AMERICAN CONSTITUTION SOCIETY

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Combatting Anti-Black Racism Through Law and Policy

As for now, it must be said that the elevation of the belief in being white was not achieved through wine tastings and ice-cream socials, but rather through the pillaging of life, liberty, labor, and land.

-Ta-Nehisi Coates, Between the World and Me

Racism in America against Black, Indigenous, and People of Color is universally harmful and toxic, but has its roots in different historical antecedents and impacts each community in unique ways. This Program Guide focuses on anti-Black racism, not because the racism Indigenous and other People of Color confront is not equally heinous, but because the nation is currently engaged in one of the most frank and direct conversations about the dire need to confront anti-Black racism since the Civil Rights Movement. The Movement for Black Lives and its allies, who seek to combat the institutional, systemic anti-Black racism in America that threatens the safety, freedom, and economic well-being of Black Americans, have reached an unprecedent level of social and cultural exposure, creating opportunities for structural legal and policy reforms.

As Ta-Nehisi Coates vividly described in his *Letter to My Son*, the history of white supremacy and anti-Black racism in America has been the "pillaging of life, liberty, labor, and land" from Black people by the white power structure. Using Coates' framing as a guide, we have divided our discussions into two thematic sections: The first section examines the pillaging of life and liberty through the modern U.S. criminal legal system and healthcare policy, and the second examines the pillaging of labor and land through economic policies that perpetuate the racial wealth gap, and permit wage, employment, and housing discrimination, among other policies. Both sections describe some of the leading legal and policy prescriptions that reformers have offered to combat entrenched anti-Black racism in American.

This Program Guide is a tool to generate conversation and reflection but is by no means meant to be a comprehensive survey of the myriad ways in which anti-Black racism operates in America or the legal and structural reforms necessary to dismantle it.[1] ACS encourages our chapters to use it as the starting point for ongoing discussions and creative action.

[1] Notably, this Program Guide does not explicitly address voting rights (a longstanding priority for ACS), despite this being an election year, in order to accommodate the discussion of other issues that are

I. Life and Liberty

A. Race and the Death Penalty

Supreme Court Justice Potter Stewart's concurrence in *Furman v. Georgia*, the 1972 case that briefly halted capital punishment in the U.S., acknowledged that "if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." The death penalty's roots in the lynching of Black people during the Jim Crow Era has led many critics to conclude that the death penalty is inherently, irredeemably racist. One examination of the role race has placed in the death penalty concluded that lynching declined in the twentieth century, in part, because state executioners replaced lynch mobs in carrying out the will of the white majority, and long-time death penalty litigator Christina Swarns has observed, "The states with the highest number of lynchings also have the highest numbers of death-penalty executions."

Nearly half a century after *Furman*, race remains a significant factor in predicting whether prosecutors will seek the death penalty and juries will impose it. As ACS President Russ Feingold noted when criticizing the federal government's resumption of executions in July 2020 after a nearly twenty-year moratorium, "The death penalty is one of the more tragic and obvious ways the racism inherent in our justice system rears its ugly head." With Black men making up more than forty-five percent of federal death row inmates, he warned that "proportionately far more African Americans will no doubt face [federal] execution and the death penalty will remain a racially unjust and corrupt enterprise." ACS has continued to draw attention to and decry the unprecedent pace of federal executions (five in the past six weeks, with two more scheduled before the end of September), including the execution of the only Native American on federal death row.

Nationally, according to a report by the NAACP Legal Defense and Educational Foundation, Inc., forty-two percent of those currently on death row in the U.S. are Black, despite the fact that Black Americans make up less than thirteen percent of the country's total population. In some states, the percentage of Black and/or Latinx people on death row exceeds fifty percent. For example, in Louisiana, Black people make up sixty-seven percent of death row inmates, in Ohio, fifty-seven percent, and in North Carolina, fifty-three percent. In Texas, Black people make up forty-four percent of death row inmates and Latinx people make up an additional twenty-eight percent, while in California they are thirty-six percent and twenty-six percent, respectively. Conversely, since the reinstatement of the death penalty in 1976, the victims for whose murder a person has been executed have been overwhelmingly white, representing nearly seventy-six percent of victims, while Black victims make up only fifteen percent and Latinx victims make

currently at the forefront of anti-Black racism discussions and because substantial materials on voting rights are already available for those chapters wishing to engage them and related issues. See, e.g., our previous Program Guides, *Marking the Centennial of the Nineteenth Amendment*, *Progressive Federalism*, and *Are All Voters Created Equal?*, as well as other ACS voting resources available here.

up only about six percent. Yet, in *McCleskey v. Kemp*, the U.S. Supreme Court held that to prevail in a claim that the death penalty is unconstitutionally racially biased, a person must show a "racially discriminatory purpose" in the prosecution of their own case or evidence that the legislature either enacted the death penalty statute to further a racially discriminatory purpose or maintained the statute because of its racially disproportionate impact. The result is that Black people challenging their death sentences may not use statistical evidence to demonstrate systemic, institutional anti-Black racism when evaluating the constitutionality of a state's application of the death penalty.

