the-2022-senate-map/?cid=\\_inlinerelated](https://fivethirtyeight.com/features/what-all-those-gop-retirements-mean-for-the-2022-senate-map/?cid=_inlinerelated).

<sup>71</sup> Hayward, *supra* note 12.

<sup>72</sup> ROYAL ACAD. OF ENG’G & MOTOROLA SOLS. FOUND., FORCES, CENTRE OF GRAVITY, REACTIONS AND STABILITY (n.d.), <https://www.raeng.org.uk/publications/other/forces-centre-of-gravity-reactions-and-stability>.

<sup>73</sup> See Thomas C. Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOCIO. 143 (1971). The phrase was first applied as a metaphor to explain segregation by sociologist Morton Grodzins. See Morton Grodzins, *Metropolitan Segregation*, SCI. AM., Oct. 1957, at 33.

<sup>74</sup> See MALCOM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (2000) (collecting examples of successful efforts to create tipping points); see also RICHARD A. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WELFARE, AND HAPPINESS (2009) (discussing strategies to help people make socially and personally beneficial decisions).

<sup>75</sup> Hayward, *supra* note 12, at 407.

however, that one can exploit “those shifts in political discourse and public opinion . . . to institutionalize structural change.”<sup>76</sup> Sympathetic actors might be positioned to enact changes that advance racial equity, and even reluctant actors may work to dismantle structural injustice because they worry that otherwise voters will defect.<sup>77</sup> Some of the resultant changes may be enduring, even though the political disruption itself is impermanent. For example, political disruption may spur change in police department protocols; officers following new protocols will eventually form new habits.<sup>78</sup>

Hayward suggests that, like the conscious awareness caused by disruptive politics, habit also plays a critical role in dismantling structural injustice. We perform habits “regularly and reflexively . . . without consulting or making conscious [our] background ethical belief.”<sup>79</sup> Hayward uses the word “habit” instead of “norm,” but what she sketches out is consistent with the substantial literature on creating socially beneficial norms.<sup>80</sup> Recycling, the example Hayward uses for how to create a habit,<sup>81</sup> is one of the go-to examples for how to instill positive social norms.<sup>82</sup> Behaviors are shaped in part by the costs of those behaviors. Costs take a variety of forms: financial, hassle, or social. Using recycling as the example, a state might require a ten-cent deposit on aluminum cans and make the deposit refundable upon return to a recycling center. One twelve-pack of pop after another, there is real financial cost in failing to recycle. A university might also place the recycling bins right next to the trash cans, reducing the hassle costs of recycling.<sup>83</sup> If many people recycle and recycling is associated with environmental stewardship, an individual might recycle because they want to be perceived as a responsible citizen or—flipped—to avoid the social sanction that might come from being perceived by others as not caring about the planet. Similarly, if an anti-racist practice is part of routine police protocol, then an officer will engage in behavior to avoid sanction or to be seen

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

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

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

<sup>79</sup> *Id.* at 402.

<sup>80</sup> See, e.g., Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537 (2000); Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253 (2000); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

<sup>81</sup> Hayward, *supra* note 12, at 401–02.

<sup>82</sup> See, e.g., W. Kip Viscusi, Joel Huber & Jason Bell, *Promoting Recycling: Private Values, Social Norms, and Economic Incentives*, 101 AM. ECON. REV. 65 (2011); Bente Halvorsen, *Effects of Norms and Opportunity Cost of Time on Household Recycling*, 84 LAND ECON. 501 (2008); Wokje Abrahamse & Linda Steg, *Social Influence Approaches to Encourage Resource Conservation: A Meta-Analysis*, 23 GLOB. ENV'T CHANGE 1773 (2013).

<sup>83</sup> See Hayward, *supra* note 12, at 402.

as “good” by fellow officers. Eventually, the officer will have acquired a new habit and simply reflexively engage in the anti-racist policing practice, independent of any reliance on background ethical beliefs.<sup>84</sup>

The formation of habits or norms aside, the changes that result from disruptive politics may also endure simply because policies that remedy racialized harms are widely beneficial. Consider the Affordable Care Act (ACA)—legislation that has helped reduce disparity in health care coverage based on race and ethnicity. In 2013, the year before the main provisions of ACA went into effect, 25.6% of Black people and 40.5% percent of Hispanic people were uninsured, compared with 14.8% of white people.<sup>85</sup> Lack of coverage affects access to health care and economic inequality, with the uninsured potentially exposed to large medical bills and thus lower credit scores and higher risks of bankruptcy.<sup>86</sup> In the first three years that the major provisions of the ACA were fully implemented, racial disparities in health care coverage decreased by 23%.<sup>87</sup>

Trump came into office vowing to repeal and replace the ACA, but the legislation has had staying power.<sup>88</sup> Even when Republicans controlled both chambers of Congress and the presidency, they were unable to eliminate the ACA.<sup>89</sup>

Since the legislation is widely beneficial, this should come as no surprise. People of all races like having insurance coverage despite preexisting conditions, the ability to keep children on their policies until the age of twenty-six, access to decent insurance even if unemployed, and other attendant benefits of the ACA.<sup>90</sup> It would strain ordinary usage to say that we have the “habit” of

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<sup>84</sup> *Id.* at 406–07.

