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Pandemic Policing

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PANDEMIC POLICING

Christian Sundquist*

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INTRODUCTION

Please don't shoot me, Mr. Officer. Please, don't shoot me, man. Please. Can you not shoot me, man? I didn't do nothing wrong man. I'll do anything, I'll do anything y'all tell me to man. I'm not resisting man. I can't breathe Mr. Officer! Please! Please! I know I can't breathe. I can't breathe. Let go of me man, I can't breathe. I can't breathe. I can't fucking breathe man. I can't fucking breathe. I can't breathe. I can't breathe. I can't breathe. I can't breathe. Mama, mama, mama, mama. Mama, mama, mama. Mama, mama, mama. Mom, I love you. Tell my kids I love them. I'm dead. I can't breathe . . . I can't breathe . . . I can't breathe. I can't breathe. I can't breathe. I can't breathe. I'll probably just die this way. They going to kill me. They're going to kill me. I can't breathe. I can't breathe. Please, sir. Please. Please.¹

The last words of George Floyd.

I can't breathe! My name is Elijah McClain! That's all I was doing, I was just going home! I'm just different! That's all! That's all I was doing! I'm so sorry. I have no gun. I don't do that stuff. I don't do any fighting. Why would you taser me? I don't do drugs. I don't even kill flies! I don't eat meat. But I'm not a vegetarian. I don't judge people or anything. I try to live in secret . . . Forgive me! All I was trying to do was become better. But I will do it. I will do it. Even if I have to sacrifice my ID, I'll do it! You all are phenomenal. You are beautiful and I love you. You can try and forgive me. Officer, I'm a Pisces sun and a moon Gemini. Stop, stop! I'm so sorry. That really hurts!

1. Transcript of Defendant's Exhibit 2 at 2–3, 8, 12, 13, 14, 15, 16, State v. Lane, No. 27-CR-20-12951 (Minn. Dist. Ct. filed June 3, 2020), <https://assets.documentcloud.org/documents/6983229/Floyd-Transcript.pdf> [<https://perma.cc/R5DL-KP2Z>]. These are the last words of George Floyd before his death under the knee of police officer Derek Chauvin.

Dreamwork makes the team work . . . (crying) . . . It hurts so much! Yeah, I'm sorry. I wasn't trying to do that. I just can't breathe directly"²

The last words of Elijah McClain.

You are Black. You are my grandson. I don't care if your dad is white or that you are light skinned, you're still Black and you still live in this Black neighborhood. So when you come across a police officer, you have to act a certain way. You have to be respectful. Don't talk back to the officer or raise your voice. Do whatever they tell you to do. Because some of these police might see you as a threat just because of where you are from.

The "Talk" as given to the author by his Black grandfather.³

I was born into racial crisis. My parents—a Black woman from a segregated African-American neighborhood in Chicago and a White man from a Swedish immigrant enclave—believed they could change the world through free love, nonviolence, and racially blended communities. It was in this utopian dream of a better world when my mother began to have contractions on a cold, wintery night at their commune near the rural fields of Southern Illinois. The car they hoped to drive to the closest country hospital—a rusted, old pick-up truck shared by all commune members—broke down on the night of my eventual birth in the middle of the muddy road leading to the main highway. My parents desperately went from house to house for help, asking only to use a telephone or perhaps for a ride to the hospital. And yet they were turned away by these (White) families time and time again—the hatred of my mother's Blackness (and my impending Blackness) plainly evident. My parents' utopian hopes for

2. *Elijah McClain Killing 911 Call & Police Body Cam Footage Transcript*, REV (Aug. 25, 2019), <https://www.rev.com/blog/transcripts/elijah-mcclain-killing-911-call-police-body-cam-footage-transcript> [<https://perma.cc/QY2U-7N7L>].

3. My grandfather made these remarks to me during the 1980s in our family home on the southside of Chicago, Illinois.

racial equality were dashed in that moment of imminent crisis as they were confronted once again with the dystopian reality of enduring racism. Though a family friend eventually noticed them walking on the snowy dirt road and took them to the hospital (where I was born just hours later), this personal story of genesis illustrates how crises can activate racially discriminatory responses.

As our world continues to face multiple crises—from the COVID-19 pandemic and climate change to famines and war—we must recognize that our historical and continuing reaction to crisis has been to demonize those at the margins of our societies while adopting social and legal measures that normalize racial inequality. We need to finally admit, in other words, that we have long suffered from a pandemic of racism born from social oppression and facilitated by public crises. The police killings of George Floyd, Breonna Taylor, Ahmaud Arbery, and too many others have briefly lifted the veil on America’s legacy of racial violence, sparking protests for racial justice and calls for criminal justice reform.

George Floyd. Breonna Taylor. Ahmaud Arbery. Tamir Rice. Eric Garner. Walter Scott. Amadou Diallo. Trayvon Martin. Sandra Bland. Philando Castile. Stephon Clark. Laquan McDonald. Michael Brown. Atatiana Jefferson. John Crawford III. Alton Sterling. Elijah McClain.

We have been here before. Our past is our present, and our present has always been our future. Our history is full of the bodies of Black men, women, and children killed for no other reason than their Blackness by the “moral monsters” of racial violence, awoken by real or perceived social crises.⁴ Say their names. Say the names of the small children that dared to dream of a future. Say the names of the mothers and fathers that struggled to overcome racial discrimination to provide a home for their families. Say the names of the community

4. *A Conversation with James Baldwin*, AM. ARCHIVE PUB. BROAD., https://americanarchive.org/catalog/cpb-aacip_15-0v89g5gf5r#at_571_s [<https://perma.cc/6ZJ6-WNY6>] (providing the entire interview and transcript of James Baldwin’s interview, which originally aired on June 24, 1963).

activists that paid with their lives fighting for freedom. Say the lost names of the buried ghosts of our slavery past, of our lost ancestral histories, and of the tens of millions of people that perished in the name of hatred and avarice.