One approach to remedying systemic racial bias in capital cases is the enactment of state-level Racial Justice Acts (RJAs), such as those passed in Kentucky and North Carolina, that explicitly permit the use of statistical evidence of racial bias to challenge capital prosecutions and death sentences. The Kentucky RJA allows a person to challenge their death sentence based on statistical evidence that death sentences in the state were sought more often for one race over another or more often as punishment for crimes by one race against another. In addition to factors similar to those in the Kentucky RJA, a North Carolina version allowed challenges based on evidence that "[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection." The North Carolina RJA, which was repealed in 2013, four years after its passage, also allowed the use of statistical evidence not just at the state level, but also at the county, prosecutorial district, or judicial division level.[2] According to the American Bar Association, the efficacy of RJAs, however, is unclear. In evaluating Kentucky's RJA, the ABA concluded, "[T]he essential effect is that prosecutors have adopted policies of pursuing death in every eligible case, rather than making a case by case determination."

The limited experience with RJAs, the persistence of anti-Black bias in the death penalty, and increased attention to recent calls to abolish the police and prisons due to the entrenched racism in our criminal legal system, have led some commentators to conclude that "the only solution is abolition." Notably, most places in the United States have abandoned the use of the death penalty. Since *Furman*, fourteen states have joined the eight states that had already abolished the death penalty, and three others states are under a governor's imposed moratorium—meaning half the states in the country do not have a death penalty. In fact, even in those states that maintain a death penalty, its use is rare, with nine "death penalty" states not having carried out an execution in at least a decade. And even in those states with an active death penalty, from 2010 to 2016, only sixteen counties out of the 3,000 counties in the U.S. imposed more than five death sentences.

Justice Breyer observed in his dissent in *Glossip v. Gross* that the geographic concentration and rarity with which the death penalty is imposed raises questions about its constitutionality under

[2] Though the RJA was repealed in 2013, a recent North Carolina Supreme Court decision held that anyone who filed a claim before the repeal is entitled to the full protections of the Act. North Carolina v. Ramseur, 843 S.E.2d 106 (N.C. 2020).

the Eight Amendment's ban on "cruel and *unusual* punishments." (emphasis added). Similarly, Professor Brandon Garrett and his co-authors have observed, "While evidence of racial discrimination in death sentencing has not been carefully and directly considered by the U.S. Supreme Court since *McCleskey*, a different type of empirical debate has played an increasingly prominent role in the Court's rulings—a debate concerning evidence of the rarity and arbitrariness of particular death penalty practices."

DISCUSSION QUESTIONS

What does the experience of Kentucky's and North Carolina's efforts to address racial bias in the administration of the death penalty teach us? Can a Racial Justice Act be designed to achieve a just, racially neutral administration of the death penalty? What role does jury selection play, particularly in light of the Supreme Court's relatively robust response to *Batson* challenges in capital cases, but continued abuses by prosecutors (i.e., Flowers v. Mississippi, Foster v. Chatman, and Miller-El v. Dretke)? What approaches might death penalty abolitionists need to pursue to successfully challenge systemic anti-Black bias in the administration of the death penalty?

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B. Racially Discriminatory Police Use of Force

The May 25 killing of George Floyd that ignited the nation's outrage was not a singular or unique event. Breonna Taylor, Sean Reed, Ahmaud Arbery, Atatiana Jefferson, Tony McDade: These are just a few of the Black people who have recently paid with their lives for the country's failure to reconcile with and dismantle systemic racism. Black people are more than three times as likely as white people to be killed by police in the United States. Black and Latinx people are also fifty percent more likely to experience some form of non-lethal force (e.g., being pushed against a wall or onto the ground, pepper sprayed or hit with a baton, held at gun point) in interactions with police. And according to Say Her Name, the "media's focus on police violence against Black men makes finding information about Black women of all gender identities and sexualities much more difficult." A 2015 survey reported that sixty-one percent of Black

transgender people, and ninety percent of those doing or thought to be doing sex work, who interacted with law enforcement experienced some form of mistreatment, including verbal harassment, misgendering, or physical or sexual assault. The pain inflicted on Black bodies by law enforcement is borne not just by its victims, but by their families and communities, as well.

Among the most frequently discussed measures to address police abuses is the elimination of the judicially created doctrine of qualified immunity. As articulated in the Supreme Court case Harlow v. Fitzgerald, qualified immunity shields police officers from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," a standard that plaintiffs have found difficult to overcome. Eliminating or reducing this barrier to holding police civilly liable could increase accountability, particularly given that police officers are rarely criminally charged, disciplined, or fired for misconduct related to use of force. Qualified immunity reform could be achieved through statute, such as the George Floyd Justice in Policing Act recently passed by the U.S. House of Representatives, or by a reexamination of the doctrine by the Supreme Court, although the Court declined to hear a group of cases in the 2020 October Term that presented the justices the opportunity to do just that.

Other reform proposals would: make it easier to federally prosecute and convict police officers for abuses committed "under the color of law" by reducing the *mens rea* requirement in 18 U.S.C. § 242, the federal criminal statute governing police misconduct, from "willful" to "reckless"; prohibit racial profiling, chokeholds, and "no-knock" warrants; increase the availability and use of investigations by federal and state attorneys general into "patterns and practices" by police departments that violate civil rights; eliminate the federal program, known as the 1033 Program, that allows local police departments to obtain surplus military equipment, such as assault rifles, grenade launchers, and mine-resistant armored vehicles; remove provisions from police union contracts that allow them to shield their members from public accountability; and empower overpoliced communities to have greater say in the manner in which they are policed, such as through the creation of a publicly available national police misconduct registry and independent, civilian review boards, comprised of stakeholders from affected communities, with the authority to either discipline officers or recommend disciplinary action, including termination, that department leaders must then enforce.