<sup>85</sup> Thomas C. Buchmueller, Zachary M. Levinson, Helen G. Levy & Barbara L. Wolfe, *Effect of the Affordable Care Act on Racial and Ethnic Disparities in Health Insurance Coverage*, 106 AM. J. PUB. HEALTH 1416, 1418 (2016).

<sup>86</sup> See Silvia Helena Barcellos & Mireille Jacobson, *The Effects of Medicare on Medical Expenditure Risk and Financial Strain*, 7 AM. ECON. J.: ECON. POL’Y 41, 41 (2015).

<sup>87</sup> Charles Courtemanche, James Marton, Benjamin Ukert, Aaron Yelowitz, Daniel Zapata & Ishtiaque Fazlul, *The Three-Year Impact of the Affordable Care Act on Disparities in Insurance Coverage*, 54 HEALTH SERVS. RSCH. 307, 314 (2019).

<sup>88</sup> Linda Qiu & Annie Karni, *Did President Trump Keep His First-Term Promises? Let’s Look at 5 of Them*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/2020/10/31/us/politics/trump-first-term-promises.html?searchResultPosition=5>.

<sup>89</sup> The ACA faces another Supreme Court challenge this term. California v. Texas, Docket No.19-840 (argued Nov. 10, 2020). The ACA is expected to withstand this latest legal attack. See Adam Liptak, *Key Justices Signal Support for Affordable Care Act*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/10/us/supreme-court-obamacare-aca.html?searchResultPosition=1>.

<sup>90</sup> See Reed Abelson & Abby Goodnough, *If the Supreme Court Ends Obamacare, Here’s What It Would*

the ACA.<sup>91</sup> But the ACA is sticky legislation, even though the political window that enabled its passage was temporary. Disruptive politics and accompanying shifts in disposition create an opening for a process that is seemingly more passive than what we have discussed thus far: the normalization and widespread acceptance of policies that remedy structural inequity.

## II. TIPPING TOWARD EQUALITY

Following the systematic approach Shelby sets forth,<sup>92</sup> the work is to identify policies that were constructed *in order to* benefit whites—“the inceptive structures”—as well as those that currently act to perpetuate the racialized benefits of the inceptive structures. We call these policies that perpetuate racialized benefits “compounding structures.” The compounding structures may not have been *consciously* constructed with the goal of benefiting white people or whiteness, but they too should be subject to examination for two reasons. First, a robust literature makes clear that our implicit racial preferences and biases are often consequential in decision making.<sup>93</sup> Second, if their effect is to deepen the inequities created by the inceptive structures, they are perpetuating systemic racism. The next step is to determine whether and how to realign these policies to dismantle their racialized harms.

### A. Inceptive and Compounding Structures in Housing and Transportation

Once any policy is in place (beneficial or not), we might—as Hayward would describe—develop habits that are consistent with the policy.<sup>94</sup> This is one way to think about the commonplace practice of commuting by car: we have developed the habit of driving to and from work. But there is something more passive at play as well: we have become habituated to a world in which it is necessary to spend two hours (or even more) driving to and from work each day. To put the habituation point in sharper relief, it is odd to say that Americans have the habit of single-family housing. Rather, Americans (even those who do not live in them) have become habituated to the idea of mostly white suburban communities in which single-family homes are optimal, and in which places of employment are far away from where people live.

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*Mean*, N.Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/article/supreme-court-obamacare-case.html>.

<sup>91</sup> The ACA was enacted into law in March 2010, when Democrats controlled the Presidency, Senate, and House. Democrats lost control of the House in the midterm elections six months later.

<sup>92</sup> See Shelby, *supra* note 22.

<sup>93</sup> See, e.g., EFRÉN O. PÉREZ, UNSPOKEN POLITICS: IMPLICIT ATTITUDES AND POLITICAL THINKING (2016); IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).

<sup>94</sup> See Hayward, *supra* note 12, at 407.

