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Race, Reputation, and the Supreme Court: Valuing Blackness and Whiteness

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I. INTRODUCTION

"[I]f He Be A Colored Man . . . He Is Not Lawfully Entitled To The *Reputation* Of Being A White Man."[1]

In the United States, being black, or not being white, has long been seen as a sign of criminality, or at least criminal propensity.[2] The notion of racial profiling, recently the subject of considerable public attention, assumes that police officers, among others, can successfully, if illegitimately, use a person's race as an indicator of likely criminal conduct. Racial profiling usually refers to the assumption of possible law-breaking by African Americans or Latino Americans, although it can be applied to a person of any perceived race.[3] Most people are unlikely to admit to the role that a person's skin color plays in their assessment of

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1. Plessy v. Ferguson, 163 U.S. 537, 549 (1896) (emphasis added).

2. *See, e.g.*, Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063 (1993); Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993).

3. In theory, whiteness can cause a person to be considered suspicious. For example, it could be assumed that a white person driving in a black neighborhood is looking for drugs. Of course, this suspicion of the white person assumes that African American communities are more likely to have drugs available for sale and use.

their worthiness or credibility. In practice, however, for many people and not just police officers, race is frequently an indicator of suspicion, usually in the case of people of color, or the lack of suspicion, usually in the case of whites.

Practices such as racial profiling cannot be understood without recourse to broader considerations of the ways in which American discourses shape discussions on the link between race and reputation. Assumptions made about the character of people because of their skin color are assessments that assume a correlation between race and reputation. These racial reputations, however, are not confined to issues of presumed innocence or criminality. For instance, common racial stereotypes assign to African Americans reputations of athletic prowess or to Asian Americans reputations of mathematical skill. Reputation is a social attribute that refers to how a person is assessed and measured and usually reflects generalized, common appraisals about the person or group's standing and acceptance.[4]

Reputations may be positive or negative. To have a good reputation is to be well-regarded. Achieving or sustaining a good reputation can be based on a person's actions or inactions, ideas or practices. Reputation can also be imputed by signifiers and symbols. In the United States and elsewhere, one of those signifiers of reputation was—and in different and similar ways, still is—race. Americans came to "recognize[ ] the reputational interest in being regarded as white as a thing of significant value, which like other reputational interests, was intrinsically bound up with identity and personhood."[5]

This article explores aspects of the United States Supreme Court's discourse regarding race and reputation, examining both consistencies and shifts over time.[6] It begins with a discussion of slavery, focusing on the *Scott v. Sanford*[7] decision. The impact of the Reconstruction Amendments is discussed in the context of the *Civil Rights Cases*[8] and

4. The *Oxford English Dictionary* offers a definition of reputation as "[t]he common or general estimate of a person with respect to character or other qualities; the relative estimation or esteem in which a person or thing is held." OXFORD ENGLISH DICTIONARY 678 (2d ed. 1989).

5. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1734 (1993). Additionally Ariela Gross's discussion of reputation in jury trials that contested racial identity in the Antebellum South argues that "reputation evidence" was used "to refer to testimony about a person's acceptance in the community, including the person's associations with blacks or whites and the racial status his neighbors assigned him—what he 'passed for.'" Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 YALE L.J. 109, 147 (1998).

6. By comparison, Gross shows how the "law, broadly defined, played an important role in constituting the cultural meaning of racial identities." Gross, *supra* note 5, at 112.

7. 60 U.S. (19 How.) 393 (1857).

8. The Civil Rights Cases, 109 U.S. 3 (1883).

Plessy v. Ferguson.[9] Decades later, *Brown v. Board of Education*[10] marked a well-recognized and decisive shift in the way the Court reassigned both racial rights and reputations. In analyzing post-civil rights movement era cases concerning jury composition, affirmative action, and the death penalty, however, this Article argues that the Court has retained a world view, reflected in its discourse, in which whites and African Americans are assigned very different reputations. Thus, the challenge of obtaining equality in rights and reputation is carried into the twenty-first century.

The Court's attitudes toward the meaning of race, which is narrowed in this Article to the meaning of blackness and whiteness, are important for at least two core reasons. First, the Court's pronouncements affect the lives of real people. For instance, as the Court interprets laws or the Constitution to expand or contract rights, real people experience actual effects in their lives. Second, the Court not only reflects societal views, but shapes, legitimizes, or challenges them. Southerners and Democrats therefore embraced the majority decision in *Scott*, while Northerners and Republicans favored and even disseminated Justice Curtis's dissent.[11] Nearly a hundred years later, *Brown* announced to segregationists that their views put them at odds with the Constitution, and thus the nation. Ideas once considered radical—from the principle of racial equality to the right of people, even criminal suspects, to know their legal and constitutional rights—are often quickly incorporated into the mainstream and hegemonic culture once the Supreme Court asserts them as part of what the Constitution requires, or even more crudely, as part of the meaning of being American.

II. SLAVERY AS REPUTATION: A "STIGMA OF THE DEEPEST DEGRADATION"[12]

Whether the Constitution as originally written in 1787 supported slavery or contained the seeds of its undoing has long been debated by jurists, scholars, and activists. In practice, however, the constitutional clauses dealing with slavery served to protect this institution. Both the three-fifths clause[13] and fugitive slave clause[14] cast light on the meaning of blackness and the personhood and reputation of African Americans as slaves. According to the three-fifths compromise, slaves or "all other

9. 163 U.S. 537 (1896).

10. 347 U.S. 483 (1954).

11. PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 49, 109 (1997).

12. *Scott*, 60 U.S. at 409.

13. U.S. CONST. art. 1, § 2, cl. 3.

14. U.S. CONST. art. IV, § 2, cl. 3.

Persons"[15] were counted as three fifths of a person for purposes of representation and taxation. Justice McLean, dissenting in *Scott*, noted that, "[I]n the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution."[16] This emphasis on personhood arguably understates, however, the more important debasement of humanity, namely that slaves were only partially counted and therefore considered, at best, partial persons.