A more structural, perhaps transformative, approach has called for the defunding or abolition of the police. The rhetoric around defunding and abolition, and the movement itself, is not monolithic. Professor Tracey Meares, for example, argues that, "[P]olicing as we know it must be abolished *before it can be transformed*." This approach may best be seen in Camden, New Jersey, which abolished and then rebuilt its police force, and Minneapolis, Minnesota, where the city council recently voted to abolish the current police department and replace it with a community-based public safety agency. Some reformers would replace the police with a smaller, more community-based public safety apparatus designed to serve the needs of

community members, not the powerful, white, largely economic interests of the prison-industrial complex.

For others, such as the abolitionist movement 8 to Abolition, the goal "is not to create better, friendlier, or more community-oriented police or prisons," but to "build toward a society without police or prisons, where communities are equipped to provide for their safety and wellbeing." The argument for this vision is that our current criminal legal system creates far more violence and destruction of lives than it prevents—in the form of police violence against Black bodies, the destruction of families and communities because of over-policing of minor or non-violent crimes, and prison violence and rape, to which too many prison officials turn a blind eye. This vision of abolition asserts that the connection between police and historical and contemporary anti-Black racism, including slavery, makes reform impossible. Rather, as Professor Amna Akbar explains, the "state must be transformed, the law must be transformed, the police must be eliminated."

No matter the vision of police abolition espoused, the goal is not to fire all the police, close the courthouse doors, and throw open prison gates tomorrow. Abolition's transformational vision is an ongoing, generational project whose foundation lies in radically changing our culture to reject the bloated criminal legal system that abolitionists argue has anti-Black racism at its core.

DISCUSSION QUESTIONS

What anti-racism goals do incremental reforms in policing achieve? Are these better achieved through abolition? Can and should a cost/benefit analysis be undertaken to evaluate the wisdom of abolition? Can incremental and more sweeping reforms be reconciled? What specific policy reforms are needed to address violence, including sexual violence, against Black women and members of the LGBTQ+ community?

FOR MORE INFORMATION

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C. Health

As Historian Evelynn Hammonds has noted, "[t]here has never been any period in American history where the health of blacks was equal to that of whites. Disparity is built into the system." The bodies of Black patients have been exploited, without consent, for medical gains in science, putting their health in jeopardy in the name of "progress," and to this day, Black patients often receive inferior care when compared to white patients. Numerous studies have shown pervasive bias among providers has measurable effects on health outcomes. These disparities are arguably at their starkest for Black pregnant women. Regardless of income or education, according to the CDC, Black mothers are "243 percent more likely to die from pregnancy- or childbirth-related causes" than white mothers, and these rates keep rising. Among the identified factors leading to a Black maternal mortality rate that is on par with Mexico and Uzbekistan are the stress resulting from systemic racism, practitioner disbelief of reported symptoms, and environmental racism.[3]

"[E]nvironmental racism continues to endanger the lives of Black people across the United States," leading to "higher rates of asthma, heart attacks and lowered life expectancy rates." According to a 2018 Environmental Protection Agency study, "people of color are much more likely to live near polluters and breathe polluted air," and Black people were exposed to the greatest level of air-borne pollutants. Sources of pollution have frequently been purposefully located in or near predominately Black neighborhoods. City planners across the country have used highways and railways to reinforce de facto segregation, and in doing so, bring prolonged, often dense traffic in or near Black communities. Once isolated by infrastructure, Black neighborhoods are often devalued, leading heavy polluting industries to take advantage of lower land prices and lower levels of political power to build industrial sites in or near the community. These same conditions often leave public infrastructure unsupported and community concerns unaddressed, and with such neglect comes preventable crises like the lead-contaminated water in Flint, Michigan and Newark, New Jersey.

Exacerbating these disparate health burdens, Black Americans do not have access to health insurance at the same rates as their white counterparts, and residential segregation and other structural factors have led to unequal access to care facilities. Attempts to desegregate healthcare facilities achieved some measure of success in the 1960's, in the wake of *Brown v. Board of Education I* and with the creation of Medicare and Medicaid, as federal funding to hospitals and clinics provided regulatory leverage to the federal government. But after that initial boon, a series of legal interpretations and rule promulgations led to civil rights enforcement actions becoming "sporadic and anemic," according to Professor Renée Landers. For instance, in 2001, the Supreme Court ruled in *Alexander v. Sandoval* that no private right of

[3] Environmental racism is defined by Dr. Benjamin Chavis, the activist who coined the term, as "racial discrimination in environmental policy making and the unequal enforcement of the environmental laws and regulations." RIGHTS, RESOURCES AND THE POLITICS OF ACCOUNTABILITY 189 (Peter Newell & Joanna Wheeler eds., 2006).

action is available under Title VI, the federal law prohibiting discrimination in programs receiving federal funding, for a disparate impact claim, eliminating a key tool used by private litigants seeking redress when the federal government could not or would not press their case. The Affordable Care Act of 2010 (ACA) and subsequent Health and Human Services Department (HHS) regulations sought to restore this pathway to redress, but recent HHS rules and ongoing litigation[4] challenging the ACA have shown how tenuous those protections are in actuality.

While the enactment of the ACA has significantly increased access to healthcare insurance for Black Americans, many healthcare reformers do not believe the Act goes far enough to directly address racial disparities in insurance access and care. Those interested in systemic overhaul of the current system, whether it be Medicare-for-All or a public option, point to the numerous areas of inequality in the current healthcare system and believe that wholesale change is warranted. Opponents of a federally-run universal healthcare program believe that such an expansion of federal involvement in the system would be congressional overreach and inevitably will "end[] up under a pile of lawsuits," with many pointing to administrative restoration of the ACA to its full power as an alternative solution. But Medicare-for-All proponents and even a few past opponents believe that the creation of Medicare laid the legal groundwork for such a program.

