

Introduction: Racism Without Racists

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This Symposium on Systemic Racism offers a timely review and analysis of an urgent and persistent problem plaguing the United States. Many of the narratives we offer about the history and trajectory of law and society emphasize progress with respect to racism and the struggle for equality. We note the milestones of racial progress: the Thirteenth Amendment’s abolition of slavery in 1865;¹ the 1868 adoption of the Fourteenth Amendment with its command of “equal protection”;² the Supreme Court’s 1954 decision in *Brown v. Board of Education*³ declaring state-sponsored racial segregation unconstitutional; the enactment of the Civil Rights Act of 1964,⁴ banning discrimination in employment, hotels, restaurants, and other places of public accommodation; the passage of the Voting Rights Act of 1965,⁵ designed to eliminate multiple barriers to voting. Each of these legal

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1. U.S. CONST. amend. XIII.
2. U.S. CONST. amend. XIV.
3. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
4. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).
5. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

triumphs reflected extraordinary efforts to advance equality and merits celebration.

And yet, as recent events remind us, racial inequality lingers. The murder of George Floyd by officer Derek Chauvin on May 25, 2020, captured on tape, along with a string of other incidents of police brutality, triggered widespread awareness of the reality of ongoing, deadly racism experienced by Black people and other people of color in the United States. Sometimes the deadly impact of racism is immediate and clear, as in the case of George Floyd. Sometimes the deadly effects of racism have broad manifestations, though lack the same kind of clear, identifiable, individual perpetrator. The COVID-19 pandemic provided a vivid reminder of the savage consequences of racial inequalities in the United States. Highlighting the impact of disparities in health care and poverty, members of racial and ethnic minority groups suffered sickness and death from the pandemic at especially high rates⁶ and experienced especially large declines in overall life expectancy.⁷

How does one explain the ongoing ravages of racism in the United States? How do the effects of racism persist, even as evolving legal doctrines target discrimination? The articles in this Symposium offer insightful analyses of these pressing questions. The authors explain how racism functions as a system. This system has broad impacts across all aspects of life including health, education, housing, and elections.⁸ Indeed, these various areas often interconnect, magnifying the effects of racism and its dire consequences for the lives and wellbeing of people of color.⁹ As a system, racism does not require the conscious support of officials or individual citizens.¹⁰ Harmful actions motivated by racial antipathy certainly continue, but this kind of animus is not necessary.¹¹ Apparently race-neutral policies and practices can perpetuate systemic racism and its continuing legacy of inequality.¹²

6. See *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [<https://perma.cc/97AC-UQAR>].

7. See Betsy McKay, *U.S. Life Expectancy Fell by 1.5 Years in 2020, the Biggest Decline in Generations*, WALL ST. J. (July 21, 2021, 12:01 AM), <https://www.wsj.com/articles/u-s-life-expectancy-fell-by-1-5-years-in-2020-the-biggest-decline-in-generations-11626840061> [<https://perma.cc/ZZ9H-GARN>].

8. See Palma Joy Strand, *This Is the House that Law Built: A Systems Story of Racism*, 58 SAN DIEGO L. REV. 811, 815–16 (2021).

9. See *id.* at 816.

10. See *id.* at 817.

11. See *id.*

12. See *id.*; see also Parisa Ijadi-Maghsoodi, *Effectuating the Fair Housing Act's De-Segregation Intent to Eradicate Race-Based Health Disparities*, 58 SAN DIEGO L. REV. 903, 924 (2021).

As the authors point out, the edifice of antidiscrimination law in the United States generally focuses on intent, on the search for bad actions motivated by racial animus.¹³ The legal doctrines fashioned by the United States Supreme Court are not well designed to combat systems of racism that do not rest on the racially motivated actions of particular individuals.¹⁴ Sometimes courts have been open to understanding the law as targeting racial impacts, rather than restricting the focus to disparate treatment.¹⁵ More recently, courts have narrowed the scope of disparate impact liability.¹⁶ Given these doctrinal limitations in federal antidiscrimination law, how might one attempt to counteract systemic racism? One possibility lies in activism at the state and local level. Drawing support from, and seeking in turn to energize, broader social movements, such activism would look beyond the judiciary to legislation and other mechanisms for social change. In reviewing the reality, causes, and potential responses to systemic racism, this Symposium offers an important and timely contribution to the study of this pernicious phenomenon.