The fugitive slave clause also protected slavery. Its purpose, to use governmental power to retrieve runaway slaves, conceals a fundamental trope regarding the reputation of slaves and black people as criminals and fugitives of the law absconding from their responsibilities. Thus, the fugitive slave clause, and the laws through which it was implemented in 1793 and 1850, implied criminality. A fugitive slave was stealing property in him or herself and evinced laziness by running away from work responsibilities. Slaves therefore required policing and control, including through the intervention of Federal governmental authority, in a society where criminal justice and broader police powers overwhelmingly belonged to the states. Runaway slaves and the legal concern with them assumed a trope of slave criminality, and therefore black criminality, which was well established by the time of the Constitutional Convention. As Paul Finkelman notes:

> In colonial and early national America color became associated with inherently criminal behavior in almost every area of law. Following Virginia's lead, most of the British mainland colonies began to create a legal system that made race a prima facie indication of criminality.
>
> The colonial laws provided special penalties for blacks, special crimes for blacks, or criminalized activities merely because a black was involved. These laws led to the increasingly subordinate status of blacks. This subordinate status in turn reaffirmed the notion that black people were to be mistrusted and feared, and that they were naturally criminal.[17]

In theory, one may not have been able to read blackness off of slavery. While all slaves were black, not all blacks were slaves. Moreover, free African Americans had the right to a full vote in five states at the founding of the United States.

At the time of the ratification of the Articles of Confederation,

15. U.S. CONST. art. 1, § 2, cl. 3.

16. *Scott*, 60 U.S. at 537 (McLean, J., dissenting).

17. Finkelman, *supra* note 2, at 2093.

> all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those states, but possessed the franchise of electors on equal terms with other citizens.[18]

In practice, however, the reputation of slavery tainted even free black people, especially, but not exclusively, in the South. This reality was worsened by the Fugitive Slave Act of 1850 which made it difficult for free African Americans to avoid being captured because they were assumed to be runaway slaves. Blackness implied slavery, opening the way to the "danger of legally sanctioned kidnapping,"[19] due in part to legal incentives, such as a ten dollar incentive for federal commissioners to find in favor of owners with only a five dollar incentive to find for the alleged runaway.[20]

Any meaningful separation between the meaning of being black and being a slave was undercut by Chief Justice Taney's opinion for the Court in *Scott v. Sandford*.[21] Taney was persistent, repetitive, and emphatic in his characterizing of African Americans as "inferior,"[22] "subordinate,"[23] "unfortunate,"[24] and merely "articles of merchandise."[25] Some proponents of slavery claimed a caring paternalism for their human possessions, regarding them as "obedient" children.[26] In contrast, Taney was relentless in his decimation of the reputation of Africans and people of African origin, denying their humanity, their legal rights other than those states choose to give them, and condemning them to perpetual slavery unless individual states chose to offer freedom. An almost random example of this rhetoric is the following, which follows a listing of various laws outlawing miscegenation and interracial marriage:

> We give both of these laws in the words used by the respective legislative bodies, because the language in which they are framed . . . show . . . the degraded condition of this unhappy race. They . . . are a faithful index to the state of feeling toward the class of persons of whom they speak . . . . They show that a perpetual and impassable

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18. *Scott*, 60 U.S. at 572-73 (Curtis, J., dissenting).

19. DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 30 (1991).

20. *See id.*

21. 60 U.S. (19 How.) 393 (1857).

22. *Id.* at 405.

23. *Id.* at 404.

24. *Id.* at 407.

25. *Id.* at 411.

26. Paul Finkelman, *Thomas R.R. Conn and the Law of Negro Slavery*, 5 ROGER WILLIAMS U. L. REV. 75, 103 (1999); *see also* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (1996) (regarding proslavery constitutionalism).

> barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. . . . [T]his stigma, of the deepest degradation, was fixed upon the whole race.[27]

Taney was leading up to his definitive legal statement regarding the status and reputation of all black people in the United States, not just slaves. Because of their color, continent of origin, and having been brought to the United States as slaves, black people could never be citizens of the United States, even if they were free and the states wherein they resided considered them citizens.

III. *THE CIVIL RIGHTS CASES* AND *PLESSY*: THE ELUSIVE REPUTATION OF WHITENESS

In 1853, the Georgia Supreme Court asserted that black people only won "freedom from the dominion of the master, and the limited liberty of locomotion."[28] Yet even in freedom, they were condemned to "social and civil degradation," because of the "taint of their blood" and the biblical curse on Ham.[29] The only way the reputation of African Americans could be redeemed was by "an Act of the Assembly."[30]

The passing of the Thirteenth, Fourteenth, and Fifteenth Amendments, would easily have appeared to be such an Act of Assembly. After all, amending the Constitution calls for the acts of many assemblies. Moreover, constitutional law is the most authoritative law and therefore would be expected to have had the greatest impact on changing the legal and social status of African Americans. Thus, the Reconstruction Amendments should have invited the legislative acts of purification of which the Georgia court spoke, and should have been the basis of undoing the reputation of social and civil degradation under which black Americans were constrained.

Although the Amendments were used to revoke some of the legal, social, and civil burdens that oppressed African Americans, the Supreme Court declined to interpret these laws as useful to the removal of the mark of social and civil degradation. Instead, the Court confirmed and

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27. *Scott*, 60 U.S. at 409.

28. Bryan v. Walton, 14 Ga. 185, 198 (1853).

29. *Id.*

30. *Id.* Interestingly, the court imbues the legislature and the law with a power and authority greater than the divine. Not only can the biblical curse be lifted by "an Act of the Assembly," but the "grace" of the Assembly has the power to "purify." *Id.*

legitimized the idea that white Americans had and were entitled to good reputations, whereas black Americans were socially inferior. Further, the Court held that the law could be used to forcibly exclude black Americans from commercial and public spaces and facilities.[31]

The *Civil Rights Cases* of 1883 consolidated a series of law suits brought under the 1875 Civil Rights Act.[32] Section one of this law protected the access of all Americans "to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theatres, and other places of public amusement [irrespective of] race and color, and regardless of any previous condition of servitude."[33] In apparent violation of this law, various African Americans were denied admission into numerous commercial facilities and therefore sued. For the Supreme Court, the question was whether this Civil Rights Act was constitutional. The Court argued that these commercial facilities were private, whereas the Fourteenth Amendment only prohibited the states from discriminating against people on a basis of their race or color. Moreover, the Court asserted that Congress only had the power to be reactive against state discrimination. For the majority, the Civil Rights Act of 1875 impermissibly "step[ped] into the domain of local jurisprudence"[34] by creating "a code of municipal law for the regulation of private rights."[35] The Court therefore held that sections one and two of the law were unconstitutional.[36] In contrast, Justice Harlan, writing in dissent, claimed that the Fourteenth Amendment gave the federal legislature proactive authority or "affirmative power" to use law "to enforce an express prohibition upon the states."[37] Moreover, in his view businesses and other commercial enterprises exist under state authority and law, and therefore should be considered in the public domain of state action, not in the private domain of discreet individual preferences.[38]

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31. Although the post-Reconstruction period mostly marks a worsening of the fate and prospects for the rights of African Americans and of equal rights for all, there were some notable exceptions. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1887) (rejecting a prima facie nonracial law that was applied in de facto racially discriminatory ways); Strauder v. West Virginia, 100 U.S. 303 (1880) (rejecting a West Virginia law limiting jury service to white men).