Similar arguments pervade the debate over the Green New Deal. Supporters argue that their proposal offers solutions for the interconnected problems that underlie racism and environmental injustice. Central to the Green New Deal's success is implementation of the Clean Power Plan (CPP)—an Obama administration initiative that was put on hold by the Supreme Court in 2016 and later repealed by the Trump administration, which claimed that the plan "exceeded EPA's statutory authority under the Clean Air Act." Proponents of the Green New Deal argue that the CPP framework is entirely consistent with federal-state partnerships provided for in the nation's environmental statutes for years. Enactment of the Green New Deal would likely revive challenges to CPP, as well as debates over the interpretation and implementation of the Clean Water Act and Clean Air Act.

DISCUSSION QUESTIONS

Black Americans are experiencing disproportionately high rates of contraction of and death from COVID-19. What aspects of our legal structure are fueling these disparities? How can our healthcare system be refined or overhauled to tackle these issues? Is a restoration of the Affordable Care Act the best place to start or would Medicare-for-All better address systemic

[4] There have been numerous legal challenges to the ACA since its enactment, including *NFIB v. Sebelius*, in which the Supreme Court upheld the law as constitutional under the Taxing and Spending Clause of Article I. The latest challenge to be taken up by the Court, *Texas v. California*, will be heard in November 2020. If the lower court's ruling is upheld, the entirety of the ACA would be struck down as unconstitutional and this avenue of redress would once again be closed off.

racism in the healthcare system? What other disparate health outcomes might be traced to racial inequities in our healthcare system and how might they be addressed? What strategies exist, in addition to the Green New Deal, for addressing environmental racism and what are their advantages and limitations? States and individual plaintiffs have recently pursued litigation as a means of redress—with some achieving moderate successes. Are the results of these efforts enough to disincentivize actors who contribute to environmental racism?

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II. Labor and Land

A. The Racial Wealth Gap and Reparations

A Brookings Institution report, EXAMINING THE BLACK-WHITE WEALTH GAP, explains:

> Efforts by Black Americans to build wealth can be traced back throughout American history. But these efforts have been impeded in a host of ways, beginning with 246 years of chattel slavery and followed by Congressional mismanagement of the Freedman's Savings Bank (which left 61,144 depositors with losses of nearly $3 million in 1874), the violent massacre decimating Tulsa's Greenwood District in 1921 (a population of 10,000 that thrived as the epicenter of African American business and culture, commonly referred to as "Black Wall Street"), and discriminatory policies throughout the 20th century including the Jim Crow Era's "Black Codes" strictly limiting opportunity in many southern states, the GI bill, the New Deal's Fair Labor Standards Act's exemption of domestic agricultural and service occupations, and redlining. Wealth was taken from these communities before it had the opportunity to grow.

As a result, in 2016, the median net worth of a white family was $171,000, whereas the median net worth of a Black family was $17,600. Since wealth-building is generational, a report by the Insight Center for Community Economic Development concluded, "[t]here are no actions that black Americans can take unilaterally that will have much of an effect on reducing the racial wealth gap. For the gap to be closed, America must undergo a vast social transformation produced by the adoption of bold national policies. . . ," and those policies will have to address the various interdependent, structural elements that make up economic life, including employment, taxation, housing, and education.

While reforms can and should be made to remedy each negative externality caused by anti-Black racism, the concern among some, as described by Sandra Susan Smith, is that one-off reforms "nibble around the edges of the problem rooted in systemic racism without doing much

to attack those very roots." The contract made between the federal government and its citizens, guaranteeing Americans equal protection under the law, has been broken "and contract breach requires a remedy," according to Professor Mehrsa Baradaran.

For generations, proponents have called upon the federal government to make reparations to redress the harm it has caused to Black Americans, but the form those reparations should take remains a topic of debate. Many leading proponents call for monetary payments to be made, though their proposals often vary on specifics as to what amount should be paid and to whom. While some include eligibility criteria that require demonstration of lineage from enslaved Americans, others believe reparations should be made to all who have suffered the effects of systemic anti-Black racism. Some call for payments to be paid directly to those who qualify, while others support investment in Black community-held assets and services. Further proposals seek to reframe the call for reparations as a call for atonement, drawing upon both American and international precedent in advocating for a truth and reconciliation commission. Introduced in every congressional session since 1989 by Representatives John Conyers and Sheila Jackson Lee, the Commission to Study and Develop Reparation Proposals for African-Americans Act (H.R. 40) received its first hearing in 2019. The bill would attempt to answer some of these questions through the creation of a commission to study the effects of slavery and anti-Black racism and make recommendations as to what form reparations should take. Additionally, the drafters of the Green New Deal implicitly include a call for reparations as part of their landmark legislation recognizing the need for structural changes to make society fairer for people of color.

For now, opponents to reparations outnumber supporters. Some scholars question the constitutionality of a reparations program, as such a project would inherently be race-based. Conservative political leadership points to the difficulty of identifying qualifying criteria and claim a lack of culpability by those currently alive. And the question of how to pay for a massive reparations program looms large over the debate. Scholars have noted that the constitutionality of a reparations program will depend on the design. While there are differing opinions among proponents on design features such as scope and scale, they are unified in their thesis: America is "both its credits and its debts" and until real redress is achieved, the debt remains outstanding.

DISCUSSION QUESTIONS

What effects does the racial wealth gap have on society, and what creative law and policy solutions can be devised to address it? Should the American government provide reparations for the inequities it has created and, if so, what form should such restitution take and to whom? Can a reparations program be designed to avoid constitutional concerns? What lessons can be learned from international models?