Yusuf Hawkins. Freddie Gray. Oscar Grant. Ezell Ford. Terence Crutcher. Akai Gurley. Clementa Pinkney. Cynthia Marie Graham Hurd. Susie Jackson. Ethel Lee Lance. Depayne Middleton-Doctor. Tywanza Sanders. Daniel L. Simmons. Sharonda Coleman-Singleton. Myra Thompson. Tanisha Anderson. Jamar Clark. Botham Jean. Natasha McKenna. Bettie Jones. Eric Reason. Dominique Clayton. Michelle Cusseaux. Dante Parker. Calin Roquemore. David Joseph. Antwon Rose II. Michael Lorenzo Dean. Quintonio LeGrier. Christian Taylor. Felix Kumi. Michael Sabbie. George Mann. Jerame Reid. Tony Robinson. Tony McDade. Willie Tillman. Aaron Bailey. Paul O'Neal. Sylville Smith. Christopher Davis. Wendell Celestine. Keith Childress, Jr. Michael Lee Marshall. Miguel Espinal. Tyree Crawford. Darius Stewart. Phillip White. Erica Harris. Mya Hall. Frank Smart. Romain Brisbon. Brendon Glenn. Alexia Christian. Salvado Ellswood. Billy Ray Davis. Samuel Dubose. Jordan Edwards. Alteria Woods. Albert Joseph Davis. Matthew Ajibade. Natasha McKenna. Anthony Hill. India Kager. David Joseph. La'vante Biggs. Kevin Matthews. Marco Loud. Peter Gaines. Darius Robinson. Benni Lee Tignor. Lamontez Jones. Asshams Pharoah Manely. Brian Keith Day. William Chapman II. Jonathan Sanders. Junior Prosper. Janet Wilson. Demarcus Semer. Mary Tuxillo. Wendell Celestine. Christopher McCorvey. Eric Reason. Pamela Turner. Paterson Brown. Richard Perkins. Anthony Ashford. Victor Manuel Larosa. Brian Keith Day. Dominic Hutchinson. Benni Lee Tignor. Michael Noel. Christopher Whitfield. Randy Nelson. Nathaniel Harris Pickett. Dyzhawn Perkins. Terrill

Thomas. Keith Harrison McLeod. Salvado Ellswood. Anthony Ashford. Addie Mae Collins. Cynthia Wesley. Carole Robertson. Carol Denise McNair. Rev. George Lee. John Earl Reese. Samuel Ephesians Hammond, Jr. Delano Herman Middleton. Henry Ezekial Smith. Benjamin Brown. Wharlest Jackson. Clarence Triggs. Ben Chester White. Vernon Ferdinand Dahmer. Samuel Leamon Young, Jr. Willie Brewster. Oneal Moore. Jimmie Lee Jackson. Lt. Col. Lemuel Penn. James Earl Chaney. Henry Hezekiah Dee. Charles Eddie Moore. Louis Allen. Virgil Lamar Ware. Medgar Evers. Cpl. Roman Ducksworth, Jr. Herbert Lee. Mack Charles Parker. Willie Edwards, Jr. John Earl Reese. Lamar Smith. Rev. George Lee. Emmet Louis Till. Dr. Martin Luther King, Jr.⁵

And yet, perhaps our future does not need to be our present. Perhaps we are living in a moment in time when the permanence of racism can be disrupted, when we can find hope and “salvation—through struggle.”⁶ Perhaps, at least, we can finally break the cycle of pandemic racism by critically engaging the racialized responses we have to public crises while disassembling the legal structures that normalize racial inequality.

This is, nonetheless, not an article of post-racial hope but of finding the moral solace in struggle and liberation in the face of crisis. This Article examines the ways in which public crises have contributed to a global pandemic of racism while identifying legal and policy interventions to disrupt discriminatory social responses. In so doing, it develops the novel concept of “pandemic racism” as encompassing the structural systems, institutions, and social norms that operate in response to public crises to normalize and reinforce racial inequality.

5. *Current List*, T.T.S. PROJECT, <https://the-tts-project.webnode.com/dining/> [<https://perma.cc/2MDR-YG9V>]; *Civil Rights Martyrs*, S. POVERTY L. CTR., <https://www.splcenter.org/what-we-do/civil-rights-memorial/civil-rights-martyrs> [<https://perma.cc/S997-ZHBL>].

6. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 98 (1992).

We continue to struggle with dual existential threats to humanity—the COVID-19 pandemic and endemic racism.⁷ The COVID-19 pandemic has unmasked the latent inequalities in our societies while, at the same time, exacerbating racial disparities in health, education, immigration, and criminal justice.⁸ And yet the tools deployed to control the COVID-19 pandemic—such as contact tracing, biosurveillance, quarantines and immigration restrictions—historically have been wielded as tools of racial control that have the potential to both increase and normalize racial inequality.⁹

And just how are we to understand the racial disparities inflamed by our historic responses to crises of disease, crime, immigration, and economics?¹⁰ The clear and honest explanation would be to acknowledge that such disparities stem from the social determinants of health, crime, and poverty, as shaped by past and present legacies of structural racism.¹¹ And yet to admit as much as a society would not only require us to engage the cognitive dissonance that comes with confronting the reality that racism is built into our social institutions but also would require a moral commitment to dismantling those very structures that help maintain the racial status quo.¹²

7. See *Fact Sheet: U.S. Efforts to Combat Systemic Racism*, WHITE HOUSE (Mar. 21, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/21/fact-sheet-u-s-efforts-to-combat-systemic-racism/> [<https://perma.cc/YTV5-YXPP>].

8. Kaimipono David Wenger, *1200 Dollars and a Mule: COVID-19, the CARES Act, and Reparations for Slavery*, 68 UCLA L. REV. DISCOURSE 204, 212–13 (2020) (discussing the racial disparities in health for African-Americans); Kele Stewart & Robert Latham, *COVID-19 Reflections on Resilience and Reform in the Child Welfare System*, 48 FORDHAM URB. L.J. 95, 106 (2020) (highlighting the disadvantages Black and Brown children receive in education); Medha D. Makhoul & Jasmine Sandhu, *Immigrants and Interdependence: How the COVID-19 Pandemic Exposes the Folly of the New Public Charge Rule*, 115 NW. U. L. REV. 146, 148 (2020) (discussing the impact of COVID-19 on immigration in America). See generally Gabriel A. Fuentes, *Federal Detention and “Wild Facts” During the COVID-19 Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 441 (2020) (discussing COVID-19’s impact on prisoners, jail populations, and surrounding communities).