32. The Civil Rights Cases, 109 U.S. 3 (1883).

33. *Id.* at 8.

34. *Id.* at 14.

35. *Id.* at 11.

36. Section two provided penalties for breach of section one. Section four of the Civil Rights Act of 1875 prohibited racial discrimination in jury selection and created punishments for state officials who attempted to maintain racially discriminatory juries. The Court held this section to be constitutional because it was "entirely corrective." *Id.* at 15.

37. *Id.* at 45 (Harlan, J., dissenting).

38. Justice Harlan was particularly emphatic about the majority being disingenuous regarding the limits of federal authority and pointed to the active role the federal government had played in

For Harlan and African Americans, the Thirteenth Amendment also gave Congress authority for its civil rights protections in commercial contexts. The Thirteenth Amendment outlawed slavery, and even the majority conceded that abolishing slavery also gave "Congress the power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[39] The question then became the meaning of slavery, and its "badges and incidents." The majority identified the "incidents" of slavery as "[c]ompulsory service . . . , restraint of . . . movements, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities."[40] Justice Bradley recognized that denial of admittance into commercial and other facilities could "affect [a] person, his property, or his reputation."[41] Yet, he did not see, nor want to see, that those exclusions involved a person's movement, or ability to hold property, make contracts, be taken seriously as a witness, and so on. The inability to eat at a restaurant or stay in an inn, for example, could affect one's ability to negotiate contracts. If one is not deemed fit to attend a theater performance, then one does not have the reputation which would allow one's testimony or witness in court to be taken seriously. Thus, the Court's distinction between social rights to use commercial facilities and "fundamental rights which appertain to the essence of citizenship" was a spurious one, due in part to the role of reputation. The ability to engage in social arenas is part of what shapes the meaning of citizenship.[42]

The meaning of slavery, and what was necessary to overcome it,

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upholding slavery, which was a local institution particularly with respect to fugitive slaves. Harlan argued that the majority's interpretation of the Fourteenth Amendment:

> would lead to this anomalous result: that whereas, prior to the amendments, Congress, with the sanction of this court, passed the most stringent laws . . . in vindication of slavery and the right of the master, it may not now, by legislation of a like primary and direct character, guard, protect, and secure the freedom established, and the most essential right of the citizenship granted, by the constitutional amendments. . . . I insist the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, for the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves.

Id. at 53. *See also* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV 1, 7, 13 (1991).

39. *Civil Rights Cases*, 109 U.S. at 20.

40. *Id.* at 22.

41. *Id.* at 17.

42. Racial segregation of day-to-day life was key to a federal court's observation that, in Alabama in the 1960s, "[n]either [jury] commissioners nor clerk have any social contacts with Negroes or belong to any of the same organizations," as is discussed below. Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 325 (1970).

was also at stake in *Plessy v. Ferguson*.[43] While the Court in the *Civil Rights Cases* deemed the facilities involved to be private, and therefore not a matter of state action, the facility at issue in *Plessy* was public transportation and racially separate railway carriages. The logic of the *Civil Rights Cases* and supposed private spaces should have implied that this public segregation was unconstitutional under the Fourteenth Amendment. In Justice Harlan's logic, it should also have been unconstitutional under the Thirteenth Amendment. He emphasized that slavery was based on an assumption of black racial inferiority, and therefore eliminating slavery would involve banning racial discrimination in all areas within governmental law and power.

The distinctions between the majority and Justice Harlan on the meaning of slavery are even clearer in *Plessy*. Justice Brown, writing for the majority, defined slavery as "involuntary servitude–a state of bondage; the ownership of mankind as chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services."[44] In contrast, Harlan believed that slavery concerned freedom and any right involved in freedom. Thus, ending slavery "decreed universal civil freedom"[45] in the United States and outlawed the use or "imposition" of symbols of slavery. In this world view, racial discrimination—the idea that "colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens"[46]—is a symbol of slavery that carries with it the reputation of slavery, a reputation of inferiority, which constitutes an impermissible burden or disability.[47]

In contrast, the majority in *Plessy* accepted social "distinctions based upon color"[48] and the claim that it was perfectly "reasonable"[49] for the legislature of Louisiana to maintain them. On the one hand, Justice Brown claimed that laws requiring racial segregation "do not necessarily imply the inferiority of either race."[50] Indeed, he claimed that any suggestion of inferiority created was because African Americans chose to view the legislation that way. On the other hand, the majority clearly reflected assumptions of white superiority in its accept-

43. 163 U.S. 537 (1896).

44. *Id.* at 542.

45. *Id.* at 555 (Harlan, J., dissenting).

46. *Id.* at 560.

47. *See id.* at 555.

48. *Id.* at 544.

49. *Id.* at 550.

50. *Id.* at 544.

ance of whiteness as a property claim;[51] that being white is more valuable than being black or non-white. The greater value of whiteness is the value of reputation that is an implicitly good reputation. Thus Brown writes:

> If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.[52]

Moreover, the *Civil Rights Cases* make related assumptions about white superiority. Alluding to the Reconstruction Amendments, the Court defined the legislation as "beneficent."[53] Given that whites held electoral and legislative majorities in the construction of those additions to the Constitution, the Court gave credit to whites with noblesse oblige magnanimity, similar to the caring paternalism pro-slavery advocates purported to shower upon slaves. Yet, when African Americans wanted to claim the equal rights promised to them by the "beneficent legislation," the majority claimed they wanted to be "the special favorite of the laws"[54] and enjoy white privileges, presumably including status and reputation.