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B. The Racial Wage Gap and Employment Discrimination

The exploitation of Black labor has persisted since the Atlantic slave trade. Slaves built this country, and their ancestors are still heavily impacted by the financial repercussions of uncompensated labor.

Today, the wage disparity between white workers and Black workers is as large as it was prior to the Civil Rights Movement. Black men make thirteen cents less per dollar than white men. Black women make twenty-one cents less per dollar than white women, and thirty-eight cents less per dollar than white men. The vast majority of Black women are the primary income earners in their households and disproportionately fill low wage positions as in-home care providers, nursing assistants, and cashiers, with a median income below a living wage in the U.S. When Black women fill the same positions as white men, such as primary school teachers or registered nurses, they are paid seventy-five to ninety-three cents for every dollar a white man in the same position is paid. Black trans and gender non-conforming individuals face even worse employment opportunities and wage discrimination. A 2008 study of nearly 6,500 trans and gender non-conforming individuals found that thirty-four percent of Black trans and gender non-conforming people live in extreme poverty with a household income of less than $10,000 a year—twice the rate of all trans and gender non-conforming individuals and four times the rate of the general Black population.

In the face of the persistent, historical under-compensation of Black workers, states and localities have increasingly sought to enact policies to address the wage gap. Nineteen states and twenty-one cities have passed legislation prohibiting employers from asking candidates about their salary history during the hiring process, a practice that perpetuates wage disparities as a worker moves from one employer to the next. Because employment and housing discrimination based on criminal history are huge barriers to reentry for the formerly incarcerated, thirty-five states and 150 cities have adopted policies that require employers to consider applicant's qualifications prior to inquiring about their criminal or arrest history. The "Create a Respectful and Open World for Natural Hair" (CROWN) Act, first passed in

California in 2019, also helps to curb the race wage gap by prohibiting race-based hair discrimination, which has often been used as a "race neutral" pretext to discriminate against Black employees based on dress codes that prohibit certain hairstyles common among Black people, including braids, locs, twists or bantu knots, or discriminate based on hair texture. A version of the CROWN Act was introduced in the U.S. Senate by Senator Cory Booker and in the House by Representative Cedric Richmond in 2020.

Also at the federal level, the Lilly Ledbetter Fair Pay Act of 2009, which overturned the Supreme Court's decision in *Ledbetter v. Goodyear*, extended the time period in which an employee can file an employment discrimination claim regarding compensation, out of a recognition that pay secrecy clauses and practices can exacerbate the wage gap by discouraging or outright forbidding employees from comparing income. In 2014, President Obama signed an executive order directing the Secretary of Labor to create regulations to prevent retaliation by employers when employees violate pay secrecy policies.

Proponents of raising the minimum wage, at both the state and federal levels, point to the success of previous increases on reducing the race and gender wage gap. Supporters of a $15 minimum wage, such as the National Employment Law Project, contend that raising the minimum wage is "an opportunity to make significant inroads in helping workers make ends meet and alleviating the especially intractable economic barriers that continue to harm women and people of color."

DISCUSSION QUESTIONS

How do gatekeeping practices in certain fields contribute to the wage gap? How can legislatures increase protections for Black workers? What methods of enforcement could revitalize already existing legislation to prevent wage discrimination? Are there non-legislative means for preventing wage discrimination?

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C. Homeownership, Residential Segregation, and Education

The pursuit of wealth through homeownership, long seen as key to achieving the American dream, has historically been a path blocked off to Black Americans. Having been shut out of traditional lending opportunities regardless of credit score or income level, Black homeowners were then disproportionately offered subprime mortgages that carried higher interest rates than traditional mortgages. Predatory lending and financial exploitation of these debt obligations led Black Americans to lose half of their wealth in the 2008 recession. Today, only forty-four percent of Black families own their home, compared with seventy-four percent of white families, and those that are homeowners pay higher rates for their mortgages.

Where Black families could purchase homes has also been severely circumscribed, often with government imprimatur. Following the Great Migration of the early-twentieth century, residential segregation became the norm in most American cities. These housing patterns were not the result of accident or universal preference, but as Richard Rothstein has noted, "racially explicit policies of federal, state, and local governments defined where whites and African Americans should live"[5] that were maintained for decades. In 1938, a federal agency created maps of major American cities, demarcating neighborhoods that local officials and bankers considered to be "high risk" or "hazardous" neighborhoods, and "marked entire communities in red ink where they deemed the influx of racial and ethnic minorities as credit risks." This process, now known as redlining, led to the dramatic and entrenched racial segregation of American cities. While the Supreme Court ruled racially restrictive real estate restrictive covenants unenforceable in 1948, the practice of redlining reinforced the racial boundaries first drawn by such covenants.

In the 1940's and 50's, the federal government responded to a national housing shortage, caused by an influx of returning WWII veterans, by funding the construction of suburban communities throughout the country. The Federal Housing Authority and Veterans Administration hired builders and paid for the construction of thousands of homes with taxpayer funds, with the express condition that these homes could not be sold to Black homebuyers, even returning Black veterans. This federal investment in the suburbs for white homeowners, reinforced by federal home loan insurance dictated by redlined maps, opened the door to the white flight of the 1960s. By the time the Fair Housing Act was signed in 1968, housing patterns were well-established. After what historian Keeanga-Yamahtta Taylor describes as "more than a century of racial discrimination and residential segregation, rooted in the government-inspired perceptions that African-Americans pose an existential threat to property values," residential segregation is well-entrenched in American cities and towns. Federal tax laws continue to reward white flight and eminent domain has been deployed to displace longtime Black residents from the communities they have built.