9. See, e.g., *Japanese-American Internment During World War II*, NAT’L ARCHIVES [hereinafter *Japanese-American Internment*], <https://www.archives.gov/education/lessons/japanese-relocation> [<https://perma.cc/4QQ2-W6SH>] (Mar. 17, 2020).

10. See Christopher Klein, *Last Hired, First Fired: How the Great Depression Affected African Americans*, HISTORY, <https://www.history.com/news/last-hired-first-fired-how-the-great-depression-affected-african-americans> [<https://perma.cc/8ESW-ACCW>] (Aug. 31, 2018).

11. Doron Samuel-Siegel et al., *Reckoning with Structural Racism: A Restorative Jurisprudence of Equal Protection*, 23 RICH. PUB. INT. L. REV. 137, 138–39 (2020) (defining structural racism and its historical presence).

12. See Julian Glover & Ken Miguel, *What Are Structural, Institutional and Systemic Racism?*, ABC 7 NEWS (July 9, 2020), <https://abc7news.com/systemic-racism-definition-structural-institutionalized->

The cost—financial, psychological, and otherwise—of undoing the racial foundations of American society is perceived as too much to bear. The refusal to acknowledge our racial reality has instead led the country to rationalize the existence of racial inequality by resorting to claims of cultural pathology, post-racialism, or biological racial essentialism when confronted with crisis.¹³

The COVID-19 pandemic fits within this narrative because it has contributed to increased race-based social disparities while resuscitating dangerous notions of biological racial difference.¹⁴ The pandemic has led to a series of social and governmental responses around the world that have often fueled xenophobia and racial discrimination while heightening inequality.¹⁵ The reaction to the COVID-19 pandemic has followed the historical pattern of pandemic racism in expected ways: racial bias against immigrants and domestic minorities has increased;¹⁶ race-based disparities in education, employment, and health have been magnified;¹⁷ public health policy mandates such as face masks, social distancing, and quarantine requirements have been disproportionately enforced; and immigration restrictions have had a disparate impact on nonwhite migrant groups.¹⁸

Perhaps most troubling is that the COVID-19 pandemic has also disparately impacted racial minorities, leading to significantly higher hospitalization and death rates.¹⁹ This is plainly the result of various

what-is/6292530/ [https://perma.cc/G7BZ-ZZ8H].

13. See W. Carson Byrd & Matthew W. Hughey, *Born that Way? 'Scientific' Racism Is Creeping Back into Our Thinking. Here's What to Watch Out for.*, WASH. POST (Sept. 28, 2015, 8:30 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/09/28/born-that-way-scientific-racism-is-creeping-back-into-our-thinking-heres-what-to-watch-out-for/> [https://perma.cc/SX34-ZX5G].

14. See *Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> [https://perma.cc/8AH2-78J6] (Mar. 12, 2021).

15. See *COVID-19 Fueling Anti-Asian Racism and Xenophobia Worldwide*, HUM. RTS. WATCH (May 12, 2020, 3:19 PM) [hereinafter *COVID-19 Fueling Racism*], <https://www.hrw.org/news/2020/05/12/covid-19-fueling-anti-asian-racism-and-xenophobia-worldwide#> [https://perma.cc/CSB3-R2QD].

16. Katherine Florey, *COVID-19 and Domestic Travel Restrictions*, 96 NOTRE DAME L. REV. REFLECTION 1, 19–20 (2020) (describing historic discriminatory purposes in travel restrictions).

17. Wenger, *supra* note 8, at 206–09 (discussing the increase of racial disparities due to COVID-19).

18. Makhoulf & Sandhu, *supra* note 8, at 148–49.

19. See Wenger, *supra* note 8, at 212–13.

social factors shaped by underlying racial inequality, such as higher levels of underlying health conditions and greater viral exposure at places of work and school.²⁰ And yet the race-based disparities caused by the coronavirus, as well as the blaming of racial minority groups by the American government for the spread of the “kung flu” pandemic,²¹ threatens once again to resurrect dangerous notions of biological race differences that have always operated to further entrench racial inequality and discrimination.²²

We have a chance to break the cycle of pandemic racism.²³ We have a chance to disrupt the permanence of racism through pragmatic initiatives that target reactionary policies and reaffirm our commitment to a common humanity. We have a chance, in other words, for “spiritual salvation” in the confession of our racial sins.²⁴

This Article applies the lens of critical race theory to the novel legal issues raised by the COVID-19 pandemic, concerning public health surveillance and the criminal justice system. In particular, this Article identifies how policing during the pandemic contributed to race-based disparities in the enforcement of criminal laws. The Article begins with an examination of face mask and social distancing rules and argues that such benign measures have exacerbated the disproportionate racial enforcement of criminal law, given the broad enforcement discretion traditionally bestowed on individual police officers. This Article also examines the manner in which criminal surveillance technology, such as predictive policing software and facial recognition algorithms, contribute to racially disparate pandemic policing. It concludes by offering anti-racist legal solutions to the issues of structural racism unveiled by the COVID-19 pandemic.

20. Gina Kolata, *Social Inequities Explain Racial Gaps in Pandemic*, *Studies Find*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/12/09/health/coronavirus-black-hispanic.html> [<https://perma.cc/D4B5-R8EL>] (noting that Dr. Ogedgebe observed, “[w]e hear this all the time—‘Blacks are more susceptible’”). See generally Ruqaiyah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 J.L. & BIOSCIENCES 1 (2020).

21. Eric M. Swalwell & R. Kyle Alagood, *Biological Threats Are National Security Risks: Why COVID-19 Should Be a Wake-Up Call for Policy Makers*, 77 WASH. & LEE L. REV. 217, 244 (2021).