IV. *BROWN*: ENDING SEGREGATION AS INFERIORITY

Brown v. Board of Education had at its core the idea that denying African Americans the right to education in white schools "generates feelings of inferiority," or that "separating the races is usually interpreted as denoting the inferiority of the negro group."[55] Whereas the

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51. *See, e.g.*, Harris, *supra* note 5.

52. *Plessy*, 163 U.S. at 549.

53. The Civil Rights Cases, 109 U.S. 3, 25 (1883).

54. *Id.* Reading these decisions by the distance of over a century, one is struck by how both of the majorities in these cases, as well as Justice Harlan who wrote that "[e]very true man has pride of race," are perfectly comfortable thinking and writing in the language of white race identity and white race pride. *Plessy*, 163 U.S. at 554 (Harlan, J., dissenting). In contrast, in the contemporary United States whiteness is generally assumed as the norm, and race (or ethnic) pride is seen, almost across the political spectrum, to properly reside among racial and ethnic minorities and not whites. This discomfort with the whiteness of whites rests in numerous factors, including the history of supposed white supremacy and its attendant politics. It also rests in the failure to see the role of whiteness in policies, practices, and laws, that is, in dominant and dominating norms. Barbara Flagg refers to this pattern as the "*transparency* phenomenon: the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific. Transparency often is the mechanism through which white decision makers who disavow white supremacy impose white norms on blacks." Barbara Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

55. Brown v. Bd of Educ., 347 U.S. 483, 494 (1954) (citing Belton v. Gebhardt, 87 A.2d 862, 865 (Del. Ct. 1952)).

majority in *Plessy* blamed African Americans for feeling slighted by segregation, *Brown* pointed to the obvious reason for Jim Crow laws, namely that whites did believe themselves to be superior to blacks, and wished to maintain a sense of racial purity and separateness through segregation. Whatever subsequent commentary or debate *Brown* raises, there is no doubt that segregation was intended to assert and to protect beliefs in white superiority and *Brown* made clear that this practice violated the Constitution. Segregation included a commitment to asserting and maintaining the good reputation of whites and the bad reputation of blacks. The nebulous terms "good" and "bad" appropriately capture the wide array of values with which they could be filled. That is, if segregation automatically gave white people or schools good reputations, desegregation and, later, integration would require positive or negative attributions to be assigned in purportedly color-blind categories such as, in the case of schools, educational quality or school funding. More fundamentally, *Brown* and the civil rights movement marked the early beginnings of major shifts in and conflict over relative racial power and the relationship between race and the distribution of societal benefits and burdens. Inextricably linked to this point, and of equal importance, is the highly contested nature of the terms of debate in legal and broader socio-political discourse.

Profound inequalities exist in the United States, and these are linked to and based upon race in both complex and simple ways. Notwithstanding these schisms, one of the most important changes achieved by the civil rights movement and, arguably, the Court in *Brown* is a new hegemonic norm whereby most members of society claim to reject beliefs in racial inferiority and superiority. Most Americans would claim to believe that, irrespective of race, everyone in the United States should be treated equally in law and in other spheres of social life. The Supreme Court certainly claims to actively pursue the Fourteenth Amendment's promise of equal protection of the laws. It has characterized its endeavors to "eradicate racial prejudice from our criminal justice system" as "unceasing efforts."[56] Nevertheless, racial reputations exist recalling old stereotypes and invoking new and more complex ideas about the meaning of blackness and whiteness. Although the terms in which they are phrased are not the stark prejudices of the pre-*Brown* era, the discourse and decisions of the Supreme Court are no exception.

V. JURIES, COMMUNITY TRUST, AND CITIZEN REPUTATION

Juries and jurors provide important challenges to racialized and

56. McCleskey v. Kemp, 481 U.S. 279, 309 (1986).

racist thinking. The idea that the right to a jury trial is a person's "right to be tried by a jury of his peers"[57] assumes that the prosecutor and defendant both consider jurors to be competent and fair, and not prejudiced by racial, legal, or other perspectives. Randall Kennedy identifies two harms involved in discriminatory exclusion of African Americans from juries. The first is the reputational harm to the black community in general, for they are stigmatized by virtue of the exclusion. The second is that African American defendants are denied the opportunity to have other African Americans determine their disputes.[58]

Although the Court rejected the exclusion of African Americans from juries as early as 1879, in *Strauder v. West Virginia*,[59] far-reaching reforms to ensure racially diverse jury pools did not begin until the 1960s.[60] Furthermore, bias in jury selection remains a contemporary problem, especially in the criminal justice system.[61] Indeed, although ruled unconstitutional by the Court in *Batson v. Kentucky*,[62] racist uses of the peremptory challenge are still widespread.[63] Such racial exclusions often have a reputational dimension to them, intended or not. In his concurring opinion in *Batson,* Justice Marshall pointed out that "[a] prosecutor's conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically."[64] Other exclusions may be based on the old and well-established criminal reputation assigned to African Americans, or may be combined with an acknowledgment of the disproportionate impact of contemporary criminal justice policies on black Americans.

> Previous adverse involvement with the criminal justice system is one of the most commonly cited explanations prosecutors give for striking black potential jurors. Given that a relatively large percentage of the black population has been arrested or convicted or is closely related to someone who has been arrested or convicted, this rationale for striking jurors could serve as an efficient pretext for what are, in

57. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

58. RANDALL KENNEDY, RACE, CRIME AND THE LAW 170-71 (1997).

59. 100 U.S. 303 (1880).

60. KENNEDY, *supra* note 58, at 179.

61. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 101, ch. 3 (1999).

62. 476 U.S. 79 (1986).

63. Cole, *supra* note 61, at 115-23; KENNEDY, *supra* note 58, ch. 6. According to *Batson*, where the defense believes the prosecutor appears to be using the peremptory challenge in a racially biased manner and can make a prima facie case to that effect, the prosecutor then has the burden of providing a nonracial reason for the apparently racial challenges. Invariably, prosecutors can and do provide ex post facto nonracial reasons for their apparently racially-based actions.

64. *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

fact, racially discriminatory strikes.[65]

Additionally, prosecutors may believe black people are less likely to find other African Americans guilty or give defendants the death penalty.[66] Beyond the problem of peremptory challenge lies the broader obstacle of ensuring diverse jury pools and juries.