We can trace our habituation to exclusionary Euclidean suburbs and long commutes back to New Deal government policies that continue to shape the world we live in. Numerous scholars have documented the racist practices of the Home Owners' Loan Corporation (HOLC) and the Federal Housing Administration (FHA).<sup>95</sup> HOLC, with its infamous redlining program, devalued homes in predominantly Black neighborhoods and only loaned to Black homeowners who lived in Black neighborhoods.<sup>96</sup> The FHA refused to insure loans in integrated neighborhoods, subsidized builders who were constructing suburbs intended only for white people, and insured astonishingly few loans for Black homeowners, who owned just 2% of the insured housing units.<sup>97</sup> As white people moved to the new suburbs, federal government transportation policies leveled Black communities to make way for interstate highways and shifted spending in ways that favored cars over public transit.<sup>98</sup> The federal government also played a significant role in encouraging exclusionary Euclidean zoning patterns and restrictive covenants in newly growing suburbs.<sup>99</sup> Post-World War II programs continued the inequality in federal investment. Even the GI Bill's guaranteed mortgages were mostly denied to Black veterans.<sup>100</sup>

The sum of these governmental actions provided white people with what we have called "racial agency."<sup>101</sup> "Agency" refers to "the capacity, condition, or state of acting or of exerting power."<sup>102</sup> Agency captures the idea that exercising power is linked to factors extrinsic to the individual. "Agency" is modified with "racial" because race has so frequently determined how the government employs its power. As Cheryl Harris argued in her iconic article *Whiteness as Property*, "[b]ecoming white increased the possibility of controlling critical aspects of one's life rather than being the object of others' domination."<sup>103</sup> These New Deal policies were inceptive structures that gave white people power and privilege that were overwhelmingly denied to Black people.

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<sup>95</sup> See RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 190–218 (1985).

<sup>96</sup> See JACKSON, *supra* note 95, at 195–203.

<sup>97</sup> Fred Carroll, *The Racial Politics of Place: Jim Crow, the New Deal, and Suburban Housing on the Virginia Peninsula*, 40 J. URB. HIST. 514, 519 (2014); see JACKSON, *supra* note 95, at 203–18.

<sup>98</sup> See Archer, *supra* note 28.

<sup>99</sup> See JACKSON, *supra* note 95, at 208, 213–17.

<sup>100</sup> See *id.* at 204–05, 215.

<sup>101</sup> Godsil & Waldeck, *supra* note 10, at 14–19.

<sup>102</sup> *Agency*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/agency> (last visited Aug. 3, 2021)

<sup>103</sup> Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713 (1993).

The initial harms caused by these inceptive structures have been exacerbated by compounding structures. For example, the deductibility of mortgage interest and local property taxes allows for a more rapid accumulation of wealth, making the homeownership opportunities that New Deal policies provided to white people even more economically advantageous.<sup>104</sup> Funding public schools primarily through local property taxes means that schools in wealthy districts are able to spend dramatically more per student than schools in poor districts, providing increased educational opportunity for students in wealthier districts.<sup>105</sup> And because home values are connected to school quality, funding schools through local property taxes—rather than relying on a more regional model—further bolsters home values in wealthy neighborhoods. People with equity in their homes have a range of additional credit options, opening up the possibility of favorable loan terms that enable pursuit of other economic opportunities. In these and other ways, the economic inequities cemented by the initial inceptive structures have compounded over time.

The irony, however, is that while these policies explicitly empowered white people and whiteness more generally, the present-day economic effects of these policies have eroded for many white people as the gap between the very rich and everyone else has grown. According to the Pew Research Center, between 1970 and 2018, the share of aggregate income going to middle-class households fell from 62% to 43% while the share going to upper-income households increased from 29% to 48%.<sup>106</sup> By contrast, the share to lower-income households inched down from 10% in 1970 to 9% in 2018.<sup>107</sup> A significant percentage of white households live paycheck to paycheck—experiencing the anxiety-inducing combination of student debt, medical costs, and job insecurity.<sup>108</sup>

As John Powell has argued: “[W]hite privilege may be overstated in terms of the privilege it brings, while understated in its cost.”<sup>109</sup> He explains that “[w]ithin white-defined structural and institutional arrangements, whiteness is generally not viewed as privilege; rather, privilege is defined as normality and

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<sup>104</sup> See Moran & Whitford, *supra* note 15, at 773–83.

<sup>105</sup> See Hackney, *supra* note 14.

<sup>106</sup> JULIANA MENASCE HOROWITZ, RUTH IGIENIK & RAKESH KOCHHAR, MOST AMERICANS SAY THERE IS TOO MUCH ECONOMIC INEQUALITY IN THE U.S., BUT FEWER THAN HALF CALL IT A TOP PRIORITY 16 (2020), [https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2020/01/PSDT\\_01.09.20\\_economic-inequality\\_FULL.pdf](https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2020/01/PSDT_01.09.20_economic-inequality_FULL.pdf).