22. *Social Darwinism*, HISTORY, <https://www.history.com/topics/early-20th-century-us/social-darwinism> [<https://perma.cc/YPT2-UZYA>] (Aug. 21, 2018).

23. See *COVID-19 Fueling Racism*, *supra* note 15.

24. See BELL, *supra* note 6, at 98.

I. THE CYCLE OF PANDEMIC RACISM

We have seen this story before: a public crisis engulfs the world; societies, already marked by racial inequalities, react by blaming communities of color, immigrants, and other marginalized groups; and governments respond to the social backlash with measures that only make those inequalities worse.²⁵ This cycle of racialized “othering” in reaction to a crisis has been repeated many times in our history and typically in response to often interrelated crises in economics, immigration, crime, and disease.²⁶

A. *Economic Crises*

Economic crises and labor shortages, for example, have long triggered reactionary discrimination against racial minorities and immigrants.²⁷ Chattel slavery and the emergence of the “Slave Economy” in America, for example, were facilitated in part by the desperate labor needs of the “New World,” with law being molded in response to formalize structural racism as the economic and ideological foundation of the new “United States.”²⁸ The idea of race-based differences in biology, intelligence, and even disease susceptibility was key to sustaining slavery as the new country’s answer to its overwhelming labor and economic needs.²⁹ The commodification of enslaved people as “property” was critical in creating the wealth of a new nation.³⁰

Economic crises that once again used law to justify racial inequality and genocide on the grounds of purported biological difference, in part, similarly facilitated the rise of Social Darwinism, racial eugenics, and Nazism.³¹ Law and science were used to validate

25. See *COVID-19 Fueling Racism*, *supra* note 15.

26. See *id.*

27. William I. Brustein & Ryan D. King, *Anti-Semitism in Europe Before the Holocaust*, 25 INT’L POL. SCI. REV. 35, 37 (2004).

28. See *How Slavery Helped Build a World Economy*, NAT. GEOGRAPHIC (Jan. 3, 2003), <https://www.nationalgeographic.com/history/article/how-slavery-helped-build-a-world-economy> [<https://perma.cc/2KSM-LEEY>].

29. *Id.*

30. *Id.*

31. See Brustein & King, *supra* note 27.

such spurious notions as a way to reconcile the tension between America's professed belief in equality with the race-based inequality that continued to mark the nation following the end of chattel slavery.³² Countries, such as America and Germany, quickly latched onto new theories of racial eugenics as a way to promote economic progress in response to the social unrest stemming from post-World War I economic retraction.³³

B. *Immigration Crises*

Perceived crises in immigration have also spawned xenophobic legal responses that have normalized racial inequality and emboldened racial discrimination. There is a long history of demonizing immigrants and racialized minority groups in response to artificial “crises” of migration and to perceived economic, disease, and crime emergencies.³⁴ The crises that lead to racialized government responses are often interconnected and in reaction to public demands for social change during periods of unrest and instability.³⁵

The Chinese Exclusion Act of 1882 is but one of many examples where nativist concerns about a crisis of “vast hordes” of “foreigners of a different race” coming to the United States led to the passage of laws discriminating against both immigrants and racial minorities.³⁶ The Supreme Court's 1944 decision in *Korematsu v. United States*,³⁷ which upheld the exclusion of immigrants based solely on account of race, shockingly was not overturned until *Trump v. Hawaii* in 2019,³⁸

32. *See id.*

33. Becky Little, *How a New Deal Housing Program Enforced Segregation*, HISTORY (Oct. 20, 2020), <https://www.history.com/news/housing-segregation-new-deal-program> [<https://perma.cc/3NVU-D3AW>]. Many other instances exist in which a society's response to economic crisis has entrenched racial inequality. *Id.* The Great Depression in the United States, for example, spawned not only a rise in racial violence against African-American and other communities of color but also federal housing policies that promoted racial housing segregation through the process of “redlining.” *Id.*

34. *Chinese Exclusion Act*, HISTORY, <https://www.history.com/topics/immigration/chinese-exclusion-act-1882> [<https://perma.cc/F5WK-K8RC>] (Sept. 13, 2019).

35. *Id.*

36. *Ping v. United States*, 130 U.S. 581, 606 (1889).

37. 323 U.S. 214 (1944).

38. 138 S. Ct. 2392, 2423 (2018) (“The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under

which demonstrates the persistent effects of reactionary legal responses to crises on future racial inequality.

The precedent established by this case, for example, has been used in recent years to uphold other immigration restrictions made in response to purported crises of immigration, such as the Trump Administration's "Travel Ban" (also known as the "Muslim Ban") and policies allowing the prolonged incarceration of migrant children.³⁹ Our historical responses to migration have operated to racialize the distinction between "citizens" and "noncitizens" while fueling discrimination against both domestic and immigrant racial minorities.⁴⁰

C. Crime Crises

Our social and legal responses to crises of crime have also solidified racial inequality. From chattel slavery and the Black Codes to the modern era of mass incarceration, society has embraced dangerous conceptions of racial biological difference and innate nonwhite criminality when confronted with a surge in crime or terrorism.⁴¹ Law has historically criminalized the mere fact of being "Black" in the United States, reflecting the broader narrative that Black and nonwhite persons need to be controlled through the states' disciplinary powers to protect the racial status quo.⁴² The reaction by state governments following the fall of chattel slavery is a clear

the Constitution." (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).

39. *Trump's US Travel Ban: What's the Full Story?*, BBC (Dec. 6, 2017), <https://www.bbc.co.uk/newsround/38794001> [<https://perma.cc/N4X6-4MCL>]; Adam Shaw, *Obama Comments on Hispanics Overlook His Own Record on Migrants in 'Cages,'* FOX NEWS (Nov. 25, 2020), <https://www.foxnews.com/politics/obama-comments-hispanics-migrants-in-cages> [<https://perma.cc/52J9-GZJ7>].