In *Carter v. Jury Commission of Greene County*, the Supreme Court dealt with the constitutionality of "key-man"[67] jury list selection. Under this system, the potential jury roll should contain "the names of all qualified, nonexempt citizens in the county . . . who are 'generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgement.'"[68] Among other attributes that automatically excluded potential jurors were an age requirement—jurors had to be over twenty-one—and inability to read English, though the literacy requirement could be waived should a person be a "freeholder or householder."[69] In Greene County, although African Americans comprised about seventy-five percent of the population, between 1961 and 1963 only seven percent of the jury list was black.[70] Following a statutory amendment in 1967, the proportion of African Americans went up dramatically, to a paltry thirty-two percent.[71]

Recalling its decision in *Strauder v. West Virginia*,[72] the Court held that excluding blacks from jury duty was racially discriminatory and branded African Americans as inferior.[73] Consequently, the Court affirmed the lower court's grant of injunctive relief requiring new procedures to ensure that black citizens would be included on the jury lists. It declined, however, to declare Alabama's key-man method and its reliance on citizen reputation unconstitutional. In doing so, the Court relied on its long-standing distinction between facially or overtly racially-biased legislation, and racially neutral legislation. According to the Court, whatever the abuses in practice, Alabama's method of identifying potential jurors fell into the latter category. Furthermore, the Court held

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65. KENNEDY, *supra* note 58, at 211.

66. Because of the disproportionate and negative impact criminal justice policies and practices have on the African American, as well as Latino, communities, these fears of jury nullification may not be unfounded. *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); KENNEDY, *supra* note 58, ch. 8.

67. KENNEDY, *supra* note 58, at 182.

68. Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 323 (1970).

69. *Id.* at 323 n.2.

70. *Id.* at 327.

71. *Id.* at 327-28.

72. 100 U.S. 303 (1879).

73. *Greene County*, 396 U.S at 329.

that states have the right to use an array of criteria, such as age or educational status, as well as subjective assessments of a person's good reputation, from "sound judgement" to being of "good character."[74]

What the Court failed to see was that notions of good moral character and other criteria of good public reputation may well be tied to racial and racist understandings of reputation. In contrast, the appellants recognized that ideas of appropriate reputation were the precise bases for excluding black citizens from the jury lists. The Court noted "that § 21 leaves the commissioners free to give effect to their belief that Negroes are generally inferior to white people and so less likely to measure up to the statutory requirements."[75] Nevertheless, the Justices did not appear to understand the import and implication of what they continued to allow. Merely echoing the language of apparently race-neutral exclusion, the Court underscored that jury lists could and should reflect those citizens "suitable in character and intelligence."[76] Yet, the Court had evidence which demonstrated precisely how notions of race were tied into notions of reputation. Quoting from the trial court's opinion, which included an examination of how potential jurors came to be included on the jury lists, the Court noted:

> The clerk . . . is acquainted with a good many Negroes, but very few 'out in the county.' She does not know the reputation of most of the Negroes in the county. Because of her duties as clerk of the Circuit Court the names and reputations of Negroes most familiar to her are those who have been convicted of crime or have been 'in trouble.' She does not know any Negro ministers, does not seek names from any Negro or white churches or fraternal organizations. She obtains some names from the county's Negro deputy sheriff.[77]

For the clerk, therefore, "Negroes" were excluded for not being

74. *Id.* at 323.

75. *Id.* at 331.

76. *Id.* at 333 (quoting Brown v. Allen, 344 U.S. 553, 474 (1953)). My point is not that we would not want intelligent jurors of good character, but rather that using these criteria to build jury lists is open to bias and abuse. These need not be racial; one could well imagine a Jewish or Buddhist citizen being excluded from the list because they had the wrong religious character in a strongly Christian fundamentalist jurisdiction. Statutes should delimit any objective category of people to be excluded. My own preference would be for very few exclusions, but I realize that others would differ. For instance, I see no intrinsic reasons why law-abiding ex-prisoners should be denied the right to jury duty any more than any other law-abiding person. Moreover, excluding former felons from the franchise has the effect of racially discrimination. Yet, such a criterion makes clear distinctions. Thus, it is not, open to subjective judgments, such as whether one member of a community believes someone has redeemed their character of reputation through or following imprisonment (think of Karla Faye Tucker), while another believes their character and reputation remains flawed. After generating neutral jury lists, it would be up to lawyers and prosecutors to use their challenges for cause to remove jurors who demonstrate insufficient intelligence, bias, or other relevant character flaws.

77. *Id.* at 324-25.

within her understanding of community. They were either rural or not members of the groups she deemed to have a positive reputation, such as white churches or fraternal organizations. Second, to the extent she was "familiar" with African Americans, the familiarity was based precisely on a criminal or suspect reputation.

Furthermore, the white jury commission members also saw African Americans as outside the community: "Neither commissioners nor clerks have any social contacts with Negroes or belong to any of the same organizations." While the Court emphasized that juries represent the community which is composed of "neighbors, fellows, associates, and persons having the same legal status in society"[78] the justices refused to accept that the whites did not understand themselves to share a community with the black citizens of Greene County. For the whites of Greene County, identifying reputable jurors meant identifying white jurors or black jurors who represented white interests. Thus, the appellants complained of the "commissioners' preference for Negroes who tend not to assert their right to legal and social equality."[79]

The Court repeatedly insisted that the facially neutral provisions of Alabama's jury selection process made it non-racial in fact. Nevertheless, it ignored the glaring problems of the jury commission of Greene County. While the district court's opinion highlighted the above-mentioned whiteness of the commissioners, clerk, and their social world, as well as the negative connotations with which these whites associated blacks and blackness, the Supreme Court played Pollyanna. The appellants argued that Alabama's governor intentionally chose a segregated jury commission. In contrast, the Court rewrote that allegation as a problem in which "even the best-intentioned white jury commissioners are unlikely to know many Negroes who satisfy the statutory qualifications."[80] The Court insisted that there was no basis to read persistent all-white commissions as excluding blacks. Although the Court recognized that "white jury officials in Alabama generally regard Negroes as incapable of satisfying the prerequisites for jury membership,"[81] it provided no mechanism to address this inherent problem of black reputation in white eyes. Instead, it left reputation in place as the central basis for jury selection in Alabama and other states.