I. SYSTEMS OF RACISM

What is systemic racism and how does it relate to racial animus, the touchstone for so much of antidiscrimination law? Professor Roy Brooks defines systemic racism as “deeply embedded patterns of racial disadvantage in our country linked to slavery.”¹⁷ Professor Brooks distinguishes systemic racism from individual actions motivated by racial hostility. He argues, “[t]hese patterns of racial inequality are structural rather than behavior, external rather than internal.”¹⁸ Animus certainly has a connection to systemic racism. Racial bias motivated many of the actions connected with slavery and Jim Crow.¹⁹ However, what was critical in the past, and remains critical in the present, are the effects of the actions and practices, rather than their motivations. The harm comes from the external impact, not the internal state of mind. Today, the association of animus with racism has

13. Strand, *supra* note 8, at 827–28.

14. See *infra* Part III.

15. See *infra* Part III.

16. See *infra* Part III.

17. Roy L. Brooks, *Systemic Racism: Patterns of Black Disadvantage and White Advantage Linked to Slavery*, 58 SAN DIEGO L. REV. 767, 769 (2021).

18. *Id.*

19. See *id.* at 770.

become less direct.²⁰ As Professor Brooks puts it, “Animus is simply not a precondition for systemic racism. Systemic racism in post-Jim Crow America is, for the most part, the racism that nonracists practice.”²¹

Making a similar point from a different perspective, Professor Palma Joy Strand deploys systems theory to illuminate systemic racism and its connection, or often lack of connection, to legal doctrines that focus on animus.²² Systems theory emphasizes the importance of the relationship among the elements of a system.²³ Understanding the operation and perpetuation of the system requires focusing on the connections among the elements, rather than on the elements themselves.²⁴ In the case of systemic racism, this perspective stresses the importance of the power dynamics among people, rather than on the identity of the actors.²⁵ The individuals may change over time, as new generations arrive, but the power relationships endure.²⁶ Professor Strand explains,

The system of racism uses the social construction of race to create roles, to allocate resources, and to establish relationships of power, of oppression, of dominance between members of different groups, racially defined. . . . Injustices emerge from complex webs of interactions among individual actors in a range of institutions and with a range of incentives—often without the actors intending harm. In this sense, racism can operate without “racists.”²⁷

Antidiscrimination law’s focus on invidious intent does not address or serve to remediate these structures of injustice.²⁸

The contributions to this Symposium also make clear that systemic racism is deeply rooted in the lived experience of Black people in the United States. In its origins, systemic racism had a foundational connection to slavery.²⁹ In contemporary society, systemic racism remains deeply immersed in Black experience.³⁰ Systemic racism is not merely an abstract, academic construction. It is a lived reality.

20. *See id.*

21. *Id.*

22. *See generally* Strand, *supra* note 8.

23. *Id.* at 816–17.

24. *Id.* at 816.

25. *See id.*

26. *Id.*

27. *Id.* at 816–17 (footnotes omitted).

28. *Id.*

29. Justin Worland, *America’s Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), <https://time.com/5851855/systemic-racism-america/> [<https://perma.cc/WLY8-X6MA>].

30. Melissa De Witte, *Stanford Scholars Examine Systemic Racism, How to Advance Racial Justice in America*, STAN. NEWS (Feb. 16, 2021), <https://news.stanford.edu/2021/02/16/examining-systemic-racism-advancing-racial-equity/> [<https://perma.cc/WL2Z-5FYD>].