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[5] Richard Rothstein, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 1 (2017).

Since traditionally, American students are assigned to their neighborhood schools, residential segregation is inextricably linked with school segregation. Having found in the landmark *Brown v. Board of Education I* decision that "[s]eparate educational facilities are inherently unequal," the Supreme Court in *Brown v. Board of Education II* directed school authorities to desegregate their public schools "with all deliberate speed." The integration of school districts has been an arduous and inconsistent project ever since, with some experts such as Nikole Hannah-Jones opining that "'all deliberate speed' has meant never." In 1974, the Court in *Milliken v. Bradley* excluded Northern states from the obligation almost entirely, holding that school districts were not required to actively tackle de facto segregation. And as recently as 2007, the Court struck down voluntary efforts by school districts to dismantle de facto segregation, finding that achieving racial balance is "an objective [the] Court has repeatedly condemned as illegitimate." This decades-long blunting of *Brown*'s force has run parallel to a divestment in public education and the rise of government-supported private education that have contributed to the public schools being as segregated now as they were in 1960. Black children are five times more likely than white children to attend schools that are "highly segregated by race." Unequal access to educational equity has led to unequal education outcomes, with Black students experiencing greater rates of absenteeism, over-disciplining, and lower graduation rates.

While the Supreme Court by a vote of 5–4 refused to find a fundamental right to education in its 1973 *San Antonio Independent School District v, Rodriguez* decision, advocates and litigators have gone to court seeking redress for the educational deprivations suffered by predominantly low-income children of color in urban public schools under a number of theories, including the violation of state constitutional provisions and a federal constitutional right to literacy. These suits seek to highlight the impact of residential segregation on educational equity and the failure of public schools to provide the basic skills necessary "to function—much less thrive—in higher education, the workforce, and the activities of democratic citizenship."

Moving further down the educational pipeline, many reformers working on education equity issues have attempted to use what we now know as "affirmative action" to redress this educational equity gap at the collegiate level. Advocates for robust affirmative action admission policies claim that the practice "has proved to be one of the most effective tools for expanding opportunity and promoting diversity for students of color" and "have helped remedy inequality created by centuries of discrimination." Critics believe that considering race and ethnicity in the admissions process, regardless of the benefits that may be achieved for marginalized students, constitutes racial discrimination, stigmatizes those admitted, and violates the Equal Protection Clause. The legal history of affirmative action before the Supreme

Court is well-documented[6] and as Professor Vinay Harpalani has noted, "[p]erhaps no major issue before the Court has so repeatedly bucked expectations."

Others believe that addressing the causes of residential segregation and poverty is the most direct way to get at the problem of educational deprivation. Some housing reformers believe that forbidding exclusionary zoning ordinances, the tool by which predominately white neighborhoods exclude a disproportionate number of people of color, would help create greater access to affordable housing, and thus more equitable educational access.

DISCUSSION QUESTIONS

Is there any legal benefit to treating de jure and de facto segregation separately? Given the Court's post-*Brown* jurisprudence, what tools are available to communities wanting to address segregation in their schools? Can a more effective course of redress for students who are experiencing individual harms created by systemic failures be created? The Supreme Court's legal justification for upholding affirmative action has been that public universities have a compelling interest in promoting diversity in their student bodies, and it rejected a program defended, in part, as "countering the effects of societal discrimination" because it would "impose[] disadvantages upon persons . . . who bear no responsibility" for the discrimination. Would affirmative action be on stronger or weaker footing if viewed as one approach to remediating the historic discrimination suffered by Black Americans?

FOR MORE INFORMATION

Video: *From Brown II to Today: A Discussion with Sherrilyn Ifill and Nikole Hannah-Jones*, NAACP LEGAL DEF. AND EDUC. FOUND., INC. (May 21, 2020); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); Sheryll Cashin, *Place Not Race: Affirmative Action and the Geography of Educational Opportunity*, 47 U. OF MICH. J. OF L. REFORM 925 (2014); Deborah Archer, *Racial Exclusion Through Crime-Free Housing Ordinances*, ACS ISSUE BRIEF (2019); THURGOOD MARSHALL INST., NAACP LEGAL DEF. AND EDUC. FOUND., INC., LOCKED OUT OF THE CLASSROOM: HOW IMPLICIT BIAS CONTRIBUTES TO DISPARITIES IN SCHOOL DISCIPLINE (2017–2018); Norrinda Brown Hayat, *Urban Decolonization*, 74 MICH. J. OF RACE & L. 75 (2018).

[6] *See* Margaret Kramer, *A Timeline of Key Supreme Court Cases on Affirmative Action*, N.Y. TIMES (Mar. 30, 2019). Note that a case challenging Harvard University's admission policies is currently before the First Circuit.

Speakers List

The following list includes a variety of scholars, advocates, and litigators you may contact when planning your chapter's events around anti-racism work this year. The speakers are listed in alphabetical order, according to their names and specialties. We have provided their title, organization, and the broad legal issues related to their fields of research, litigation, and advocacy. These categories are necessarily simplistic. When considering any of the experts listed below for your programming, you should research the speaker to ensure their specialties align with the goals of your event.

This speakers list is not exhaustive. Instead, it is intended to provide you with a sampling of the scholars, advocates, institutions, and organizations that work on these issues. When developing your events, you should also consider local experts and practitioners and consult law school faculty members, including ACS student chapter faculty advisors, for additional suggestions.