Problems relating to the reputation of jurors and how juries are con-

78. *Id.* at 330.

79. *Id.* at 331. There is a pun, no doubt unintended, in the Court's decision. It affirms that: "The States remain free to confine the selection of citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character." *Id.* at 332.

80. *Id.* at 337.

81. *Id.*

structed by racial prejudice are not confined to the South of the 1960s and early 1970s. Amy Kastely provides an example of negative racial reputations in the early 1990s in New Jersey.[82] In *United States v. Uwaezhoke*,[83] the Third Circuit upheld "raced reasoning"[84] when it allowed the prosecutor to use a peremptory challenge to strike an African American from the jury. By some accounts, the potential juror, Kim Lucas, was the model of hard-working respectability. She had worked for the same employer for four years, lived in the same home for five years, took care of her children, and remained physically fit. She had neither used drugs nor had she been a victim of crime. For the prosecutor, however, she raised reputational alarm bells. Her employer was the United States Postal Service, her home was rented, and she was a single parent. That, plus the fact that Ms. Lucas was black, was enough for the prosecutor to conclude that she "may be involved in a drug situation where she lives."[85] Kastely elaborates on the implication of this decision:

> [I]t is as if, for the judges and the prosecutor, the metonymic associations among blackness, single motherhood, and poverty are stronger than any empirical connection between postal service employment and a good salary. And the only reason [the prosecutor or judges had] to infer that Lucas lived in "low-income housing" was that she is black: the term "low-income housing" is itself a code for government-subsidized housing projects that are used to warehouse thousands of black people with low income . . . Lucas herself stated under oath that she had virtually no involvement with drug usage.[86]

VI. AFFIRMATIVE ACTION AND THE DEATH PENALTY: INNOCENCE AND THE VALUE OF LIFE

The examples discussed above, which identify the Court's concerns with racial reputation, have pointed to reputations being assigned to blackness or whiteness. A particularly telling instance of racial reputation concerns the association of whiteness with "innocence" in various affirmative action cases.[87] In *Regents of the University of California v.*

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82. *See* Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269 (1994).

83. United States v. Uwaezhoke, 995 F.2d 388 (3d Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994).

84. Kastely, *supra* note 82, at 286.

85. *Uwaezhoke*, 995 F.2d at 391.

86. Kastely, *supra* note 82, at 288-89.

87. Interestingly, because many of those opposing race-based affirmative action are men, notions of innocence are potentially gendered and raced. (Of course, not all are men, such as Wendy Wygant in *Wygant v. Jackson Bd. of Educ*, 476 U.S. 267 (1986)). For a discussion of the problem of treating race and gender as mutually exclusive categories as reflected in

Bakke,[88] the Court examined affirmative action in a medical school and both permitted and limited the right of educational institutions to use affirmative action to redress past racism. Justice Powell asserted that "there is a measure of inequity in forcing *innocent* persons in respondent's position to bear the burdens of redressing grievances not of their making."[89] In this case, the "innocent" person[90] was a white male, Alan Bakke, though the opinion stressed the potential for an array of groups to be harmed, as well as to claim to be victims of historical harm.[91] Likewise, in *Wygant v. Jackson Board of Education*,[92] where senior white teachers were laid off so that junior African American teachers could keep their jobs, the majority emphasized the harm done to the innocent white teachers and stated, "[w]e have previously expressed concern over the burden that a preferential-layoffs scheme imposes on innocent parties."[93] In contrast, Justice Marshall's dissent emphasized that the lay-offs were a product of a protracted collective bargaining agreement to redress a long history of discrimination in hiring, and had, following difficult negotiations, been supported by a majority of all teachers.[94]

The framing of whites as innocent parties in affirmative action decisions is significant in a number of respects. First, by innocence, the Court means that those white people who are denied social benefits that they might otherwise have received are not in any way responsible for

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antidiscrimination law, see Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 195 (David Kairys ed., 1990). The question of the connection between racial and gender reputations is an enquiry I hope to examine in the future.

88. 438 U.S. 265 (1978).

89. *Id.* at 298 (emphasis added).

90. *Id.* at 308.

91. The Court argued:

> During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups. As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination.

Id. at 292 (citations omitted). Because I have grave misgivings about the mainstream construal of issues regarding race and ethnicity being portrayed in minority-majority terms (a subject beyond the scope of this Article), I am in some sense sympathetic to the Court's identification of a "nation of minorities." The broader implication of equally situated minority groups, however, is one that I reject. The historical and contemporary record shows vast differences in disadvantage and privilege experienced by different groups who therefore are not similarly situated with respect to the societal distribution of benefits and burdens.

92. 476 U.S. 267 (1986).

93. *Id.* at 282.

94. *Id.* at 296-300 (Marshall, J., dissenting).

historic racial discrimination and oppression. The Court's claim is that innocent whites are paying a debt incurred by previous generations, rather than that of their own generation. While there may be contexts in which this scenario applies, the Court ignores the generalized benefits whites have been accorded through centuries of white privilege that has positive effects for whites today. As Justice Marshall argued in his *Bakke* dissent:

> It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured.[95]

Among other measures of these benefits is the disparity in wealth, rather than income, between blacks and whites. John Calmore notes that "[t]here is a tremendous gap between black and white asset holdings or wealth. . . . [I]n terms of mean net financial assets, poverty-level whites come close to controlling a similar amount of wealth as do the highest earning blacks: $26,683 to $28,310, respectively."[96] Thus although some African Americans have dramatically improved their incomes, the legacy of inherited wealth remains important for income stratification and associated status and opportunity. Whether individual whites have personally discriminated against blacks or others does not exempt whites from at least the protection and often the privileges which whiteness allows. The legacy of differential racial advantage is too complex for it to be reduced to mere "guilt" or "innocence."

Second, the emphasis on white innocence is particularly disturbing given the pairings of guilt and innocence as linked binaries in the broader language and culture, and perhaps especially in the legal arena. If whites, who are no longer privileged by whiteness due to affirmative action decisions, are innocent, then the implication is that blacks or other beneficiaries of affirmative action are guilty. In this logic or context, social goods are distributed in a zero sum game, and redistribution is inherently unfair because the guilty are rewarded with social goods. Thus, African Americans and other affirmative action beneficiaries become guilty and responsible for the burden on individual whites. In

95. *Bakke*, 438 U.S. at 400 (Marshall, J., dissenting).