II. CONSEQUENCES OF SYSTEMIC RACISM

The lived reality of systemic racism may be manifest in intense individual collisions—the knee on the neck—or in broader patterns of disadvantage, patterns that themselves reflect webs of individual interactions and institutional practices. The Tulsa Race Massacre offers an acute example of this kind of pernicious interconnection.³¹ The recent centennial of the massacre renewed attention to that horrific event and to its lingering impact.³² The Greenwood neighborhood in Tulsa, sometimes called “Black Wall Street,” was one of the wealthiest Black communities in the country.³³ In 1921, a White mob looted and destroyed the area.³⁴ The human toll was immense. The actual numbers will likely never be known, but the estimates range up to 300 deaths.³⁵ The massacre also destroyed enormous amounts of Black wealth.³⁶ Subsequent government policies and private practices, including housing discrimination and the selective location of highway projects, served as further obstacles to the development of lasting wealth among the Black residents of the area.³⁷ The Tulsa story is especially dramatic and tragic, but the pattern is not unique. The intertwined effects of racially motivated violence, race-based economic discrimination, and government policy and indifference have led to large wealth disparities among Blacks and Whites.³⁸ Further, gaps in wealth tend to compound over generations.³⁹ The chasm between the median

31. *1921 Tulsa Race Massacre*, TULSA HIST. SOC’Y & MUSEUM, <https://www.tulsa-history.org/exhibit/1921-tulsa-race-massacre/> [https://perma.cc/EZ79-X64S].

32. Yuliya Parshina-Kottas et al., *What the Tulsa Race Massacre Destroyed*, N.Y. TIMES (May 24, 2021), <https://www.nytimes.com/interactive/2021/05/24/us/tulsa-race-massacre.html> [https://perma.cc/QT4B-EVT4].

33. *See Tulsa Race Massacre Sidelined Legacy of Black Wealth in Greenwood*, WALL ST. J. (May 28, 2021, 12:12 PM), <https://www.wsj.com/articles/tulsa-race-massacre-sidelined-legacy-of-black-wealth-in-greenwood-11622218327> [https://perma.cc/G6SJ-MJNE].

34. *1921 Tulsa Race Massacre*, *supra* note 31.

35. *See Tulsa Race Massacre Sidelined Legacy of Black Wealth in Greenwood*, *supra* note 33.

36. Parshina-Kottas et al., *supra* note 32.

37. Dreisen Heath, *The Case for Reparations in Tulsa, Oklahoma: A Human Rights Argument*, HUM. RTS. WATCH (May 29, 2020, 8:00 AM), <https://www.hrw.org/news/2020/05/29/case-reparations-tulsa-oklahoma> [https://perma.cc/FFF3-8YSH].

38. Kriston McIntosh et al., *Examining the Black-White Wealth Gap*, BROOKINGS (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/> [https://perma.cc/JG8X-WSVZ].

39. *Id.*

wealth of White and Black people in the United States is larger today than in 1983.⁴⁰

Systemic racism has broad impacts on the wealth, health, and life chances of racial minorities in the United States. Professor Parisa Ijadi-Maghsoodi notes the pervasiveness of residential segregation in the United States and the role of federal policy in creating and perpetuating this segregation.⁴¹ She documents the consequences of housing for a wide range of social outcomes, including health, educational achievement, and life expectancy.⁴² One's zip code is a strong predictor of life success.⁴³

COVID-19 has offered more evidence of the dire consequences of racial disparities in our society. Members of racial and ethnic minority groups suffered higher levels of hospitalizations and death from the pandemic.⁴⁴ These adverse outcomes reflect systems of inequality. It would be very difficult to trace these disparities to specific racially motivated actions. A recent report by the Centers for Disease Control and Prevention suggested that the factors leading to the increased COVID-19 risks among racial and ethnic minorities include discrimination; healthcare access and use; occupation, educational, income, and wealth gaps; and housing.⁴⁵ The list at once emphasizes the pervasiveness and seriousness of the problem and the obstacles to addressing it through the traditional tools of antidiscrimination law.