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

<sup>108</sup> See Zack Friedman, *78% of Workers Live Paycheck to Paycheck*, FORBES (Jan. 11, 2019, 8:32 AM), <https://www.forbes.com/sites/zackfriedman/2019/01/11/live-paycheck-to-paycheck-government-shutdown/?sh=69a13bd64f10>.

<sup>109</sup> POWELL, *supra* note 10, at xxii.

those without this white normality as defective. White Americans need not seek white privilege; they simply exist within it.”<sup>110</sup> Hence, with the growing gap between the exceedingly wealthy and everyone else, most white people are not “privileged” economically, but *are* privileged in not being subject to a set of racialized harms on a regular basis.

We are in no way seeking to underestimate the racialized harms that are both constant sources of stress—the often-daily indignities of microaggressions<sup>111</sup>—and racialized policing. Yet Powell’s overarching argument is that for people of color to have what the *average* white person has is not what we want for our society.<sup>112</sup> Even middle-class white families experience an increased burden on primary expenditures for health, housing, and education.<sup>113</sup> Poor and working-class white people are significantly worse off with respect to these basic necessities than they were in previous decades.<sup>114</sup> Other indicia of well-being for white people are more dire—suicide rates among white people without college degrees have seen a sharp rise, and the opioid crisis has hit rural white communities particularly hard.<sup>115</sup> The bar needs to be higher. Black people and people across lines of race and ethnicity who are currently experiencing the challenges of a bifurcated economy and a government that inadequately responds deserve far more. As activists on the frontlines have articulated, “We work vigorously for freedom and justice for Black people and, by extension, all people.”<sup>116</sup> Once we implement policies that dismantle the inceptive structures

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<sup>110</sup> *Id.*

<sup>111</sup> See DERALD WING SUE & LISA SPANIERMAN, MICROAGGRESSIONS IN EVERYDAY LIFE (2d ed. 2020).

<sup>112</sup> See POWELL, *supra* note 10, at 75–101.

<sup>113</sup> See Emily Dohrman & Bruce Fallick, *Is the Middle Class Worse Off Than It Used to Be?*, FED. RSRV. BANK OF CLEVELAND (Feb. 12, 2020), <https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2020-economic-commentaries/ec-202003-is-middle-class-worse-off.aspx> (noting that wages have risen nominally since 1980 and purchasing power has increased for some categories, but not those of most importance to families).

<sup>114</sup> See Christian E. Weller, *Working-Class Families Are Getting Hit from All Sides*, CTR. FOR AM. PROGRESS (July 26, 2018, 12:01 AM), <https://www.americanprogress.org/issues/economy/reports/2018/07/26/453841/working-class-families-getting-hit-sides/>; *Poverty Rate by Race/Ethnicity*, KAISER FAM. FOUND., <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/> (last visited Aug. 3, 2021). While the rate of poverty is higher for people who are Black and Hispanic/Latinx, the overall number of poor white people is far higher than poor Black people in every state except Louisiana and Mississippi. *Poverty Rate by Race/Ethnicity*, *supra*. In some states, the number of poor Hispanic people exceeds both groups. *Id.* It is also notable that in California, the number of poor people who are Asian is higher than the number of poor people who are Black. *Id.*

<sup>115</sup> See Austin Frankt, *What Can Be Learned from Differing Rates of Suicide Among Different Groups*, N.Y. TIMES (Dec. 30, 2020), <https://www.nytimes.com/2020/12/30/upshot/suicide-demographic-differences.html>; *Opioid Overdose Deaths by Race/Ethnicity*, KAISER FAM. FOUND., <https://www.kff.org/other/state-indicator/opioid-overdose-deaths-by-raceethnicity/> (last visited Aug. 3, 2021).

<sup>116</sup> *Guiding Principles*, BLACK LIVES MATTER L.A., <https://www.blmla.org/guiding-principles> (last visited Aug. 3, 2021).

that functioned to provide agency to white people, but not to Black people, people of all races will experience benefits.

Consider, for example, our habituation to a world where millions of people commute to work by car. This traces back to the massive federal investment in highway construction in the 1950s. The construction often created racial barriers between white neighborhoods and neighborhoods with a large presence of Black households and also subsidized white flight to the suburbs.<sup>117</sup> This initially racialized policy has extended to the present with the federal government spending far more on roads and highways than on mass transit.<sup>118</sup> We have argued for flipping transportation spending to provide greater funding for mass transit and to make it as easy for states to construct mass transit as roads.<sup>119</sup> Widespread availability of mass transit helps reduce racial injustice in housing and has additional benefits as well.