96. John O. Calmore, *Dismantling the Master's House: Essays in Memory of Trina Grillo: Random Notes of an Integration Warrior*, 81 MINN. L. REV. 1441, 1458 (1997).

reality, however, affirmative action is a social tax on the conscious and intentional distortions and harms of the past that shape our society.

Third, innocence evokes its opposite, guilt. This evocation is especially dangerous and invidious in the context of the criminal justice system. As has already been noted there is a lengthy history of associating blackness with criminality. The contemporary focus on racial profiling is an indicator of the persistence of this linkage and, possibly, its exacerbation. Racial profiling is, however, only one consequence of assigning a criminal reputation to African Americans. This reputation is an important, but not one explanation of the disproportionate subjection of African Americans and Latinos to criminal justice system surveillance, interaction, prosecution, and punishment. At almost every point in the criminal justice system black people are more likely to be suspects and to experience harsher punishments than whites. As David Harris notes:

> African-Americans are just 12% of the population and 13% of the drug users, but they are about 38% of all those arrested for drug offenses, 59% of all those convicted of drug offenses, and 63% of all those convicted for drug trafficking. While only 33% of whites who are convicted are sent to prison, 50% of convicted blacks are jailed, and blacks who are sent to prison receive higher sentences than whites for the same crimes.[97]

The trope and reputation of white innocence may also relate to the trope of black criminal reputation and contemporary bias in another way. By disproportionately seeking the death penalty for the murder of whites more often than for the murder of blacks, the criminal justice system appears to value the loss of innocent murdered whites more than the loss of African Americans and other people of color. In *McCleskey v. Kemp*,[98] the Supreme Court learned that the victim's race was "the most consistent and powerful factor"[99] in determining whether a person was sentenced to death. A killer of a white person in Georgia was 4.3 times more likely to receive a death sentence than a killer of a black person.[100] The influence of the victim's race was more important than

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97. David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 297 (1999) (citations omitted).

98. 481 U.S. 279 (1986).

99. KENNEDY, *supra* note 58, at 329.

100. Using actual numbers of real people concerned, Justice Brennan noted that:

> Since our decision upholding the Georgia capital sentencing system in *Gregg*, the State has executed seven persons. All of the seven were convicted of killing whites, and six of the seven executed were black. Such execution figures are especially striking in light of the fact that, during the period encompassed by the Baldus study, only 9.2% of Georgia homicides involved black defendants and white victims, while 60.7% involved black victims.

McClesky, 481 U.S. at 327 (Brennan, J., dissenting) (citations omitted).

"whether the defendant was a prime mover in the homicide . . . [and] nearly as crucial as the statutory aggravating circumstance whether the defendant had a prior record of a conviction for a capital crime."[101] The Court did not refute this statistical evidence produced by academic David Baldus and accepted the probability that "the Baldus study indicates a discrepancy that appears to correlate with race."[102] It argued, however, that Warren McCleskey, the convicted prisoner, had not established racial discrimination in his own case. The Court gave no indication that the discrepancy identified in the statistics disturbed the justices in the majority. Indeed, one of the reasons they gave for not taking McCleskey's claim to its "logical conclusion"[103]—the inference of a widespread, unconstitutional role of racism in the criminal justice system—was that it "throws into serious question the principles that underlie our entire criminal justice system."[104] For anyone genuinely opposed to racial prejudice in society, and for anyone who takes Fourteenth Amendment and other constitutional protections seriously, *McCleskey* not only calls into question the roles of race and racism in shaping contemporary criminal justice, but also calls for urgent changes to that reality.[105]

The value of whiteness in both capital punishment and affirmative action cases may also be explained by the property interest in whiteness and by the relationship between reputation and property. Cheryl Harris argues that the political and economic power that whites accrued through slavery, segregation, and racial domination has led to whites identifying "white privilege . . . [as] a property interest worthy of protection."[106] Alan Bakke, for example, "had a property interest in a space in the [medical school] class."[107] Affirmative action programs seek to upset white privilege, and are therefore opposed by whites in order to prevent any redistribution that the redress of discrimination may involve. For instance, "Bakke expected that he would never be disfavored when competing with minority candidates, *although he might be disfavored*

101. *Id.* at 355 (Blackmun, J., dissenting).

102. *Id.* at 312.

103. *Id.* at 314.

104. *Id.* at 315. Regarding the relevance of the Baldus study to the death penalty beyond Georgia, Cole notes that "[i]n 1990, the General Accounting Office reviewed twenty-eight empirical studies of race and the death penalty, and concluded that 82 percent of the studies demonstrated that the race of the victim influenced the likelihood of the defendant being charged with or receiving the death penalty." COLE, *supra* note 61, at 134.

105. *See* COLE, *supra* note 61, at 137 (arguing that "*McCleskey* may be the single most important decision the Court has ever issued on the subject of race and crime").

106. Harris, *supra* note 5, at 1768.

107. *Id.* at 1773.

with respect to other more privileged whites."[108] Affirmative action programs, at once narrowed and increasingly rejected by the Court, evince a Court protecting the reputation of white innocence and the property interest that reputation allows. In contrast, the reputation of black criminality allows for greater black prosecution in the criminal justice system. Furthermore the reputation of black people as inferior hides or justifies the lesser protection of black victims whose lives are less worthy of capital prosecutions.[109] Because reputation lies, in part, in the value of the person, esteem for people is linked to valuing life, individually and collectively. That involves protecting the individual body and, by extension, the body politic—hence the historic exclusion and today's sometimes ambiguous inclusion of African Americans in republican government. As Harris notes:

> The conception of reputation as property found its origins in early concepts of property that encompassed things (such as land and personality), income (such as revenues from leases, mortgages, and patent monopolies), and one's life, liberty, and labor. Thus, Locke's famous pronouncement, "every man has a 'property' in his own 'person,'" undergirded the assertion that one's physical self was one's property. . . . The idea of self-ownership, then, was particularly fertile ground for the idea that reputation, as an aspect of identity earned through effort, was similarly property.[110]

VII. THE DEATH PENALTY, AFFIRMATIVE ACTION, AND THE DISRUPTION OF THE SOCIAL ORDER

Affirmative action and death penalty cases share another similarity, at least in the cases of *Washington v. Davis*[111] and *McCleskey v. Kemp*. In these cases, African American litigants are cast as challengers to the "American way" and the apparently correct status quo, perhaps as a recourse to the trope of black rebellion, from slave uprisings to "uppity blacks." In both cases, one of the important reasons the Court offers for not finding on behalf of the black claimants is that to do so would be too disruptive to the economic, social, and political order. The Supreme Court does not suggest that the prevailing balance of power in the United States is particularly just or equitable, but rather that it needs to

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108. *Id.* (emphasis added).