III. COMBATING SYSTEMIC RACISM

The impacts of racism are broad, deep, ongoing, and deadly. Though often connected, at least historically, to racially motivated actions, the perpetuation of systemic racism does not require the kind of individual animus targeted by antidiscrimination law.⁴⁶ So, what can be done to address this pressing problem?

While the courts have required proof of racially motivated action to trigger heightened constitutional scrutiny,⁴⁷ Congress has sometimes focused

40. See *Tulsa Race Massacre Sidelines Legacy of Black Wealth in Greenwood*, *supra* note 33.

41. See generally Ijadi-Maghsoodi, *supra* note 12.

42. See *id.* at 907–08.

43. See generally *id.*

44. *Health Equity Considerations and Racial and Ethnic Minority Groups*, *supra* note 6.

45. *Id.*

46. Strand, *supra* note 8, at 827.

47. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”).

on disparate impacts.⁴⁸ In such legislation, Congress has taken account of the continuing harm of racial disparities and of the difficulty of proving racial intent.⁴⁹ Even if such legislation is enacted, though, the question remains how broadly the courts will permit the statutes to reach. As Professor Ijadi-Maghsoodi discusses, in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,⁵⁰ the United States Supreme Court reaffirmed the availability of disparate impact claims under the Fair Housing Act.⁵¹ However, Justice Anthony Kennedy cast the decisive vote in that 5-4 decision.⁵² It remains to be seen how receptive the post-Kennedy court will be to disparate impact theories.

The Justices could read statutes narrowly or even conclude that the United States Constitution prohibits disparate impact liability. In *Ricci v. DeStefano*,⁵³ for example, Justice Scalia suggested that disparate impact liability might itself violate the United States Constitution by effectively requiring race-based actions by parties seeking to comply with the statutory mandates.⁵⁴ This suggestion, if adopted, would require striking down many well-established civil rights statutes.⁵⁵ In other contexts, the Supreme Court has shown willingness to find constitutional barriers to the implementation of longstanding civil rights legislation.⁵⁶

This past Term, in *Brnovich v. Democratic National Committee*,⁵⁷ the Court gave a narrow construction to a provision of the Voting Rights Act that prohibits the implementation of voting qualifications or practices “in a manner which results in a denial or abridgement of the right . . . to vote on account of race.”⁵⁸ Justice Kagan forcefully argued that the statute

48. See, e.g., Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619.

49. See *id.*

50. *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015).

51. See *id.* at 540–41.

52. *U.S. Supreme Court Upholds Fair Housing Disparate Impact Principle*, NAT’L LOW INCOME HOUS. COAL. (June 29, 2015), <https://nlihc.org/resource/us-supreme-court-upholds-fair-housing-disparate-impact-principle> [<https://perma.cc/N2BL-8ZHX>].

53. *Ricci v. DeStefano*, 557 U.S. 557 (2009).

54. *Id.* at 594 (Scalia, J., concurring).

55. See, e.g., *Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <http://www.eeoc.gov/fact-sheet/federal-laws-prohibiting-job-discrimination-questions-and-answers> [<https://perma.cc/H7DM-ZBWR>].

56. See *Shelby Cnty. v. Holder*, 570 US 529, 556–57 (2013) (holding unconstitutional a portion of the Voting Rights Act of 1965).

57. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

58. 52 U.S.C. § 10301(a); *Brnovich*, 141 S. Ct. at 2346–47.

demanded a focus on effects, not intent: “Rather than hinge liability on state officials’ motives, Congress made it ride on their actions’ consequences.”⁵⁹ That argument, however, was made in dissent.⁶⁰ This decision and the attitude it reflects might interfere with the broader use of the Voting Rights Act to address barriers to voting, such as the felon disenfranchisement measures highlighted in this issue by Ellen Atkinson.⁶¹

Given the insistence of the Supreme Court on proving racial animus and the resistance to theories premised on disparate outcomes,⁶² responses to systemic racism may need to proceed through other channels. Professor Harold McDougall notes the importance of activism at the local level.⁶³ The new wave of progressive prosecutors represents this kind of local achievement.⁶⁴ Professor McDougall points out that the work of these prosecutors extends beyond the criminal justice system.⁶⁵ Their offices may focus on a range of issues, including consumer protection, workers’ rights, affordable housing, and tenants’ rights, among others.⁶⁶