Among urban dwellers, 34% of Black people report taking public transit daily or weekly, compared with only 14% of white people.<sup>120</sup> While the vast majority of American households—including Black households—have access to a car, a higher percentage of Black households lack such access and are more likely to use mass transit to commute to work.<sup>121</sup> Across the United States, the connectivity of mass transit—the degree to which it gets people to where they want to go—is pretty dismal. But most regions are particularly lacking in transit that connects people to the range of jobs available throughout entire metropolitan regions.<sup>122</sup> While high-skill jobs tend to be concentrated in cities, low- and medium-skill jobs are usually scattered across metropolitan regions. The typical worker can reach only about 25% of these kinds of jobs by transit in

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<sup>117</sup> See Archer, *supra* note 28, at 1263–71.

<sup>118</sup> See Phillip Oliff, *Funding Challenges in Highway and Transit: A Federal-State-Local Analysis*, PEW TRS. (Feb. 24, 2015), <https://www.pewtrusts.org/en/research-and-analysis/articles/2015/02/24/funding-challenges-in-highway-and-transit-a-federal-state-local-analysis>.

<sup>119</sup> See Godsil & Waldeck, *supra* note 10, at 38–39.

<sup>120</sup> Monica Anderson, *Who Relies on Public Transit in the U.S.*, PEW RSCH. CTR. (April 7, 2016), <https://www.pewresearch.org/fact-tank/2016/04/07/who-relies-on-public-transit-in-the-u-s/>. There are few racial differences between non-urban users of transit, but the lack of mass transit outside cities makes it difficult to use mass transit in other places. Only 6% of suburban residents and 3% of rural residents use transit on a regular basis. *Id.*

<sup>121</sup> *Id.* Only 6% of white households lack access to a car while 19% of Black households do not have access to a car. *Car Access: Everyone Needs Reliable Transportation and in Most Places That Means a Car.*, NAT'L EQUITY ATLAS, [https://nationalequityatlas.org/indicators/Car\\_access#/?breakdown=2](https://nationalequityatlas.org/indicators/Car_access#/?breakdown=2) (last visited Mar. 18, 2021).

<sup>122</sup> See Tanya Snyder, *Brookings: Transit Access to Jobs Is the Missing Link*, STREETSBLOG USA (May 13, 2011), <https://usa.streetsblog.org/2011/05/13/brookings-transit-access-to-jobs-is-the-missing-link/> (noting that “the typical metropolitan resident can reach only 30 percent of jobs in their region via transit in 90 minutes”).

90 minutes or less.<sup>123</sup> Across every metropolitan region in the United States and every industry, city jobs are more easily accessible by transit than suburban jobs.<sup>124</sup>

The lack of widespread and connective mass transit also makes it more expensive for working-class Black families to live in suburban communities. Whether housing is affordable depends not just on the cost of housing, but also the cost of transportation. HUD deems housing affordable when it requires no more than 30% of a household's income,<sup>125</sup> and current recommendations are that a family spend no more than 45% of its income on housing and transportation combined.<sup>126</sup> But the average household in the United States spends just over 20% of its total income on transportation expenses, and for low-income households, the average burden can be as high as 30%.<sup>127</sup> The expenses that come with the necessity of commuting by car function to make entire communities unaffordable for all but the most affluent Black families.

Heavy reliance on cars also creates environmental consequences that are both harmful generally and that Black people experience even more profoundly than white people. To illustrate, COVID-19 is the single biggest headline from 2020. As of November 30, 2020, the Centers for Disease Control and Prevention was reporting that the rate of deaths from COVID-19 was 1.9 times higher among Black Americans than white Americans, the rate of hospitalizations was 2.9 times higher, and the rate of cases was 1.1 times higher.<sup>128</sup> Relevant to COVID-related Black mortality is the link between race and neighborhood exposure to pollutants. Studies released in October and November 2020 showed that small increases in particulate matter—the kind created by car engines—corresponded to significant increases in COVID-19 mortality.<sup>129</sup> These

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<sup>123</sup> *Id.*

<sup>124</sup> See ADIE TOMER, METRO. POL'Y PROGRAM AT BROOKINGS, WHERE THE JOBS ARE: EMPLOYER ACCESS TO LABOR BY TRANSIT (2012), <https://www.brookings.edu/wp-content/uploads/2016/06/11-transit-labor-tomer-full-paper.pdf>.

<sup>125</sup> *Defining Housing Affordability*, HUD, <https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-081417.html> (last visited Aug. 3, 2020).

<sup>126</sup> See, e.g., *About the Index*, CTR. FOR NEIGHBORHOOD TECH., <https://htaindex.cnt.org/about/> (last visited Aug. 3, 2021). The CNT's Housing and Transportation Affordability Index provides an overview of affordability at the neighborhood level. *H+T Index*, CTR. FOR NEIGHBORHOOD TECH., <https://htaindex.cnt.org/> (last visited Aug. 3, 2021). The Index demonstrates the importance of considering both housing and transportation when determining the affordability of a particular community.