Name	Title	Affiliation	State	Specialty
Aziza Ahmed	Professor of Law	Northeastern University School of Law	MA	Health; Reproductive Rights
Deborah Archer	Associate Professor of Clinical Law; Co-Faculty Director, Center on Race, Inequality, and the Law	NYU School of Law	NY	Civil Rights; Housing Discrimination; Education; Affirmative Action
Mehrsa Baradaran	Professor of Law; Associate Dean for Equity, Diversity and Inclusion	University of California Irvine School of Law	CA	Racial Wealth Gap; Housing Discrimination; Banking Law
Mario Barnes	Toni Rembe Dean Professor of Law	University of Washington School of Law	WA	Race and the Criminal Legal System

Name	Title	Affiliation	State	Specialty
Lisa Cylar Barrett	Director of Policy	NAACP Legal Defense and Educational Fund, Inc.	DC	Racial Wealth Gap; Education; Housing Discrimination; Economic Justice
Adam Benforado	Professor of Law	Drexel University Kline School of Law	PA	Implicit Bias in the Criminal Legal System; Criminal Justice; Child Welfare Law
Derek Black	Professor of Law; Ernest F. Hollings Chair in Constitutional Law	University of South Carolina School of Law	SC	Education
Gary Bledsoe	Acting Dean	Texas Southern University Thurgood Marshall School of Law	TX	Civil Rights; Education; Employment Discrimination; Housing Discrimination
John Blume	Samuel F. Leibowitz Professor of Trial Techniques; Director of the Cornell Death Penalty Project	Cornell Law School	NY	Death Penalty
Locke Bowman	Clinical Professor of Law; Executive Director, Roderick and Solange MacArthur Justice Center	Northwestern University Pritzker School of Law	IL	Policing and Police Accountability

Name	Title	Affiliation	State	Specialty
Christopher A. Bracey	Vice Provost for Faculty Affairs; Professor of Law	The George Washington University Law School	DC	Policing and Police Accountability
Alvin Bragg	Visiting Professor of Law; Co-Director, Racial Justice Project	New York Law School	NY	Policing and Police Accountability; Criminal Law and Civil Rights; Prosecutorial Discretion and Accountability
Khiara Bridges	Professor of Law	University of California Berkeley Law	CA	Health; Reproductive Justice
Tomiko Brown-Nagin	Dean of the Radcliffe Institute for Advanced Study; Daniel P.S. Paul Professor of Constitutional Law; Professor of History	Harvard Law School	MA	Civil Rights; Education; Affirmative Action
Ashley Carter	Senior Staff Attorney	The Advancement Project	DC	Race and the Criminal Legal System
Guy-Uriel Charles	Edward and Ellen Schwarzman Professor of Law; Co-Director, the Duke Law Center on Law, Race and Politics	Duke University School of Law	NC	Constitutional Law; Race and the Law; Race and Political Representation

Name	Title	Affiliation	State	Specialty
Kami Chavis	Associate Provost for Academic Initiatives; Professor of Law; Director of Criminal Justice Program; Director of Criminal Justice Program	Wake Forest School of Law	NC	Policing and Police Accountability; Race and the Criminal Legal System
Blanche Bong Cook	Robert E. Harding Jr. Associate Professor of Law	University of Kentucky Rosenberg College of Law	KY	Race and the Criminal Legal System
Frank Rudy Cooper	William S. Boyd Professor of Law	University of Nevada, Las Vegas Boyd School of Law	NV	Race, Gender, Class, and Policing
Gilda R. Daniels	Associate Professor of Law	University of Baltimore School of Law	MD	Civil Rights; Race and Political Representation
Andrea L. Dennis	Associate Dean for Faculty Development; John Byrd Martin Chair of Law	University of Georgia School of Law	GA	Race and the Criminal Legal System; Family Law; Juvenile Law
Judith Browne Dianis	Executive Director	The Advancement Project	DC	Education; Race and Political Representation
Joel Dodge	Judicial Strategy Attorney	Center for Reproductive Rights	NY	Health; Reproductive Rights
Atiba Ellis	Professor of Law	Marquette University Law School	WI	Civil Rights; Race and the Law; Race and Political Representation

Name	Title	Affiliation	State	Specialty
Lia Epperson	Professor of Law	American University Washington College of Law	DC	Education
Jeffrey Fagan	Isidor and Seville Sulzbacher Professor of Law	Columbia Law School	NY	Death Penalty; Policing and Police Accountability
Katherine Franke	James L. Dohr Professor of Law	Columbia Law School	NY	Racial Wealth Gap; Reparations; Racial History; Marriage; LGBTQ Rights
Abbe Gluck	Professor of Law; Faculty Director of the Solomon Center for Health Law and Policy	Yale Law School	CT	Health; Statutory Interpretation
Nicole Godfrey	Visiting Assistant Professor Civil Rights Clinic	University of Denver Sturm College of Law	CO	Civil Rights
Rachel Godsil	Professor of Law; Chancellor's Social Justice Scholar	Rutgers Law School	NJ	Education; Health; Criminal Justice; Implicit Bias
Michele Bratcher Goodwin	Chancellor's Professor of Law; Director, Center for Biotechnology & Global Health Policy	University of California Irvine School of Law	CA	Civil Rights; Constitutional Law; Health Law; Reproductive Rights and Justice