40. See *Japanese-American Internment*, *supra* note 9. Additional examples of racialized responses to immigration abound, such as the incarceration of persons of Japanese descent (the majority of whom were United States citizens) in internment camps in response to immigration and national security fears during World War II. *Id.*

41. See Christian B. Sundquist, *Genetics, Race and Substantive Due Process*, 20 WASH. & LEE J. C.R. & SOC. JUST. 341, 344 (2014); Khaled A. Beydoun, *Boxed In: Reclassification of Arab Americans on the U.S. Census As Progress or Peril?*, 47 LOY. U. CHI. L.J. 693, 696-97 (2016); see also Elizabeth M. Vasily, Note, *Women, Gangs, and Law Enforcement in America: A Critical Race and Feminist Analysis*, 7 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 319, 322 (2015).

42. See Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 210 (2013).

example of the pandemic racism cycle. The end of slavery was certainly not celebrated by all but was instead viewed by large swaths of White society as a crisis that would lead to surges of crime.⁴³ The response to this perceived “crisis” of ending the bondage of African-American men, women, and children was the passage of Black Codes and Jim Crow laws that re-entrenched de facto slavery and inequality.⁴⁴

The 1994 Crime Bill serves as an additional example of how governmental responses to perceived crises of crime can exacerbate racial inequality.⁴⁵ Passed in response to perceptions of an epidemic of crime in “urban” cities, the Crime Bill led not only to an increase in race-based disparities in criminal justice but also to socio-legal assumptions of Black “super predator” criminality.⁴⁶ The 1994 Crime Bill fueled the expansion of modern systems of mass incarceration while establishing the normative and legal conditions for increased racial surveillance.⁴⁷ These same conditions facilitated the racialization of religious difference in our legal responses to the 9/11 terrorist attack,⁴⁸ an expansion of racial profiling,⁴⁹ and a proliferation of police surveillance technologies disproportionately employed in nonwhite communities.⁵⁰

43. A. Leon Higginbotham, Jr. & F. Michael Higginbotham, “*Yearning to Breathe Free*”: *Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1228 (1993).

44. Rodney D. Coates, *If a Tree Falls in the Wilderness: Reparations, Academic Silences, and Social Justice*, 83 SOC. FORCES 841, 851 (2004); see also Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1228 (1992).

45. See German Lopez, *The Controversial 1994 Crime Law That Joe Biden Helped Write, Explained*, VOX, <https://www.vox.com/policy-and-politics/2019/6/20/18677998/joe-biden-1994-crime-bill-law-mass-incarceration> (Sept. 29, 2020, 10:25 AM).

46. Vanita Saleema Snow, *Reframing Radical Religion*, 11 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 1, 8–9 (2019).

47. See Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019, 2:30 PM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis> [https://perma.cc/FRQ3-AWYP].

48. See Romtin Parvaresh, Note, *Prayer for Relief: Anti-Muslim Discrimination As Racial Discrimination*, 87 S. CAL. L. REV. 1287, 1310–11 (2014).

49. See generally ACLU, SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11 (2004), https://www.aclu.org/sites/default/files/field_document/racial%20profiling%20report.pdf [https://perma.cc/R2P9-YAC8].

50. See Camille Gear Rich, *Angela Harris and the Racial Politics of Masculinity: Trayvon Martin, George Zimmerman, and the Dilemmas of Desiring Whiteness*, 102 CALIF. L. REV. 1027, 1039 (2014).

This pattern has been repeated throughout our history.⁵¹ Perceived increases in crime (especially in so-called “urban” centers) lead to the panicked resurrection of racial stereotypes of criminality, which in turn pressures the government to enact “tough on crime” legislative responses that ultimately increase and normalize racial inequality.⁵² Our legal reactions to perceived crime emergencies entrench the racial myth of Black and nonwhite criminality in our social mores and, in so doing, cast race-based disparities in criminal justice as “normal” and inevitable.⁵³

The racialization of crime is heightened when a society is faced with outbreaks of disease. Our history is littered with somber examples of how past pandemics and epidemics—such as the yellow fever outbreak, the 1918 “Spanish” flu, the HIV epidemic, and the SARS epidemic—have triggered a racialized “othering” process, whereby disenfranchised communities were blamed for outbreaks of disease.⁵⁴ Health crises are racially weaponized in that immigrant and nonwhite persons are seen as both potential disease threats to White “Americans” as well as biologically more susceptible to the disease itself.⁵⁵ The public health measures that are enacted in reaction to this crisis-driven racialized fear of others—such as quarantines, immigration restrictions, and the enforcement of health mandates—are in turn disproportionately applied by law enforcement in a manner that exacerbates race-based disparities.⁵⁶

51. See Ranya Shannon, *3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, *CTR. FOR AM. PROGRESS* (May 10, 2019, 9:03 AM), <https://www.americanprogress.org/issues/race/news/2019/05/10/469642/3-ways-1994-crime-bill-continues-hurt-communities-color/> [<https://perma.cc/6ASS-VNVM>].

52. *Id.*

53. *Id.*

54. See Janis Hutchinson, *AIDS and Racism in America*, 84 *J. NAT'L MED. ASS'N* 119, 119 (1992) (“Racism has always affected the health of those being discriminated against.”).

55. See generally Howard Markel & Alexandra Minna Stern, *The Foreignness of Germs: The Persistent Association of Immigrants and Disease in American Society*, 80 *MILBANK Q.* 757 (2002).

56. Alex J. Rouhandeh, *Social Distancing, Racism, and Protecting People in a Pandemic Without the Police*, *AM. PROSPECT* (June 21, 2020), <https://prospect.org/coronavirus/social-distancing-racism-protecting-people-without-police/> [<https://perma.cc/5B5U-9VND>].