<sup>127</sup> BARBRA J. LIPMAN, CTR. FOR HOUS. POL'Y, A HEAVY LOAD: THE COMBINED HOUSING AND TRANSPORTATION BURDENS OF WORKING FAMILIES RECONNECTING AMERICA 1 (2006), <http://www.reconnectingamerica.org/assets/Uploads/pubheavyload1006.pdf>. The average transportation expenses as a share of income was compiled based on a survey of twenty-eight metropolitan areas across the country. *Id.*

<sup>128</sup> *Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity*, *supra* note 4.

<sup>129</sup> See Andrea Pozzer, Francesca Dominici, Andy Haines, Christian Witt, Thomas Münzel & Jos

particulate matter pollutants are more prevalent in Black communities. In a 2019 study, researchers found that “racial/ethnic minorities (vs. [w]hites) are exposed to greater concentrations of three types of air pollutants in their residential neighborhoods.”<sup>130</sup> This is consistent with other research showing that Black people “in the United States suffer worse air quality across geographic scales and multiple pollution metrics.”<sup>131</sup>

Creating more mass transit would help eliminate systemic racism in housing. It would also provide myriad other benefits. People of all races need broad access to employment opportunities and housing options that are not put out of reach by the cost of commuting. Quite critically, mass transit also aids in the fight against climate change, with carbon dioxide emissions from light-duty vehicles accounting for a substantial proportion of the United States’ greenhouse gas emissions.<sup>132</sup> The effects of automobile emissions on the environment are concerning enough that the “Green New Deal” calls for a \$300 billion investment in affordable public transportation.<sup>133</sup>

We can make the same point about correctives that seek to increase the supply of affordable housing by retreating from Euclidean zoning and allowing mixed-use development on land that had previously been used for office parks or shopping malls—land that is likely to be in high supply given changes in working and shopping practices in the wake of COVID-19.<sup>134</sup> Mixed-use development, which places residential, retail, and civic uses in close proximity, helps make room for what has been dubbed the “missing middle” in housing.

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Lelieveld, *Regional and Global Contribution of Air Pollution to the Risk of Death from COVID-19*, 116 CARDIOVASCULAR RSCH. 2247 (2020); X. Wu, R.C. Nethery, M.B. Sabath, D. Braun & F. Dominici, *Air Pollution and COVID-19 Mortality in the United States: Strengths and Limitations of an Ecological Regression Analysis*, SCI. ADVANCES (Nov. 4, 2020), <https://advances.sciencemag.org/content/6/45/eabd4049>.

<sup>130</sup> Bongki Woo, Nicole Kravitz-Wirtz, Victoria Sass, Kyle Crowder, Samantha Teixeira & David T. Takeuchi, *Residential Segregation and Racial/Ethnic Disparities in Ambient Air Pollution*, 11 RACE & SOC. PROBS. 60, 64 (2019).

<sup>131</sup> Marie Lynn Miranda, Sharon E. Edwards, Martha H. Keating & Christopher J. Paul, *Making the Environmental Justice Grade: The Relative Burden of Air Pollution Exposure in the United States*, 8 INT'L. J. ENV'T RSCH. & PUB. HEALTH 1755, 1768 (2011).

<sup>132</sup> See *Fast Facts on Transportation Greenhouse Gas Emissions*, EPA, <https://www.epa.gov/greenvehicles/fast-facts-transportation-greenhouse-gas-emissions> (last visited Aug. 3, 2021) (noting that, in 2017, transportation was the largest greenhouse gas emitting sector, accounting for 28% of all U.S. greenhouse gas emissions); see also OFF. OF TRANSP. & AIR QUALITY, EPA, *FAST FACTS: U.S. TRANSPORTATION SECTOR GREENHOUSE GAS EMISSIONS 1990–2017*, at 1, 4 (2019), <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100WUHR.pdf> (noting that 60% of transportation emissions come from light duty vehicles like cars, sports utility vehicles, and other light trucks).

<sup>133</sup> The Green New Deal is a House resolution that calls for the creation of a comprehensive climate action plan that would include a just transition to a sustainable economy bolstering workers’ rights and investment in environmentally friendly infrastructure. H.R. Res. 109, 116th Cong. (2019).

<sup>134</sup> Godsil & Waldeck, *supra* note 10, at 33–34.

These are options that fall between large apartment buildings and substantial single-family homes, including small lot single-family homes and townhouses, stacked townhouses and flats, two- to four-family buildings, courtyard housing, and small apartment buildings.<sup>135</sup> Dismantling the inceptive policies that created structural racial segregation would have the effect of making housing accessible for working people of all races and ethnicities.