Name	Title	Affiliation	State	Specialty
Fatima Goss Graves	President & CEO	National Women's Law Center	DC	Education; Employment Discrimination; Health; Racial Wealth Gap; Gender and Income Security; Reproductive Rights
Wendy Greene	Professor of Law	Drexel University Kline School of Law	PA	Employment Discrimination; Comparative Slavery and Race Relations
Samuel Gross	Thomas and Mabel Long Professor Emeritus of Law	University of Michigan Law School	MI	Death Penalty
Justin Hansford	Director of the Thurgood Marshall Civil Rights Center	Howard University School of Law	DC	Race and the Criminal Legal System
Daniel Scott Harawa	Assistant Professor of Practice; Director, Appellate Clinic	Washington University in St. Louis School of Law	MO	Race and the Criminal Legal System
Vinay Harpalani	Associate Professor of Law; Henry Weihofen Professor	University of New Mexico School of Law	NM	Education; Employment Discrimination; Affirmative Action; Race and Political Representation
Stephen K. Harper	Clinical Professor of Law Emeritus	Florida International University College of Law	FL	Death Penalty

Name	Title	Affiliation	State	Specialty
Alexis Hoag	Associate Research Scholar in the Faculty of Law; Lecturer in Law	Columbia Law School	NY	Death Penalty; Policing; Racial Justice; Criminal Procedure
Sam Kamin	Vicente Sederberg Professor of Marijuana Law and Policy	University of Denver Sturm College of Law	CO	Death Penalty; Drug Policy; Criminal Procedure
Nancy Leong	Professor of Law	University of Denver Sturm College of Law	CO	Civil Rights; Education; Employment Discrimination; Housing Discrimination; Affirmative Action
Michael J.Z. Mannheimer	Professor of Law	Northern University of Kentucky Chase College of Law	KY	Death Penalty; Fourth Amendment
Tracey Meares	Walton Hale Hamilton Professor of Law; Founding Director of The Justice Collaboratory	Yale Law School	CT	Policing and Police Accountability
Pamela Metzger	Director of the Deason Criminal Justice Reform Center; Professor of Law	SMU Dedman School of Law	TX	Right to Counsel; Criminal Legal Reform; Prosecutorial Discretion; Small, Tribal, and Rural Criminal Legal Reform

Name	Title	Affiliation	State	Specialty
Preston Mitchum	Adjunct Professor of Law; Director of Policy URGE	Georgetown University Law Center	DC	Health; Reproductive Justice; LGBTQ Health Law and Policy
Melissa Murray	Frederick I. and Grace Stokes Professor of Law; Faculty Director, Birnbaum Women's Leadership Network	NYU School of Law	NY	Health; Reproductive Rights and Justice; Equal Rights Amendment
Priscilla Ocen	Professor of Law	Loyola Marymount University Law School	CA	Race and the Criminal Legal System
Adaku Onyeka-Crawford	Director of Educational Equity and Senior Counsel	National Women's Law Center	DC	Education
Mridula Raman	Clinical Supervising Attorney, Death Penalty Clinic	University of California Berkeley Law	CA	Death Penalty
Sonia M. Gipson Rankin	Assistant Professor of Law	The University of New Mexico School of Law	NM	Civil Rights; Housing Discrimination
Teressa Ravenell	Associate Dean for Faculty Research and Development; Professor of Law	Villanova University Widger School of Law	TN	Policing and Police Accountability

Name	Title	Affiliation	State	Specialty
Barbara A. Reich	Professor of Law	Western New England University School of Law	MA	Race and the Law; Health Law
Camille Gear Rich	Associate Provost for Faculty and Student Initiatives in the Social Sciences; Professor of Law and Sociology	University of Southern California Gould School of Law	CA	Race, Gender, and Sexuality
L. Song Richardson	Dean and Chancellor's Professor of Law	University of California Irvine School of Law	CA	Policing and Police Accountability; Implicit Racial Bias; Race and the Criminal Legal System
Addie Rolnick	Professor of Law	University of Nevada, Las Vegas Boyd School of Law	NV	Race and the Criminal Legal System; Native Discrimination; Juvenile Justice;
Stephen Rushin	Associate Professor of Law	Loyola University Chicago School of Law	IL	Policing and Police Accountability
Valerie Schneider	Associate Professor of Law; Director of Clinical Law Center	Howard University School of Law	DC	Housing Discrimination; LGBTQ Rights

Name	Title	Affiliation	State	Specialty
Joshua Sellers	Associate Professor of Law	Arizona State University Sandra Day O'Connor College of Law	AZ	Race and the Law; Gender and the Law; Race and Political Representation
Elisabeth Semel	Director, Death Penalty Clinic and Clinical Professor of Law	University of California Berkeley Law	CA	Death Penalty
Theodore M. Shaw	Julius L. Chambers Distinguished Professor of Law; Director of the Center for Civil Rights	University of North Carolina School of Law	NC	Constitutional Law; Race and the Law
Jordan Steiker	Judge Robert M Parker Endowed Chair in Law; Director of the Capital Punishment Center	University of Texas at Austin School of Law	TX	Death Penalty
Carlton Waterhouse	Professor of Law	Howard University School of Law	DC	Health; Environmental Justice; Reparations
Patricia Williams	University Distinguished Professor of Law and Humanities	Northeastern University School of Law	MA	Health; Critical Race Theory
Ekow N. Yankah	Professor of Law	Cardozo School of Law	NY	Race and the Criminal Legal System

Name	Title	Affiliation	State	Specialty
Ruqaiijah Yearby	Professor of Law; Executive Director and Co-Founder, Institute for Healing Justice and Equity	Saint Louis University School of Law	MO	Health

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