Responses to systemic racism may involve local legislative responses as well. For example, the City of Evanston recently adopted a plan for racial reparations.⁶⁷ The program targets the inequities in housing and the resulting wealth disparities that flowed from decades of housing discrimination.⁶⁸ Evanston will offer \$25,000 home improvement grants and mortgage assistance to Black residents who can show they are descendants of individuals who lived in the city before 1969.⁶⁹ Such local legislative initiatives offer a potentially promising alternative to the largely unsuccessful attempts to

59. *Brnovich*, 141 S. Ct. at 2357 (Kagan, J., dissenting).

60. *See id.* at 2350.

61. *See generally* Ellen Atkinson, Comment, *Race-Based Discrimination in the Totality of the Circumstances: Why America’s Highest Court Should Permit Section II Voting Rights Act Challenges to State Felon Disenfranchisement Laws*, 58 SAN DIEGO L. REV. 933 (2021).

62. *See generally* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006).

63. *See* Harold McDougall, *Think Nationally, Act Locally: Cities and the Struggle for Social Justice*, 58 SAN DIEGO L. REV. 849, 850 (2021).

64. Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren’t Happy.*, NBC NEWS (Aug. 19, 2019, 1:47 AM), <https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286> [<https://perma.cc/SJ4-274C>].

65. McDougall, *supra* note 63, at 855.

66. *See id.* at 854.

67. *See* Mark Guarino, *Evanston, Ill., Leads the Country with First Reparations Program for Black Residents*, WASH. POST (Mar. 22, 2021, 9:52 PM), https://www.washingtonpost.com/national/evanston-illinois-reparations/2021/03/22/6b5a308c-8b2d-11eb-9423-04079921c915_story.html [<https://perma.cc/Z9BK-QWB9>].

68. *Id.*

69. *Id.*

remediate systemic racism through the federal courts.⁷⁰ Accomplishing reparations one locality at a time is a slow and time-intensive response. In an era in which federal courts seem reluctant to endorse systemic solutions to systemic problems, though, such local action may offer the most promising solution.

IV. CONCLUSION

This Symposium highlights the broad and savage impact of systemic racism and the limited remedial capacity of contemporary legal doctrine. While law, in the form of judicial decisions and legislation, has been deployed to combat racial discrimination, inequalities persist.⁷¹ Further, sometimes laws have served to perpetuate or worsen the racial disparities in the United States.⁷² Current legal doctrines, as interpreted by the United States Supreme Court, focus on racial animus and offer little aid in addressing systems of racism that result from patterns of actions and inactions, rather than easily identifiable instances of racially motivated practices.⁷³ Local initiatives, spurred by local activism and social movements, offer a potential response, but the timeframe seems very long indeed.⁷⁴ Perhaps dramatic events, such as a global call for racial justice following the murder of George Floyd, can catalyze change at a faster pace. Or perhaps one must expect that systems of inequality established over centuries of time will yield only slowly to efforts at reform.

70. *Id.*

71. *See generally* THE SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018).

72. *See* Lauren Gambino, "Things have Changed": Can Biden Overcome the Racist Legacy of the Crime Bill He Backed?, *GUARDIAN* (Oct. 17, 2020), <https://www.theguardian.com/us-news/2020/oct/17/joe-biden-race-crime-bill-1994-policing> [<https://perma.cc/3M45-AZHG>].

73. *See, e.g.*, Candelario Ramos v. Baxter Healthcare Corp. of P.R., Inc., 360 F.3d 53, 61 (1st Cir. 2004) ("Even with reasonable inferences drawn in plaintiffs' favor, the district court correctly held that there was no evidence of animus—and that means that the discriminatory treatment claim fails.")

74. *See* McDougall, *supra* note 63, at 850–51.