Just as we are presently habituated to commuting by car and the ideal of suburban communities with single-family homes, we would become habituated to widely available affordable housing in both cities and suburbs, highly available mass transit, and other characteristics of an America without systemic injustice in housing. The consequences of dismantling the inceptive structures that underlie residential segregation and inequitable access to transportation have the potential for cascading effects that may alter the racialized effects of the compounding structures or may trigger realignment of those structures. For example, if neighborhoods and suburbs cease to be starkly identified by race and class, current funding schemes for schools based upon property taxes would not lead to such dramatic disparities—or may be abandoned for a more efficient state allocation of funds.

### *B. Next Steps: Building a Cross Racial Movement for Justice*

An array of scholars and public intellectuals, including critical race scholar Ian Haney López<sup>136</sup> and political commentator Heather McGhee,<sup>137</sup> are arguing that calling out and organizing against racism alone will be insufficient to build the movement necessary to sustain progressive policies. They are not suggesting downplaying calls for racial justice<sup>138</sup>—but rather expanding the set of concerns to include class and explicitly including people across race into political partnership.

Haney López and linguist Anat Shenker-Osorio conducted empirical message testing to determine if a class-race combination would be effective

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<sup>135</sup> See *Missing Middle Housing*, CONG. FOR NEW URBANISM, <https://www.cnu.org/our-projects/missing-middle-housing> (last visited Aug. 3, 2021). See generally ELLEN DUNHAM-JONES & JUNE WILLIAMSON, RETROFITTING SUBURBIA: URBAN DESIGN SOLUTIONS FOR REDESIGNING SUBURBS (2011) (discussing how suburban development can grow and change using traditionally urban designs).

<sup>136</sup> See LÓPEZ, *supra* note 21.

<sup>137</sup> See HEATHER MCGHEE, THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER (2021).

<sup>138</sup> See, e.g., Edward Lempinen, *Ian Haney López: To Combat Racism, We Need to Talk About Economic Justice*, U.C. BERKLEY (Oct. 28, 2020), <https://news.berkeley.edu/2020/10/28/ian-haney-lopez-to-combat-racism-we-need-to-talk-about-economic-justice/>.

against messages that promote racial fears to turn out white voters. They found that among a significant majority, discussing race overtly, framing racism as a tactic to divide people, and connecting unity with economic prosperity was successful.<sup>139</sup> They concluded that “[t]he key for cross-racial solidarity, voter engagement, and policy victories is mobilizing around the connections between racial divisions and economic hardship . . . while showing the benefits of calling out dog-whistle racism for what it is: a divide-and-conquer strategy that creates distrust and undermines belief in government.”<sup>140</sup> The benefit of this strategy is clear: it speaks to the self and group interest of those who for decades have been convinced that they are being harmed by progressive policies.

It may seem difficult to make the seemingly counterintuitive case that actions taken to keep resources from being shared across race are actually harmful to whites. McGhee employs a powerful metaphor—drained pool politics—to show how white peoples’ refusal to share resources with people of color has damaged white families too. The drained pool refers literally to the Fairground Park pool in St. Louis, Missouri, which when built in 1919 was the largest public pool in the United States, featuring sand from a beach, a diving board and room for up to 10,000 swimmers.<sup>141</sup> The city closed and ultimately drained the pool rather than allow it to become integrated.<sup>142</sup> McGhee writes that “one of the most powerful subterranean stories in America” is “[t]he narrative that [w]hite people should see the well-being of people of color as a threat to their own. . . . Until we destroy the idea, opponents of progress can always unearth it, and use it to block any collective action that benefits us all.”<sup>143</sup>

A horrific murder of a man by a police officer captured on video and the disruptive politics that followed have triggered a recognition of underlying systemic racial injustice. Past circumstances give reason to believe that people will become habituated if egalitarian policies flow from this political moment. The seeming next step is to continue make the case that we live in a society in which our fates are linked.

Given the seeming intractability of systemic racism, the potential for cross-racial linked fate may seem utopian or naive. However, both social science research and historical examples involving groups who were once deemed

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<sup>139</sup> See *Race-Class Narrative Messaging Resources*, DEMOS ACTION, <https://demosaction.org/raceclass-narrative> (last visited Aug. 3, 2021).

<sup>140</sup> *Id.*

<sup>141</sup> MCGHEE, *supra* note 137, at 27.

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

<sup>143</sup> *Id.* at 15.