II. PANDEMIC POLICING

Policing responses to a public health crisis follow the same historical cycle of normalizing and exacerbating racial discrimination. We tend to respond to a crisis in ways that can normalize inequality, such as by strongly embracing our current beliefs about the world,⁵⁷ avoiding information that conflicts with our worldview,⁵⁸ engaging in ideological defensiveness,⁵⁹ and succumbing to biased information processing.⁶⁰ People have a cognitive motivation to respond to the systemic threat and social conflict posed by crises through psychological reactions that rationalize the status quo and pre-existing social inequality.⁶¹ These psychological processes explain, in part, why police enforcement of public health measures in response to a health epidemic or pandemic tend to be disproportionately applied to immigrant and nonwhite communities.⁶² Racial minorities and immigrants are blamed for the spread of disease, which in turn reifies dangerous social beliefs about racial biological differences and disease susceptibility.⁶³ Race-based disparities in disease outcomes are interpreted to result not from the social determinants of health but rather from a cultural failure to respect the law or genetic inferiority.⁶⁴ Socio-legal mores of Black and nonwhite criminality and cultural depravity are solidified, leading to heightened police suspicion and surveillance of marginalized communities.

57. See generally SAUL KASSIN ET AL., *SOCIAL PSYCHOLOGY* (8th ed. 2011).

58. See generally *id.*; CTRS. FOR DISEASE CONTROL & PREVENTION, CERC: *PSYCHOLOGY OF A CRISIS* (2019).

59. John T. Jost et al., *System Justification: A Motivational Process with Implications for Social Conflict*, in JUSTICE AND CONFLICTS: THEORETICAL AND EMPIRICAL CONTRIBUTIONS 315, 320–21 (Elisabeth Kals & Jurgen Maes eds., 2012) (describing how people respond to system threats and social conflict through psychological reactions that rationalize the status quo and preexisting social inequality).

60. *Id.* at 321–22.

61. *Id.*

62. Cato T. Laurencin & Joanne M. Walker, Commentary, *A Pandemic on a Pandemic: Racism and COVID-19 in Blacks*, 11 *CELL SYSTEMS* 9, 9–10 (2020).

63. Stephen Mihm, *The Ugly History of Blaming Ethnic Groups for Disease Outbreaks*, JAPAN TIMES (Feb. 20, 2020), <https://www.japantimes.co.jp/news/2020/02/20/world/social-issues-world/history-outbreak-disease/> [https://perma.cc/XBQ4-Q9HQ].

64. David R. Williams et al., *Race, Socioeconomic Status, and Health: Complexities, Ongoing Challenges, and Research Opportunities*, 1186 *ANNALS N.Y. ACAD. SCIS.* 69, 81 (2010).

Law enforcement responses to the COVID-19 pandemic have similarly led to the disproportionate targeting of Black, minority, and marginalized immigrant groups across the world.⁶⁵ In Bulgaria, the police have targeted the ethnic Roma community for increased surveillance, arrests, and quarantines in an effort to “protect the general population” from the “threat” posed by the Roma and “residents of different ethnicities.”⁶⁶ More disturbingly, Bulgarian officials have declared that the Roma are a public health threat that needs to be “controlled and contained,” and used airplanes to spray chemicals to purportedly “disinfect” Roma neighborhoods.⁶⁷ In France, fines for violating COVID-19 rules were three times higher in areas with majority North and West African residents than in the rest of the country.⁶⁸ Refugees and asylum-seekers have similarly been subjected to targeted quarantines, police abuse, and deprivation of basic human rights in countries throughout the world.⁶⁹ Pierrette Herzberger-Fofana, a former German Member of the European Parliament, observed that research has demonstrated that “racialised groups, black people, Roma people, people of north African origin and migrants are much more likely to be targeted and victims of police violence” in the enforcement of COVID-19 public health measures.⁷⁰ Similarly, a report from the United Nations concluded that “people of African descent are reportedly being disproportionately controlled, harassed and profiled by law

65. See AMNESTY INT’L, *POLICING THE PANDEMIC: HUMAN RIGHTS VIOLATIONS IN THE ENFORCEMENT OF COVID-19 MEASURES IN EUROPE* 10–11 (2020).

66. *Id.*

67. *Id.* The Roma have been disproportionately policed in many other countries as well, with officials blaming Roma persons for the spread of COVID-19 and subjecting them to harsh quarantines and police abuses of force. *Id.* at 5; see also Maria Cheng & Teodora Barzakova, *Some European Officials Use Virus As Cover to Target Roma*, AP NEWS (Oct. 15, 2020), <https://apnews.com/article/virus-outbreak-pandemics-police-discrimination-eastern-europe-2ebcdb5ee070578b73b1bc35ebdb426e> [https://perma.cc/ME9K-G8YA].

68. AMNESTY INT’L, *supra* note 65, at 20.

69. *Id.* at 9–17. Amnesty International has found in a detailed report of global human rights abuses in the wake of COVID-19 that “enforcement of lockdown measures [has] rapidly served as a pretext for the unlawful use of force” by law enforcement. *Id.* at 21.

70. Daniel Boffey, *Policing of European COVID-19 Lockdowns Shows Racial Bias - Report*, THE GUARDIAN (June 24, 2020, 10:38 AM), <https://www.theguardian.com/world/2020/jun/24/policing-of-european-covid-19-lockdowns-shows-racial-bias-report> [https://perma.cc/YZ5G-6HDE].

enforcement authorities, with other people being treated differently or not subjected to control at all.”⁷¹

Racial bias has also unsurprisingly impacted the policing of COVID-19 health measures in the United States.⁷² Though there has been little demographic data released on police enforcement of COVID-19 rules, the information that is available paints a stark picture of racially disproportionate policing.⁷³ In Ohio, researchers found that the vast majority of people arrested by police for violating COVID-19-related stay-at-home orders were Black and that only 50% of Black defendants were released without bond compared to 95% of White defendants.⁷⁴ Policing data from the New York City Police Department (NYPD) reveals that over 80% of persons issued summonses for violating stay-at-home orders were people of color.⁷⁵ Additionally, out of 374 summons issued by the NYPD during the spring of 2020 for violating COVID-19 emergency protocols, 304 summons were issued to Black and Latinx people.⁷⁶ And perhaps most shockingly, 92% of people arrested by police for social distancing violations in New York City were Black or Latinx.⁷⁷ Research by the Legal Aid Society in New York City further found that although the majority of social distancing complaints were not

71. U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, RACIAL DISCRIMINATION IN THE CONTEXT OF THE COVID-19 CRISIS 3 (2020), https://www.ohchr.org/Documents/Issues/Racism/COVID-19_and_Racial_Discrimination.pdf [<https://perma.cc/5SKL-8QB4>] (“[R]acial discrimination is manifested in who is penalized for ‘violating’ restrictions during the pandemic, with marginalised communities facing heightened risks.”).