109. For those, like myself, who oppose capital punishment entirely, the solution to race-based capital punishment disparities does not, of course, lie in increasing the number of capital trials of executions of whites or anybody else. But the disparate attempt by prosecutors seeking the death penalty is a powerful political commentary about the role of racial reputation in organizing and policing the political and human community.

110. Harris, *supra* note 5, at 1735 (notes omitted).

111. Mayor of Washington, D.C., et al., v. Davis et al., 426 U.S. 229 (1976).

be protected from radical disruptions or rearrangement. Black or non-white litigants are those who represent a challenge to the prevailing status quo.

In *Davis*, African American applicants to the Washington D.C. police force argued that a civil service exam was discriminatory because black applicants failed it at a grossly disproportionate rate relative to white applicants.[112] Among the reasons the Court gave for rejecting this argument was that, if it were to consider the disparate impact of social policies on the vulnerable sectors of society, widespread and perhaps even wholesale economic redistribution and social re-engineering would occur.[113] Thus the Court notes that if statutes were found unconstitutional because "in practice [the law] benefits or burdens one race more than the other," it would be too challenging to the prevailing status quo.[114] Indeed, the Supreme Court argued that such a rule would be "far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[115] Likewise, the highest Court recognized that *McCleskey* questions the fairness and equity of the criminal justice system at large:

> Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.[116]

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112. *Davis*, 426 U.S. at 232-34.

113. *Id.* at 248.

114. *Id.*

115. *Id.*

116. McCleskey v. Kemp, 481 U.S. 279, 314-17 (1986) (citations omitted). The Court attempted to trivialize McCleskey's claim of an illegitimate correlation of race in the criminal justice system by suggesting that any number of spurious demographic or other correlations could be drawn between criminal justice actions and actors that suggested a disproportionate presence of one or another demographic group. Thus it wrote:

> Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys or judges. Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decision making. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey. The Constitution

In neither *Davis* nor *McCleskey* does the Supreme Court shy away from recognizing deep-rooted inequalities and inequities both, potential and actual, in the American legal-judicial, economic, and political order. It is, however, black litigants who highlight these potential and actual injustices, and the Court declines to support the black challenge. This refusal to accept such a far-reaching and deep-rooted confrontation to the status quo is not because the justices necessarily disagree with the conclusions about unfairness and discrimination in the status quo. Rather, the challenge is rejected because it is too fundamental to the prevailing distribution of benefits and burdens in society.

As such, the claims of the black complainants are rejected as too radical, too un-American, too disruptive, and too socially disorganizing. The consequence and implication of this choice is that blacks—or at least those people, mainly of color, who challenge fundamental American inequity—are dangerous and un-American. In this way, the Court adopts a long-standing reputational trope of African-Americans as people who violate the natural order by challenging the social order. This confrontation of the existing balance of power and the calls for the redistribution of societal privilege and punishment, rights and responsibilities, is not cast as consistent with the American heroism of the Revolution, President Lincoln and the Emancipation Proclamation, *Brown*, or Martin Luther King as civil right hero, but as the work of rebels, deviants, and cheeky blacks. This reputational thinking of the Court recalls the pattern of American public opinion in which civil rights calls for greater justice and equality in the United States are seen as and responded to as threats to the real and good American order. As Scott Christianson notes, "common assertions that lawlessness . . . [is] shooting up in response to social 'permissiveness'" is often a sine qua non for "civil rights for Negroes."[117] It is in this sense that the broader American polity, as well as the Supreme Court, accepted and embraced a link between "tough on crime," "law and order" rhetoric, and the emergence of expanded civil rights, including in the expansion of the

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> does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not "plac[e] totally unrealistic conditions on its use." *Gregg v. Georgia*, 428 U.S., at 199, n.50.

Id. at 317-19 (citations omitted). The limits of the Court's claim lie, at least in part, in its own jurisprudential history, which recognizes that race and gender categories deserve strict and intermediate scrutiny because of the history of unconstitutional discrimination associated with race and gender.

117. SCOTT CHRISTIANSON, WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA 275 (1998).

franchise to historically excluded groups.[118]

VIII. CONCLUSION

The differential reputation of whites and African Americans in United States history and politics has played itself out in the field of law, including the decisions of the Supreme Court. The nadir of the Court's discourse on race and reputation was during slavery, especially as displayed in the *Scott* decision. But the Court's reluctance to fundamentally repudiate a view of white superiority and black inferiority was evinced in both the facts and the language of decisions which declined to accord African Americans and other people of color their full rights and the associated reputation of human equals. While the Court used *Brown* to challenge not just segregation and inequality but the reputation of inferiority which undergirded it, the same degree of introspection or political commitment has not marked the more recent Supreme Court decisions. Under the guise of race neutrality, colorblindness, and equal protection of the laws irrespective of race, and using an analysis of affirmative action and an instance of capital sentencing review, we see that the Court has again valorized whites and the reputation of whiteness, and accepted a denigration of black life and African American repute. While assessments of the Court's comments on race profiling itself are beyond the scope of this article, it is clear that the Court's discourse contributes to a world view in which racial profiling and other acts of civil and criminal justice discrimination can find legitimation.

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118. A. Leon Higginbotham underscores the importance of voting rights in the constitution of racial reputation and political and economic opportunities, in contemporary and historic terms:

> Many whites have used means–subtle and blatant–to deny African Americans voting rights and thereby to enforce the precepts of African-American inferiority and African-American powerlessness. The current congressional redistricting controversy during the 1990s has been triggered by a series of United States Supreme Court opinions that, for the 1990s, has been almost as retrogressive as were the Supreme Court's opinions in the 1896 *Plessy v. Ferguson* era. Many will view the 1990s decisions as a re-incorporation of some aspects of the shameful history of white supremacy, a process that was designed to safeguard white control and to exclude African Americans from significant political power.

A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 182 (1996).