“other”<sup>144</sup> give reason to conclude otherwise. Eliminating the structural barriers that perpetuate residential segregation has the potential to result in a level of intergroup contact through integrated neighborhoods and communities that this country has never experienced. Genuine intergroup contact as members of the same town or neighborhood has the potential to dramatically alter racial dynamics for lasting change.<sup>145</sup> Intergroup contact provides the only lasting method of reducing stereotypes, biases, and cross-group anxieties and moving toward a sense of “belonging” across identity.<sup>146</sup>

We agree with Tommie Shelby that what is critical from a corrective justice perspective is that “individuals have the *option* to integrate (which is the demand for desegregation and social equality).”<sup>147</sup> Indeed, as Shelby contends, not only is “[t]here . . . nothing wrong with the existence of predominantly [B]lack urban communities . . . , in light of the long-standing predicament of [B]lack people in the United States, there is much to be said in favor of such neighborhoods.”<sup>148</sup> But if structural barriers fall and the *opportunity* for integration increases, there is reason to believe that existing sources of bias would decrease. Because currently segregated white communities would no longer have the power to exclude, levels of intergroup contact would increase. Through increased contact, people would rely less on embedded stereotypes about racial or ethnic groups and more on the actual characteristics of individual people. Currently, racial biases held by some are transmitted to others in a process described as “bias contagion.”<sup>149</sup> With a combination of a narrative of cross-group political benefit

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<sup>144</sup> When families deemed “not yet white ethnics” by historian Thomas Sugrue “moved from their urban enclaves and began a new existence within suburban communities living side by side[,] [t]he stereotypes of the white ethnics lost their valence as their status as ‘white’ overwhelmed the group differentiation. So the stereotypes of the Irish, Polish, Italians, and other white ethnics diminished as with socially salient impediments to opportunity and designation as a dangerous ‘other.’” Rachel D. Godsil, *Rigor and Relationships: The Positive Case for Integration in Schools and Neighborhoods*, 40 CARDozo L. REV. 1287, 1325 (2019).

<sup>145</sup> Gary Orfield, Milliken, and *Metropolitan Segregation*, 62 UCLA L. REV. 364, 367 (2015). Evidence already exists to support the argument that biases and stereotypes will decrease in counties with higher levels of Black residents. By contrast, in counties where Black residents face more discrimination and more formidable structural barriers (e.g., absence of economic and housing opportunities, disproportionate policing), negative stereotypes are more prevalent. Mark J. Chin, David M. Quinn, Tasminda K. Dhaliwal & Virginia S. Lovison, *Bias in the Air: A Nationwide Exploration of Teachers’ Implicit Racial Attitudes, Aggregate Bias, and Student Outcomes*, 49 EDUC. RESEARCHER 566, 567 (2020).

<sup>146</sup> See generally Linda R. Tropp & Elizabeth Page-Gould, *Contact Between Groups*, in 2 APA HANDBOOK OF PERSONALITY AND SOCIAL PSYCHOLOGY 535 (Mario Mikulincer & Phillip Shaver eds., 2015) (summarizing intergroup contact literature). For a discussion of the importance of “belonging,” see John A. Powell, *Bridging or Breaking? The Stories We Tell Will Create the Future We Inhabit*, NONPROFIT Q. (Feb. 15, 2021), <https://nonprofitquarterly.org/bridging-or-breaking-the-stories-we-tell-will-create-the-future-we-inhabit/>.

<sup>147</sup> TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM 275 (2016) (emphasis added).

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

<sup>149</sup> Max Weisbuch & Kristin Pauker, *The Nonverbal Transmission of Intergroup Bias: A Model of Bias*

and the development of integrated communities, the conditions that continue to be rife for racial division may finally tip toward equality.

## CONCLUSION

Schelling's use of a "tipping point" to explain residential segregation was premised on the power of individual preferences for living in a neighborhood with a certain percentage of neighbors of the same race to determine the racial composition of neighborhoods more generally.<sup>150</sup> Not surprisingly, this model has been criticized for ignoring the underlying institutional causes of segregation, including income and wealth effects, and the social structure of cities.<sup>151</sup> Our ultimate goal is for Hayward's "tipping point"—the shift in disposition that compels people to take action against systemic injustice<sup>152</sup>—to translate into the end of racial hierarchy. This requires capitalizing on the openings provided by disruptive politics to enact policies that dismantle the inceptive structures of systemic racism. Such policies are likely to be widely beneficial, which will help them stick. As we become habituated to their consequences, those policies will also become normalized and the intergroup contact that will follow has an opportunity to create a sense of belonging among people who presently feel divided. This is the point where we will have tipped away from anti-Blackness and toward a more equitable society.

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*Contagion with Implications for Social Policy*, 5 SOC. ISSUES & POL'Y REV. 257, 258 (2011).

<sup>150</sup> See *supra* note 73–74 and accompanying text.

<sup>151</sup> See Sébastien Grauwin, Florence Goffette-Nagot & Pablo Jensen, *Dynamic Models of Residential Segregation: An Analytical Solution*, 96 J. PUB. ECON. 124, 125 (2012).

<sup>152</sup> Hayward, *supra* note 12.