72. Joshua Kaplan & Benjamin Hardy, *Early Data Shows Black People Are Being Disproportionally Arrested for Social Distancing Violations*, PROPUBLICA (May 8, 2020, 6:22 PM), <https://www.propublica.org/article/in-some-of-ohios-most-populous-areas-black-people-were-at-least-4-times-as-likely-to-be-charged-with-stay-at-home-violations-as-whites> [<https://perma.cc/NBN3-UXK6>].

73. *Id.*

74. Justin Jouvenal & Michael Brice-Saddler, *Social Distancing Enforcement Is Ramping Up. So Is Concern That Black and Latino Residents May Face Harsher Treatment*, WASH. POST (May 10, 2020, 11:00 AM), https://www.washingtonpost.com/local/public-safety/social-distancing-enforcement-is-ramping-up-so-is-concern-that-black-and-latino-residents-may-face-harsher-treatment/2020/05/10/b1bcf490-8fbd-11ea-9e23-6914ee410a5f_story.html [<https://perma.cc/25TS-4Q3Y>].

75. Josiah Bates, *Police Data Reveals Stark Racial Discrepancies in Social Distancing Enforcement Across New York City*, TIME (May 8, 2020, 5:26 PM), <https://time.com/5834414/nypd-social-distancing-arrest-data> [<https://perma.cc/B6NG-YB9U>]; Ashley Southall, *N.Y.C. Commissioner Denies Racial Bias in Social Distancing Policing*, N.Y. TIMES, <https://www.nytimes.com/2020/05/13/nyregion/nypd-social-distancing-race-coronavirus.html> [<https://perma.cc/EBY3-KV4N>] (Nov. 5, 2020).

76. Bates, *supra* note 75; Southall, *supra* note 75.

77. Bates, *supra* note 75; Southall, *supra* note 75.

made in non-majority Black or Latinx neighborhoods, that the majority of COVID-19 related summonses and arrests nonetheless occurred in neighborhoods of color.⁷⁸ Although arrest data based on race may be lacking, there have been numerous accounts of racially disproportionate uses of force and arrests related to COVID-19 enforcement nationwide.⁷⁹

These patterns in pandemic policing have been compounded by the disproportionate law enforcement surveillance—technological, genetic, and physical—of racialized communities during the pandemic.⁸⁰ Public health surveillance tools, such as contact tracing and quarantines, have been used throughout history to respond to epidemics and pandemics. Although there are clearly significant benefits from such measures to control disease spread, the nature and scope of public health surveillance has shifted with the advent of new technologies:

- Cell site location information (CSLI) has been used for contact tracing (and at times to penalize people for violating quarantine mandates);
- Proximity apps installed on wearables and cell phones (such as the Google and Apple COVID-19

78. THE LEGAL AID SOC'Y, RACIAL DISPARITIES IN NYPD'S COVID-19 POLICING: UNEQUAL ENFORCEMENT OF 311 SOCIAL DISTANCING CALLS 3–4 (2020), https://legalaiddnyc.org/wp-content/uploads/2020/05/LAS_Racial-Disparities-in-NYPDs-COVID-19-Policing_5.20.20_5PM_FINAL.pdf [<https://perma.cc/NEB8-GHTB>].

79. See, e.g., *Brooklyn DA Opens Probe into Apparent Racial Disparities in Enforcement of Coronavirus Social Distancing*, CBS N.Y. (May 6, 2020, 11:25 PM), <https://newyork.cbslocal.com/2020/05/06/brooklyn-da-opens-probe-into-apparent-racial-disparities-in-enforcement-of-coronavirus-social-distancing/> (reporting on allegations of excessive force used by police against Black and Latinx persons); Jouvenal & Brice-Saddler, *supra* note 74 (referencing reports of aggressive police enforcement of COVID-19 rules against racialized persons across the country); *Police Accused of Racial Bias in Virus-Order Enforcement*, CRIME REP. (May 11, 2020), <https://thecrimereport.org/2020/05/11/police-accused-of-racial-bias-in-virus-order-enforcement/> [<https://perma.cc/GW4W-JBHR>]; Janell Ross, *Pattern of Uneven Social Distancing Enforcement Coming into View, Civil Rights Experts Say*, NBC NEWS (May 28, 2020, 1:05 PM), <https://www.nbcnews.com/news/nbcblk/pattern-uneven-social-distancing-enforcement-coming-view-civil-rights-experts-n1216506> [<https://perma.cc/VWQ6-9HQX>]; Betsy Pearl et al., *The Enforcement of COVID-19 Stay-at-Home Orders*, CTR. FOR AM. PROGRESS (Apr. 2, 2020, 9:01 AM), <https://www.americanprogress.org/issues/criminal-justice/news/2020/04/02/482558/enforcement-covid-19-stay-home-orders/> [<https://perma.cc/27PU-AD72>].

80. PASCAL EMMER ET AL., UNMASKED: IMPACTS OF PANDEMIC POLICING 11, 38–39, 54 (2020), <https://communityresourcehub.org/wp-content/uploads/2020/12/Unmasked.pdf> [<https://perma.cc/FMK6-L6HX>].

apps) allow for digital contact tracing and warnings of possible exposure to COVID-19;

- GPS ankle monitors and geofencing technology have been used to police quarantine restrictions;
- Thermal imaging cameras have been deployed to detect possible COVID-19 cases;
- Video and drone surveillance technology has been used for contact tracing and to enforce COVID-19 restrictions (such as quarantines and mask wearing); and
- Biological samples collected from COVID-19 testing (containing individual DNA information) have become a crucial public health tool to reduce the spread of infection.⁸¹

The use of COVID-19 technologies has played an important role in the global response to the pandemic. Nonetheless, the expansion of such surveillance carries with it the risk of undermining the privacy rights and exacerbating the disproportionate surveillance of racialized communities.⁸² Our history of socio-legal responses to disease outbreaks demonstrates that racialized persons are *much* more likely to be subjected to disparate surveillance based on a devaluation of their civil rights informed by racist ideas about disease susceptibility and spread. These new systems of COVID-19 surveillance are being expanded at the same time that Black and Brown communities are

81. Arthur Shay, *Cell Site Location Information Helps Digital Fencing Against COVID-19 Pandemic*, INT'L L. OFF. (Apr. 24, 2020), <https://www.internationallawoffice.com/Newsletters/Tech-Data-Telecoms-Media/Taiwan/Shay-Partners/Cell-site-location-information-helps-digital-fencing-against-COVID-19-pandemic> [https://perma.cc/8A5G-5H5N]; *Exposure Notifications: Using Technology to Help Public Health Authorities Fight COVID-19*, GOOGLE, <https://www.google.com/covid19/exposurenotifications/> [https://perma.cc/X6FW-EZDZ]; Yasheng Huang et al., *How Digital Contact Tracing Slowed Covid-19 in East Asia*, HARV. BUS. REV. (Apr. 15, 2020), <https://hbr.org/2020/04/how-digital-contact-tracing-slowed-covid-19-in-east-asia> [https://perma.cc/ZGH4-D3KA].

82. Nena Beecham, *Mass Surveillance to Track the Coronavirus Threatens Black and Brown Communities*, TEEN VOGUE (June 2, 2020), <https://www.teenvogue.com/story/mass-surveillance-coronavirus> [https://perma.cc/6KBT-8WZ2]; Hannah Sassaman, *Covid-19 Proves It's Time to Abolish 'Predictive' Policing Algorithms*, WIRED (Aug. 27, 2020, 9:00 AM), <https://www.wired.com/story/covid-19-proves-its-time-to-abolish-predictive-policing-algorithms> [https://perma.cc/M2G6-KYQ9].

already subject to mass (and disproportionate) surveillance by law enforcement.⁸³ Facial recognition software and drone technology have been employed by police to monitor #BlackLivesMatter and racial justice protestors under the guise of COVID-19 monitoring.⁸⁴ Surveillance technology has also been used by law enforcement to disproportionately target racialized communities for the enforcement of public health restrictions.⁸⁵ Such discriminatory mass surveillance creates dangerous disparities in how persons of color are policed during a pandemic, leading to more interactions with law enforcement and increased collection of surveillance data that can be used for criminal arrests and prosecution.⁸⁶ The expansion of racialized surveillance also contributes to a degradation in the trust of public authorities (of law enforcement in particular), which can undermine the public health response to COVID-19.⁸⁷

Race-based surveillance has historically operated as a tool of social control that serves to normalize racial boundaries, and thus inequality, in ways that seem neutral and natural.⁸⁸ Such surveillance shapes socio-legal norms of Black and Brown criminality, while resurrecting alarming ideas of racial biological inferiority.⁸⁹ If our past is prologue, then the expansion of suspicionless surveillance of racialized communities under the guise of public safety can also become normalized—just as it was in the aftermath of the War on Drugs and the War on Terror.

83. EMMER ET AL., *supra* note 80, at 38–39, 54.

84. Anjali R.K. Shere & Jason Nurse, *Police Surveillance of Black Lives Matter Shows the Danger Technology Poses to Democracy*, THE CONVERSATION (July 24, 2020, 10:38 AM), <https://theconversation.com/police-surveillance-of-black-lives-matter-shows-the-danger-technology-poses-to-democracy-142194> [<https://perma.cc/MN64-ETAF>]; Katelyn Ringrose & Divya Ramjee, *Watch Where You Walk: Law Enforcement Surveillance and Protester Privacy*, 11 CALIF. L. REV. ONLINE 349, 359 (2020).

85. EMMER ET AL., *supra* note 80, at 38–39, 54.

86. *Id.*

87. *See id.*

88. *See* Ashley D. Farmer, *Tracking Activists: The FBI's Surveillance of Black Women Activists Then and Now*, ORG. AM. HISTORIANS, <https://www.oah.org/tah/issues/2020/history-for-black-lives/tracking-activists-the-fbis-surveillance-of-black-women-activists-then-and-now/> [<https://perma.cc/6J2S-UYJ7>].

89. EMMER ET AL., *supra* note 80, at 11.

CONCLUSION

How can we break the cycle of pandemic racism in our policing and public health responses to COVID-19? A start would be to acknowledge the structural, institutional, and individual layers of systemic racism that have come to define our criminal justice system and continue to influence public health strategies. A national reckoning on the pervasiveness of racism could lead to the adoption of new laws that decrease the racialized enforcement of COVID-19 health rules. These initiatives should begin with a decoupling of police enforcement of criminal laws from the regulation of public health and social services. Simply put, the enforcement of public health restrictions should rest with civilian public health authorities rather than with a militarized police force that is marked by a historical legacy of racial oppression.⁹⁰ Our laws must also be reformed to limit police discretion in their encounters with the public, which at a minimum should include legislative measures eliminating racial profiling, stop-and-frisk practices, and discriminatory identity checks. Further, we must establish meaningful accountability measures for police misconduct, which should include ending qualified immunity doctrines, providing civilian police review boards with sufficient funding and investigatory powers, and reducing the barriers to civil and criminal actions against police officers for discriminatory conduct. Finally, public health surveillance should be conducted by public health authorities (rather than by police officers whose primary responsibility is to enforce our criminal laws), while creating new laws that will safeguard the privacy rights of Black and Brown communities to be free from racialized surveillance technologies.

90. See U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, *supra* note 71, at 4; AMNESTY INT’L, *supra* note 65, at 32–33.